1ST TEAM FITNESS, LLC, et. al. Plaintiffs and Counter-Defendants vs. **FRANK ILLIANO** Defendant and Counter-Plaintiff	IN THE CIRCUIT COURT FOR CARROLL COUNTY CASE NO. **06-C-13-63876**

MEMORANDUM OPINION AND ORDER

This matter came before the Court for trial on October 27-30, 2014. At the conclusion of the testimony and presentation of evidence, the Court directed the parties to submit written closing arguments and replies thereto, the last of which was due on December 15, 2014. The Court held the matter *sub curia*.

Findings of Fact

The case arises out of a failed business arrangement by and between three individuals who joined forces for a brief period of time to operate a fitness center in Mount Airy, Carroll County, Maryland. During his opening statement, counsel for Defendant and Counter-Plaintiff Francesco "Frank" Illiano (hereinafter "Illiano") suggested that this case, and his client's actions in particular, are an example of the adage, "no good deed goes unpunished."[1] Perhaps, this case is best characterized by reference to the following lines from William Shakespeare's "Merchant of Venice:"

[1] The author, stateswoman, and former U.S. Ambassador, Clare Boothe Luce, and the author, poet and play-write, Oscar Wilde, are most often credited with coining this oft-quoted phrase.

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"You speak an infinite deal of nothing…"

"All that glisters[2] is not gold;
Often have you heard that told:
Many a man his life hath sold
But my outside to behold:
Gilded tombs do worms enfold." [3]

Act I (The Business Formation)

The central characters in this clash are 1st Team Fitness, LLC (hereinafter "1st Team Fitness") and its owners, Donald Caparotti (hereinafter "Don"), and his wife, Diane Caparotti (hereinafter "Diane"), and Illiano. The opening scene unfolds in 2006, when Illiano formed Pozzuoli, LLC (hereinafter "Pozzuoli"),[4] a Maryland Limited Liability Company. Three years later, in 2009, Pozzuoli embarked on a plan to operate a franchise fitness center known as SNAP Fitness (hereinafter "The Gym") from the lower level of a building located at 1311 South Main Street, Mount Airy, Maryland 21771. At all times relevant to this controversy, the building was owned by BAIA, LLC (hereinafter "BAIA"), a Maryland Limited Liability Company solely owned by Illiano, which leased space on the lower level of the building to Pozzuoli for operation of The Gym. **P. EX. 6 & D. EX. 13**. Sometime between February and May, 2009, Illiano obtained the SNAP Fitness franchise, and in September or October, 2009 he opened The Gym.

Meanwhile, in February, 2009, Don and Diane, whom Illiano had yet to meet, had formed 1st Team Fitness. Don was providing personal training services in nearby Urbana, Maryland and in the surrounding vicinity. The Caparottis' lives would intersect

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[2] The word "glisters" was commonly used in the 17th century and evolved into the more common modern day word "glitters."
[3] William Shakespeare, The Merchant of Venice.
[4] Pozzuoli is a city in the province of Naples.

with Illiano's in or around May of that same year, when Illiano asked Leigh Sauter, one of his employees, to inquire of Don whether the Caparottis would be interested providing personal training services at The Gym. Although no deal was reached at that time, Don contacted Illiano in the summer of 2009, and provided Illiano with a business proposal, whereby the Caparottis, through 1st Team Fitness, proposed to furnish personal training services at the SNAP Fitness franchise location. **P. EX. 2.** Under the arrangement, which Illiano accepted, the Caparottis agreed to provide personal training services to Gym members. Payment for the training services was to be made by the Gym members to Pozzuoli, with 25% of the training receipts being retained by Pozzuoli, and Pozzuoli issuing payment for the remaining 75% to 1st Team Fitness. The Gym opened in October 2009 and the Caparottis began providing personal training services under this 75/25 arrangement. Diane did not meet Illiano until shortly after The Gym opened.

Soon after assuming their duties as personal trainers at The Gym, the Caparottis realized that The Gym's then manager would frequently fail to show up on time or would sometimes miss work altogether. After receiving complaints from some of The Gym members, the Caparottis notified Illiano of the problems by communicating with one of his employees. Not long thereafter, in November 2009, Don was contacted by an Illiano employee and asked to meet Illiano in his office, located on the third floor of the building where The Gym is located.

Don testified that at his initial meeting with Illiano, Illiano asked him if he was interested in purchasing The Gym. Don indicated that he and Diane did not have the means to purchase The Gym at that time. Illiano told Don that he would have papers (later revealed to be an Operating Agreement) drawn up that would make 1st Team

Fitness and Illiano co-owners of the Gym. Under this new arrangement, the Caparottis/1st Team Fitness would be entitled to keep 100% of the personal training revenue. The arrangement would also give 1st Team Fitness the right to furnish all of the personal training services, and permit Don and Diane to retain their existing clients, as long as the Caparottis were present at The Gym onsite, because Illiano did not want "absentee ownership." The new business relationship called for the Caparottis to manage the day-to-day operations of The Gym, while Illiano would remain the managing member of Pozzuoli with full responsibility for financial oversight. According to Don, there was no discussion at the initial meeting of the percentage of ownership, but Illiano told him that he and Diane could soon start telling the public that the Caparottis were owners. Indeed, during the Operating Agreement negotiations, Illiano informed the Caparottis that even though the Operating Agreement was not yet signed, they could begin to keep 100% of the personal training revenues and that they could begin to advise the public they were owners of The Gym.

Illiano instructed another one of his employees, Tammy Ference, to request Pozzuoli's attorney to prepare an Operating Agreement whereby "Don and Diane will have a 50% ownership interest in Snap Fitness with no money down." **P. EX 122**. The Operating Agreement was drafted, and after several rounds of negotiated changes, it was executed by parties in December, 2009, having an effective date of January 1, 2010 (**P. EX.5**).

Section 7 of the Operating Agreement, by reference *Exhibit A* thereof, outlines the ownership percentages of each of the two Members of Pozzuoli. *Exhibit A* designates Illiano and 1st Team Fitness as each having a 50% ownership interest in Pozzuoli. Section

8 of the Operating Agreement states that each of the Members of Pozzuoli shall make a $100 cash contribution to the capital account of Pozzuoli. Despite testimony from both sides that neither party actually made a cash contribution, Pozzuoli's income tax returns reflect that the $100 contributions were paid by each of the partners. The Caparottis testified that they offered Illiano the $100, but he told them not to worry about it, and that it would be deducted from their capital account. It is undisputed that the Caparottis did not invest money or other tangible or intangible assets into Pozzuoli either prior to or after the execution of the Operating Agreement, save and except for some pieces of gym equipment that they brought to The Gym, and small amounts of money that they advanced for the purchase of supplies and sundry items for which they were ultimately reimbursed. Regardless, Illiano acknowledged at his deposition that in exchange for managing The Gym, the Caparottis were granted (1) a 50% interest in Pozzuoli and (2) the right to retain 100% of all money received for personal training. **(P. EX. 128, p. 13)**.

The Operating Agreement also sets forth the parties' respective rights and obligations as Members of Pozzuoli as the parties had discussed. Illiano was designated as the Managing Member, and was responsible for all decisions and duties with respect to the finances, management, operation and conduct of Pozzuoli's business. Illiano was also designated as the "Tax Matters Member." 1st Team Fitness was responsible for overseeing and supervising the day to day operations of The Gym. The Operating Agreement also contained a "right of first refusal" provision, whereby any member

desiring to sell his interest in Pozzuoli was first required to offer the interest for sale to the other member. **(P. EX 5, Fitness 11, Section 17(b))**.[5]

Although 1st Team never demanded proof of Illiano's initial investment in Pozzuoli, the parties agreed in the Operating Agreement that Illiano made an initial investment of $140,000 in Pozzuoli, which was treated by the parties as a loan from Illiano to Pozzuoli. As revenue was earned, all revenue was to be deposited into Pozzuoli's accounts, and 1st Team Fitness agreed to await payment from Pozzuoli. Per the terms of the Operating Agreement, in addition to payment to 1st Team Fitness for personal training services, net profits from Pozzuoli were required to be divided as follows: 50% to Illiano in repayment of the loan, and the remaining 50% to be divided equally between Illiano and 1st Team Fitness, until the loan was paid off. After the loan was paid off, the net profits were to be divided equally between Illiano and 1st Team.

For their part, Don and Diane were required by the Operating Agreement to work a minimum of 50 hours per week at The Gym, and were not paid a salary. Instead, in addition to their share of the net profits as described above, they were entitled to 100% of any fees earned by them in providing personal training services to "members of the "Company." The meaning of this seemingly innocuous phrase found in Section 11c of the Operating Agreement was subject to differing interpretations during the trial, and merits a closer inspection. The words of a contract are given their customary, ordinary, and accepted meaning, *Connors v. GEICO*, 216 Md. App. 418, 88 A. 3d 162 (2014), citing

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[5] Section 17 (b)(i) provides as follows: "In the event that a Member desires to sell all or any portion of his membership interest in the Company, then, unless the sale is otherwise permitted under subparagraph 17(a) hereof, such Member (the "Selling Member") must, prior to making such sale, 1st comply with the following provisions granting to the other Members the right of first refusal."

Beale v. Am. Nat'l Lawyers Ins. Reciprocal, 379 Md. 643, 660, 843 A.2d 78 (2004). The ordinary meaning of a word is determined by what a reasonably prudent layperson would attach to it. *Id.* A court must also consider "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Chevy Chase Land Co. v. United States*, 355 Md. 110, 123, 733 A.2d 1055 (1999) (quoting *Calomiris v. Woods*, 353 Md. 425, 436, 727 A.2d 358 (1999) (citation omitted)).

It is clear from the Operating Agreement that the term "Company" is synonymous with Pozzuoli. Moreover, the term "member," refers to 1st Team Fitness and Illiano, and generally appears in the Operating Agreement with an uppercase letter M, denoting membership in Pozzuoli. Elsewhere in Section 11 c of the Operating Agreement, the term "membership" is used. For example, the Operating Agreement states, "1st Team Fitness shall, among other things, use best efforts to increase the Company's membership and membership revenues and promote the business of the Company." Read literally, that phrase would require 1st Team Fitness to use best efforts to increase Pozzuoli's membership, rather than The Gym's membership. This could not have been the parties' intent. Therefore, "membership" as used in Section 11c clearly means membership in The Gym, not Membership in Pozzuoli.

The Court's construction of the term "member" is aided by the language of Section 3 of the Operating Agreement, which states, "[t]he purpose of the Company shall be to own and operate a franchise fitness center known as "SNAP Fitness." With reference to 1st Team Fitness' compensation for personal training fees, "membership" can only logically mean membership in The Gym, not membership in Pozzuoli. It defies logic to suggest that in consideration for not receiving a salary, Don and Diane agreed to

accept only the fees earned by them for providing personal training services to members of Pozzuoli, rather than members of The Gym. The Court finds that the intention of the parties as expressed in the Operating Agreement was that in addition to a share of the net profits of Pozzuoli, 1st Team Fitness was entitled to 100% of fees received for personal training services to members [and non-members] of The Gym.

The Effect of the Operating Agreement.

Defendant posits that the Operating Agreement does little more than define the parameters for governance of Pozzuoli, and that nothing in the Operating Agreement either established any consideration for 1st Team Fitness' claimed acquisition of a 50% stake in Pozzuoli, or effectuated a transfer an interest in Pozzuoli to 1st Team Fitness. Defendant asserts that the Caparottis acknowledged in their testimony that neither they nor Fitness ever paid Illiano any money, ever furnished Illiano any services, and never provided Illiano with anything of value whatsoever, so there was no consideration for 1st Team Fitness' purported acquisition. According to Defendant "Illiano, perhaps like the Caparottis themselves, lost track of the fact that Fitness had never taken any steps to acquire any portion of Illiano's interest in Pozzuoli and, for that reason, in his good faith mistaken belief that Fitness had become a Member of Pozzuoli, Illiano provided Fitness with the full financial benefits of a 50% Member of Pozzuoli." Defendant's argument is summarized in the following passage from his Closing Argument:

> Conspicuous by its absence in the Operating Agreement was any mechanism for the transfer of any portion of Illiano's interest in Pozzuoli to Fitness, any statement of the consideration that Fitness had provided or would provide to Illiano for a portion of his interest in Pozzuoli, or any statement as to how Fitness had acquired an interest in Pozzuoli from Illiano. No such statement was included in the Operating Agreement

because no such transfer had ever occurred. *Defendant's Closing Argument, pp. 10-11.*

As will be discussed below, Defendant's argument misconstrues the concept of consideration, and begs the question of what Maryland law requires for a person to acquire a membership interest in a Limited Liability Company ("LLC"). The Court declines to adopt Defendant's restrictive reading of the Operating Agreement.

Storm Clouds on the Horizon

For the first several months after the Operating Agreement became effective, relations between the parties were uneventful. Over the initial six (6) month period after the Operating Agreement went into effect, Gym membership increased from approximately 150 to 600 members. **P. EX 17**. Illiano publicly promoted the Caparottis as owners of The Gym, authorizing his staff to work with the Caparottis in creating The Gym's ads listing the Caparottis as owners. **P. EX 11-13**. The staff acknowledged and treated 1st Team Fitness and the Caparottis as owners of the Gym. **P. EX 10, 20.** The staff also requested that the Caparottis perform certain functions to benefit the Gym, such as collecting member dues. **P. EX 18.**

Several months into the first year of operation in 2010, the Caparottis began to have concerns. It was beginning to appear to the Caparottis that all that glittered was not gold. Don and Diane began fielding complaints from vendors and employees who had not been paid, and who were beginning to refuse goods and services to The Gym. In addition, Don and Diane were not receiving payment for their personal training or distributions in a timely manner from Pozzuoli. Much later, during trial, Illiano testified

that Pozzuoli did not have sufficient funds to cover the expenses of the business, so he arranged for those funds to be infused by Illiano or other Illiano owned entities. Illiano acknowledged however, that he never shared Pozzuoli's financial woes with the Caparottis until after the litigation commenced.

Unaware that Pozzuoli was having financial difficulty, the Caparottis requested information from Illiano and his employees concerning the unpaid vendors, and requested that Illiano furnish them with financial reports as to the profit and loss of Pozzuoli, as well as the amount of the personal training fees and share of the profits which were due to them. **P. EX 26-29.** The Caparottis testified that Illiano had previously informed the Caparottis that he would issue quarterly profit distributions pursuant to the 50/25/25 arrangement set forth in the Operating Agreement, though the Operating Agreement does not require payments to be made quarterly. **P. EX 5, Fitness 5, Section 9.** For the most part, Don or Diane dealt not with Illiano directly, but with one of several of his employees who were also employees of other entities owned by Illiano. Don and Diane became increasingly worried. Since the time that 1st Team Fitness assumed management of The Gym, membership at The Gym increased, and it seemed to Don and Diane that revenues should have therefore been increasing. They were confused as to why vendors and employees were not being timely paid, and why they were not being timely paid.

The Caparottis made repeated demands for their distribution checks along with the profit and loss statements that should have accompanied those checks. The breakdown of the quarterly check, when it was provided, was not provided in a timely

manner and almost was never accompanied by supporting financial details actually explaining how the numbers were calculated.

After receipt of the first financial statement from Illiano in April 2010, subsequent financial statements were received only sporadically for some time thereafter, and even then they were largely incomplete. The Caparottis made multiple requests to meet with Illiano. After repeated requests for meetings and for financial information, which were either ignored altogether, or passed off by Illiano to his employees, **(P. EX 21, 23 Fitness 901),** the Caparottis secured a meeting with Illiano in early 2011. The meeting did not resolve the ongoing concerns. Vendors continued unpaid, employees' paychecks bounced, and the Caparottis continued to make repeated demands for the quarterly distribution checks, while being denied access to the books and records of the business.

Beginning in approximately June or July of 2011, and for a period of approximately 18 months thereafter, 1st Team Fitness ceased receiving financial statements altogether, despite their continued demands, and payments for personal training and its share of the net profits were received only intermittently. When Don and Diane requested direct access to the financial reports through Quick Books[6] online, they were told that they would not be issued a password, because all of the available passwords had been allocated to other users. Such denial of online access violated the terms of the Operating Agreement. Section 13(b) of the Operating Agreement granted 1st Team Fitness the right to a reasonable examination of the books of account of Pozzuoli during regular business hours. That Section further guaranteed that "[a]ll books

[6] Quick Books is a computer-based accounting software program used by Pozzuoli, and all of Illiano's entities.

of account shall also be made available to Members online if Managing Member chooses to maintain the books in such manner that would allow this access." It is undisputed that Illiano maintained Pozzuoli's books of account online using Quick Books.

Finally, in November 2012, Illiano agreed to meet with Don and Diane to discuss their concerns. At that meeting, Don and Diane were shocked to learn from Illiano that Illiano had been discussing the sale of The Gym to SNAP Fitness, the franchisor. When Don and Diane indicated to Illiano that they objected to such a sale, and that they had a "right of first refusal" under the Operating Agreement to purchase Illiano's interest in Pozzuoli if Illiano were to offer The Gym for sale to a third-party, Illiano agreed that he would not sell The Gym. Illiano also indicated that if 1st Team Fitness wanted to purchase his interest in Pozzuoli, he would sell it for $250,000. No written agreement was ever signed for 1st Team Fitness's purchase of Illiano's interest in Pozzuoli, and there were no additional discussions between the parties about 1st Team Fitness' purchase after that November 2012 meeting. Illiano did, however, follow up the meeting with an email to the Caparottis in which he confirmed that he would not sell The Gym to SNAP Fitness, and reported that he told SNAP Fitness that he was not interested in selling.[7] **P. EX. 51.** Illiano also promised to personally send the Caparottis monthly profit and loss statements within 15 days of the end of each month and quarterly P&Ls within 15 days of the end of each quarter, and to timely pay invoices. Finally, in bold type, Illiano requested that the Caparottis not contact SNAP Fitness about the issue of the sale. Don and Diane testified that they left the meeting feeling as if their concerns

[7] In fact, Illiano emailed SNAP Fitness on November 15, 2012 to advise that "we have decided not to sell the gym at this time." It is not clear to the Court to whom the pronoun "we" refers.

were heard by Illiano, and that Illiano would immediately begin providing them with regular financial statements and timely payments for their personal training fees. As will become evident later, the Caparottis' positive feelings about the November, 2012 meeting would be short-lived.

At no time during the meeting, nor at any other time prior to suit being filed, did Illiano complain about the work that 1st Team Fitness was doing with regard to The Gym. According to Don and Diane, they similarly never received a single complaint from Illiano about retaining personal training fees for Gym members versus nonmembers, and for that matter, never received any complaints from Illiano, or anyone on Illiano's behalf about anything that 1st Team Fitness was doing at The Gym, until after this litigation began. Illiano himself admitted at his at trial and at his deposition that he never notified the Caparottis prior to suit being filed that they were in breach of the Operating Agreement or that they failed to meet their obligations in any way. **P. EX. 128, p.14**.

Act II (The Gym Is Sold)

The next time the Caparottis had any contact with Illiano was on Sunday March 3, 2013, when Don was summoned to a meeting in Illiano's office. It was at that meeting, that the proverbial rug was pulled out from under the Caparottis. Illiano proceeded to inform Don that Illiano had sold The Gym to SNAP Fitness. Illiano told Don at that meeting, "it's nothing personal; I can't afford to lose my empire." Illiano testified at trial that he does not recall having made such a statement. Unbeknownst to the Caparottis at the time of the meeting, Illiano, Illiano's wife, and several of Illiano's other business entities had been sued by lenders for non-payment in February and March, 2013, just

prior to or immediately following the sale of The Gym. Illiano claimed at trial that these lawsuits were not the impetus behind the sale of The Gym. At the March 3rd meeting, Illiano presented Don with a release and copy of a sales proceeds reconciliation. **P. EX 60 and 58.** Although the details of the transaction were not discussed, Illiano told Don that 1st Team Fitness' share of the sale proceeds would be approximately $55,000, which 1st Team Fitness would receive once the release was signed. Don refused to sign the release, and it is undisputed that the Caparottis have never received any money from the sale of The Gym.

Illiano did not present the Caparottis with a reconciliation of the proceeds of sale until after litigation began. At some point during discovery prior to trial, Illiano produced four (4) different versions of documents that he created after the sale, and that purported to show the gross proceeds of sale, less expenses and liabilities (including the payoff on the balance of Illiano's initial $140,000 loan), yielding a net proceeds amount. **P. EX. 61-64.** **P. EX. 61** reflected that the net surplus proceeds were $54,937.91, with 50%, or $27,468.96 due to 1st Team Fitness. **P. EX. 62**, disclosed total net proceeds of $81,704.82, with 1st Team Fitness' share being $40,852.41, **P. EX. 63** showed total net proceeds of $122,705.52, 50% of which was $61,352.76, and finally, **P. EX. 64** showed a net deficit of $42,814.31, of which 1st Team Fitness was obligated to pay $21,407.16. Documentation furnished by Illiano during discovery and at trial failed to substantiate the validity of any of these statements. At trial, Defendant stated Plaintiffs' Exhibit 64 was the most accurate representation of the sale proceeds breakdown, which resulted in a loss to each member of $21,407.16. Previously, Illiano had maintained that The Gym was profitable.

The Court finds that Defendant manipulated the reconciliation statements to fabricate or increase expenses, without regard to whether such expenses were actually incurred in the amounts stated. This is evident from Illiano's February 23, 2013 email to Beth Barnes, one of Illiano's employees who testified at trial. Illiano wrote in that email, "yes I agree we also going to create a broker fee of 10% of the sale to IP (Illiano Property Management, Inc.). And a fee to be paid to Baia for over 100,000 K because the want low rent so over the next 5 years Baia will lose total of 119,000 k in rent and I can not stand this ass anymore." **P. EX 55.** Defendant also testified that the $10,000 legal fee expense on Exhibit 61 was an estimate of fees, not actual fees incurred.

Act III (The Post-Sale Aftermath)

After the sale, the scene shifted from Mt. Airy to the Circuit Court for Carroll County. 1st Team Fitness commenced these proceedings with the filing of its Complaint against Illiano on May 10, 2013. Illiano responded with a Counter-Complaint of his own, and the course was charted toward the inevitable trial. Along the way, numerous discovery disputes arose, all essentially claiming that Illiano was less than forthright in his document production. Ultimately, the matter was tried before this Court in late October, 2014.

The first order of business at trial was the presentation of evidence by the Plaintiffs to support their claim that 1st Team Fitness owned 50% of Pozzuoli. Despite his direct examination testimony that until suit was filed he believed that the Caparottis were 50/50 owners with him in Pozzuoli, Illiano admitted on cross examination that during his sale negotiations with SNAP Fitness in February 2013, he intentionally misrepresented to SNAP Fitness that he was the sole owner of Pozzuoli. **P. EX. 54**. The

documentary evidence bears this out. In the Asset Purchase Agreement dated March 1, 2013 between Pozzuoli and SNAP Fitness, Illiano represented that he was the sole owner of Pozzuoli. **P. Ex. 56**. Illiano testified that he held himself out to SNAP Fitness as the sole owner of Pozzuoli to benefit the Caparottis so that they would not have to sign a non-competition agreement with SNAP Fitness. The Court finds Illiano's claim that he was acting for the benefit of the Caparottis to be suspect.

At the same time that he professed to be acting for the benefit of the Caparottis, Illiano altered Pozzuoli's financial statements by omitting significant liabilities in order to artificially inflate Pozzuoli's profitability. Illiano made these material misrepresentations despite Sections 8.9 and 10.2 of the Asset Purchase Agreement, in which Illiano represented on behalf of Pozzuoli that the financial information he delivered to SNAP Fitness prior to the execution of the Agreement, along with all other representations and warranties of Pozzuoli contained in the Agreement were true and correct in all material respects. That representation is now known to be false, as Illiano admitted at trial that he had made material alterations to the financial statements presented to SNAP Fitness in order to induce them to purchase the franchise from Pozzuoli.[8] **P. EX. 104**.

Illiano's post-litigation epiphany that 1st Team Fitness did not own 50% of Pozzuoli is at odds with his conduct prior to the time suit was filed. For the three years that Pozzuoli operated SNAP Fitness prior to the sale of The Gym; i.e. 2010-2012, Illiano caused tax returns to be prepared and filed in each of those years, which identified 1st

[8] Illiano claimed that SNAP Fitness, as a sophisticated company, knew that practices of this type are common in the purchase and sale of businesses. No one from SNAP Fitness testified at trial to corroborate Illiano's claim.

Team Fitness and Illiano each as 50% partners. Each party was issued nearly identical K-1s, and in all other respects, 1st Team Fitness and Illiano were treated as equal owners of Pozzuoli. Illiano asserted during his testimony that until the litigation was instituted, he operated under the mistaken belief that the Caparottis were equal partners with him in Pozzuoli. Illiano testified on direct examination, "I treated the Caparottis like they were partners – it never occurred to me that they weren't." It was only after discussing the matter with his lawyer that Illiano concluded he was mistaken. As the Court has already noted, there are good reasons to doubt the veracity of Illiano's testimony.

Once litigation commenced, the Caparottis obtained for the first time many of the financial records they had long sought, albeit much of the documentation was obtained from independent sources, such as Damascus Community Bank and New Windsor State Bank. Plaintiff retained Andrew J. Runge, CPA to assist them in reviewing the financial records of Pozzuoli, and in offering opinions in this litigation which the Court will discuss below. Mr. Runge, who in addition to being a certified public accountant, is also a certified fraud examiner, was accepted by the Court as an expert in the fields of Forensic Accounting Services, Forensic Fraud Investigation, and Business Valuations. In fact, Mr. Runge was the only expert witness to testify in this matter. Although Defendant's accountant, Michael Per, testified, he was not offered as an expert, and provided no expert testimony.

After Plaintiff's receipt of documents produced by Illiano and in response to subpoenas issued to several of Illiano's financial institutions, the Caparottis for the first time learned of the extent of the comingling of Pozzuoli funds with those of Illiano and

other Illiano-owned business entities.[9] Illiano's deposition transcript, which was admitted in evidence at trial, makes clear that Illiano transferred money in and out of the Pozzuoli account, to and from his other business entities on a regular basis because he believed it was all "his money." **P. EX 128, Pages 66 and 67, lines 9-21 and 1-16.** Many of these transactions were categorized by Illiano for bookkeeping purposes using the moniker "Due To/Due From," meaning that transfers of money flowing in and out of Pozzuoli were classified as either Due To or Due From Illiano or one of his other entities, depending on whether Illiano claimed the money was due to him or from him (or one of his entities).

The Defendant essentially testified at trial that he moved money between his various business entities on an as-needed basis to solve short-term cash flow shortages that arose. Illiano was quick to explain, however, that all of the transfers balanced out in the end, and no entity received or spent more money than it should have. Defendant suggested at trial that any money that flowed out of Pozzuoli to Illiano personally or to Illiano-owned entities was in fact due to those payees.

To bring home the point, Defendant's counsel sought to elicit from Mr. Runge on cross examination that the total accumulated rent due under Pozzuoli's lease with BAIA was less than the aggregate amount shown in the Quick Books bank records to have been paid out to BAIA by or on behalf of Pozzuoli. Defendant reiterates the argument in his Closing Argument. The Court is not persuaded that this was the case for several reasons.

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[9] The Caparottis testified that they first learned of money being transferred out of Pozoulli's account to other entities in an email from Kathy Reiland dated February 14, 2011. **P. EX. 30**

First, the Court gives little weight to much of Illiano's testimony in this regard, based on the Court's finding that Illiano was admittedly untruthful in several material respects with regard to financial records that he prepared before and after the sale. Second, the Court credits the testimony of Mr. Runge that many of the material inaccuracies found by Mr. Runge in the books and accounts of Pozzuoli and other Illiano-owned entities reflect intentional conduct, or actions done with reckless disregard for the truth, rather than careless or inadvertent actions committed by Illiano or at Illiano's direction. As evidence for his opinion, Mr. Runge thought it was significant, and the Court agrees, that many of the expenses paid by Pozzuoli to other Illiano-owned entities were not paid directly to those payees by checks drawn on Pozzuoli's account at Damascus Community Bank. Rather, in an effort to hide the payments, Illiano frequently drew checks payable to Damascus Community Bank, and in turn drew a treasurer's check to make the payments. **P. EX. 93**. Mr. Runge also found that Illiano took excess withdrawals from Pozzuoli totaling $105,219 (**P. EX. 126**), one-half of which is due to 1st Team Fitness. As well, Mr. Runge found "off the books" transactions, including transactions related to the proceeds of sale of Pozzuoli. As of March 20, 2013, Runge calculated a total of $422,612 in checks written from the Pozzuoli bank account payable to Damascus that were not included in the company accounting records. **P. EX 127**.

As it relates directly to the rent issue, Mr. Runge defended his position under dogged cross examination. Counsel for Illiano pressed Mr. Runge to acknowledge that the total base rent due by Pozzuoli excluding CAM charges was $251,393 prior to the sale, but the books and accounts of Pozzuoli show that only $91,000 in rent was paid

prior to the sale. Mr. Runge countered that Pozzuoli's 2010-2012 tax returns reflect that a total of $253,269 in rent was paid for that period, and that Pozzuoli's tax returns for that period did not list a liability for unpaid rent. **P. EX. 14-16**. Mr. Runge also indicated that if $160,000 in past-due rent was in fact due BAIA as of the date of sale, one would have expected to see that obligation reflected in the post-sale reconciliation statements prepared by Illiano, which it was not. **P. EX. 61-64.**

Illiano did not produce what was referred to throughout this litigation as "source documentation" to substantiate many of the withdrawals that he claimed were legitimate. For example, with respect to **P. EX. 61**, Mr. Runge testified that he found no documentation to support the $10,000 retainer held by SNAP Fitness or the $10,000 in legal fees, and he was unable to verify the claimed $12,879.98 in property taxes, or the Illiano loan balance in the amount of $63,667.00. Similarly, Mr. Runge testified that despite his repeated requests, Illiano did not provide source documents to substantiate many of the "Due To/Due From" entries, or the "off the books" transactions.

It is clear to the Court that Illiano viewed his unorthodox bookkeeping practices as proper because in the end, he maintains, no one was deprived of any money. The problem is that Illiano's assertion is not supported by the books, records, and tax returns of Pozzuoli and the other Illiano-owned entities with whom Pozzuoli exchanged funds. As the Defendant himself testified at trial, many of the Illiano-owned businesses that received payment from Pozzuoli's bank accounts had absolutely no legitimate business relationship with Pozzuoli that would justify the receipt of Pozzuoli funds. **P. EX 93, 95-102**. Further, the Court was not presented with any evidence of documented business loans or agreements between any of these companies that would identify, substantiate or

account for these payments because as Illiano testified, he didn't think it was necessary. Illiano additionally testified on cross examination that he viewed his companies as an extension of himself, so therefore, it was "his money." This statement is consistent with Defendant's position taken at his December 2013 deposition, namely, that the money was his personal money. **P.EX 128 Pages 66-67, Lines 9-21 and 1-16.** In the end, the Court is being asked to rely on Illiano's word that all of the inter-company transfers of funds were on "the up and up." The documents tell a different story.

Show Me The Money

Notwithstanding Illiano's dilatory production of documents, Mr. Runge was able to trace the proceeds of sale of The Gym, largely by analyzing the records obtained from Damascus Community Bank. Those records reveal that the sales proceeds were deposited into the Pozzuoli account at Damascus and were immediately withdrawn by Illiano. On March 1, 2013, $255,788.45 was deposited into the Pozzuoli account by wire transfer. **P. EX 89, Illiano 04-10-14-5 and P. EX 94.** That same day, Illiano caused check no. 1317 for $200,008.00, amounting to almost the entire sale proceeds, to be written to Damascus Community Bank ("Damascus") without explanation or justification. *Id.*[10] It was after their receipt of the Damascus records that the Caparottis learned of Illiano's practice of purchasing treasurer's checks for ultimate deposit into Illiano's other business entities. **P. EX 93**. The checks found within Plaintiffs' Exhibit 93 were paid to various Illiano-owned entities, including BAIA, LLC, Illiano Property Management, Inc., Mt. Airy Green Turtle, LLC (restaurant), Ridgeville, LLC (holding company), Napoli, Inc.

[10] Mr. Runge explained that an $8.00 charge was imposed by Damascus Community Bank for the cost of the Treasurer's Check.

(restaurant), RBI Sports Bar, LLC (restaurant), Leanos, LLC (owner of commercial property), Main Street, LLC (owner of commercial property), Olney GT, LLC (restaurant), Germantown, GT LLC (restaurant), and Mt. Airy Inn, LLC (restaurant). *Id.* Defendant testified at trial, other than BAIA, LLC and Illiano Property Management, Inc., these entities had no business relationship with Pozzuoli. Check 1317 in particular, located with Plaintiffs' Exhibit 93, was deposited into the account of BAIA. **(P. EX. 93, Damascus 36-37)**.

Mr. Runge testified that after the deposit of the $200,000 sale proceeds into BAIA's account, the funds were then disbursed by BAIA to other Illiano-owned-entities, in multiple transfers on the same day, March 4, 2014. **P. EXs 95-102**, as follows: (A) 3 separate transfers to Illiano Property Management Inc. in the amount of $92,000; (B) 2 separate transfers to Mt. Airy Green Turtle, LLC in the amount of $24,000; (C) $10,000 transferred to Ridgeville, LLC; (D) $10,000 transferred to Napoli, Inc.; (E) $20,000 transferred to Leanos, LLC; (F) $47,000 transferred to Main Street, LLC; and (G) $360 transferred to Mt. Airy Inn, LLC. *Id.* With the exception of Illiano Property Management, Inc., these entities did not provide any goods or services to Pozzuoli, nor was there any legitimate business relationship between the entities. Funds were then transferred from each of those entities to other Illiano-owned-entities. *Id.* The remainder of the initial sale proceeds was disbursed from the Pozzuoli bank account by check on March 5, 2014 to Illiano Property Management, Inc. **P. EX 94, Damascus 1851 and 1855.**

Based on the above facts, the Court finds that there is a sufficient factual basis to support Mr. Runge's testimony that Illiano took excess withdrawals of $105,219 from the Pozzuoli bank account at Damascus. **P. EX 126.** Similarly, the Court finds an adequate

basis in the record to support Mr. Runge's testimony that as of March 20, 2013, a total of $422,612 "off the books" checks were drawn on the Pozzuoli bank account payable to Damascus that were not included in the company accounting records. This figure includes, and is not in addition to the proceeds of sale of Pozzuoli's assets. **P. EX 127**. In total, Runge calculated that $527,831 ($105,219 + $422,612) should be returned to Pozzuoli by Illiano, half of which; i.e., $263,915, should be paid to 1st Team Fitness.

As noted earlier, Mr. Runge was accepted by the Court as an expert in, among other things, the field of Forensic Fraud Investigation. In Mr. Runge's opinion, the financial irregularities that he uncovered amounted to more than mere carelessness, and were not undertaken to address short-term cash flow issues. Mr. Runge surmised this because, based on his review of the bank records, the practice of transferring funds between businesses continued well past the date when The Gym was sold and Pozzuoli ceased operations. According to Mr. Runge, the Defendant's actions were deliberate, and done with an intent to conceal the existence and amount of the inter-company transfers and "off the books" transactions. The most glaring example according to Mr. Runge was Illiano's purchase and use of treasurer's checks to move funds between the various businesses, in an effort to obfuscate the payments. Runge testified that, at the very least, there was clear accounting mismanagement and that in the scope of his twenty-five year career this case is one of the three most egregious cases of accounting irregularities he had ever seen.

Mr. Runge offered an opinion regarding future profits that he estimated the Plaintiff lost as a result of the sale of The Gym. Mr. Runge relied for his opinion on the financial statements and tax returns of Pozzuoli, and concluded that had the assets of the

business not been sold *and had the business continued to operate,* the net income for the business going forward would have been approximately $80,000 per year. The Court is not persuaded by Mr. Runge's testimony that the $80,000 annual net profit is a reliable figure, given that the underlying basis for Mr. Runge's opinion was his review of Pozzuoli's financial statements and tax returns, the reliability was called into question by Mr. Runge. The Court also agrees with Defendant that it would be speculative to assume that the business would continue to operate for any period of time, and rejects the Plaintiff's argument that the testimony indicated the business would in fact have made money for the foreseeable future. Under Maryland law, in order to recover lost profits damages, a plaintiff must show that (1) the breach by the defendant was the proximate cause of the plaintiff's loss; (2) the defendant could reasonably foresee that a loss of profits would result from the breach; and (3) the amount of lost profits can be proved with reasonable certainty. *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 202 Md. App. 307, 32 A. 3d 456 (2011); *M & R Contractors & Builders, Inc. v. Michael*, 215 Md. 340, 346, 138 A.2d 350 (1958).

I. Conclusions of Law

A. Plaintiffs' Claims

1. Count XIII- Declaratory Judgment

In Count XIII of Plaintiffs' Second Amended Complaint, 1st Team Fitness seeks a declaratory judgment pursuant to Annotated Code of Maryland, Courts and Judicial Proceedings, § 3-401 et. seq., that 1st Team Fitness is a 50% member in Pozzuoli. For the reasons expressed herein, the Court finds in favor of the Plaintiff as to Count XIII, and will enter a judgment declaring that 1st Team Fitness is a 50% member in Pozzuoli.

"The cardinal rule of contract interpretation is to give effect to the parties' intentions." *Tomran v. Passano*, 391 Md. 1, 14. A. 2d 336 (2006). In determining the intent of the parties, Maryland follows the objective theory of contract interpretation. *Hashmi v. Bennett*, 416 Md. 707, 723, 7 A. 3d 1059, 1068 (2010). Under the objective law of contract interpretation, courts are to interpret contracts based on "what a reasonable person in the position of the parties would have meant at the time it was effectuated." *Bretheren Mut. Ins. Co. v. Buckley*, 437 Md. 332, ___ A. 3d ___ (2014), quoting *General Motors Acceptance Corp. v. Daniels*, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985). If the language of a contract is plain and unambiguous, we presume that the parties meant what they expressed. *Bretheren Mut. Ins. Co.*, at 341.

While it is true as Defendant points out, that one purpose of the Operating Agreement is "to set forth [the Members'] agreements regarding the governance of the affairs of the Company (Pozzuoli) and its Members," **(P. EX. 5,)**it is equally true that the clear intent of the parties as expressed in the Operating Agreement is to define the ownership interests of the Members. In particular, Sections 7 through 10 of the Operating Agreement leave no doubt that at least one function of the Operating Agreement is to delineate the Members' percentage of ownership and the rights and duties of the Members (i.e. owners) of Pozzuoli. And, while no assignment was ever made and no membership certificates were ever issued to either 1st Team Fitness or Illiano, nor was any other formal action taken to transfer membership interests, the Maryland Limited Liability Company Act, does not require that either a formal transfer, assignment or issuance of

membership certificates as a prerequisite to conferring ownership on an LLC's members.

Md. Code Ann. Corp. & Assoc. Art. §4A-101, defines a "Member" as follows:

> (m) "Member" means a person who has been admitted as a member of a limited liability company under § 4A-601 of this title or as a member of a foreign limited liability company, and who has not ceased to be a member.
>
> (n) "Membership interest" means a member's economic interest and noneconomic interest in a limited liability company.
>
> (i) "Economic interest" means a member's share of the profits and losses of a limited liability company and the right to receive distributions from a limited liability company.
>
> (o) "Noneconomic interest" means all of the rights of a member in a limited liability company other than the member's economic interest, including, unless otherwise agreed, the member's right to:
>
> (1) Inspect the books and records of the limited liability company;
>
> (2) Participate in the management of and vote on matters coming before the limited liability company; and
>
> (3) Act as an agent of the limited liability company

Md. Code Ann. §4A-601, Corp. & Assoc., prescribes how and when a person becomes a member of a limited liability company:

> (a) A person becomes a member of a limited liability company at:
>
> (1) The time the limited liability company is formed;
>
> (2) A later time specified in the operating agreement; or

(3) The time specified in § 4A-902(b)(1) of this title relating to continuation of the limited liability company after there are no remaining members.

More relevant for purposes of this case:

(b) After the formation (*emphasis supplied*) of a limited liability company, a person may be admitted as a member:

(1) In the case of a person acquiring a membership interest directly from the limited liability company, upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the unanimous consent of the members (*Emphasis supplied*).

(2) In the case of an assignee of the economic interest of a member, only as provided in § 4A-604 of this subtitle; or

(3) In the case of a personal representative or successor to the last remaining member who is not an assignee of the last remaining member, as provided in § 4A-902(b)(1) of this title.

Md. Code Ann. Corp. and Assoc. §4A-601 (c) provides:

(c) Unless otherwise agreed, a person may be admitted as a member of a limited liability company and may be the sole member of a limited liability company without:

(1) Making a capital contribution to the limited liability company;

(2) Being obligated to make a capital contribution to the limited liability company; or

(3) Acquiring an economic interest in the limited liability company.

A plain reading of the Operating Agreement again leaves no doubt that 1st Team Fitness acquired its membership interest from Pozzuoli by means of the January 1, 2010 Operating Agreement on either or both of the two bases set forth in Corp. and Assoc. § 4A-601 (b) (1); i.e., either upon compliance with the Operating Agreement or unanimous

consent of the members. Defendant postulates that "[1st Team] Fitness could not have acquired an interest in Pozzuoli from Pozzuoli in accordance with the Operating Agreement because there was no Operating Agreement at the time that [1st Team] Fitness claims it became a Member." Defendant continues reasoning that "[t]he Operating Agreement recites that [1st Team] Fitness is a member, but does not, within the four corners of the document, convey a Membership interest to [1st Team] Fitness." Therefore, Defendant argues, if 1st Team Fitness was a member at all, it must have become a member before the execution of the Operating Agreement, since the Operating Agreement does not describe how the actual transfer was to occur. Defendant's syllogism is unconvincing.

First, the Court finds that the Operating Agreement, and subsequent actions taken by the parties in compliance therewith, effected a membership acquisition by 1st Team Fitness, and represent the unanimous consent of the members to 1st Team Fitness becoming a member. Second, the Court rejects Defendant's suggestion that for an acquisition to occur, there must have also been a formal conveyance or transfer of an interest from Pozzuoli to 1st Team Fitness.

The Corp. and Assoc. Article does not define the term "acquire," and Defendant has not cited the Court to any authority for the proposition that acquisition of a membership interest requires a formal transfer or conveyance. Unlike Md. Code Ann., Corp. and Assoc. § 4A-601 (b)(2), which requires an assignment when an interest passes from an existing member, Md. Code Ann., Corp. and Assoc. § 4A-601 (b)(1) permits acquisition of a membership interest directly from the LLC without a formal assignment. Both the language of the Operating Agreement itself and subsequent actions taken by

Illiano establish without a doubt that 1st Team Fitness membership acquired a fifty percent (50%) interest in Pozzuoli. As noted above, for the three years that Pozzuoli operated prior to the sale, Illiano caused tax returns to be prepared and filed in each of those years, which identified 1st Team Fitness and Illiano each as 50% partners. Moreover, it is undisputed, even by Illiano, that he and his employees treated 1st Team Fitness and the Caparottis as owners of Pozzuoli.

The Operating Agreement that was signed by 1st Team Fitness and Illiano is binding and conclusive on the membership interests articulated therein. Maryland's Limited Liability Company Act makes clear that an operating agreement that is duly adopted or amended is binding on each person who is or becomes a member of the limited liability company and each person who is or becomes an assignee of a member of the limited liability company regardless of whether the person has executed the operating agreement or amendment. Md. Code Ann., Corp. and Assoc. §4A-402(d)(5).

The Court also rejects Defendant's argument that there was a lack of consideration for the agreement that Plaintiff acquire a 50% membership interest in Pozzuoli. In most instances, the determination of a contract's enforceability is decided by the existence of consideration, *Holloman v. Circuit City Stores, Inc.*, 391 Md. 580 (2006); *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 378 Md. 139, 835 A.2d 656 (2003); *Harford County v. Town of Bel Air*, 348 Md. 363, 381, 704 A.2d 421, 430 (1998), which may be established through evidence of " a benefit to the promisor or a detriment to the promisee. " *Harford County*, 348 Md. at 382, 704 A.2d at 430, quoting *Vogelhut v. Kandel*, 308 Md. 183, 191, 517 A.2d 1092, 1096 (1986). It is well settled that courts will not inquire

into the adequacy of the value exacted for the promise so long as it has some value. *Harford County*, at 348 Md. 431. The Court has no difficulty concluding that there was adequate consideration for Defendant's agreement to have Plaintiff acquire a 50% membership interest in Pozzuoli. Illiano received a benefit from the Caparottis' promise to manage The Gym, and both parties acted to their detriment, with the Caparottis committing to work a minimum of 50 hours per week at The Gym, and with Illiano being willing to relinquish part of his theretofore sole ownership in Pozzuoli.

2. Count I - Accounting

To prevail in an action for accounting, the plaintiff must show (1) the defendant was under a legal duty to account for money or property of another; (2) the defendant was compelled to render such account; and (3) the defendant failed to render such account. *P.V. Props. Inc.*, 77 Md. App. 77 (1985). The general rule is that a suit in equity for an accounting may be maintained when the remedies at law are inadequate. *Id.* at 89. An accounting may be had where one party is under an obligation to pay money to another based upon facts and records which are known and kept exclusively by the party to whom the obligation is owed, or where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account. *Id.* Maryland's Limited Liability Company Act governs the inspection rights of members.

> (a) A member may inspect and copy, in person or by agent, from time to time on reasonable written demand, for any purpose reasonably related to the member's membership interest:
>
> (1)True and full information regarding the state of the business and financial condition of the limited liability company [...]
>
> Md. Code Ann., Corp. and Assoc. §4A-406.

In addition to the statutory right afforded 1st Team Fitness, Illiano had an affirmative contractual duty to provide Plaintiffs with access to Pozzuoli's books of account. Section 13 of the Operating Agreement requires Defendant, as Managing Member, to keep full and true books of account in which each transaction of the company is to be entered fully and accurately, and requires that all books of account, including online if the books are maintained in that manner, shall be made available to the members. **P. EX 5, Fitness 8-9, Section 13.**

The evidence before the Court is clear in that Defendant failed both to keep full and true books of account and to provide 1st Team Fitness with access to the accounting records, online or otherwise. The largely uncontradicted testimony by the Caparottis was that despite their repeated demands over a period of years, Defendant failed to provide access to the QuickBooks account as required by the Operating Agreement, and failed to provide the Caparottis with complete financial statements, including an eighteen (18) month period during which the Defendant did not furnish a single (1) profit and loss statement for the business. Most of the financial information that the Caparottis ultimately received was not received until after this litigation was initiated.

The Court finds for the Plaintiff on the cause of action for an accounting. However, because the Plaintiff has a clear remedy available at law as set forth later in this Opinion, the Court declines to award damages to Plaintiff for Defendant's failure to account.

3. Count V- Breach of Contract

Breach of contract has been defined as a failure to perform any promise expressly or impliedly included within the contract. *String v. Steven Dev. Corp., 269 Md. 569, 307 A.*

2d 713 (1973). An action for breach of contract requires the existence of a contractual obligation owed by the defendant to the plaintiff and a material breach of that obligation by the defendant. *Cont'l Masonry Co. v. Verdel Constr. Co.*, 279 Md. 476 (1977). A breach is material where the "the act failed to be performed [goes] to the root of the contract or ... render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for." Maslow v. Vanguri, 168 Md. App. 298, 323, 896 A. 2d 406 (2006); Barufaldi v. Ocean City Chamber of Commerce, Inc., 196 Md. App. 1, 23, 7 A. 3d 643 (2010). Every contract imposes on both parties a duty of good faith and fair dealing in its performance. Blondell v. Littlepage, 413 Md. 96, 113-14, 991 A.2d 80 (2010); Julian v. Christopher, 320 Md. 1, 575 A.2d 735 (1990).

The parties entered into an Operating Agreement on or about January 1, 2010. **P. EX 5.** Illiano was the managing member under the Operating Agreement. **P. EX 5, Fitness 7, Section f.** As managing member, Illiano was obligated to "keep or cause to be kept full and true books of account." ***Id at* Fitness 8-9, section 13(a).** "All said books of account....shall be open during reasonable business hours to the reasonable examination of the Members or their representatives. All books of account shall also be made available to the Members online if managing Member chooses to maintain the books in such a manner that would allow this access." ***Id at* Fitness 9, Section 13(b).** "All funds of the Company shall be deposited or invested in the Company name." ***Id at* Fitness 9, Section 14.** Defendant testified that at the time the Operating Agreement was signed, he knew he was required to give online access per the provisions of the Agreement and conceded that he did not do it. Defendant also testified he routinely transferred money between his businesses. The Court has determined that 1st Team Fitness owned a 50%

membership interest in Pozzuoli. As such, 1st Team Fitness was entitled to 50% of the net profits of Pozzuoli, and Illiano's failure as the Managing Member to pay 1st Team Fitness its share of the net profits in accordance with the express terms of the Operating Agreement constituted a material breach of the agreement by Illiano.

For the reasons set forth herein, Illiano failed to comply with the express provisions of the Operating Agreement, and likewise breached his implied contractual duty of good faith and fair dealing thereby materially breaching the contract between the parties. . Accordingly, the Court awards compensatory damages on Plaintiffs' breach of contract claim, and will enter judgment in the amount of $527,831, against Defendant and in favor of Pozzuoli, LLC, AND half of that amount, $263,915, awarded against Defendant and in favor of 1st Team Fitness, LLC.

4. Count VI- Breach of Fiduciary Duty

Unlike the corporate and general partnership context, there is no statute in Maryland expressly addressing LLC members' fiduciary duties. Nevertheless, managing members of LLCs owe common law fiduciary duties to the LLC and to the other members, which imposes on the fiduciary a duty to exercise care, loyalty, and good faith. Managing members are clearly agents for the LLC and each of the members, which is a fiduciary position under common law. *Wasserman v. Kay*, 197 Md. App. 586 (2011), *citing Insurance Co. of North America v. Miller*, 362 Md. 361, 765 A.2d 587 (2001); *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 335, 983 A.2d 408 (2009). In addition, provisions within an operating agreement can alter existing duties or create other duties that would not otherwise exist. Md. Code Ann., Corp. and Assoc. §4A-402(a). *Wasserman*, 197 Md. App. at 616.

To establish a breach of fiduciary duty, a plaintiff must demonstrate (1) the existence of a fiduciary relationship, (2) breach of the duty owed by the fiduciary to the beneficiary, and (3) harm to the beneficiary resulting from the breach. *Lyon v. Campbell,* 120 Md. App. 412 (1998).

As the managing member of Pozzuoli, Illiano was clearly an agent for the LLC and each of the members, including 1st Team Fitness, and thus stood in a fiduciary capacity to 1st Team Fitness and Pozzuoli. As such, Illiano owed 1st Team Fitness and Pozzuoli duties as a fiduciary to act for the benefit of Pozzuoli and its members with loyalty, care and good faith, without any self-interest or self-dealing. The Court finds that Illiano breached his fiduciary duties to 1st Team Fitness and Pozzuoli by misleading 1st Team fitness as to the sale of the assets of Pozzuoli; converting and fraudulently transferring the purchase price paid for those assets to himself and various other entities owned by him; manipulating the profits and financial condition of the company; failing to provide access to accurate and detailed books of account to all members; continuously writing checks from the company bank account, and authorizing transfers of money from the Pozzuoli bank account to himself personally, and to his other business entities; failing to keep accurate books of account and failing to report checks written by him to his other business entities in the Company's accounting software; and misappropriating Company funds for his own personal use.

For Defendant's violation of fiduciary duty, Plaintiffs ask the Court to award compensatory damages in the amount of $263,915, along with other damages. Whether there exists in Maryland an independent cause of action for monetary damages for breach of fiduciary duty, however, is another matter. The Court of Special Appeals has

stated rather clearly that in a claim for monetary damages at law, an alleged breach of fiduciary duty may give rise to a cause of action, but it does not, standing alone, constitute a cause of action. In Wasserman, 197 Md. App. at 631-32, relying on Kann v. Kann, 344 Md. 689, 690 A.2d 509 (1997), the Court of Special Appeals noted:

> Several cases in the wake of *Kann* have held similarly. See *Int'l Bhd. of Teamsters v. Willis Corroon Corp.*, 369 Md. 724, 727 n. 1, 802 A.2d 1050 (2002) (treating a complaint by a labor organization against its insurance broker for negligence and breach of fiduciary duty as a complaint for negligence alone, and reasoning that "although the breach of a fiduciary duty may give rise to one or more causes of action, in tort or in contract, Maryland does not recognize a separate tort action for breach of fiduciary duty"); *Vinogradova v. Suntrust Bank, Inc.*, 162 Md. App. 495, 510, 875 A.2d 222 (2005) (combining plaintiff's breach of fiduciary duty count and negligence count into a single negligence count where a third-party agent of a customer of a financial institution allegedly mismanaged customer's funds and investment accounts); *G.M. Pusey and Assocs., Inc. v. Britt/Paulk Ins. Agency, Inc.*, No. RDB-07-3229, 2008 WL 2003747, at *6-7, 2008 U.S. Dist. LEXIS 37525, at *18-20 (D. Md. May 6, 2008) (holding that plaintiff, wife of deceased insurance specialist, had no claim of breach of fiduciary duty against an insurance agency that the insurance specialist worked with because "Maryland does not recognize an independent cause of action for breach of fiduciary duty" and plaintiff had alternative remedies, including a "breach of contract claim, in which a breach of fiduciary duty may be a part").

In Count VI of their Second Amended Complaint, Plaintiffs seek only monetary damages for Defendant's alleged breach of fiduciary duty, and in their closing argument, only monetary damages are sought. The Court concludes that the Defendant's breach of fiduciary duty is relevant to Plaintiffs' other causes of action alleged (e.g., fraud, breach of contract, accounting), but it does not constitute a stand-alone cause of action which is not recognized in Maryland, at least where the remedy sought is monetary damages.

5. Count II - Intentional Misrepresentation, Fraud in the Inducement.

The elements of a claim for intentional misrepresentation, fraud in the inducement are:

(1) The defendant made a false representation of a material fact;

(2) The defendant knew of its falsity or made it with such reckless indifference to the truth that it would be reasonable to charge the defendant with knowledge of its falsity;

(3) The defendant intended that the plaintiff would act in reliance on such statements;

(4) Plaintiff did justifiably rely on the representations of the defendant; and,

(5) Plaintiff suffered damages as a result of that reliance.

There must be "clear and convincing" proof of each of the elements. *Colandrea v. Colandrea*, 42 Md. App. 421 (1979); *Rhee v. Highland Dev. Corp.*, 182 Md. App. 516 (2008). Fraud in the inducement is a subspecies of fraud. *Sass v. Andrew*, 152 Md. App. 406, 832 A.2d 247 (2003). "Fraud encompasses, among other things, theories of fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement." *See Wedeman v. City Chevrolet Co.*, 278 Md. 524, 529, 366 A.2d 7 (1976) ("[W]hen one may be induced by fraud to enter into a contract, the tort in that instance cannot be said to arise out of the contractual relationship. It is the tortious conduct which conversely induces the innocent party to enter into the contractual relationship.").

Plaintiffs argue that Illiano made false representations of material facts to the Caparottis to induce 1st Team Fitness into signing the Operating Agreement with Illiano, to become a member in Pozzuoli, to provide labor in operating The Gym on a day-to-day

basis, to continue doing business with Defendant, and to engage in discussions to purchase Illiano's ownership interest in the Company. Specifically, Plaintiffs contend that Iliano's statement to the Caparottis that they could train 1st Team Fitness' clients at The Gym, which he then sued them for later, and statements that he would sell his interest in the Gym to the Caparottis/1st Team Fitness are actionable. Plaintiffs further contend that Illiano committed fraud in the inducement by continually misrepresenting the financial status of the business to keep 1st Team Fitness and the Caparottis on board, and informed the Caparottis he was not going to sell the Gym to SNAP Corporate.

The Court does not find by clear and convincing evidence that Illiano committed fraud in the inducement. Plaintiffs have not proven by clear and convincing evidence that Illiano knowingly or recklessly made a false statement which caused or induced them to enter into the Operating Agreement, or that the Plaintiffs reasonably relied to their detriment on any false statements. To the contrary, the Court has already found that Illiano told the Caparottis that they could train members and non-members at The Gym, and that the Operating Agreement allowed the Caparottis to train non-members. Similarly, the Court cannot find by clear and convincing evidence that Illiano's continual misrepresentations of the financial status of the company and his promise not to sell The Gym constituted fraud in the inducement. There was no evidence, and certainly no clear and convincing evidence, that the Plaintiffs took some action, or would have taken some action in reasonable reliance on Defendant's representations. Accordingly, the Court finds for Defendant as to Count II of the Second Amended Complaint.

6. **Count III - Intentional Misrepresentation, Concealment or Non-Disclosure.**

Count IV - Constructive Fraud

The elements of the tort of intentional misrepresentation, concealment or non-disclosure are as follows:

1) Duty to disclose;

2) Failure to disclose a material fact;

3) With the intent to deceive, i.e., the defendant knows the plaintiff would act in a different manner had he or she known of the existence of the undisclosed fact;

4) The plaintiff acts in justifiable reliance upon the concealment; and

5) The plaintiff suffers damages as a result of the concealment.

Hill v. Brush Engineered Materials, Inc., 383 F. Supp. 2d 814, 820 (D. Md. 2005).

The false representation associated with the tort of intentional misrepresentation "may be based on an affirmative misrepresentation of fact; a concealment of fact, which includes a partially misleading disclosure; or a non-disclosure of fact in the face of a duty to disclose." *Hoffman v. Stamper*, 155 Md. App. 247, 302 (2004). A person commits fraud by concealment when he engages in a deceptive act or contrivance intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. [citation omitted]. When one intentionally produces a false impression to mislead another person, or to entrap or cheat him, or to obtain undue advantage of him, there is a positive fraud. Id., 155 Md. App. at 302.

Constructive Fraud is the breach of a duty, legal or equitable, which the law declares fraudulent because the breach intends to deceive others, violates public or private confidence, or injures public interest. *Ellerin v. Fairfax Sav., F.S.B.,* 337 Md. 216 (1995). The elements of constructive fraud include:

1) The existence of a legal or equitable duty, usually arising out of a relationship where trust and confidence exist, i.e., a fiduciary relationship or a confidential relationship;
2) A breach of that duty; by
3) Conduct which deceives or violates a confidence or injures the public interest.

Id at 236.

However it may be characterized, a successful claim for fraud requires proof of *scienter* on the part of the defendant. Recovery in a tort action for fraud or deceit in Maryland requires evidence of a defendant's deliberate intent to deceive, coupled with proof of the defendant's knowledge of the falsity. The plaintiff in an action of fraud or deceit must prove that the defendant either knew that the representation was false or made the representation with "reckless indifference" as to its truth. *Id.*, at 230.

Plaintiffs have proven by clear and convincing evidence that Illiano acted in several respects with an intent to deceive. Unquestionably, the Defendant attempted to conceal from the Plaintiffs his improper bookkeeping practices as well as the sale of Pozzuoli's assets. Moreover, the Court is satisfied that Illiano's own testimony established that he acted with reckless indifference as to whether many of the material representations he made to the Caparottis were true or false. Mr. Runge's

uncontroverted opinion in this matter was that the Defendant's actions went beyond mere carelessness inadvertence. Mr. Runge testified that either Illiano acted intentionally, by concealing the misuse of Pozzuoli funds through the use of treasurers' checks, or at the very least, there was clear accounting mismanagement. He further opined that Defendant knowingly removed $422,612 in funds from the Pozzuoli bank account, and failed to record those transactions in Pozzuoli's accounting records. **P. EX 127.**

The Court agrees with Mr. Runge, that the "off-the-books transactions" which were accomplished via the purchase and negotiation of treasurers' checks deposited into the accounts of other entities owned by Defendant, evidenced an intent to obfuscate the transfer of funds in and out of the Pozzuoli account, and that Defendant took excess withdrawals without justification from the Pozzuoli bank account in the amount of $105,219. **P. EX 126.** The Court also concludes that, however ill-advised Illiano's actions were, Plaintiffs have not proven that they were done with the knowledge that the representations were false. Rather, the Court concludes that Illiano acted under the woefully misguided belief that he or his entities were entitled to withdraw funds from Pozzuoli as he saw fit, that he was entitled to sell all of Pozzuoli's assets, and that he was further entitled to create expenses of sale to justify that which he believed would result in a proper distribution of the sale proceeds.

The Court finds that Defendant's sale of the assets of Pozzuoli to SNAP Fitness without the knowledge or consent of 1st Team Fitness was fraudulent. Defendant argues that his March 1, 2013 sale of The Gym to SNAP Fitness was authorized by the Operating Agreement. Defendant contends that Section 11 of the Operating Agreement, which

invests Illiano with the authority, as Managing Member, to manage and supervise the day-to-day operations of Pozzuoli, granted Defendant the unfettered right to sell the assets of Pozzuoli. Specifically, Defendant directs the Court to the following portions of the Operating Agreement to support his argument:

> (a) Except as otherwise expressly provided in this Agreement, all decisions with respect to the finances, management, operation and conduct of the Company's business shall be made by the Managing member. The Managing Member shall have the full, exclusive, and complete discretion, power and authority in operating the Company's business. Without limiting the foregoing, the Managing Member shall have the authority, acting alone, to take any of the following actions (emphasis added):
>
> * * *
>
> (iii) To enter into contracts relating to or affecting the Company's property, including, but not limited to, the franchise agreement with Snap Fitness.
>
> * * *
>
> (x) To file a petition for relief under any bankruptcy or insolvency statute or to acquiesce in the filing of any such petition against the Company.

The Court rejects the argument that Section 11 of the Operating Agreement authorized Illiano, a fifty-percent (50%) owner together with 1st Team Fitness, to sell all the assets of Pozzuoli. That Illiano had "the full, exclusive, and complete discretion, power and authority in operating the Company's business," and (acting alone) to enter into contracts relating to or affecting the Company's property," did not in this Court's judgment authorize Illiano to sell all of the Company's assets, without his equal partner's knowledge or consent. As noted above, the Court is required is to give effect to the parties' intentions with regard to the Operating Agreement, *Tomran*, 391 Md. at 14, and to interpret the Operating Agreement based on what a reasonable person in the position

of the parties would have meant at the time it was effectuated. *Bretheren Mut. Ins. Co. v. Buckley*, 437 Md. 332 (2014).

Clearly, there is no provision in the Operating Agreement that specifically authorizes Illiano to sell all of Pozzuoli's assets. Moreover, the Court concludes that a reasonable person in the position of the parties would not interpret the language of Section 11 to grant Illiano such power. In reaching this conclusion, the Court has considered Section 11 in the context of the entire Operating Agreement, including the right of refusal contained in Section 17. It would not be reasonable to expect that the parties intended to allow one owner to sell all of the assets of the Company without the knowledge of consent of the other owner, when the same Operating Agreement provides that a sale of a membership interest gives rise to a non-selling owner's right to purchase the selling owner's interest. In the absence of a clear and definite provision in the Operating Agreement permitting Illiano to sell all of Pozzuoli's assets, the Court declines to find that such action was permitted.

The Effect of Defendant's Breach of Fiduciary Duty

The Court previously found that Defendant owed a fiduciary duty of loyalty to 1st Team Fitness and Pozzuoli as managing member of the Company, and that Illiano breached his duty to Plaintiffs. Although the Court determined that a breach of fiduciary duty under Maryland law cannot support a claim for monetary damages, the Court does find that Illiano's breach of fiduciary duty in this case amounts to intentional misrepresentation. Defendant's breaches and intentional misrepresentations include the following:

1) Failure to keep and maintain full and true books of account; **P. EX 5, Fitness 8-9, section 13(a);**

2) Extreme mismanagement of company funds, books and records in violation of common law fiduciary duties;

3) Failure to provide 1st Team Fitness access to the Pozzuoli online QuickBooks account; **P. EX 5, Fitness 9, Section 13(b)**;

4) Failure to provide 1st Team Fitness access to the financial and accounting records of Pozzuoli, despite many repeated requests; ***Id;***

5) Failure to deposit or invest all Pozzuoli funds in the company name; **Fitness 9, Section 14;**

6) Taking $105,219 in excess withdrawals from the Pozzuoli bank account; **P. EX 126;**

7) Causing $422,612 in funds to be removed from the Pozzuoli bank account, which transactions were not entered into the Pozzuoli accounting records; **P. EX 127;**

8) Causing $422,612 in Pozzuoli funds to be deposited into not fewer than nine (9) other companies owned by Defendant, most of which Defendant testified had no business relationship with Pozzuoli LLC; **P. EX 93;**

9) Intentionally comingling Pozzuoli funds with his other business entities;

10) Treating business funds as his own personal funds, including treating the Pozzuoli bank account as his own; **P. EX 128, page 55 lines 14-15; page 56 lines 4-9, pages 56-57 lines 17-21 and 1-3; pages 66 and 67 lines 9-21 and 1-16**

11) Failing to disclose his actions, much less seek majority or supermajority consent, with regard to the sale of the Pozzuoli assets to SNAP Corporate; **P. EX 53,56, 57-58;**

12) Causing all or substantially all of the Pozzuoli assets to be sold to SNAP Corporate; (discussions initiated by Defendant in February 2013, **P. EX 52, SNAP 1**);

13) Failing to disclose to SNAP Corporate during deal discussions of the existence of 1st Team Fitness as a member in Pozzuoli; **P. EX. 54, SNAP 13;** (Defendant testified that he always treated 1st Team Fitness as a member and at his deposition, **(P. EX 128, page 8-9, lines 15-21 and 1-13)**, claimed he didn't realize 1st Team Fitness was not a member until the lawsuit was initiated, some four (4) months after making the statement in **P.EX 54** that he was the sole member).

14) Creating unsubstantiated expenses to be subtracted from the sale proceeds in an effort to increase his share of the proceeds; **P. EX 55;**

15) Creating more unsubstantiated expenses to drive the Sales Price Less Expenses values down as the litigation continued; **P. EX 61-64; P. EX 128, page 135;**

16) Taking a guaranteed payment in the amount of $45,799 in 2011 not also paid to 1st Team Fitness; **P. EX 15, Illiano 1106;**

17) Refusing to turn over any money from sales proceeds to 1st Team Fitness until the release was signed; (Defendant testified he did require the Caparottis to

sign the release, **P. EX 60,** before he would give them any money from the sale);

18) Failing to pay any portion of the sales proceeds from the March 1, 2013 asset sale to 1st Team Fitness;

19) Causing substantially all of the sales proceeds from the asset sale to be transferred to his company BAIA, LLC**; P. EX 94-95;**

20) Causing the sales proceeds to be further transferred from BAIA, LLC's bank account to eight (8) other entities owned by Defendant, most of which Defendant testified had no business relationship with Pozzuoli LLC; **P. EX 96-101**;

As a direct result of Defendant's actions, Plaintiffs' expert witness testified $527,831 should be returned to Pozzuoli, or half that amount, $263,915, should be payable to 1st Team Fitness.

Punitive Damages

The Court declines to find that Illiano acted with actual malice, and thus declines to award punitive damages in this case. A party seeking punitive damages must prove actual malice by clear and convincing evidence. *Darcars Motors of Silver Spring, Inc. v. Borzym*, 150 Md. App. 18, 43-33 (2003), *aff'd*, 379 Md. 249 (2004). An award of punitive damages must be based upon actual malice, in the sense of evil or wrongful motive, intent to injure, ill will, or fraud. *Tierce Md., Inc. v. Williams*, 381 Md. 378, 849 A. 2d 504 (2004). A breach of fiduciary duty alone does not establish actual malice. *Bresnahan. Bresnahan*, 115 Md. App. 226, 693 A. 2d 1 (1997).

It is true that the Court found that Illiano breached his fiduciary duty to Plaintiffs, and that such breach of fiduciary duty constituted intentional misrepresentation toward the Plaintiffs. Those findings alone are not sufficient to support a claim for punitive damages. A finding of fraud or deceit based on a defendant's actual knowledge that his representations were false coupled with an intent to deceive can and normally will justify an award of punitive damages. *Ellerin*, at 240-41. However, where a defendant's fraud or deceit is premised not on his actual knowledge or falsity, but on his reckless disregard or indifference as to the truth of his representations, punitive damages are generally not recoverable. *Id.*, at 235. Similarly, other conduct, recognized by the law and sometimes labeled "fraud," falls short of the act of deliberate deception required for actual malice in this context, and is not sufficient to sustain a punitive damages award. *Ellerin*, at 235-36. For example, while "constructive fraud" has been recognized for certain purposes in Maryland, it does not necessarily involve the type of dishonest or immoral conduct that is required to support an award of punitive damages. *Id.*

As indicated above, the Court finds that Illiano's actions, while done with an intent to deceive, where carried out with reckless indifference to and not actual knowledge that his representation were false. Accordingly, the Court declines to award punitive damages to the Plaintiffs.

The Court awards compensatory damages to the Plaintiffs, and will enter judgment in the amount of $527,831, against Defendant and in favor of Pozzuoli, LLC, and half of that amount, $263,915, awarded against Defendant and in favor of 1st Team Fitness, LLC.

7. **Count IX- Conversion/Embezzlement**

Conversion is the wrongful exercise of dominion by one person over the personal property of another. *Medi-Cen Corp. v. Birschbach*, 123 Md. app. 765, 720 A.2d 966 (1998). One cannot convert monies unless the monies alleged to have been converted are "specific, segregated, or identifiable funds," and the funds allegedly converted in this case do not meet that test. *Lasater v. Guttmann*, 194 Md. App. 431, 447 (2010) ("The general rule is that monies are intangible, and therefore, not subject to a claim for conversion.") (citing *Allied Inv. Corp. v. Jasen*, 354 Md. 547, 564, 731 A.2d 957 (1999)). Some intangibles, for example accounts receivable represented by electronic data or hard copy may be subject to conversion. *Medi-Cen Corp.*, at 777-78.

The Court finds that the Defendant committed conversion. In doing so, the Court incorporates its findings and conclusions above as to the claims for fraud and deceit. Illiano intentionally converted funds that belonged to Pozzuoli and therefore in part to 1st Team Fitness, and used said funds for his personal use or the use of his entities, that had no legitimate business relationship with Pozzuoli. Defendant testified that he had no documentation to substantiate the payouts, because it was not necessary. Moreover, with regard to the 10% broker fee that Illiano created and added to the costs of sale of Pozzuoli's assets, Defendant stated there was no contract authorizing the fee because he felt he could do whatever he wanted. **P. EX 128, pages 71-72 lines 12-21 and 1-18.** By creating false expenses, Illiano intentionally appropriated the sales proceeds and paid them to himself or nine (9) of his other business entities.

Accordingly, the Court awards compensatory damages on Plaintiffs' conversion claim, and will enter judgment in the amount of $527,831, against Defendant and in favor

of Pozzuoli, LLC, AND half of that amount, $263,915, awarded against Defendant and in favor of 1st Team Fitness, LLC. For the reasons stated above, the Court declines to award punitive damages.

8. **Count VII- Dissolution and Appointment of a Receiver**

On application by or on behalf of a member, the circuit court of the county in which the principal office of the limited liability company is located may decree the dissolution of the limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or the operating agreement. MARYLAND CODE, CORP. AND ASSOC. §4A-903.

The appointment of a receiver is an appropriate remedy where there is "fraud, spoliation, or imminent danger of loss of property unless immediate possession thereof be taken by the Court." *First Union Sav. & Loan, Inc. v. Bottom*, 232 Md. 292, 297, 193 A.2d 49, 52 (1963), citing *Brown v. Brown*, 204 Md. 197, 103 A.2d 856.

The Court agrees with Plaintiffs that Pozzuoli should be dissolved. The Court will appoint a receiver to oversee the dissolution of Pozzuoli and the proper distribution of the funds in accordance with the decision rendered herein.

9. **Alternate Theories of Recovery**

Count VIII- Negligent Misrepresentation

Count X- Quantum Meruit

Count XI- Unjust Enrichment

Count XII- Promissory Estoppel/Detrimental Reliance

Inasmuch as the Court finds that Plaintiffs have proven Defendant's breach of contract and fraud, the Court denies Plaintiffs' claims for relief as to Count VIII-

Negligent Misrepresentation, Count X- Quantum Meruit, Count XI- Unjust Enrichment, and Count XII- Promissory Estoppel/Detrimental Reliance.

10. Sanctions

Plaintiffs request this Court issue sanctions against the Defendant for his repeated and willful failures or refusals to comply with discovery in this matter.

Maryland Rule 2-433(a)(3) gives trial courts broad discretion to impose sanctions for discovery violations. *Valentine-Bowers v. Retina Group of Washington, P.C.*, 217 Md. App. 366, 92 A.3d 634 (2014). A trial court has inherent authority to issue sanctions for a discovery or scheduling order violation by a party. *Station Maintenance Solutions Inc. v. Two Farms, Inc.*, 209 Md. App. 464, 485 (2011). "The governing principle that the appropriate sanction for a discovery or scheduling order violation is largely discretionary with the trial court, and that the more draconian sanctions, of dismissing a claim or precluding the evidence necessary to support a claim, are normally reserved for persistent and deliberate violations that actually cause some prejudice, either to the party or the court." *Butler, Jr. v. S&S Partnership, et al.*, No. 1, Sept. Term 2013, (Ct. of Appeals, 2013), quoting *Admiral Mortgage, Inc. v. Cooper*, 357 Md. 533, 545 (2000). In imposing sanctions, a trial court has considerable latitude, and a trial court's decision regarding sanctions will not be overturned, absent an abuse of discretion. *Valentine-Bowers*, at 378, *citing Sindler v. Litman*, 166 Md. App. 90, 887 A.2d 97 (2005).

After careful consideration of the Plaintiffs' request for sanctions, and although the Court does not condone Defendant's discovery conduct in this matter, the Court declines to impose sanctions on the Defendant, in the exercise of the Court's discretion.

B. Defendant's Counterclaims

Inasmuch as the Court has found in favor of the Plaintiffs on their claims for declaratory judgment and accounting, the Court likewise finds in favor of the Plaintiffs and against the Defendant on Defendant's counterclaims for the identical causes of action.

Conclusion

For the reasons set forth in this Memorandum Opinion, the Court finds **in favor** of the Plaintiffs, 1st Team Fitness and against the Defendant, Francesco "Frank" Illiano, as to Counts I (Accounting), Count III (Intentional Misrepresentation - Concealment or Non-Disclosure), Count IV (Constructive Fraud), Count V (Breach of Contract), Count VI (Breach of Fiduciary Duty), Count VII (Dissolution and Appointment of a Receiver), Count IX (Conversion/Embezzlement), and Count XIII (Declaratory Judgment), **against the** Plaintiffs and in favor of the Defendant as to Count II (Fraud in the Inducement), Count VIII (Negligent Misrepresentation), Count X (Quantum Meruit), Count XI (Unjust Enrichment) and Count XII (Promissory Estoppel/Detrimental Reliance, and **against the** Defendant on Defendant's counterclaims.

Accordingly, it is this 27th, day of January, 2015, by the Circuit Court for Carrol County, hereby

ORDERED as to Count I, Accounting, judgment shall be entered in favor of the Plaintiffs, 1st Team Fitness, LLC and Pozzuoli, LLC and against the Defendant Frank Iliano; for the reasons previously set forth, no damages are awarded; and it is further

ORDERED as to Count II, Fraud in the Inducement, judgment shall be entered in favor of the Defendant, Frank Iliano and against the Plaintiffs; and it is further

ORDERED as to Count III, Intentional Misrepresentation - Concealment or Non-Disclosure, judgment shall be entered in favor of the Plaintiffs, and against the Defendant, Frank Iliano, and compensatory damages are awarded to the Plaintiff, Pozzouli, LLC, in the amount of $527,831, and half of that amount, $263,915, is awarded against Defendant and in favor of 1st Team Fitness, LLC; and it is further

ORDERED as to Count IV, Constructive Fraud, judgment shall be entered in favor of the Plaintiffs, and against the Defendant, Frank Iliano, and compensatory damages are awarded to the Plaintiff, Pozzouli, LLC, in the amount of $527,831, and half of that amount, $263,915, is awarded against Defendant and in favor of 1st Team Fitness, LLC; and it is further

ORDERED as to Count V, Breach of Contract, judgment shall be entered in favor of the Plaintiffs, and against the Defendant, and compensatory damages are awarded to the Plaintiff, Pozzouli, LLC, in the amount of $527,831, and half of that amount, $263,915, is awarded against Defendant and in favor of 1st Team Fitness, LLC; and it is further

ORDERED as to Count VI, Breach of Fiduciary Duty, judgment shall be entered in favor of the Plaintiffs, and against the Defendant Frank Iliano, and for the reasons stated above, the Court declines to award damages; and it is further

ORDERED as to Count VII, Dissolution and Appointment of a Receiver, judgment shall be entered in favor of the Plaintiffs, and against the Defendant Frank Iliano, and in a separate Order, the Court will appoint a receiver; and it is further

ORDERED as to Count VIII, Negligent Misrepresentation, judgment shall be entered in favor of the Defendant, Frank Iliano and against the Plaintiffs; and it is further

ORDERED as to Count IX, Conversion/Embezzlement, judgment shall be entered in favor of the Plaintiffs, and against the Defendant, Frank Iliano, and compensatory damages are awarded to the Plaintiff, Pozzouli, LLC, in the amount of $527,831, and half of that amount, $263,915, is awarded against Defendant and in favor of 1st Team Fitness, LLC, ad for the reasons stated above, the Court declines to award punitive damages; and it is further

ORDERED as to Count X, Quantum Meruit, judgment shall be entered in favor of the Defendant, Frank Iliano and against the Plaintiffs; and it is further

ORDERED as to Count XI, Unjust Enrichment, judgment shall be entered in favor of the Defendant, Frank Iliano and against the Plaintiffs; and it is further

ORDERED as to Count XII, Promissory Estoppel/Detrimental Reliance, judgment shall be entered in favor of the Defendant, Frank Iliano and against the Plaintiffs; and it is further

ORDERED as to Count XIII, Declaratory Judgment, that judgment shall be entered in favor of the Plaintiff 1st Team Fitness, LLC declaring that 1st Team Fitness, LLC is a 50% member in Pozzuoli, LLC; and it is further

ORDERED as to the Defendant's counterclaims, judgment shall be entered in favor of the Plaintiffs and against the Defendant; and it is further

ORDERED that the total amount of compensatory damages awarded to the Plaintiff, Pozzouli, LLC, and against Defendant, Frank Iliano, is $527,831, and half of that

amount, $263,915, is awarded against Defendant and in favor of 1st Team Fitness, LLC, plus costs and post-judgment interest as the legal rate; and it is further

ORDERED that the Court denies Plaintiffs' claims for punitive damages and sanctions; and it is further

ORDERED, that any other relief not expressly granted herein is denied.

January 27, 2015
DATE

JUDGE FRED S. HECKER
Circuit Court for Carroll County

SO ORDERED.

January 27, 2015
DATE

JUDGE FRED S. HECKER
Circuit Court for Carroll County