IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

LOYOLA UNIVERSITY OF CHICAGO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No: 2021 M1 701604
	)	
ONWARD MSO, LLC. and Unknown Occupants,	)	
	)	
	)	
Defendants.	)	

DEFENDANT'S VERIFIED ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS TO PLAINTIFF'S FIRST AMENDED EVICTION COMPLAINT

NOW COMES the Defendant, Onward MSO, LLC, an Illinois limited liability company, (hereinafter "Onward" or "Tenant"), through its attorney RICHARD M. CARBONARA, and pursuant to the Illinois Rules of Civil Procedure, files its Verified Answer, Affirmative Defenses and Counterclaims to Plaintiff's First Amended Eviction Complaint (the "Complaint"), and states as follows:

COUNT I - EVICTION ACTION BASED ON DEFENDANT'S FAILURE TO PAY RENT

1. Admit.

2. Admit.

3. Deny. Onward entered into a written lease and amendments for the Premises, but did not agree to the force majeure clause that appears in Exhibit C. Prior to executing the Lease, Onward and Loyola agreed that if Onward's use and occupancy of the Premises was impaired due to an unforeseen event, Onward would not have to pay rent for the duration of the event.

4. Admit.

5. Deny.

6. Deny.

7. Admit.

8. Admit.

9. Deny.

10. Deny.

11. Deny.

WHEREFORE, Defendant respectfully requests this Court enter judgment in its favor as to Plaintiff's First Amended Eviction Complaint and award such further relief as this Court deems just and proper.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Waiver. Plaintiff waived its ability to evict Defendant for nonpayment of rent when Plaintiff agreed to allow Defendant to remain in possession and pay rent late while the restaurant was getting established and generating revenue to pay overhead costs, including rent payments. Plaintiff stated to Defendant that it understood the new restaurant could take up to two years to get established once it opened and promised to work with Defendant with late rent payments and accepted late rent payments. In November 2019, Defendant met with Plaintiff's agent, Wayne Magdziarz, and Plaintiff acknowledged the business challenges that Defendant was facing and stated that a few months of missed rent would not matter and asked Defendant not to let it get out of hand or the Board of Trustees would apply pressure upon Mr. Magdziarz. On February 14, 2020, Plaintiff sent a written *Notice of Default Under Lease* (the "Default Notice") to Defendant claiming payment defaults in the amount of $65,440.02 and advising that unless such amount was cured within ten (10) days that Landlord would terminate the Lease. Subsequent to

receiving the Default Notice, Plaintiff's agent, Michael Loftsgaarden, met with Michael Olszewski at Onward where he received a free lunch and stated that Onward could ignore the payment demand because Plaintiff's agent, Mr. Magdziarz, had granted another tenant, Argo Tea, one year of free rent after it opened to help jumpstart that business and that Plaintiff would do the same for Defendant because Olszewski had invested over $1 million in build-out costs and improvements which was substantially more money than Argo Tea invested at its leased location. Relying upon Plaintiff's representations and waiver of monthly rent, Defendant made its last rent payment to Plaintiff in February 2020 just prior to the COVID-19 pandemic forcing Onward to close. Over one year later, on April 13, 2021, Plaintiff sent a second Default Notice to Defendant claiming payment defaults and again threatened Lease termination.

SECOND DEFENSE

Novation. Subsequent to executing the Lease on March 22, 2017, Defendant commenced a complete build-out of Plaintiff's vacant space which would become Onward's fine dining restaurant. During construction, Plaintiff failed to (1) construct a demising wall separating the tenants, and (2) secure the ground floor retail space of the building. Plaintiff's breach of the Lease resulted in a theft of Defendant's building materials and plans and forced Defendant to spend additional time and $21,300.00 to construct an insulated fire-rated demising wall. Plaintiff informed Defendant that it paid Argo Tea to build the demising wall, but Argo Tea did not build the demising wall. In addition, Plaintiff breached the Lease when it disconnected Defendant's electric service from approximately November 15, 2017 to February 20, 2018 for the purpose of adding electric service to co-tenant Argo Tea. The Lease between Plaintiff and Defendant was substituted with a new oral agreement when Plaintiff agreed to allow Defendant to pay rent late in exchange for Defendant not suing Plaintiff for reimbursement of substantial losses resulting

from theft of Defendant's property and subsequent delay in opening the restaurant during the $1 million plus build-out proximately caused by Plaintiff's failure to secure the Premises.

THIRD DEFENSE

Estoppel. Plaintiff is equitably estopped from evicting Defendant because Plaintiff agreed to allow Defendant to pay rent late. In addition, Plaintiff failed to satisfy its obligations and duties as landlord under the Lease, including by breaching the covenant of quiet enjoyment under section 7.1 and not appealing tax assessments under section 4.4. Moreover, Plaintiff is equitably estopped from evicting Defendant because Plaintiff acted unfairly by inducing Defendant to perform a complete build-out of empty space and subsequently not honoring its commitment to Defendant to work together to establish a sit-down, fine dining restaurant at Plaintiff's property in Rogers Park. Defendant justifiably and detrimentally relied upon Plaintiff's representations to support the build-out and the parties' joint effort to create a fine dining restaurant at Plaintiff's Rogers Park campus location in exchange for Defendant agreeing to use his business acumen as a 3-Star Michelin rated restaurant developer and invest over $1 million in capital improvements without any financial contribution from Plaintiff.

FOURTH DEFENSE

Fraud. Plaintiff fraudulently induced Defendant to enter into the Lease by misrepresenting to Defendant that it understood the new restaurant could take up to two years after opening for business to generate sufficient revenue to meet operating expenses, including rent, and that Plaintiff would allow Defendant to pay rent untimely when Plaintiff knew or should have known that its statements were false. Plaintiff wanted Defendant to believe its statements of promised support so Defendant would invest over $1 million to build out and make improvements to Plaintiff's vacant space. Despite the known challenges of establishing a fine

dining, sit-down restaurant in Rogers Park, Defendant believed that it would recover its substantial investment of time and money at the Premises during the initial ten-year term due to Plaintiff's promises to support the development. Plaintiff knew or should have known that its statements to Defendant acknowledging the difficulty in establishing a fine dining restaurant in Rogers Park and Plaintiff's willingness to be patient with Defendant for rent payments for at least two years to be false. As a result of Defendant's reliance on Plaintiff's false statements, Defendant suffered damages.

FIFTH DEFENSE

Unclean Hands. Plaintiff is not entitled to obtain eviction because Plaintiff acted unethically or in bad faith with respect to the subject of the complaint. Plaintiff is not entitled to any form of equitable relief due directly to its own wrongdoing and breaches of fiduciary duty to Defendant. After Plaintiff served Defendant with a default notice on February 14, 2020, Plaintiff stated that it was a formality, not to worry about it, and that Plaintiff wanted Defendant to reopen for business once it was safe to do so during the pandemic. Defendant detrimentally relied upon Plaintiff's representations that it would not evict Defendant during the pandemic, so Defendant continued to maintain the Premises, pay insurance and utilities, lease restaurant equipment, and plan for a reopening. Plaintiff lied to Defendant and fraudulently induced Defendant because Plaintiff was actively searching for a new tenant, and over one year later on May 4, 2021 sued Defendant for eviction when Plaintiff located a replacement tenant. If Plaintiff had been honest with Defendant, Defendant could have sold the business before an eviction complaint was filed and preserved Onward's going concern value. Moreover, certain employees of Plaintiff engaged in a defamation campaign of Mr. Olszewski's reputation to influence Plaintiff from working with Defendant on a plan to reopen the restaurant during the pandemic as specified in the Complaint

filed by Mr. Olszewski against Plaintiff, Wayne Magdziarz and David Beall on October 1, 2021 seeking monetary damages and injunctive relief, a copy of which is attached hereto as **Exhibit A** and expressly incorporated herein.

SIXTH DEFENSE

Setoff. Defendant is entitled to setoff of unpaid rent in the amount of money that Defendant contributed to making capital improvements to the Premises to the extent the Lease is rescinded or terminated prematurely. Under the Lease, all personal property, furnishings, machinery, and trade fixtures, equipment, and improvements that Tenant installed in the Premises remains the property of Tenant upon expiration of the Lease or termination of Tenant's right of possession. *See* Lease, 3.10. Defendant is also entitled to setoff in the amount of revenue that Defendant lost due to Plaintiff's breaches of the Lease, including failure to build a demising wall, and causing Defendant's property to be stolen, disconnecting Defendant's electric service for three months to benefit a co-tenant (Argo Tea), and other breaches of the covenant of quiet enjoyment. Plaintiff's failure to properly secure the Premises during the build-out caused Defendant's building materials and plans to be stolen causing substantial delay and expense. During the Lease term, Plaintiff performed building maintenance to outdoor light fixtures and obstructed customer access to the restaurant resulting in loss of revenue. Also, in June 2019 Plaintiff failed to remedy an outdoor leaking pipe that prevented Defendant from utilizing its sidewalk dining area resulting in loss of revenue. Further, Plaintiff allowed graffiti to remain on the building exterior that detracted from the fine dining experience resulting in loss of revenue. Moreover, Plaintiff failed to perform and/or enforce other co-tenants' pest extermination on the building's exterior and above Defendant's restaurant resulting in spiders and other pests infiltrating the outdoor sidewalk dining area resulting in loss of revenue. Plaintiff's numerous

breaches of the Lease caused permanent loss to the business hurting its reputation and with several customers stating that they would never return to Onward.

SEVENTH DEFENSE

Frustration of Purpose. The sole purpose of Defendant in entering into the Lease was to develop and operate a fine dining sit-down restaurant with a ten-year minimum term. *See* Lease, Section 1.1I, Section 1.1M, Section 7.3, and Section 8.1B. The Lease terms, including the provisions relating to rent and use were negotiated by Landlord and Tenant on the assumption that Tenant will be the occupant of the Premises for the full Term. *See* Lease, Section 8.4 (D) ("The terms of this Lease, including the provisions relating to Rent and use have been negotiated by Landlord and Tenant on the assumption that Tenant will be the occupant of the Premises for the full Term."). The purpose of the Lease was substantially frustrated when Illinois Governor Pritzker entered executive orders initially requiring all restaurants to close, and subsequently implementing mitigation measures that limited capacity due to the pandemic. The non-occurrence of a pandemic that forced Defendant's restaurant to close for several weeks and subsequently authorized reopening in a restricted capacity was a basic assumption on which the Lease was made. *See* Restatement 2d of Contracts § 265. The government shutdown was unforeseeable and could not have been built into the Lease. In fact, the Lease's force majeure clause is narrowly tailored to only "labor troubles of a third party, an act of God, inability to obtain materials, failure of power, riots or war (each, a "Force Majeure Event")" and does not contemplate any closures due to plagues, epidemics, disease or government acts or regulations, including shutdowns. *See* Lease, Section 11.2. As a result of the unforeseeable and unprecedented nature of the COVID-19 pandemic and the government-mandated restrictions imposed on Defendant's business, Defendant's purpose for making the Lease, to operate a fine

dining sit-down restaurant, was frustrated. The pandemic still exists, mask-wearing and social distancing continue, causing a permanent and severe disruption to Defendant's restaurant business. Even though reduced capacity seating for indoor dining was allowed in Chicago subsequent to the closure orders, Onward's fine dining sit-down restaurant was unable to reopen in a reduced capacity for several reasons, including impossibility to rearrange kitchen and furniture (tables, chairs, bars, booths, serving stations) to comply with Center for Disease Control ("CDC") guidelines, and vendors' and Landlord's refusal to reduce costs on a pro rata basis. Moreover, curbside dining service is not a permitted use under the Lease and Plaintiff instructed Defendant not to offer take-out dining.

EIGHTH DEFENSE

Impossibility of Performance. Actual performance of the Lease's intended purpose as a sit-down fine dining restaurant was made impossible, or impracticable, due to the pandemic. The government shutdown was unforeseeable and could not have been built into the Lease. In fact, the Lease's force majeure clause is narrowly tailored to only "labor troubles of a third party, an act of God, inability to obtain materials, failure of power, riots or war (each, a "Force Majeure Event")" and does not contemplate any closures due to disease or government shutdowns. *See* Lease, Section 11.2. Actual performance of the Lease was rendered impossible when Illinois Governor Pritzker entered executive orders initially requiring all restaurants to close, and subsequently implementing mitigation measures that limited capacity due to the pandemic. The non-occurrence of a pandemic that forced the restaurant to close for many months and subsequently authorized reopening in a restricted capacity was a basic assumption on which the Lease was made. The pandemic still exists, mask-wearing and social distancing continue, causing a permanent and severe disruption to Defendant's business making it objectively

impossible or impracticable to operate a sit-down fine dining restaurant at the Premises precluding Defendant from performing its contractual obligations. The pandemic was, and remains, so severe (1 in 500 Americans nationwide have died!) that even Plaintiff closed its university and dormitories for several months preventing in-person contact.

NINTH DEFENSE

Mutual Mistake / Equitable Rescission. The parties entered into the Lease based on a mutual mistake of fact that was material to the agreement, and the Lease should be rescinded. Prior to the Lease, the Premises was vacant, open air space with a dirt floor, no walls, and no utilities. No business or retail operation could occur at the Premises in its original condition. Recognizing that it would take over one year of permitting and construction, at least $1 million of Defendant's money, and up to two years after its grand opening for the sit-down, fine dining restaurant to become profitable, the parties agreed to an initial ten (10) year lease term with two five (5) options to renew. Notably, Plaintiff did not invest any funds in the project, and agreed to support Defendant in the long process to establish the restaurant adjacent to its Rogers Park campus for the benefit of its students, faculty, and staff. Once the pandemic hit, however, it became impossible for the restaurant to operate and the Lease's intended purpose of having Defendant operate a sit-down, fine dining restaurant was frustrated. Thus, the parties were mutually mistaken about a material fact – that the restaurant would operate for the remainder of the initial ten-year term after its grand opening.

In addition, the parties made a mutual mistake in drafting a lease that failed to foresee and address the possibility of a pandemic like COVID-19. Notably, the Lease's force majeure provision does not address the impact of disease or governmental regulation on lease performance. *See* Lease, Section 11.2. Prior to the pandemic, Plaintiff honored its commitment

to work with Defendant and accepted late rent payments, but once Plaintiff began to experience its own financial problems with the University being closed due to the pandemic, it reneged on its promise to Defendant and declared a Lease default making it impossible for Defendant to renew its liquor license and reopen for business. It would be inequitable for Plaintiff to keep the benefit of Defendant's $1 million plus build-out of Plaintiff's property when Defendant's performance under the Lease was frustrated initially by the pandemic (which no party could have predicted) and subsequently by Plaintiff's refusal to work with Defendant in reopening the fine dining sit-down restaurant. During the pandemic and up to the present, Defendant maintained the Premises, paid the required insurance and utilities, and planned to reopen with Plaintiff's cooperation. Plaintiff initially supported Defendant's plan but changed its mind to the financial detriment of Defendant. Even if Defendant made a unilateral mistake of fact in believing that it would be allowed to operate the restaurant for up to ten years to recoup its substantial $1 million plus in capital improvements, the effect of the mistake is such that enforcement of the Lease would be unconscionable. As a result of the foregoing, the Lease is void *ab initio*, and the parties should be restored to the positions they held before they first entered into the Lease with Plaintiff making restitution to Defendant for the substantial capital improvements it made as tenant `to the Premises.

TENTH DEFENSE

Force Majeure. The Lease's force majeure clause was triggered by Illinois Governor Pritzker's March 16, 2020 order which suspended service for businesses that offered food or beverages for on-premises consumption. Governor Pritzker's order triggered the force majeure clause because it was a governmental action that hindered the tenant's ability to perform by prohibiting on-premises food consumption. The Governor's order was the proximate cause of

the tenant's inability to pay rent because it prevented the tenant from operating normally as a fine dining sit-down restaurant. Further, Defendant did not agree to a force majeure clause in the Lease that obligated it to pay rent even if a force majeure event occurred.

ELEVENTH DEFENSE

Failure of Consideration. A party may rescind a contract when the counterparty, through no fault of its own, fails in a material way to give the performance required under the contract. Due to the pandemic's closure and government mandated mitigation orders, Plaintiff could not provide Defendant with unfettered possession of the Premises as required under the Lease. Defendant was unable to operate the sit-down, fine dining restaurant that the parties mutually intended. Operating Onward's sit-down fine dining restaurant in a socially distanced manner with reduced seating capacity was not a viable option for logistical and economic reasons. Therefore, Defendant did not receive its bargained-for consideration from Plaintiff.

TWELFTH DEFENSE

Unjust Enrichment. Based upon Plaintiff's acknowledgment that it understood the difficulties with creating a sit-down fine dining restaurant at its Rogers Park campus and would support Onward in the development of Plaintiff's vacant space, Defendant honored its contractual obligation and spent over $1 million in build-out costs and improvements at the Premises knowing that it would have at least ten years to operate the business and recoup its capital investment. The parties expressly acknowledged in the Lease that, "All personal property, furnishings, machinery and trade fixtures, equipment and improvements that Tenant installs in the Premises will remain the property of Tenant." *See* Lease, Section 3.10.

When Defendant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of Tenant, the

Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease. As a result, the Lease terminated and became void. Based upon the parties' agreement that the Lease term would exist for at least ten years, Tenant paid for all of Tenant's Work and provided other consideration to the Landlord for a period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises. The Landlord was enriched as a result of these payments at Tenant's expense. Under principles of good conscience, Landlord should not be allowed to retain the Tenant's Work and other consideration paid for the period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises as originally contemplated by the Lease. Landlord wrongfully declared default and sued for eviction seeking to keep the benefit of substantial improvements which were contracted for on the premise that the Lease term would be a minimum of 10 years. Finally, Lease Section 3.10 B. provides that upon termination of Tenant's right of possession, all personal property, furnishings, machinery and trade fixtures, equipment, and improvements that Tenant installs in the Premises remains Tenant's property. Thus, Landlord must compensate Tenant if it wants to keep any build-out improvements made by Tenant.

THIRTEENTH DEFENSE

Laches. Plaintiff is barred from raising a claim due to its unreasonable delay in pursuing the eviction claim. Since Lease inception, Plaintiff was aware of Defendant's defaults in making rent payments late or not at all. On February 14, 2020, Plaintiff sent a written *Notice of Default Under Lease* to Defendant claiming payment defaults in the amount of $65,440.02 and advising that unless such amount was paid within ten (10) days that Landlord would terminate the Lease. Plaintiff unreasonably delayed in commencing the eviction action on May 4, 2021, fifteen (15)

months after serving a notice of default. As a direct result of Plaintiff's unreasonable delay in suing Defendant for eviction, Defendant suffered damage by losing the opportunity to sell its business as a going concern and having to maintain, repair and insure the Premises.

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LOYOLA UNIVERSITY OF CHICAGO,	)	
	)	
Plaintiff/Counter-Defendant,	)	
	)	
v.	)	Case No: 2021 M1 701604
	)	
ONWARD MSO, LLC. and Unknown Occupants,	)	
	)	
	)	
Defendants/Counter-Plaintiff.	)	

DEFENDANT'S VERIFIED COUNTERCLAIMS

Counter-Plaintiff, Onward MSO LLC ("Onward" or "Tenant"), through undersigned counsel, as and for its complaint against Defendant Loyola University of Chicago ("Loyola" or "Landlord"), states as follows:

NATURE OF THE CLAIMS

1. The COVID-19 pandemic has presented unique and unprecedented circumstances that were unforeseeable—indeed, unimaginable. The disease is highly contagious, and its spread has been rapid. The government's reaction was profound and prevented Onward from opening its doors for several months. To protect the health and safety of its employees, customers, and the surrounding community, and comply with applicable law, Onward was required to close the restaurant and keep it closed. And like innumerable other companies, it was required to make the difficult decision to furlough its employees to preserve its finances while revenue from the restaurant dropped to zero overnight. Today, as government restrictions continue the disease remains virulent. The recommended guidelines for operations may provide some measure of protection but have radically changed the sit-down fine dining experience for the years that

remain of what the parties expected would be the remaining term of the Lease. Sit-down fine dining today looks nothing like what was contemplated by the Lease when it was executed. In a world of unforeseeable events, the circumstances the restaurant has faced are at the extreme end of unforeseeability.

2. These circumstances not only imposed severe and irreparable hardship on Onward, but they frustrated the express purpose of the lease (the "Lease") Onward holds for sit-down fine dining space (the "Premises") at the building located at 6580 North Sheridan Road, Chicago, Illinois 60626 (the "Building") and made the principal object of the Lease illegal, impossible, and impracticable. Because several years remained on the Lease term at the time COVID-19 reached Chicago, the impairment of the purpose of the Lease, and Onward's interests in the Lease, became permanent and irreparable. Under such circumstances, the Lease was terminated pursuant to law effective on or about March 15, 2020, both under the terms of the Lease and the laws of the State of Illinois, and Onward had no further obligation to pay rent or other consideration under it. Onward is entitled to declaratory relief regarding its obligations under the Lease, and the equitable remedies described below.

3. Tenant is an Illinois limited liability company with its principal place of business in Chicago, Illinois.

4. Landlord is an Illinois not-for-profit corporation.

5. Loyola failed to honor its commitment to work with Onward in reopening the sit-down fine dining restaurant during the pandemic. Prior to being forced to close due to the pandemic, Onward was operated at all times in a high grade, first-class and reputable manner, in recognition of and in keeping with the academic, Catholic and Jesuit identity of Loyola University and its campus. Since opening in November 2018, Onward welcomed, and served

thousands of customers, including many Loyola alum, employees, professors, and students. Onward also employed 20 Loyola students. Onward's commitment to Loyola, its people and the local community is second to none. While Onward experienced some financial difficulties before the pandemic, as the parties' acknowledged would occur with a new sit-down fine dining restaurant establishing itself in Rogers Park, February 2020 was the first month that Onward netted positive cash flow. But for the pandemic and Governor Pritzker's closure and mitigation orders crushing the business, Onward was projecting future growth and profitability.

6. The origins of Onward began in late 2016 when Wayne Magdziarz (Onward's Senior Vice President of Capital Planning and Campus Development) met with Michael S. Olszewski (Onward's principal) at Mr. Olszewski's home and sampled Mr. Olszewski's chef's food. Knowing that Mr. Olszewski had successfully developed and operated a 3-star Michelin awarded restaurant in Chicago ("Grace"), Loyola was eager to partner with Mr. Olszewski. Mr. Magdziarz explained that Loyola wanted a sit-down, fine dining establishment of its own at one of its new buildings in Rogers Park. Upon information and belief, Loyola promised the hotel owner who developed and operated the Hampton Inn by Hilton in the Building, that it would procure a fine dining tenant to compliment the hotel's lodging business.

7. As a Loyola alumnus and donor, Mr. Olszewski was eager to help the University and improve the distressed Rogers Park neighborhood. Relying upon his decades of real estate experience in Chicago, Mr. Olszewski explained to Mr. Magdziarz that a fine dining concept could be accomplished, but it would be challenging in that environment and take a few years before it became net cash flow positive. Mr. Magdziarz (and subsequently Michael Loftsgaarden, Loyola's Assistant Vice President, Capital Planning) assured Mr. Olszewski that

Loyola was in it for the long haul and would be flexible as they worked together to provide the Loyola community and surrounding neighborhood with a top-rated, fine dining establishment.

8. The Lease was entered between Landlord and Tenant on March 22, 2017. Under the Lease, Loyola did not make any monetary contribution to the build-out and relied solely upon Mr. Olszewski's expertise and wealth to design, build, furnish and decorate a gorgeous restaurant. Prior to the Lease, the Premises was empty with a dirt floor, no walls, and no utilities. Indeed, Loyola has derived a significant benefit and acknowledged same per Section 3.4 of the Lease.

9. Prior to its grand opening in December 2018, Tenant invested over $1 million in building out the Premises as required by the Lease. Tenant's work would have been completed sooner, but Landlord's breach of the Lease caused a significant delay of over three months. Landlord failed to (1) construct a demising wall separating Tenant's space from co-tenant Argo Tea, and (2) secure the Premises' construction site, resulting in a theft of Tenant's building materials and plans. Landlord failed to reimburse Tenant for the loss of building materials and loss in value of the Tenant's three plus months of rent abatement under Year 1 of the Lease.

10. The parties' mutual and express purpose in entering into the Lease was for Tenant to (i) improve Landlord's vacant space by building a first class, sit-down fine dining restaurant, at Tenant's sole cost, and (ii) operate the fine dining restaurant for a minimum of ten years.

11. Article 1.1I of the Lease provides for an initial ten (10) years term after the Rent Commencement Date. Article 1.1M of the Lease states in relevant part that Tenant "shall use and occupy the Premises ***solely*** for the operation of a sit-down restaurant." (emphasis added). Article 3.4 of the Lease states in relevant part that Tenant's Work "shall be performed by Tenant

at Tenant's sole cost and at an expense estimated to be in excess of One Million and No/100 Dollars."

12. But for the ability to operate a sit-down fine dining restaurant at the Premises for a minimum ten (10) years term, Tenant would not have entered into the Lease. Tenant's ability to operate a sit-down fine dining restaurant at the Premises for at least ten years was the sole consideration Tenant received in exchange for entering into the Lease, all other nominal benefits of the Lease being a part of, and subordinate and ancillary to, that consideration.

13. From the inception of the Lease until March 2020, Tenant spent over $1 million developing Loyola's vacant property, and subsequently maintaining and operating a sit-down, fine dining restaurant at the Premises pursuant to the Lease.

14. On March 15, 2020, the Governor of Illinois issued an Executive Order declaring a disaster in the State of Illinois and forced all bars and restaurants to close to dine-in customers beginning at the end of business March 16, 2020. For several months thereafter, additional executive orders and proclamations at the state and local levels required bars and restaurants to close, operate at limited occupancy, and enforce mask mandates and social distancing practices.

15. Following the outbreak of COVID-19 in the United States, Tenant was forced to suspend all operations at the Premises on or about March 16, 2020, to comply with applicable governmental orders and guidelines and to protect the health and safety of its employees, customers, and the surrounding community. Between March 2020 and the present, Tenant was never able to resume normal operations at the Premises. And given the continued duration and severity of the pandemic and consequential harm to Onward's unique fine dining operations, Tenant will never be able to resume operations in a manner contemplated by the Lease.

16. As a result of the foregoing circumstances and government orders and proclamations, and other applicable governmental rules and guidelines, all of which were unforeseeable at the time the Lease was entered into, and which resulted from no act of either party, the parties' intended use of the Premises was frustrated, became impossible, illegal, and impracticable. Specifically, Tenant was forced to suspend all sit-down fine dining restaurant operations at the Premises. Tenant's purpose in entering into the Lease was frustrated. Tenant's performance under the Lease became impossible and impracticable. Tenant was deprived of the consideration it received in exchange for entering into the Lease.

17. Although the Lease specifically contemplated that Tenant would benefit from its use of the Premises for a fixed ten-year term, as a result of the unforeseeable COVID-19 crisis, Tenant has been deprived of its use of the Premises for the full term that Tenant was promised under the Lease. Such a result is inequitable and damages Tenant because the Lease's minimum ten years term, and the expectation that Tenant would be able to use it for its entire term, was the basis for the parties' negotiations and calculations at the time of contracting concerning Tenant's obligation to complete Tenant's Work at Tenant's sole cost in excess of $1 million, pay rent and other consideration under the Lease. Thus, for the additional fact and reason that the Premises was not usable for the entire term of the Lease, it is impossible and impracticable for the Landlord and Tenant to continue performing their obligations under the Lease, the parties' mutual purpose for entering into the Lease was frustrated, and the consideration Tenant was to receive under the Lease has failed.

18. The COVID-19 crisis and the civil orders affecting Tenant's ability to operate a sit-down fine dining restaurant at the Premises constitute a casualty under Article IX of the Lease that rendered the Premises unusable, such that Tenant was entitled to a complete abatement of

rent beginning on or about March 16, 2020. Section 9.1 of the Lease states in relevant part that "[i]f the casualty, … shall render the Premises untenantable, in whole or in part, and the damage shall not have been due to the fault or neglect of Tenant, a proportionate abatement of the Rent shall be allowed from the date when the damage occurred …."

19. Because the Landlord was not able to restore the Premises for the permitted use under the Lease, the rent abatement was permanent and, indeed, the Lease terminated pursuant to law on the date Tenant closed its business in the Premises.

20. Despite the protections granted Tenant under Article IX of the Lease (Damage or Taking and Restoration) and Tenant's rights as a result of the frustration of purpose of the Lease, the failure of its consideration, and the impossibility, illegality and impracticability of performance, Landlord has wrongly demanded that Tenant pay rent under the Lease for the period after Tenant was deprived of its use of the Premises.

21. Landlord's demand for rent and possession constitutes a breach of the terms and conditions stated in Article IX of the Lease and related provisions, as well as Tenant's rights pursuant to applicable law.

22. Further, Landlord owes Tenant damages equal to the amount of the unamortized portion of capital improvements and Tenant's Work made to the Premises for the period which Tenant was deprived of the use of the Premises.

COUNT ONE - BREACH OF CONTRACT

23. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

24. Prior to the effective date of the Lease's termination and/or rescission, which occurred on or about March 16, 2020, the Lease constituted a binding enforceable contract.

25. Landlord breached the contract by, among other things: failing to construct a demising wall and failing to secure the Premises allowing Tenant's property to be stolen, disconnecting Tenant's electricity for three months, demanding Tenant pay rent and other expenses that were not owed under the Lease; serving a purported notice to cure default and a purported termination notice in violation of Tenant's rights and the notice provisions of the Lease; failing to challenge and/or appeal real estate tax assessments; failing to comply with the covenant of quiet enjoyment, and taking such other actions as are inconsistent with Tenant's rights.

26. Tenant performed all of its obligations under the Lease except those that were waived, excused, or rendered impossible and/or impracticable.

27. As a direct and proximate result of Landlord's breach of contract, Tenant suffered the damages alleged hereinabove.

28. Tenant is entitled to a judgment against Landlord in an amount to be proven at trial.

COUNT TWO - DECLARATORY RELIEF

29. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

30. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the express purpose of the Lease.

31. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, and but for its right to operate such a restaurant, Tenant would not have entered into the Lease and invested over $1 million in a comprehensive

build-out with substantial improvements. Indeed, without Tenant's ability to use the Premises for a minimum ten-year term, the transaction between the parties that resulted in the Lease makes no sense. When Tenant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant. The Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

32. Although necessary, the sudden suspension of restaurant operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.

33. An actual controversy exists between Tenant and Landlord concerning their respective rights under the Lease, and Tenant has no adequate remedy at law. Specifically, the parties dispute: a. Whether the Lease terminated on or about March 16, 2020 pursuant to the Lease and applicable law; b. Alternatively, whether the obligation to pay rent was abated from and after March 16, 2020, c. Alternatively, for what period from and after March 16, 2020 the obligation to pay rent abated if the abatement was not permanent despite the interruption or impairment of Tenant's use of the Premises; d. Whether there was a frustration of purpose of the Lease; e. Whether the continued operation of a sit-down fine dining restaurant under the Lease was illegal, impossible, or impracticable during the pandemic; f. Whether there was a failure of consideration under the Lease; g. Whether a casualty occurred that rendered the Premises unusable under Article IX of the Lease; and h. Whether Tenant owns the improvements made by Tenant to the Premises upon termination of the Lease.

34. The parties further dispute the effects of the foregoing on the Lease's Term, expiration, and the continuing obligations, if any, of the parties.

35. Therefore, Tenant seeks a judgment declaring the following: a. That the Lease terminated on or about March 16, 2020 pursuant to the Lease and applicable law; b. Alternatively, that the rent under the Lease abated from and after March 16, 2020; c. Alternatively, if the abatement of rent was not permanent despite the interruption or impairment of Tenant's use of the Premises, that the rent abated for a period in the discretion of the Court from and after March 16, 2020; d. That there was a frustration of purpose of the Lease; e. That the continued operation of a sit-down fine dining restaurant under the Lease was illegal, impossible, or impracticable; f. That there was a failure of consideration under the Lease; g. That a casualty occurred that rendered the Premises unusable under Article IX of the Lease; h. That Tenant owns the improvements made by Tenant to the Premises upon termination of the Lease; and i. That the parties have no continuing obligations to one another under the Lease from and after March 16, 2020 (or another date in the discretion of the Court) when Tenant was forced to suspend restaurant operations, which occurred on or about March 16, 2020, and at all times thereafter.

36. In addition, Tenant seeks a judgment declaring that Landlord's purported notice to cure default and notice of termination were ineffective and of no legal consequence, because Tenant was not in default, because the Lease had already terminated, and because Landlord failed to respect the notice provisions of the Lease.

COUNT THREE - RESCISSION (Rescission/Cancellation of Lease)

37. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

38. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the parties' mutual purpose in entering into the Lease, as both

parties understood at the time of contracting, and but for its right to operate such a restaurant, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.

39. When Tenant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

40. The sudden suspension of restaurant operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.

41. An actual controversy exists between Tenant and Landlord concerning their respective rights under the Lease, and Tenant has no adequate remedy at law.

42. In addition to, and/or in the alternative to, Tenant's claim for declaratory relief regarding the termination of the Lease, Tenant is entitled to judicial rescission of the Lease, as a result of the frustration of purpose of the Lease, the illegality, impossibility, and impracticability of the Lease, and/or the failure of consideration, effective on such date as the Court determines based on the evidence presented at trial.

COUNT FOUR - REFORMATION OF LEASE

43. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

44. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, and but for its right to operate such a restaurant, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the

Premises for a sit-down, fine dining restaurant for a minimum tens year term, the transaction between the parties that resulted in the Lease makes no sense.

45. When Tenant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

46. This sudden suspension of restaurant operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.

47. The Parties would not have entered into the Lease had they known that Tenant would have been unable to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises, and Tenant's ability to use the Premises as a sit-down, fine dining restaurant for a minimum ten-year term was the sole consideration Tenant received under the Lease.

48. It was the Parties' true intent that Tenant would not pay rent or other consideration for the Premises if such use was rendered impossible or impracticable. Had the Parties been able to foresee the events of the COVID-19 crisis at the time of contracting, the Parties would have provided language stating their true intent expressly.

49. An actual controversy exists between Tenant and Landlord concerning their respective rights under the Lease, and Tenant has no adequate remedy at law.

50. In the alternative to Tenant's claims related to the termination and rescission of the Lease, Tenant is entitled to judicial reformation of the Lease to reflect the Parties' true intent that Tenant would have no obligation to pay rent once it was deprived of the use of the Premises and that the Lease would terminate automatically when Tenant was deprived of its use of the

Premises as originally contemplated by the Lease, or that the amount of rent for the Term would have otherwise been adjusted to account for the portion of the Lease's Term during which Tenant could not operate a sit-down, fine dining restaurant for a minimum ten years term at the Premises.

COUNT FIVE - MONEY HAD AND RECEIVED

51. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

52. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, and but for its right to operate such a restaurant, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.

53. When Tenant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease.

54. This sudden suspension of restaurant operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.

55. The Parties would not have entered into the Lease had they known that Tenant would have been unable to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises, and Tenant's ability to use the Premises as a sit-down, fine dining restaurant for a minimum ten-year term was the sole consideration it received under the Lease.

56. Tenant made substantial capital improvements at the Premises and provided other consideration to the Landlord, in an amount to be proven at trial, for a period of time that Tenant was unable to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises.

57. The Landlord benefited from Tenant's Work and other consideration to Tenant's detriment.

58. Under principles of good conscience, Landlord should not be allowed to retain the benefit of Tenant's Work and other consideration paid for the period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises as originally contemplated by the Lease.

59. Tenant is entitled to a judgment in its favor equal to the sum of Tenant's Work that Tenant made to the Premises and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises as originally contemplated by the Lease or after which the Lease terminated pursuant to law.

COUNT SIX - UNJUST ENRICHMENT

60. Tenant repeats, realleges, and incorporates all prior paragraphs and fact allegations as stated in each Affirmative Defense.

61. Tenant's ability to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises was the parties' mutual purpose in entering into the Lease, as both parties understood at the time of contracting, and but for its right to operate such a restaurant, Tenant would not have entered into the Lease. Indeed, without Tenant's ability to use the Premises, the transaction between the parties that resulted in the Lease makes no sense.

62. When Tenant was forced to suspend all restaurant operations at the Premises, the purpose of the Lease was frustrated and impossible to effectuate due to no fault of the Tenant, the Lease's object and purpose became impossible and impracticable, and Tenant was deprived of the consideration it received in exchange for entering into the Lease. As a result, the Lease terminated and became void.

63. This sudden suspension of restaurant operations at the Premises was unforeseeable and not contemplated by the parties at the time the Lease was executed.

64. The Parties would not have entered into the Lease had they known that Tenant would have been unable to operate a sit-down, fine dining restaurant for a minimum ten-year term at the Premises, and Tenant's ability to use the Premises as a sit-down, fine dining restaurant for a minimum ten-year term was the sole consideration it received under the Lease.

65. Based upon the parties' agreement that the Lease term would exist for at least ten years, Tenant paid over $1 million for all of Tenant's Work and provided other consideration to the Landlord, in an amount to be proven at trial, for a period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises.

66. The Landlord was enriched as a result of these payments at Tenant's expense.

67. Tenant owns all property, furnishings, machinery and trade fixtures, equipment, and improvements that Tenant installed in the Premises. The Lease provides that, "upon expiration of this Lease or termination of Tenant's right of possession hereunder, … All personal property, furnishings, machinery and trade fixtures, equipment and improvements that Tenant installs in the Premises will remain the property of Tenant." *See* Lease, Section 3.10 B.

68. Under principles of good conscience, Landlord should not be allowed to retain the Tenant's Work and other consideration paid for the period of time that Tenant was unable to

operate a sit-down, fine dining restaurant at the Premises as originally contemplated by the Lease.

69. Tenant is entitled to restitution of the sums that Tenant has previously paid for completing Tenant's Work and as other consideration to the Landlord, in an amount to be proven at trial, for the period of time that Tenant was unable to operate a sit-down, fine dining restaurant at the Premises as originally contemplated by the Lease.

WHEREFORE, having filed its Answer, Affirmative Defenses and Counterclaims, Defendant respectfully requests that this Court adjudicate the rights and interests between the parties, deny any award to Plaintiff, and enter judgment: a. Awarding damages to Tenant in an amount to be proven at trial; b. Declaring that the Lease terminated pursuant to law effective on or about March 16, 2020; c. Alternatively, that the obligation to pay rent under the Lease abated from and after March 16, 2020; d. Alternatively, if the abatement of rent was not permanent despite the interruption or impairment of Tenant's use of the Premises, that the rent abated for a period in the discretion of the Court from and after March 16, 2020; e. That there was a frustration of purpose of the Lease; f. That the continued operation of the Lease was illegal, impossible, or impracticable on and after March 16, 2020; g. That there was a failure of consideration under the Lease; h. That a casualty occurred that rendered the Premises unusable under Article IX of the Lease; i. That the parties had and have no continuing obligations to one another under the Lease from and after March 16, 2020 (or another date in the discretion of the Court); j. Such other effects of the foregoing on the Lease's Term and expiration as the Court deems just and proper; k. Declaring that Landlord's purported notice to cure default and notice of termination were ineffective and of no legal consequence, because Tenant was not in default, because the Lease had already terminated, and/or because Landlord failed to respect the notice

provisions of the Lease; l. In the alternative, declaring that the Lease was equitably rescinded effective on or about March 16, 2020; m. In the alternative, granting equitable reformation of the Lease to reflect the Parties' true intent that Tenant would have no obligation to pay rent while it was deprived of the use of the Premises and that the Lease would terminate automatically when Tenant was deprived of its use of the Premises as originally contemplated by the Lease, or adjusting the amount of rent for the portion of the Lease's Term during which Tenant could not operate a sit-down, fine dining restaurant for a minimum ten years term at the Premises; n. Ordering Landlord to reimburse and give restitution to Tenant for the payment of Tenant's Work and other expenses paid for the period that Tenant was deprived of its use of the Premises as originally contemplated by the Lease; and o. Such other and further relief that this Court may deem just and proper.

DEMAND FOR JURY TRIAL

Defendant, Onward MSO, LLC, further demands a Trial by Jury of all issues so triable. Defendant reserves the right to amend its Answer, Affirmative Defenses and Counterclaims to reflect additional facts discovered subsequent to the filing of this pleading.

Dated: October 6, 2021

Respectfully submitted,

Onward MSO, LLC, by:

Richard M. Carbonara
One of its Lawyers

Richard M. Carbonara
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Exhibit A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

MICHAEL S. OLSZEWSKI	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No:**
	)	
WAYNE MAGDZIARZ, DAVID BEALL, and LOYOLA UNIVERSITY OF CHICAGO	)	**JURY TRIAL DEMANDED**
Defendants.	)	

PLAINTIFF MICHAEL S. OLSZEWSKI'S VERIFIED COMPLAINT

Plaintiff Michael S. Olszewski (hereinafter "Olszewski" or "Plaintiff"), by and through his attorney RICHARD M. CARBONARA, hereby files a Verified Complaint against Defendant Wayne Magdziarz ("Magdziarz"), individually, Defendant David Beall ("Beall"), individually, and Defendant Loyola University of Chicago ("Loyola"), together with Magdziarz and Beall, the "Defendants"), and in support thereof, alleges as follows:

General Factual Allegations

1. Plaintiff Michael S. Olszewski is a natural person who is a citizen of the State of Illinois and is over the age of 18 years, and who owns and operates Onward MSO, LLC, an Illinois limited liability company ("Onward").

2. Defendant Wayne Magdziarz is a natural person who, on information and belief, is a citizen of the State of Illinois, and is over the age of 18 years, and is a Senior Vice President, the Chief Financial Officer (CFO), and the Chief Business Officer (CBO) at Loyola University of Chicago in the Office of the President.

3. Defendant David Beall is a natural person who, on information and belief, is a citizen of the State of Illinois, and is over the age of 18 years, and is an Associate Vice President of Business Operations at Loyola University of Chicago.

4. Defendant Loyola University of Chicago is an Illinois not-for-profit corporation, and the employer of Defendant Wayne Magdziarz and Defendant David Beall.

5. On December 6, 2016, Olszewski met with Magdziarz to discuss Loyola's solicitation of Olszewski for development and operation of a restaurant at its new building in Rogers Park. Following the meeting at Magdziarz's office, Magdziarz wrote to Olszewski, "Looking forward to working with you…your energy and passion for this project is contagious and I want to be sure this is a successful venture for you as well as Loyola." A few weeks later, Magdziarz had dinner at Olszewski's home where they discussed business plans and sampled food prepared by Onward's chef.

6. On March 22, 2017, Onward, as tenant, entered into a lease agreement with Loyola, as landlord, for Onward to (i) improve Loyola's vacant space by building a first class, sit-down fine dining restaurant, at Onward's sole cost, and (ii) operate the restaurant for a minimum term of ten years (the "Lease").

7. After making a substantial investment of time and money as required under the Lease, Olszewski delivered on his promise and commitment to Loyola and created one of the best restaurants in Rogers Park – Onward was successful and received fantastic reviews. Indeed, after visiting Onward Magdziarz wrote to Olszewski on February 14, 2019, "The place was "hoppin" with not a seat to be had around 7:00 pm. The food was fantastic. I told our server that my short rib pasta dish was one of my top 5 ever – including those I had in Italy!

Congratulations on a great place and terrific food! My very best wishes for many years of culinary success."

8. On May 4, 2021, after the COVID-19 pandemic forced the restaurant to close, Loyola sued Onward for eviction.

9. Prior to commencement of this action and Loyola's eviction lawsuit against Onward, Olszewski had several conversations with Loyola's representatives to resolve lease and payment issues.

10. Namely, due to Onward's closure resulting from the COVID-19 pandemic, Olszewski attempted to work out a payment plan with Loyola for the rent which Onward had been unable to pay.

11. During the course of his effort to negotiate a lease workout with Loyola, Olszewski spoke with multiple individuals at Loyola including Michael Loftsgaarden, Assistant Vice President of Capital Planning, Irma Papabathini, Business Manager, Steven Holler, Assistant General Counsel, and Defendant Wayne Magdziarz.

12. Upon information and belief, the individuals listed in paragraph eleven above similarly spoke with each other and other Loyola employees concerning Olszewski.

13. Olszewski is a graduate of Loyola University of Chicago and has been a licensed realtor since 1986. He is well regarded throughout the State of Illinois as the owner/broker of Area Wide Realty, which opened for business in 1997. Olszewski holds a real estate broker's license in the States of Illinois and Wisconsin where he also maintains offices. Olszewski services nonperforming residential and commercial real estate for many institutional lenders, governmental entities, servicing companies, Wall Street firms and investors.

14. Olszewski has served as a court appointed receiver for the City of Chicago, renovates homes for the Cook County Land Bank Authority, and is a HUD licensed broker and a National Community Stabilization Trust ("NCST") developer for Freddie Mac and Fannie Mae properties. Recently, the Cook County Land Bank Authority deeded 35 abandoned row houses to Olszewski in Chicago's historic Pullman neighborhood for rehabilitation to improve the community, increase property values, and reduce homelessness.

15. During the past decade Olszewski has personally sold over 2.2% of the entire market share for the northeastern portion of the State of Illinois and sold over one billion dollars of residential real estate.

16. Since 2017, Olszewski has donated over $10,000 to Loyola University of Chicago in charitable contributions.

17. Olszewski is well regarded in Chicago's culinary community for developing and operating award-winning fine dining restaurants. Prior to developing Onward, Olszewski was the developer and owner of Grace, a three-Michelin-star fine dining restaurant that operated in Chicago from 2010 to 2017. Olszewski also developed and owned Yugen, a one-Michelin-star fine dining restaurant that operated in Chicago from 2018 to 2021 before the COVID-19 pandemic forced it to close.

Count I – Libel

18. Plaintiff re-alleges paragraphs 1-17 of the general factual allegations as to Count I of this complaint, and by that reference incorporates those allegations herein.

19. Olszewski is a private figure for the purposes of this defamation action, having lived his entire life outside of the public eye.

20. Each of the Defendants has defamed Olszewski by knowingly, intentionally, willfully, or negligently publishing false defamatory statements set forth below about Olszewski, which each of the Defendants knew or should have known to be false.

21. Each of the Defendants has published statements to third parties wherein Magdziarz and Beall defame Olszewski despite knowledge of the falsity of these statements.

22. Defendant Magdziarz and Defendant Beall made the foregoing false defamatory statements that are Defamation *Per Se* by falsely and maliciously accusing Olszewski of poor character, dishonesty, lying and lack of integrity in his business dealings.

23. Defendant Magdziarz and Defendant Beall each made their false defamatory statements: (a) with malice aforethought; (b) with reckless disregard for the truth; (c) with the intent to injure and defame Olszewski; and (d) with reckless indifference to the consequences of their actions.

24. Defendant Magdziarz's and Defendant Beall's false, defamatory, and malicious statements, when considered alone and without innuendo, (a) have negatively impacted Olszewski's reputation and character; (b) have caused Olszewski to be subjected to ridicule in the Loyola community; and (c) have injured Olszewski's reputation which was built on many years of hard work and dedication to public service.

25. Each of the Defendants' actions were designed to ruin Olszewski's reputation, and amount to Defamation *Per Se*.

26. In Illinois, to establish libel, a plaintiff must show that: (1) the defendant made a false statement concerning plaintiff; (2) there was an unprivileged publication of the defamatory statement by defendant to a third party; and (3) plaintiff was damaged. *Coghlan v. Beck,* 984 N.E.2d 132; 368 Ill. Dec. 407 (Ill. App. Ct. 1st Dist. 2013); *Thomas v. Fuerst*, 345 Ill. App. 3d

929, 934 (Ill. App. Ct. 1st Dist. 2004) (*citing Stavros v. Marrese*, 323 Ill. App. 3d 1052, 1057 (Ill. App. Ct. 1st Dist. 2001)).

27. A statement is considered defamatory if it tends to cause such harm to another's reputation such that it lowers that person in the eyes of the community or deters third persons from associating with that person. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996) (*citing Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1; 607 N.E.2d 201 (1992)).

28. A statement or publication is considered defamatory on its face if it contains words which impute an inability to perform or want of integrity in the discharge of duties of office or employment. *Id.* at 88.

29. The Illinois Supreme Court considers five types of statements to be defamatory *per se*, including accusing a person of lacking ability or integrity in the performance of job duties, and statements that otherwise prejudice a person in his profession or business. *Green v. Rogers*, 234 Ill. 2d 478, 491-92 (2009); *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 580 (2006); *Van Horne v. Muller*, 185 Ill. 2d 299 (1999). A plaintiff does not need to plead or prove actual damage to his reputation to recover for a statement that is defamatory *per se* because the words used are so obviously and materially harmful to the plaintiff that injury to his reputation is presumed.

30. On March 19, 2021, Defendant Magdziarz made false statements to his colleagues concerning Olszewski's character and lack of integrity by writing that he is "a piece of work" and "untrustworthy and a blowhard. He's been a tenant at LSC for several years and has never been current with rent, always blames someone else for his lack of knowledge and has lied to my face on numerous occasions." A true and correct copy of Defendant Magdziarz's March 19, 2021 email is attached hereto as **Exhibit A** (Loyola bates-stamped 000366).

31. The false statements that Olszewski is "untrustworthy", "always blames someone else for his lack of knowledge", and "has lied to my face on numerous occasions" are negative and directly impute a lack of integrity to Olszewski in the discharge of his duties as a business owner. These *per se* defamatory statements caused prejudice to Olszewski in his business and as the owner of Onward.

32. The statement that Olszewski has "been a tenant at LSC for several years and has never been current with rent" is false. Olszewski has never been a tenant of Loyola. On the contrary, Onward is a tenant of Loyola.

33. Defendant Magdziarz either knew the publication was false or believed the publication was true but lacked reasonable grounds for that belief. *Troman v. Wood*, 62 Ill. 2d 1984, 299 (1975).

34. Defendant Magdziarz acted with actual malice when he published the defamatory statements. Defendant Magdziarz's malice toward Olszewski is demonstrated by his derogatory and sarcastic comments, including "he's a piece of work", "[a]fter I got myself off the floor", "I would not recommend further engagement with him on any front", "in the likely event [Olszewski] tries to reach the president to opine on his expertise, philanthropic spirt and deep commitment to Loyola", and "[t]he comment that Biden may be visiting his restaurant made me laugh out loud!" *See* **Exhibit A**.

35. Further, Defendant Magdziarz's malice toward Olszewski and bad faith, self-dealing is shown by his flippant remark in a March 5, 2021 email to other Loyola employees, "Let's be sure we get the $10,000 fire places [sic] in the divorce." *See* **Exhibit B** (Loyola bates-stamped 000281).

36. Defendant Magdziarz published his defamatory statements through a March 19, 2021 e-mail to other Loyola employees, Karen Paciero and Kate Peterson. *See* **Exhibit A**.

37. On March 5, 2021, Defendant Beall made a false statement to his colleagues concerning Olszewski's character by saying that, "He is a nut job!" A true and correct copy of Defendant Beall's March 5, 2021 email is attached hereto as **Exhibit B**.

38. The false statement that Olszewski is a "nut job" is negative and directly imputes a lack of integrity to Olszewski in the discharge of his duties as a business owner. This *per se* defamatory statement caused prejudice to Olszewski in his business and as the owner of Onward.

39. Defendant Beall either knew the publication was false or believed the publication was true but lacked reasonable grounds for that belief. *Troman v. Wood*, 62 Ill. 2d 1984, 299 (1975).

40. Defendant Beall acted with actual malice when he published the defamatory statement. Defendant Beall's malice toward Olszewski is demonstrated by his sarcastic response, "Hilarious!" when he responded to Defendant Magdziarz's email criticizing Olszewski. *See* **Exhibit B**.

41. Defendant Beall published his defamatory statement through a March 5, 2021 e-mail to other Loyola employees, Defendant Wayne Magdziarz and Michael Loftsgaarden. *See* **Exhibit B**.

42. Interoffice reports constitute a publication for defamation purposes. *Popko v. Continental Cas. Co*., 355 Ill. App. 3d 257, 261 (Ill. App. Ct. 1st Dist. 2005) (*citing Gibson v. Phillip Morris, Inc.*, 292 Ill. App. 3d 267 (Ill. App. Ct. 5th Dist. 1997)).

43. Defendant Loyola is responsible for employee Defendant Magdziarz's and Defendant Beall's misconduct because their libelous statements were made within the scope of their employment and while using Defendant Loyola's email communication system.

44. Defendant Magdziarz's defamatory statements were made while responding to a work email from another Loyola employee, Karen Paciero, requesting feedback from Defendant Magdziarz and Jack Clark concerning Olszewski's interest in discussing a partnership with Loyola to keep the restaurant open.

45. Rather than respond only to Karen Paciero's work email, Defendant Magdziarz copied another Loyola employee, Kate Peterson, on his defamatory email response within the scope of his employment duties.

46. Similarly, Defendant Beall's defamatory statement was made while responding to a work email from another Loyola employee, Defendant Magdziarz, concerning Magdziarz's conversation with Olszewski about Onward.

47. Olszewski's reputation and career were damaged by Defendants' defamatory statements. Defendants' emails called into question Olszewski's character implying that he should be distrusted or avoided and cast him in a negative light within the Loyola community. Olszewski has suffered financial, emotional, and social losses as a result of Defendants' defamatory statements.

48. Olszewski reserves the right to plead punitive damages.

49. In addition to monetary damages, Olszewski is entitled to injunctive relief enjoining Defendants from publishing further defamatory statements.

WHEREFORE, Plaintiff, Michael S. Olszewski, respectfully requests that this Honorable Court enter a judgment in favor of Olszewski awarding damages and injunctive relief against

Defendants, joint and severally, plus reasonable attorney's fees and costs, and for such other and further relief as this Court deems just and proper.

Dated: September 30, 2021

By: 

Richard M. Carbonara

Attorney for Plaintiff
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RE: Michael Olszewski

Magdziarz, Wayne <Wmagdzi@luc.edu>
Fri 3/19/2021 9:08 AM
To: Paciero, Karen <kpaciero@luc.edu>
Cc: Peterson, Kate <kjpeterson@luc.edu>

Thanks Karen.

I spoke with Mike a couple of weeks ago. Candidly, he's a piece of work.

He asked me about the university being interested in partnering with him on his business and I said no. He also asked about the process for becoming a trustee. After I got myself off the floor, I told him such recommendations typically come from our existing board members and then through a committee of the board.

I would not recommend further engagement with him on any front. While his daughter is a graduate of Loyola (Quinlan) from awhile back and he did support Founders' a few years ago with a sponsorship, I find him to be untrustworthy and a blowhard. He's been a tenant at LSC for several years and has never been current with rent, always blames someone else for his lack of knowledge and has lied to my face on numerous occasions.

I'm copying Kate on this in the likely event he tries to reach the president to opine on his expertise, philanthropic spirit and deep commitment to Loyola.

Sorry you asked?

Wayne

P.S. The comment that Biden may be visiting his restaurant made me laugh out loud!

From: Paciero, Karen <kpaciero@luc.edu>
Sent: Thursday, March 18, 2021 5:31 PM
To: Magdziarz, Wayne <Wmagdzi@luc.edu>; Clark, Jack <jclark@luc.edu>
Subject: FW: Michael Olszewski

Greetings. After a quick check in with Phil Hale, he suggested I reach out to the two of you about a request that has surfaced from Mike Olszewski, the primary owner of Onward, across from Lake Shore campus.

He is interested in discussing a creative partnership to keep the restaurant open. You can see the details below. Hi initial call was to the President's office.

Thanks for helping me assess this question. K

From: Paciero, Karen <kpaciero@luc.edu>
Sent: Wednesday, March 17, 2021 12:00 PM
To: Paciero, Karen <kpaciero@luc.edu>
Subject: Michael Olszewski

Returned call to the President's office 3/17/2021

Beall, David

From: Magdziarz, Wayne
Sent: Friday, March 5, 2021 12:37 PM
To: Loftsgaarden, Michael; Beall, David
Subject: RE: Olszewski

Let's be sure we get the $10,000 fire places in the divorce.

w.

From: Loftsgaarden, Michael <mloftsgaarden@luc.edu>
Sent: Friday, March 5, 2021 12:28 PM
To: Beall, David <DBEALL@luc.edu>
Cc: Magdziarz, Wayne <Wmagdzi@luc.edu>
Subject: Re: Olszewski

Ouch. My apologies Wayne.
He has reached out to me a few times this past week. I have been ducking him because I have nothing left to say. As Steve and I discussed yesterday, all we can do is wait to evict.

Mike

Michael Loftsgaarden, LEED AP
Assistant Vice President Capital Planning

Loyola University Chicago
Capital Planning
Office: (773)508-2106
Mobile: (773)495-1443
Fax: (773)508-3368

On Mar 5, 2021, at 12:25 PM, Beall, David <DBEALL@luc.edu> wrote:

Hilarious! He has talked to Mike a few times bringing the Trustee topic up. Also mentioned Loyola buying of Onward.
He is slated to go to eviction court as soon as that opens back up. He is a nut job!

From: Magdziarz, Wayne <Wmagdzi@luc.edu>
Sent: Friday, March 5, 2021 12:17 PM
To: Beall, David <DBEALL@luc.edu>; Loftsgaarden, Michael <mloftsgaarden@luc.edu>
Subject: Olszewski

He called.
Sadly, I answered.
He wanted to know how he could become a Trustee.
He asked if Loyola would be interested in buying Onward.
He was excited to hear I'm working from Vegas because he's coming out here in June and would like to have dinner.

State of Illinois)
County of Cook)

Affidavit

MICHAEL S. OLSZEWSKI ("Affiant"), being first duly sworn on oath, deposes and states as follows:

1. Affiant is a citizen and resident of the State of Illinois, County of Cook, and Village of South Barrington;

2. Affiant is a natural person who is a citizen of the State of Illinois and is over the age of 18 years, and who owns and operates Onward MSO, LLC, an Illinois limited liability company;

3. Affiant is familiar with the content of a lawsuit styled Olszewski v. Magdziarz, et. al., to be filed in the Circuit Court of Cook County, Illinois, County Department, Law Divison;

4. Affiant certifies that the content of said lawsuit and the allegations therein are true, correct and complete to the best of his knowledge;

5. Pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

FURTHER, Affiant sayeth not.

Michael S. Olszewski

Subscribed and sworn to
before me this 30th day
of September, 2021.
Witness my hand and
Official Notorial Seal.

Official Seal
Patricia Herrera
Notary Public State of Illinois
My Commission Expires 07/29/2023

Notary Public

State of Illinois)
County of Cook)

Affidavit

MICHAEL S. OLSZEWSKI ("Affiant"), being first duly sworn on oath, deposes and states as follows:

1. Affiant is a citizen and resident of the State of Illinois, County of Cook, and Village of South Barrington;

2. Affiant is a natural person who is a citizen of the State of Illinois and is over the age of 18 years, and who owns and operates Onward MSO, LLC, an Illinois limited liability company;

3. Affiant is familiar with the content of a lawsuit styled *Loyola University of Chicago v. Onward MSO, LLC, et. al.*, pending in the Circuit Court of Cook County, Illinois, Municipal Department, First District, numbered 2021 M1 701604; and particularly with "Defendant's Verified Answer, Affirmative Defenses and Counterclaims to Plaintiff's First Amended Eviction Complaint";

4. Affiant certifies that the content of said "Defendant's Verified Answer, Affirmative Defenses and Counterclaims to Plaintiff's First Amended Eviction Complaint" and the allegations therein are true, correct and complete to the best of his knowledge;

5. Pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

FURTHER, Affiant sayeth not.

Michael S. Olszewski

Subscribed and sworn to
before me this 6th day
of October, 2021.
Witness my hand and
Official Notorial Seal.

Notary Public

Official Seal
Patricia Herrera
Notary Public State of Illinois
My Commission Expires 07/29/2023