

Circuit Court for Baltimore County
Case No. 03-C-12-007741

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 761

September Term, 2017

JOSEPH J. BALSAMO

v.

JOHN J. ZORZIT, *ET AL.*

Kehoe,
Berger,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned)

JJ.

Opinion by Kehoe, J.

Filed: July 9, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. *See* Md. Rule 1-104.

This appeal arises out of a multi-faceted business dispute between Joseph J. Balsamo and John J. Zorzit regarding Zorzit's management of a company that they jointly owned, Balsamo Norino Properties, LLC ("BNP"). In 2012, Balsamo filed a multi-count civil action in the Circuit Court for Baltimore County asserting direct and derivative claims against Zorzit, other entities owned by him, and James Parks, CPA, an accountant who worked for BNP. Before trial, the parties entered into a stipulation that reduced the number of counts before the court to nine.¹ These claims were tried before the circuit court, the Honorable Michael J. Finifter presiding.

After a fifteen day court trial, as well as a post-trial accounting, the court entered a series of judgments resolving the parties' claims. What is significant for purposes of this appeal is that:

(1) The court denied relief as to Balsamo's breach of contract and negligence claims based upon assertions that Zorzit had breached his fiduciary duties to BNP and Balsamo.

(2) The court denied Balsamo's request for the judicial dissolution and winding-up of BNP's business.

(3) The trial court ordered that an independent accounting be undertaken for BNP's capital accounts. The accounting report recommended adjustments to the parties' capital accounts based on the special auditor's review of BNP's financial records and in

¹ Submitted for trial were: Counts 3 and 17 (declaratory judgment); Count 9 (unjust enrichment); Count 6 (breach of contract/breach of fiduciary duties); Count 5 (negligence/breach of fiduciary duties); Count 16 (professional negligence against James Parks, CPA); Count 1 (judicial dissolution of BNP); Count 2 (judicial winding up of BNP); and Count 4 (constructive trust and accounting).

accordance with the findings of fact and conclusions of law issued by the trial court. Balsamo filed exceptions to the report, which the court denied.

(4) The court granted several forms of derivative relief, retitling more than \$14 million assets and declaring that certain contracts were unenforceable against BNP. As a sequela to the grant of derivative relief, the court awarded Balsamo attorneys' fees to be paid out of the recovered assets.²

In his appeal, Balsamo presents three issues, which we have reworded:

1. Did the trial court err in denying Balsamo's requests that were premised on the assertion that Zorzit breached his fiduciary duties to BNP?
2. Did the trial court abuse its discretion in denying Balsamo's request for judicial dissolution and winding up of BNP?
3. Did the Circuit Court err in denying Balsamo's exception to an accounting report that credited Zorzit's capital account with illegal gambling revenue in violation of Maryland public policy and contrary to evidence that such credit was not factually correct?

Zorzit has filed a cross-appeal. His sole assertion is that the court's award of attorneys' fees was excessive.

We will affirm the trial court's judgment.

² Balsamo also filed a derivative claim asserting that Parks was negligent in his handling of BNP's books and records. Parks asserted counterclaims against BNP and Balsamo. The trial court granted judgment in Parks' favor on the malpractice claim, and in favor of BNP and Balsamo as to Parks' claims. These parts of the court's judgment are not at issue in this appeal.

Background

We can sometimes fulfill our obligations as an intermediate appellate court without necessarily “indulging the conceit that we could somehow say it better” than did the trial court. *Sturdivant v. Maryland Dep’t of Health & Mental Hygiene*, 436 Md. 584, 587–88 (2014). This is such a case. In lieu of providing our own summary of the factual and legal background to this appeal, we adopt pages 1 through 44 of Judge Finifter’s comprehensive and well-reasoned Findings of Fact and Conclusions of Law dated March 4, 2015 (the “Memorandum Opinion”). (A copy of the Memorandum Opinion is attached as to this opinion as Exhibit A.)

Analysis

The applicable standards of review are well-established. We will review a trial court’s interpretation of law *de novo*. *Griffin v. Berman*, 403 Md. 186, 195 (2008). In cases, such as the present one, which are tried before the court, we “will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.” Md. Rule 8-131(c). The role of a court auditor is analogous to that of a magistrate. *See Robinson v. Brodsky*, 268 Md. 12, 24 (1973). In exceptions proceedings regarding findings by a magistrate, a finding of fact will be set aside by the circuit court only if the court concludes that the finding was clearly erroneous. *See Domingues v. Johnson*, 323 Md. 486, 496 (1991); *Guidash v. Tome*, 211 Md. App. 725, 735–36 (2013). There is no reason why the same standard should not apply to an exception proceeding regarding findings by an auditor.

Assuming that the trial court’s decision is based on factual findings supported by substantial evidence, and the court correctly understands the law, we will reverse a discretionary ruling only when the decision is:

well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable. That kind of distance can arise in a number of ways, among which are that the ruling either does not logically follow from the findings upon which it supposedly rests or has no reasonable relationship to its announced objective.

North v. North, 102 Md. App. 1, 14 (1994).

1. Breach of fiduciary duty

At trial, Balsamo presented breach of contract and negligence claims against Zorzit premised on his assertion that Zorzit breached his fiduciary duties to BNP and Balsamo himself. The trial court did not grant any of this relief. On appeal, Balsamo’s first contention is that he “established by a preponderance of the evidence that Zorzit breached most, if not all, of the fiduciary duties that a managing member owes to an LLC and its members.” Therefore, he argues, we should reverse those parts of the court’s judgment denying his direct and derivative claims based on Zorzit’s breach of fiduciary duties, and remand with instruction to the trial court to enter judgment in his and BNP’s favor. He points to the following as supporting his breach of fiduciary duties claims:

1. Zorzit claimed that Norino Properties (not BNP) was the owner of 100% of the beneficial interest in the Joppa Road Property.

Judge Finifter unraveled the tangled skein of the Joppa Road transaction in pages 4 through 10 of the Memorandum Opinion. He concluded that the property should be titled in BNP’s name. However, he specifically rejected Balsamo’s claim that Zorzit attempted

to acquire the property by fraud or concealment, finding instead that Zorzit’s claim to the property “was the product of a bona fide dispute.” Memorandum Opinion at 41. A fiduciary does not breach his or her duties to the principal by having a good faith dispute. Balsamo does not suggest that there was no evidence to support the court’s findings as to Zorzit’s state of mind.

2. Zorzit laundered proceeds from Nick’s Amusements’ illegal activities through BNP’s operating account thereby exposing BNP’s assets to the government’s civil forfeiture claim.

Illegal conduct by a fiduciary—in this case, money laundering—can be the basis for a conclusion that there has been a breach of fiduciary duty. However, Judge Finifter found that Balsamo:

knew and acquiesced to Nick’s Amusements using BNP to launder its illegal gambling proceeds. Mr. Balsamo also accepted the benefits of the vending proceeds. Certainly, Mr. Balsamo knew that there were ramifications to these actions.

Memorandum Opinion at 27.

Balsamo does not assert that any of these findings were clearly erroneous. Nor does he explain how Zorzit breached his fiduciary duties when Balsamo was aware of, and acquiesced to, the conduct that is the basis for the claim of breach of fiduciary duty.

3. Zorzit claimed that BNP was obligated to indemnify Nick’s Amusement for amusement taxes, interest, and penalties, so he used BNP funds to pay over \$191,000 of legal fees he incurred defending himself against the federal civil forfeiture action and the Maryland tax lien.

BNP signed an agreement with Nick’s Amusements (a company owned by Zorzit) wherein BNP agreed to indemnify Nick’s Amusements against claims arising out of BNP’s

ownership or operation of video poker machines. Memorandum Opinion at 15, 18. After the Internal Revenue Service and the State Comptroller imposed liens upon a number of businesses affiliated with Zorzit, including BNP and Nick’s Amusements, a dispute arose between Balsamo and Zorzit as to BNP’s obligations under the agreement. The trial court ultimately concluded that the indemnity agreement was not enforceable. *Id.* at 17–18. However, the court also found that Zorzit’s interpretation of the agreement was a reasonable one and therefore was not a breach of his duty to BNP. Memorandum Opinion at 29. Balsamo does not explain how the trial court’s assessment of Zorzit’s state of mind was clear error.

Balsamo is correct that Zorzit used BNP funds to pay for his attorney’s fees. But the federal civil forfeiture action and the state tax lien were imposed on BNP’s assets, so BNP benefitted from Zorzit’s efforts to resolve these matters. Moreover, as we have explained, the trial court found that Balsamo was aware of, and acquiesced to, Zorzit’s activities that led to the penalties and enforcement actions.

4. Zorzit involved BNP in litigation against the attorney who represented his ex-wife in their divorce proceedings.

Zorzit also used BNP funds to pay for his legal fees in what the trial court and the parties term the “Tydings litigation,” which involved Zorzit’s contentions that his former spouse’s lawyer had defamed him, resulting in damage to the credit relationship between

Bank of America and various entities, including BNP.³ The trial court found that the Tydings action had been brought in good faith and that Balsamo failed to prove that Zorzit “acted unreasonably when he included BNP in the Tydings litigation.” Memorandum Opinion at 27. The court also found that Zorzit did not breach his fiduciary duties when he included BNP in the action. *Id.* at 30.

5. Zorzit unilaterally obligated BNP to fund a deferred compensation agreement for his benefit.

The trial court concluded that there was no justiciable controversy regarding the deferred compensation agreement Zorzit put into place to benefit himself because he revoked the agreement prior to trial, and so it was not otherwise addressed in the Memorandum Opinion.

6. Zorzit failed to exercise care and diligence regarding the Lauzon Road property transaction.

Zorzit used BNP funds to acquire a property in Ontario, Canada—the Lauzon Road property. This parcel is titled in the name of Norino Properties, Inc., a Canadian corporation formed to hold title to the property. The trial court did not specifically address this transaction in the Memorandum Opinion. From what we can tell from the briefs, there is no dispute whatsoever that the beneficial owner of the property has always been BNP.

³ Additional information about this dispute may be found in this Court’s unreported opinion in *Norino Properties & Construction, Inc. et al. v. Ferrier R. Stillman*, No. 30, September Term 2013.

Balsamo asserts that BNP's business records regarding the transaction were inaccurate and that there should have been a deed of trust on the property securing BNP's interest in it. He doesn't explain why this state of affairs (which has since been corrected by Zorzit) rose to the level of a breach of fiduciary duty on Zorzit's part. He also points out there were improprieties regarding notary acknowledgments executed by Parks. Balsamo does not explain how these discrete pieces of information add up to an abuse of fiduciary duty on Zorzit's part. We are not inclined to explore the matter further. *See Konover Property Trust v. WHE Associates*, 142 Md. App. 476, 494 (2002).

7. Zorzit encumbered BNP assets for his personal benefit through the use of IDOTs secured by BNP properties, which IDOTs were released by his employee (Parks), who fraudulently notarized Balsamo's signature.

Balsamo refers us to a part of the Memorandum Opinion that discusses Balsamo's derivative malpractice claim against James Parks, a certified public accountant who kept BNP's financial records. Balsamo presented evidence that Parks assisted Zorzit in conjuring up fictitious loan documents in an attempt to reduce Zorzit's apparent net worth during his divorce proceeding. This clearly would be improper, but the trial court concluded that there was no evidence that any of this damaged BNP. Memorandum Opinion 34–35. Balsamo does not explain how this would relate to a claim that Zorzit breached his fiduciary duties. *See Konover*, 142 Md. App. at 494.

8. Zorzit caused BNP to pay 100% of Parks' salary despite the fact that Parks performed accounting services for all of Zorzit's companies.

The trial court determined that BNP paid Parks' salary, finding that from 2004 to 2012 it reimbursed Nick's Amusements and Norino Properties a total of \$1,065,800, the full

amount of Mr. Parks’ salary. Memorandum Opinion at 12 n. 91. However, the trial court concluded that the statute of limitations barred this claim against Zorzit, because Balsamo knew or should have known about it, as Parks was hired in 2004.

In conclusion, Balsamo has certainly identified evidence of improper conduct on Zorzit’s and Parks’ part. However, the trial court considered most of these matters and rejected them as a basis to conclude that Zorzit had breached his fiduciary duties. There was certainly evidence—some of it controverted, some of it not—that supported the trial court’s conclusions. His breach of fiduciary duty argument fails.

2. Dissolution and winding up

Section 4A-903 of the Corporations and Associations Article (“CA”) of the Maryland Code sets out the requirements for a judicial dissolution of a limited liability corporation (emphasis added):

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 case law does not yet provide much guidance on what circumstances would render it not reasonably practicable to carry on the business. Crucially, though, the statute provides that the trial court “may” decree the dissolution of the limited liability corporation. The auxiliary verb means that the decision is one left to the discretion of the trial court, and our task is to review whether the trial court abused its discretion in arriving at its decision.

See, e.g., 101 Geneva LLC v. Wynn, 435 Md. 233, 242 (2013) (In the context of Md. Rule 14-207.1, the use of the term “may” “grants a circuit court discretion in these decisions.”)

Judge Finifter addressed Balsamo’s request for dissolution in pages 35–40 of the Memorandum Opinion. We adopt his analysis as our own. Even if we didn’t, there is no basis for us to conclude that the trial court’s decision to deny the request for dissolution was “beyond the fringe of what [this] court deems minimally acceptable” in terms of judicial decision-making” in light of the trial court findings. *North*, 102 Md. App. at 14.

3. The exceptions to the independent accounting report

The trial court ordered an independent accounting of BNP’s capital accounts. The parties agreed on a certified public accountant, whom the court appointed as special auditor. The special auditor’s report was filed under seal. For our purposes, it’s sufficient to note that the special auditor recommended that Zorzit’s capital account should be increased by \$783,722 and Balsamo’s capital account should be reduced by the same amount. Balsamo filed exceptions to the accounting, which the trial court denied without explanation.

At this juncture, Balsamo presents three reasons why his exceptions should have been granted by the trial court.

First, he asserts that a finding by the special auditor was clearly erroneous. The pertinent part of the special auditor’s report reads as follows (emphasis added):

BNP’s income tax returns . . . did not report any of the vending transactions to income in any year, but treated these transactions as loans from partners. Loans

from partners included the net vending receipts, and capital asset-related transactions unrelated to vending operations.

• • • •

Finally, in the [Memorandum Opinion], *Judge Finifter stated that, “Indeed, BNP never reported vending revenue on its tax returns. Neither partner has disputed Judge Finifter’s statement during the course of this engagement.*

To this Court, Balsamo argues that this conclusion is both factually incorrect and based upon a misreading of the relevant part Judge Finifter’s opinion. As to factual error, he points us to an affidavit prepared by his expert witness, William J. Bavis, CPA and submitted to the trial court in support of Balsamo’s exceptions to the special auditor’s report. E 309. Mr. Bavis averred that his examination of BNP’s records led him to the conclusion that BNP’s tax returns filed for 1999 through 2009 in fact did reflect vending machine income, although such income was often, although not always, mischaracterized on the federal and state returns.

Balsamo also asserts that the special auditor misread a part of the trial court’s opinion.

The trial court stated:

The fact that the ledger entries evolved from “Vending Commissions” to “Rent” and “Collections” indicates intent to conceal the source of the funds. Indeed, BNP never reported vending revenue on its tax returns.

Memorandum Opinion at 17.

Consistent with Bavis’ affidavit, Balsamo asserts that the trial court did not state that vending revenues were never reported, but rather that they were not reported as vending revenues.

Second, Balsamo asserts that Zorzit was estopped from arguing to the special auditor that he “should receive a credit to his capital account for vending revenue reported on BNP’s tax returns” because he failed to raise this contention at trial, and affirmatively asserted to the trial court that minimal adjustments needed to be made.

Finally, Balsamo argues that permitting Zorzit to retain the proceeds of his illegal activities “is against public policy,” and that he should be barred “from profiting in any manner from such activities.”

None of these arguments are convincing. As to the first, Md. Rule 2-543(h) states in pertinent part (emphasis added):

The exceptions shall be decided on the evidence presented to the auditor unless: (1) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the auditor; and (2) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the auditor to hear the additional evidence and to make appropriate findings or conclusions or the court may hear and consider the additional evidence.

The special auditor was appointed in May of 2015. He finished his report on April 29, 2016 and promptly forwarded copies of it to counsel for the parties. The report was filed under seal in the circuit court on July 6, 2016. In his exceptions filed on August 26, 2016, Balsamo challenged, for the very first time, the special auditor’s conclusion that the trial court had found that BNP “never reported vending revenue on its tax returns” in the relevant years, a conclusion which, as the special auditor noted, was unchallenged by either party in the accounting proceeding.

During the exceptions hearing, the trial court asked Balsamo's counsel to explain why the analysis contained in Bavis's affidavit had not been presented to the special auditor. Counsel was unable to come up with a satisfactory response. In order to consider the Bavis affidavit, the trial court was required to make an affirmative ruling that the new evidence should be considered. Md. Rule 2-543(h). Because the court did not make such a ruling, we conclude that the trial court did not consider the Bavis affidavit. Without the affidavit, there was not a factual basis to grant the exception.

Balsamo's estoppel argument is similarly unavailing because he does not suggest that either he or the court was prejudiced by Zorzit's original contention that no adjustment to the capital accounts was necessary. A showing of prejudice is a requirement for both judicial estoppel, *Gordon v. Posner*, 142 Md. App. 399, 426 (2002), and estoppel by admission. *Eagan v. Calhoun*, 347 Md. 72, 88 (1997).

This brings us to Balsamo's public policy argument. Zorzit has already settled with both the Internal Revenue Service and the Comptroller. Assuming for purposes of analysis that public policy demands some further mulcting, we can think of worthier recipients of the resulting windfall than Balsamo, who was aware of, and acquiesced to, the money laundering scheme.

4. The award of Balsamo's attorney's fees

In his cross-appeal, Zorzit takes the position that the trial court erred in granting Balsamo attorney's fees beyond what is allowed under CA § 4A-804, which governs the allocation of proceeds from a derivative suit. The statute provides:

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court:

- (1) May award the plaintiff reasonable expenses, including reasonable attorney's fees; and
- (2) Shall direct the plaintiff to remit to the limited liability company the remainder of those proceeds.

Zorzit contends that Balsamo was only entitled to recover up to \$191,070.66, the amount of the attorney's fees from the tax lien that Zorzit was ordered to reimburse to BNP. These were the only monetary proceeds of Balsamo's derivative action, and by Zorzit's reading, the "proceeds" referred to in CA § 4A-804 are limited to the cash or other liquid assets recovered as a result of the derivative action. He states that, "[h]ad the Circuit Court correctly interpreted § 4A-804 as limiting an award of attorney's fees to the amount of liquid funds actually recovered through a successful derivative action, Balsamo would be entitled to no more than \$191,070.66 as an award of attorney's fees. Thus, the Court's actual award of \$816,393.43 in attorney's fees to Balsamo was in error, and should be reversed."

In a Memorandum Opinion and Order dated September 22, 2015, the trial court addressed the argument appellant now presents to us. The pertinent part of the opinion stated:

[T]he statute makes it clear that a plaintiff can obtain reasonable attorney's fees and expenses via two alternative routes. The first route is if the plaintiff's derivative action is successful. The second route is if the plaintiff receives anything as a result of a judgment, compromise, or settlement of an action or claim. Had the General Assembly wanted to confine award of attorney's fees and expenses to [derivative] actions that resulted in a monetary award, as is argued by Zorzit, then it would not have used alternative language in the beginning of the statute.

• • • •

When read as a whole, § 4A-804 is clear that a plaintiff need not recover monetary damages to obtain attorney’s fees and expenses. If a derivative action is successful, or if a plaintiff receives anything from bringing an action or a claim, the Court may award the plaintiff expenses and attorney’s fees. After that, the plaintiff must remit the remainder of those proceeds. The ‘proceeds,’ in this context, refers to anything of value received as a result of the lawsuit. If there are no cash proceeds, because the plaintiff recovered equitable remedies, then there is nothing to remit to BNP.

(Citations omitted).

Once again, we adopt Judge Finifter’s analysis.

To this Court, Zorzit argues that *Little v. Cooke*, 247 Va. 697, 717–721 (2007), stands for the contrary. It does not. The issue in *Little* was whether attorney’s fees were to be collected *from* the assets recovered or *in addition to* the assets recovered. 247 Va. at 720-21. *Little* provides no support for Zorzit’s contention.

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY IS AFFIRMED. COSTS TO BE ALLOCATED: 75% TO APPELLANT/CROSS-APPELLEE AND 25% TO APPELLEE/CROSS-APPELLANT.

EXHIBIT A IS ATTACHED.

EXHIBIT A

JOSEPH J. BALSAMO

Plaintiff,

v.

JOHN ZORZIT, et al.

Defendants.

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IN THE

CIRCUIT COURT

FOR

BALTIMORE COUNTY

Case No. 03-C-12-007741

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for trial on June 10, 2014. Steven J. Nolan, Esq. and Robert L. Hanley Jr., Esq. represented Plaintiff Joseph Balsamo (hereinafter "Mr. Balsamo"). Robert S. Brennen, Esq., Todd M. Reinecker, Esq., and Erin M. Maguire, Esq. represented Defendants John Zorzit (hereinafter "Mr. Zorzit"), Norino Properties, LLC (hereinafter "Norino Properties"), and Nick's Amusements, Inc. (hereinafter "Nick's Amusements"). David S. Sellman, Esq. represented Defendant James Parks (hereinafter "Mr. Parks"). After a fifteen-day bench trial, Plaintiff and Defendants submitted Proposed Findings of Fact and Conclusions of Law and responses thereto. For the reasons set-forth below, the relief requested by Plaintiff is GRANTED, in part, and DENIED, in part.

I. BACKGROUND

On November 18, 1998, Mr. Balsamo and Mr. Zorzit formed Balsamo and Norino Properties, LLC (hereinafter "BNP"), as a real estate investment company.¹ Upon its formation, Mr. Balsamo and Mr. Zorzit each owned a 50% membership interest in BNP. Mr. Zorzit is the managing member of BNP.² The parties do not have a written operating agreement. Since its

¹ Joint Ex 1.

² Joint Ex 2.

cc: E. Maguire
R. Hanley
S. Brennen
T. Reinecker

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formation, BNP has acquired over thirty-five properties.³ BNP holds all of its property free and clear of debt.⁴

Both Mr. Balsamo and Mr. Zorzit are involved in businesses other than BNP. In addition to BNP, Mr. Zorzit is the 100% owner of Nick's Amusements, a vending company, and Defendant Norino Properties, a real estate company.

On June 1, 2004, Mr. Zorzit hired Mr. Parks, a certified public accountant, to assist with his companies.⁵ There is a dispute as to whether Mr. Parks is an employee of BNP; however, he regularly performed accounting services for BNP. Mr. Parks' duties included setting up the accounting module for BNP's Quick Books general ledger and maintaining BNP's general ledger.⁶ Mr. Parks also tracked the BNP capital accounts.⁷

Per the parties' Joint Statement Relating to Remaining Defendants and Counts of the Fourth Amended Complaint and the First Amended Complaint of James Parks, the following counts, which the Court has reorganized and re-characterized, remained pending and subject to decision at trial:⁸

³ Pl.'s Fourth Am. Compl. 8–12.

⁴ Trial Tr. 2501, June 27, 2014.

⁵ Trial Tr. 2085, June 25, 2014.

⁶ Trial Tr. 725–26, June 13, 2014.

⁷ Trial Tr. 2139–44, June 25, 2014.

⁸ Counts Eighteen, Nineteen, and Twenty-One are Mr. Balsamo's derivative claims. Count Eighteen and Twenty-One seek the same equitable relief sought in Counts Four and Nine. Similarly, Count Nineteen seeks the same relief as Count Five. Accordingly, the Court will address those claims in the same section. Mr. Balsamo's Proposed Findings of Fact and Conclusions of Law did not address Count Twenty-Two, the derivative count seeking indemnification against Zorzit and Nick's for BNP's benefit. Per Plaintiff's request, Court will treat the claim in that count as having been withdrawn. *See* Pl.'s Proposed Findings of Fact and Conclusions of Law.

1. Counts Three⁹ and Seventeen¹⁰ seeking a declaratory judgment that: (a) certain properties are owned by and for the benefit of BNP; (b) Mr. Parks has no interest in BNP;¹¹ and (c) the Nick's Amusements Agreement, the Norino Properties Agreement, the Nick's Amusements Affirmation, the Norino Properties Affirmation, and the Deferred Compensation Agreement are neither binding nor enforceable;
2. Count Nine, a claim for unjust enrichment;¹²
3. Count Six, a breach of contract action based on Mr. Zorzit's breach of fiduciary duties;¹³
4. Count Five, a negligence claim based on Mr. Zorzit's breach of fiduciary duties;¹⁴
5. Count Sixteen, a claim against Mr. Parks for professional negligence;¹⁵
6. Count One, a claim seeking judicial dissolution of BNP;¹⁶
7. Count Two, a claim seeking judicial winding up of BNP;¹⁷
8. Count Four, a claim seeking the imposition of a Constructive Trust and for an Accounting.¹⁸

⁹ Pl.'s Fourth Am. Compl. 25.

¹⁰ *Id.* at 46.

¹¹ Mr. Parks filed a counter complaint against Mr. Balsamo asserting that he owned a 20% interest in BNP. These are the same issues for the Court to decide and Mr. Parks' counter claim will be discussed in the declaratory judgments section.

¹² Pl.'s Fourth Am. Compl. 32.

¹³ *Id.* at 30.

¹⁴ *Id.* at 29.

¹⁵ *Id.* at 44-45.

¹⁶ *Id.* at 23.

¹⁷ *Id.* at 24.

¹⁸ Pl.'s Fourth Am. Compl. 27.

II. ANALYSIS

1. Declaratory Judgment Counts

A court may grant a declaratory judgment if it will serve to terminate uncertainty or controversy giving rise to the proceeding, and if: (1) an actual controversy exists between contending parties; (2) antagonistic claims are present between the parties involved, which indicate imminent and inevitable litigation; or (3) a party asserts a legal relation, status, or privilege and this is challenged or denied by an adversary party, who also has or asserts a concrete interest in it.¹⁹ A declaratory judgment is remedial and its purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.²⁰ A court may construe a contract and declare the parties' rights.²¹

Counts Three and Seventeen of Mr. Balsamo's Fourth Amended Complaint seek a declaratory judgment that: (1) certain properties are owned by and for the benefit of BNP; (2) Mr. Parks has no interest in BNP; and (3) the Nick's Amusements Agreement, the Norino Properties Agreement, the Nick's Amusements Affirmation, the Norino Affirmation, and the Deferred Compensation Agreement are neither binding nor enforceable.²² There is a justiciable controversy relating to each of these claims.²³

a. BNP is the owner of the Joppa Road Property.

Mr. Balsamo and Mr. Zorzit agree as to the ownership of most of BNP's real property. The sole exception is the property located at 2008-2014 East Joppa Road in Baltimore County,

¹⁹ Md. Code Ann., CTS. & JUD. PROC., § 3-409(a).

²⁰ *Phillips v. Allstate*, 156 Md. App. 729, 737 (2004)

²¹ *Northern Assurance Co. v. EDP Floors*, 311 Md. 217, 223 (1987).

²² Pl.'s Fourth Am. Compl. 25 & 46.

²³ Neither party disputes there is a justiciable controversy as to the Nick's Amusements Agreement or the Norino Properties Agreement.

Maryland (hereinafter “Joppa Road Property”), which has an estimated value of \$3.5 million.²⁴ Mr. Balsamo contends that Norino Properties holds title to the Joppa Road Property solely for the benefit of BNP and BNP owns 100% interest in that property.²⁵ Mr. Zorzit counters, asserting, as legal titleholder, Norino Properties owns 100% interest in the Joppa Road Property.²⁶

In November 1998, Milton Zacharski (hereinafter “Mr. Zacharski”) owned the Joppa Road Property and operated the Carney Crabhouse restaurant.²⁷ At this time, Mr. Zacharski wanted to sell his business as his operational financing fell into default.²⁸ On November 2, 1998, prior to BNP’s formation, Norino Properties entered into a Contract of Sale with Mr. Zacharski.²⁹ The Contract of Sale was subject to the terms of a Management Agreement and Agreement of Sale.³⁰ Essentially, the agreements provided that Norino Properties would purchase the property for five dollars, clear the debt and liens, and pay Mr. Zacharski a continuing stake in the restaurant.³¹

However, Mr. Zacharski did not attend the closing.³² In response, Attorney Donald Mazer (hereinafter “Mr. Mazer”) drafted a letter stating he represented BNP as assignee of Norino Properties, and demanded Mr. Zacharski appear for settlement to transfer title to the business and real estate.³³ Mr. Zacharski still did not appear for settlement.³⁴ As a result, on

²⁴ Trial Tr. 2723, June 30, 2014.

²⁵ Pl.’s Proposed Findings of Fact and Conclusions of Law

²⁶ Def. Norino Properties’ Proposed Findings of Fact and Conclusions of Law 7.

²⁷ Trial Tr. 2580–81, June 27, 2014.

²⁸ *Id.*

²⁹ Def.’s Ex. 306.

³⁰ *Id.*

³¹ Def.’s Exs. 306–08.

³² *See* Pl.’s Ex. 24.

³³ *Id.*

³⁴ *See* Def.’s Ex. 307A.

November 25, 1988, Norino Properties filed a complaint seeking specific performance of the November 2, 1998 agreements.³⁵

On March 12, 1999, Mr. Zacharski filed bankruptcy and the proceedings were stayed.³⁶ On September 15, 1999, Lori Simpson (hereinafter “Ms. Simpson”), Chapter 11 Trustee of Mr. Zacharski’s bankruptcy estate, entered into an Amendment to Contract and Agreement of Sale with Norino Properties (hereinafter “Amended Contract”).³⁷ The Amended Contract stated it replaced the November 2, 1998 agreements in their entirety, except for Section 16.³⁸ The Amended Contract provided for the sale of all of Ms. Simpson’s right, title, and interest in the Joppa Road real property, the improvements thereon, and the liquor license for \$1.2 million.³⁹ Ms. Simpson deeded the Joppa Road Property to Norino Properties on October 29, 1999.⁴⁰ Shortly after the sale, the Carney Crabhouse burned down.⁴¹ Neither Mr. Balsamo nor Mr. Zorzit opened a restaurant. Rather, the property was leased to Imperial Gourmet, Inc.,⁴² followed by Doa Yang Cheng,⁴³ and then Chick-fil-A, Inc.⁴⁴

As titleholder, Norino Properties is presumed to be the owner of the Joppa Road Property.⁴⁵ However, Mr. Zorzit’s narrative regarding the Joppa Road Property is inconsistent

³⁵ *Id.*

³⁶ *See* Case No. 03-C-98-11894.

³⁷ Def.’s Ex 314.

³⁸ *Id.* Section 16 set forth a reservation of rights in the event the court did not approve the Amended Contract.

³⁹ *Id.*

⁴⁰ Def.’s Ex. 315.

⁴¹ Trial Tr. 850, June 16, 2014. \$177,170.19 of the adjusted insurance claim was allocated to the damage to the building and the insurance proceeds were deposited into BNP’s checking account. *See* Pl.’s Ex. 53.

⁴² Pl.’s Ex. 282.

⁴³ Pl.’s Ex. 44.

⁴⁴ Pl.’s Ex. 300.

⁴⁵ *Mountford v. Mountford*, 181 Md. 212, 223 (1942).

with the parties' actions and the credible evidence. Mr. Zorzit contends that, in accordance with his normal practice, he contracted for the real property and the business, put a management agreement in place that would permit him to start running the business immediately, and sold the business while retaining ownership of the real property.⁴⁶ Indeed, bifurcating real estate and business is a common practice.⁴⁷ Accordingly, Mr. Zorzit asserts it was always his plan for Norino Properties to own the real property and for BNP to own and operate the restaurant business.

As previously stated, Ms. Simpson, the trustee for Mr. Zacharski's bankruptcy estate, sold both the real property and the restaurant business for \$1.2 million.⁴⁸ However, there is no evidence Norino Properties ever sold an interest in the restaurant business to BNP. Rather, the evidence shows both Mr. Balsamo and Mr. Zorzit contributed toward the purchase price of \$1.2 million. Mr. Balsamo borrowed \$900,000 from Baltimore Trust Company.⁴⁹ The loan application stated the funds were used to assist in the purchase of commercial property on Joppa Road, Baltimore County, Maryland and was secured by Mr. Balsamo's personally held real property in Delaware.⁵⁰ Mr. Zorzit borrowed \$344,000 from Bank of America and contributed that amount to BNP for the purchase of the Joppa Road Property.⁵¹ BNP's taxes reflect these amounts were treated as member capital contributions.⁵²

⁴⁶ Def. Norino Properties' Proposed Findings of Fact and Conclusions of Law 12.

⁴⁷ Trial Tr. 1942, June 24, 2010.

⁴⁸ Def.'s Ex. 314.

⁴⁹ Pl.'s Ex. 223 & 237.

⁵⁰ *Id.*

⁵¹ Trial Tr. 1549, June 20, 2014.

⁵² *Id.* at 1551-52.

Moreover, in May 2000, Mr. Zorzit, as BNP's managing member, signed a commercial lease which identified BNP as the landlord and Imperial Gourmet as the tenant.⁵³ The leased premises included the land beneath the premises, the parking lot, and the building.⁵⁴ Similarly, in February 2004, Mr. Zorzit, again as BNP's managing member, signed a commercial lease with Dao Yang Cheng, which included the land beneath the premises, parking lot, and building.⁵⁵ Finally, though the ground lease with Chick-fil-A identifies Norino Properties as the landlord, the original lease contains a handwritten notation with the name BNP and BNP's federal tax identification number.⁵⁶ All of the rent received from the Imperial Gourmet lease, the Doa Yang Cheng lease, and the Chick-fil-A lease were deposited into BNP's checking account and recorded on its general ledger.⁵⁷ Further, BNP has paid real estate taxes and water and sewage fees relating to the property.⁵⁸

Mr. Zorzit contends BNP is collecting rent on property it does not own because he has allowed BNP to use the Joppa Road Property since 1999 to recoup its initial investment and receive a reasonable return.⁵⁹ To achieve this goal, and without relinquishing ownership in the real property, Norino Properties entered into an oral lease or assignment of income with BNP.⁶⁰ However, no witness was able to testify as to the terms of the lease and BNP's leasehold interest was never reported on the books as a leasehold interest.⁶¹ Moreover, on March 7, 2007, Mr. Zorzit signed an Owner's Affidavit on behalf of Norino Properties stating:

⁵³ Pl.'s Ex. 282.

⁵⁴ *Id.*

⁵⁵ Pl.'s Ex. 55.

⁵⁶ Pl.'s Ex. 300.

⁵⁷ Joint Ex. 10.

⁵⁸ Joint Ex. 47-60.

⁵⁹ Trial Tr. 2020, June 24, 2014.

⁶⁰ Trial Tr. 1969-70, June 24, 2014.

⁶¹ Trial Tr. 2051-53, June 24, 2014.

That [Norino Properties] and Chick-fil-A, Inc. are in exclusive undisturbed possession of the [Joppa Road Property] and, except for Chick-fil-A, Inc., no other person has possession or any right to possession of the [Joppa Road Property] or any interest therein, and *there are no unrecorded tenancies, leases, or other occupancies* on the [Joppa Road Property] except for the lease between [Norino Properties] and Chick-fil-A, Inc.⁶²

Mr. Zorzit's books and records as well as his previous statements directly contradict his current position.

As of January 1, 2000, BNP recorded the Joppa Road property land and building as an asset on its balance sheet and tax returns.⁶³ There was no allocation relating to the business itself.⁶⁴

In early 2012, Mr. Balsamo, in an effort to retire, approached Mr. Zorzit to divide BNP properties.⁶⁵ In furtherance of this discussion, Mr. Parks, on behalf of Mr. Zorzit, emailed Mr. Balsamo's lawyer a working schedule identifying all of BNP's properties.⁶⁶ Mr. Parks included the Joppa Road Property on the schedule.⁶⁷

Finally, from 2007 to 2013, Norino Properties held title to two properties in Florida.⁶⁸ It is undisputed that, despite Norino Properties having title, BNP was the beneficial owner of those properties.⁶⁹ Norino Properties transferred title to those properties in 2014.⁷⁰ Thus, the Joppa Road property is not the first property in which BNP was the rightful owner, yet Norino Properties held legal title.

⁶² Def.'s Ex. 319 (emphasis added).

⁶³ Trial Tr. 1500–1501, June 19, 2014.

⁶⁴ *Id.*

⁶⁵ Trial Tr. 106, June 10, 2014.

⁶⁶ Pl.'s Ex. 124.

⁶⁷ *Id.*

⁶⁸ Pl.'s Ex. 335–36.

⁶⁹ Trial Tr. 2269–72, June 26, 2014.

⁷⁰ *Id.*

The Court does not find Mr. Zorzit's position credible. Mr. Zorzit's contention that Norino Properties is the rightful owner of the Joppa Road Property is inconsistent with the companies' books and records, his prior statements, and the behavior of the parties. Accordingly, the Court finds BNP has overcome its presumption and is the rightful owner of the Joppa Road Property.

b. Mr. Parks does not have a 20% interest in BNP.

Counts Three and Seventeen of Mr. Balsamo's Fourth Amended Complaint seek a declaration that Mr. Parks has no interest in BNP.⁷¹ Mr. Parks counters that as of January 1, 2009, he is entitled to receive a 20% interest in BNP.

The circumstances surrounding Mr. Parks' employment with BNP are highly contested. However, the uncontroverted evidence establishes Mr. Zorzit and Mr. Parks met through a common friend in 2003.⁷² At that time, Mr. Parks was a practicing public accountant.⁷³ Mr. Zorzit and Mr. Parks had two dinners together wherein they discussed a possible business relationship.⁷⁴ Subsequently, Mr. Parks visited Mr. Zorzit's offices to review his companies' records.⁷⁵ Mr. Parks noticed there was no clear demarcation between BNP and Mr. Zorzit's other companies, as every employee worked for all of the companies.⁷⁶

Mr. Parks contends in April 2004, he had a meeting with Mr. Balsamo and Mr. Zorzit wherein Mr. Balsamo and Mr. Zorzit agreed to offer Mr. Parks participation in the profits after five years of employment.⁷⁷ Mr. Parks testified that after the meeting, the three verbally agreed

⁷¹ Pl.'s Fourth Am. Compl. 46.

⁷² Trial Tr. 2075-76, June 25, 2014.

⁷³ *Id.*

⁷⁴ *Id.* at 2077.

⁷⁵ *Id.* at 2081.

⁷⁶ *Id.* at 2080.

⁷⁷ *Id.* at 2085.

that Mr. Parks would receive 20% of BNP after five years of employment.⁷⁸ Mr. Parks then began working for BNP on June 1, 2004 with no written employment agreement.⁷⁹

According to Mr. Parks, he continued to provide outside accounting services despite his new employment with BNP.⁸⁰ Mr. Zorzit expressed that he did not want Mr. Parks to continue providing outside accounting services and asked him to stop his side work.⁸¹ In consideration, Mr. Zorzit offered Mr. Parks a 20% interest in his other companies.⁸²

Conversely, Mr. Balsamo contends he never agreed that BNP would hire Mr. Parks and that he met Mr. Parks only after Mr. Zorzit hired him.⁸³ Mr. Balsamo did not know BNP was paying Mr. Parks' salary and benefits.⁸⁴ Mr. Balsamo testified he never transferred any part of his ownership interest and he did not promise anyone an interest in BNP.⁸⁵

The Court finds Mr. Zorzit hired Mr. Parks to provide accounting services for all of his companies, including some work for BNP, and that Mr. Zorzit agreed to give Mr. Parks 20% of his ownership interest. To support his position that he is entitled to a 20% interest in BNP, and not just 20% of Mr. Zorzit's 50% interest, Mr. Parks produced an employment letter, which is not signed by Mr. Balsamo. The letter memorialized the terms of the agreement between Mr. Zorzit and Mr. Parks.⁸⁶ The agreement stated that Mr. Parks would be entitled to 20% ownership

⁷⁸ Trial. Tr. 2085, June 25, 2014

⁷⁹ *Id.*

⁸⁰ *Id.* at 2088.

⁸¹ Trial Tr. 2736, June 30, 2014.

⁸² Trial. Tr. 2090–92, June 25, 2014.

⁸³ Trial Tr. 885–87, June 16, 2014.

⁸⁴ *Id.*

⁸⁵ *Id.* at 833.

⁸⁶ Def.'s Ex. 57. Mr. Parks also produced a memorandum he prepared for Mr. Balsamo wherein Mr. Balsamo purportedly signed and agreed to be bound by the terms and conditions of the employment agreement between Mr. Zorzit and Mr. Parks effective June 1, 2014. However, the memorandum did not list any specific terms. *See* Def.'s Ex. 56.

interest in any real property or business investment owned by Mr. Zorzit.⁸⁷ Mr. Parks contends his understanding of “owned by” Mr. Zorzit applied to BNP in its entirety, not just Mr. Zorzit’s portion of BNP.⁸⁸ Finally, Mr. Parks also testified that, after his assistance with the civil forfeiture settlement, Mr. Balsamo, in Mr. Zorzit’s presence, stated Mr. Parks earned his 20%.⁸⁹

The weight of the evidence conflicts with Mr. Parks’ position. Nick’s Amusements issued W-2 Wage and Tax Statements to Mr. Parks for tax years 2004 through 2006.⁹⁰ In 2008, 2009, 2011, and 2012, BNP paid Mr. Parks nonemployee compensation.⁹¹ Although BNP reimbursed Nick’s Amusements and Norino Properties for Mr. Parks’ compensation and benefits, the records show Mr. Parks was not treated as an employee of BNP on its books.

Further, in 2009, Mr. Parks assisted Mr. Zorzit and Mr. Zorzit’s counsel with interrogatory answers propounded in Mr. Zorzit’s divorce. In his answers, Mr. Zorzit stated he owned a 40% interest in BNP, indicating that Mr. Balsamo owned 50% and Mr. Parks owned the remaining 10%. At a deposition for Mr. Zorzit’s divorce, Mr. Parks testified that he owned 10% of BNP and Mr. Balsamo owned 50%.⁹² Additionally, on July 20, 2010, Mr. Parks’ attorney wrote a demand letter to Mr. Zorzit.⁹³ In the letter, Mr. Parks’ attorney stated he was retained in connection with his various claims arising out of a breach of employment contract with Mr.

⁸⁷ Def.’s Ex. 57 (emphasis added).

⁸⁸ Despite Mr. Parks’ contention, this is the same language used in his attorney’s letter to Mr. Zorzit discussed *supra*. In that letter the phrase, “in any real property or business investment owned by Mr. Zorzit” was defined as 10% of BNP. See Pl.’s Ex. 217.

⁸⁹ Trial Tr. 2207, June 25, 2014.

⁹⁰ Pl.’s Ex. 111.

⁹¹ *Id.* BNP reimbursed Nick’s Amusements and Norino Properties for the full amount of Mr. Parks’ salary, totaling \$1,065,800.00 from 2004 to 2012. Mr. Parks argues this was because BNP did not have a payroll set up so he was paid by Nick’s Amusements and Norino Properties but then BNP reimbursed those companies.

⁹² Trial Tr. 718, June 13, 2014.

⁹³ Pl.’s Ex. 217.

Zorzit, Norino Properties, LLC, BNP, and Norino Properties and Construction, Inc.⁹⁴ The letter claims Mr. Parks was entitled to 20% ownership *in any real property or business investment owned by John Zorzit.*⁹⁵ To that end, the letter goes on to state, Mr. Parks is entitled to: “10% interest in [BNP], 10% interest in Norino and Balsamo Properties, LLC...[and] 10% in Warren Road, LLC.”⁹⁶ Finally, the letter states Mr. Parks is entitled to a 20% ownership interest in other companies owned solely by Mr. Zorzit.⁹⁷

Given the lack of documentary evidence and prior inconsistent statements, the Court does not find the testimony of Mr. Zorzit nor Mr. Parks credible. Accordingly, Mr. Parks is not entitled to any percentage of Mr. Balsamo’s ownership in BNP.⁹⁸

c. The Nick’s Amusements Agreement is not enforceable against BNP. The Norino Properties Agreement is binding and enforceable against BNP. There is no justiciable controversy as to the Deferred Compensation Agreement.

In January 2009, the Internal Revenue Service (hereinafter “IRS”) and the Baltimore County Police Department raided numerous locations where Nick’s Amusements placed video poker and fruit machines and where Mr. Zorzit or his affiliated companies owned real property.⁹⁹ The IRS alleged, *inter alia*, Nick’s Amusements funneled illegal gambling proceeds into BNP to “conceal and disguise the nature, location, source, ownership, and control of the gambling proceeds.”¹⁰⁰

⁹⁴ *Id.*

⁹⁵ *Id.* (emphasis added). This is the same language as Def.’s Ex. 57.

⁹⁶ *Id.* (emphasis added). Norino & Balsamo Properties, LLC and 10 Warren Road, LLC are wholly owned by BNP. *See* Trial Tr. 673, June 13, 2014.

⁹⁷ Pl.’s Ex. 217.

⁹⁸ At most, Mr. Parks is entitled to 10% interest in BNP, which is 20% of Mr. Zorzit’s 50% ownership. However, Mr. Parks’ ownership in Mr. Zorzit’s companies is not before the Court as Mr. Parks’ counter claim was against BNP only, and not Mr. Zorzit. As a result, the Court will not make a declaration as to Mr. Parks’ interest in Mr. Zorzit’s ownership.

⁹⁹ Pl.’s Ex. 165.

¹⁰⁰ *Id.*

As a result, a Civil Forfeiture Action was filed against, *inter alia*, BNP's bank accounts and real property (hereinafter "Civil Forfeiture Action").¹⁰¹ On July 16, 2010 a settlement in the Civil Forfeiture Action was reached wherein \$1 million was forfeited to the IRS in exchange for the release of the real property and bank accounts.¹⁰² BNP paid \$91,657.00 toward the settlement.¹⁰³

On April 23, 2010, the Comptroller of Maryland issued an assessment against Nick's Amusements and Mr. Zorzit for failure to remit amusement tax from January 1, 2000 to January 31, 2009 (hereinafter "Tax Lien").¹⁰⁴ The current amount of the Tax Lien is \$5,770,353.18.¹⁰⁵ Mr. Balsamo contends that under the indemnification provision of the Nick's Amusements Agreement, BNP has paid \$191,070.66 in attorney's fees related to the Civil Forfeiture Action and Tax Lien.¹⁰⁶

In May 2009, Norino Properties & Construction, Inc.,¹⁰⁷ BNP, and Mr. Zorzit filed a lawsuit against Julie Zorzit (hereinafter "Ms. Zorzit"), Mr. Zorzit's ex-wife, and Ferrier Stillman, Esquire (hereinafter "Ms. Stillman"), Ms. Zorzit's lawyer (hereinafter "Tydings litigation").¹⁰⁸ The complaint alleges damage to the banking relationship between Bank of America and the Plaintiffs due to allegations of forgery of Ms. Zorzit's signature by Mr. Zorzit on Certificates of

¹⁰¹ Joint Ex. 19.

¹⁰² Pl.'s Ex. 167

¹⁰³ Def.'s Ex. 154.

¹⁰⁴ Trial Tr. 0222-0225, June 11, 2014. Nick's Amusement calculated its tax on the net proceeds rather than the gross.

¹⁰⁵ *Id.* at 230.

¹⁰⁶ Pl.'s Proposed Findings of Fact and Conclusions of Law 8.

¹⁰⁷ Norino Properties & Construction, Inc. is owned 100% by Mr. Zorzit.

¹⁰⁸ Def.'s Ex. 159. The Complaint was amended in September 2010 to include Ms. Stillman. Def.'s Ex. 160.

Deposit that were pledged as collateral to secure credit.¹⁰⁹ BNP was charged \$199,707.49 for the prosecution of the Tydings litigation, which was ultimately dismissed.¹¹⁰

i. Nick's Amusements Agreement

Mr. Zorzit formed Nicks Amusements, a Delaware Corporation, as a vending operation.¹¹¹ Nick's Amusements placed, among other gaming devices, illegal video poker and fruit machines in restaurants and bars.¹¹² Nick's Amusements also made loans to its vending customers.¹¹³

On the same day Mr. Balsamo and Mr. Zorzit formed BNP, Nick's Amusements entered into the following Agreement for Management Services (hereinafter "Nick's Amusements Agreement") which states, in pertinent part:

[Nick's Amusements] will not take responsibility or liability for any tax or related liability arising from any *Video Poker games owned or operated by [BNP]*. Further, [BNP] will reimburse [Nick's Amusements] for any and all taxes, penalties, interest, and costs that arise from any liability from [BNP]'s operations of *Video Poker games* and such amounts to be determined at sole authority and discretion of Nick's Amusements.¹¹⁴

Mr. Zorzit, as managing member of BNP and owner of Nick's Amusements, executed the agreement.¹¹⁵ On November 1, 2010, Nick's Amusements and BNP affirmed the previous agreement.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ Joint Ex. 38–41.

¹¹¹ Def. Nick's Amusements Proposed Findings of Fact and Conclusions of Law 2.

¹¹² Trial Tr. 157, June 10, 2014.

¹¹³ Trial Tr. 2365–66, June 26, 2014.

¹¹⁴ Joint Ex. 3 (emphasis added).

¹¹⁵ *Id.* For the same reasons discussed *infra*, Mr. Zorzit was authorized to execute the agreement on behalf of both parties, it was not the product of self-dealing, and was not a breach of fiduciary duties. See Part (1)(c)(ii) discussion regarding the Norino Properties Agreement.

¹¹⁶ Joint. Ex. 23.

As previously stated, the Court may construe a contract and declare the parties' rights.¹¹⁷ If the language of a contract is unambiguous, the Court gives effect to its plain meaning and does not contemplate what the parties may have subjectively intended by certain terms at the time of formation.¹¹⁸ The Court must give the terms their ordinary meaning.¹¹⁹ A written contract is ambiguous if, when read by a reasonably prudent person, is susceptible of more than one meaning.¹²⁰ If the contract term is ambiguous, the Court may look to extrinsic evidence to resolve the ambiguity.¹²¹ Where one party is responsible for drafting, absent evidence indicating the intention of the parties, any ambiguity is resolved against the drafting party.¹²²

The Nick's Amusements Agreement provides BNP's obligation to indemnify Nick's Amusement must arise out of liability caused by BNP's *ownership or operation of Video Poker games*.¹²³ The terms of this contract are not ambiguous. BNP is only required to indemnify Nick's Amusements for liability arising out of Video Poker games it owns or operates.

Nick's Amusements asserts, prior to forming BNP, Mr. Balsamo and Mr. Zorzit discussed whether they would run their vending business through Nick's Amusements or JAG Vending, Mr. Balsamo's vending business.¹²⁴ Mr. Balsamo and Mr. Zorzit chose Nick's Amusements and the agreement was an acknowledgement of shared liability.¹²⁵ As a result of this agreement, BNP is involved in the vending industry and owns and operates Video Poker games.

¹¹⁷ *Northern Assurance Co.*, 311 Md. at 223.

¹¹⁸ *Cochran v. Norkunas*, 398 Md. 1, 16 (2007).

¹¹⁹ *Mascaro v. Snelling and Snelling of Baltimore, Inc.*, 250 Md. 215, 229 (1968).

¹²⁰ *Heat & Power Corp. v. Air Products & Chemicals, Inc.*, 320 Md. 584, 596 (1990).

¹²¹ *See Calomiris v. Woods*, 353 Md. 425, 437 (1999).

¹²² *Truck Ins. Exch. v. Marks Rentals*, 288 Md. 428, 435 (1980).

¹²³ Joint Ex. 3 (emphasis added).

¹²⁴ Trial Tr. 2387–88, June 26, 2014.

¹²⁵ *Id.*

Nick's Amusements emphasized volumes of BNP ledger pages detailing vending receipts, expenses, and loans.¹²⁶ The ledgers, contemporaneously provided by Mr. Zorzit to Mr. Balsamo reflected weekly deposits by Nick's Amusements of vending proceeds into BNP.¹²⁷ These deposits were reflected on the company ledgers as, "Vending Commissions," "Shore Rent," "Nick's Shore Rent," "Shore Collections," "Jose Collections," "House of Welsh," "Nick's Rent," or "Nick's Collections." Nick's Amusements also provided evidence that Mr. Balsamo requested reimbursement from BNP for his own vending expenses.¹²⁸ The deposits totaled roughly \$1.6 million from November 1998 to January 2009.¹²⁹ Nick's Amusements also provided evidence that Mr. Balsamo collected vending from Nick's Amusements vending stops.

The evidence provided by Mr. Balsamo shows that Mr. Zorzit, via Nick's Amusements, was placing gambling proceeds in his other companies, including BNP. The evidence does not show BNP owned vending machines nor that BNP ran its vending operations through Nick's Amusements. The fact that the ledger entries evolved from "Vending Commissions" to "Rent" and "Collections" indicates intent to conceal the source of the funds. Indeed, BNP never reported vending revenue on its tax returns. Moreover, the deposits into BNP's account are a fraction of Nick's total vending revenue. During the period of the Tax Lien, Nick's Amusements paid \$2,108,590.56 in amusement taxes on vending receipts in Baltimore City and Baltimore

¹²⁶ Joint Ex. 5-12.

¹²⁷ *Id.*

¹²⁸ Def.'s Ex. 133B. In this instance, Mr. Balsamo ordered vending equipment for his personal property, House of Welsh, paid for it through JAG and then made a request that BNP reimburse him.

¹²⁹ Def.'s Ex. 402-03.

County.¹³⁰ At the amusement tax rate of ten percent, Nick's Amusement would have collected revenue of \$21,085,905.60, only \$1.6 million of which was deposited into BNP accounts.¹³¹

The Court finds Mr. Balsamo knew of and accepted money funneled from Nick's Amusements to BNP accounts and that Mr. Balsamo was in the vending business through JAG Vending. However, the Court does not find BNP owns or operates any video poker games as required by the Nick's Amusements Agreement. In fact, the evidence supports that Nick's Amusements, and only Nick's Amusements, actually owned and operated the Video Poker games and that it only used BNP to conceal its illegal gambling proceeds.

Additionally, the Nick's Amusements Agreement requires BNP to indemnify for liability arising out BNP's ownership or operation of *Video Poker games*.¹³² "Video poker games" has a precise meaning in the vending industry. The term is not ambiguous. As previously stated, in addition to video poker games, Nick's Amusements was a full service vending company offering jukeboxes, pool tables, shuffle bowlers, and video games.¹³³ Nick's Amusements also owned and operated illegal fruit machines.¹³⁴ Though payouts on video poker and fruit machines are both illegal, the two games are distinct.¹³⁵ The Tax Lien applied to both video poker and fruit machines.¹³⁶

The Nick's Amusements Agreement unmistakably singles out video poker games as opposed to any other type of vending machine. However, Nick's Amusements did not maintain

¹³⁰ Pl.'s Ex. 196.

¹³¹ Trial Tr. 231–232, June 11, 2014.

¹³² Joint Ex. 3 (emphasis added).

¹³³ Def. Nick's Amusements Proposed Findings of Fact and Conclusions of Law 3.

¹³⁴ Trial Tr. 157, June 10, 2014.

¹³⁵ *Id.* at 175.

¹³⁶ Trial Tr. 226, June 11, 2014.

any records to differentiate the receipts from vending machines on which payouts were made.¹³⁷

The receipts from video poker machines were commingled with all of the other vending receipts.¹³⁸

As a result, Nick's Amusements cannot state what portion, if any, of the taxes assessed by the Comptroller were the result of BNP's alleged operation or ownership of video poker machines as opposed to any other type of vending device or fruit machine.¹³⁹ Without proper records, it is impossible to calculate BNP's indemnification obligation.¹⁴⁰ Accordingly, the Nick's Amusements Agreement is unenforceable against BNP as it relates to the Tax Lien.

ii. Norino Properties Agreement

Also on the same day BNP was formed, Norino Properties entered into an Agreement for Management services with BNP (hereinafter "Norino Properties Agreement").¹⁴¹ On November 1, 2010, Norino Properties and BNP executed an Affirmation of Agreement for Management Services, reaffirming the previous agreement.¹⁴² Both agreements state, in pertinent part:

[Norino Properties] will bill for services at such times as practical, or may choose to have [BNP] pay for such costs directly, whichever is more expedient. In any event, [Norino Properties] will defer collecting payment for amounts owed in order for [BNP] to grow at a reasonable rate.¹⁴³

The Norino Properties Agreement also provides that Norino Properties shall be entitled to 10% of any rents collected under the terms of leasing agreements negotiated while the Agreement

¹³⁷ *Id.* at 229.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Tr. 244, June 11, 2014.

¹⁴¹ Joint Ex. 4.

¹⁴² Joint. Ex. 22.

¹⁴³ Joint Exs. 4 & 22.

remains in place.¹⁴⁴ Though Mr. Balsamo testified that he never saw the original Norino Properties Agreement, he did see the Affirmation of the Norino Properties Agreement executed in 2010.¹⁴⁵

Mr. Zorzit, as managing member of BNP and as owner of Norino Properties executed the agreements.¹⁴⁶ Mr. Balsamo argues that he never authorized the agreements, they are not supported by consideration, and they resulted from Mr. Zorzit's self-dealing and violation of his fiduciary duties.¹⁴⁷ Mr. Balsamo asserts that, as a result of these agreements, BNP has been required to pay 100% of Mr. Parks' salary and attorneys' fees paid in the Civil Forfeiture and the Tydings Litigation. Mr. Balsamo also asserts that, if the agreement is upheld, BNP's potential obligation to Norino Properties is \$1,772,154.00 through December 31, 2013.¹⁴⁸

There is no evidence that any payments BNP made toward Mr. Parks' salary, or any attorney's fees were made pursuant to the Norino Properties Agreement. Indeed, Mr. Zorzit testified he never issued BNP an invoice under the Norino Properties Agreement.¹⁴⁹ However, as Mr. Bavis testified, BNP potentially owes Norino Properties over \$1.7 million as a result of this agreement.¹⁵⁰ As a result, the Court may determine the disputed rights of the parties under the agreement.

¹⁴⁴ *Id.*

¹⁴⁵ Trial Tr. 844, June 16, 2014.

¹⁴⁶ *Id.*

¹⁴⁷ Pl.'s Proposed Findings of Fact and Conclusions of Law 52.

¹⁴⁸ Trial Tr. 1601, June 20, 2014.

¹⁴⁹ Trial Tr. 2391, June 26, 2014.

¹⁵⁰ Trial Tr. 1601, June 20, 2014.

An LLC's members owe the LLC common law fiduciary duties of loyalty and care.¹⁵¹ Self-dealing is an action taken by a corporate fiduciary done for personal gain, rather than for benefit of the corporation.¹⁵²

Contemporaneous with filing BNP's Articles of Organization, Mr. Balsamo and Mr. Zorzit executed the "Actions of Members at Initial Organizational Meeting" wherein Mr. Balsamo and Mr. Zorzit designated Mr. Zorzit to serve as BNP's managing member.¹⁵³ Pursuant to the agreement, Mr. Balsamo granted Mr. Zorzit the sole authority to: (1) manage the business and property of the company; (2) sign and execute all authorized deeds, mortgages, bonds, contracts or other instruments; (3) designate financial institutions and determine authorized signatories for accounts held at such institutions; (4) incur debts or liabilities; (5) sell or exchange BNP's assets; (6) relocate the company's principal place of business; (7) offer and compromise any amounts owed to the company; (8) appoint persons to act as representatives of BNP; (9) maintain BNP's books and records; and (10) take any other action and make any other decision that is required for BNP to conduct business.¹⁵⁴ It is undisputed that BNP's offices have been housed in Norino Properties and that Norino Properties has provided overhead and administrative support services to BNP since 1998.¹⁵⁵ Norino Properties has never billed or sought to bill BNP for these services.¹⁵⁶

Pursuant to the powers Mr. Balsamo granted Mr. Zorzit as managing member, Mr. Zorzit was authorized to enter into the Norino Properties Agreement. As a real estate business, BNP

¹⁵¹ *Ebenezer United Methodist Church v. Riverwalk Development Phase II, LLC*, 205 Md. App. 496, 501 (2012).

¹⁵² *See Ebenezer United Methodist Church*, 205 Md. App. at 503.

¹⁵³ Joint Ex. 2.

¹⁵⁴ *Id.*

¹⁵⁵ Trial Tr. 2381, June 26, 2014.

¹⁵⁶ Trial Tr. 2390–91, June 26, 2014.

needed office space, utilities, office supplies, and personnel. As managing member, Mr. Zorzit was entitled to enter into contracts necessary for BNP to conduct its business. Indeed, Mr. Balsamo acquiesced and accepted the benefits of the Norino Properties Agreement for over a decade without objecting to it. Mr. Balsamo does not dispute that Norino Properties provided services to BNP. Norino Properties is entitled to compensation for those services. There is no evidence that Mr. Zorzit nor Norino Properties benefited at the expense of BNP as a result of the Norino Properties Agreement. Rather, the evidence shows BNP received an extensive benefit without being billed for the services it received. As a result, the Norino Properties Agreement is enforceable against BNP as it is supported by ample consideration and not the product of self-dealing or breach of Mr. Zorzit's fiduciary duties. Accordingly, the relief sought by Plaintiff is denied.

iii. Deferred Compensation Agreement

On November 1, 2010, Mr. Zorzit, as managing member of BNP, executed a Memorandum of Understanding Deferred Compensation Agreement for Managing Member Services (hereinafter "Deferred Compensation Agreement").¹⁵⁷ Under the Deferred Compensation Agreement, Mr. Zorzit was due compensation based on rental income generated by BNP and the net book value of BNP determined on an annual basis.¹⁵⁸

Mr. Balsamo seeks a declaration that the Deferred Compensation Agreement is unenforceable. However, on the eve of trial, Mr. Zorzit revoked the Deferred Compensation Agreement because it was impossible to determine with reasonable certainty what amount would be owed to him.¹⁵⁹ As a result, there is no requisite justiciable controversy because the

¹⁵⁷ Pl.'s Ex. 15.

¹⁵⁸ *Id.*

¹⁵⁹ Trial Tr. 286-87, June 11, 2014.

agreement is no longer in effect. Accordingly, the Court will not enter a Declaratory Judgment as it relates to the Deferred Compensation Agreement.

2. Unjust Enrichment

Count Nine of Mr. Balsamo's Fourth Amended Complaint is a claim against all Defendants for unjust enrichment.¹⁶⁰ Mr. Balsamo bases his assertion on the following: (a) BNP's payments to Nick's Amusements in reimbursement of Mr. Parks' compensation; (b) BNP's payment of attorney's fees and expenses in the Tydings litigation; (c) BNP's payment of attorney's fees and expenses related to the Civil Forfeiture Action; and (d) BNP's payment of attorney's fees and expenses in connection with the Tax Lien.¹⁶¹ Mr. Balsamo asserts that, rather than using his own funds to prosecute or defend actions in which BNP had no legitimate interest, Mr. Zorzit misused BNP's funds for his own benefit with full knowledge he was doing so.¹⁶²

Mr. Balsamo must establish three elements to succeed on an unjust enrichment claim: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of that benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the

¹⁶⁰ Pl.'s Fourth Am. Compl. at 32.

¹⁶¹ Pl.'s Proposed Findings of Fact and Conclusions of Law 69–72. Def. John Zorzit included Mr. Balsamo's claim for unjust enrichment regarding BNP's payment of attorney's fees and expenses in defense of the instant litigation. See Def. John Zorzit's Proposed Findings of Fact and Conclusions of Law 41. However, Mr. Balsamo did not include this claim in his Proposed Findings of Fact and Conclusions of Law. He also did not explicitly waive this claim. In any event, the Court finds Mr. Zorzit is entitled to indemnification in connection with litigation arising out of his service to BNP. See Md. Code Ann., CORPS & ASS'NS, § 2-418; *Kramer v. Liberty Property Trust*, 408, Md. 1 (2009); *Constantini v. Swiss Farm Stores Acquisition, LLC*, 2013 WL 4758228 (Del. Ch. Sept. 5, 2013)(extending the same rights of corporate indemnification to members of an LLC). Thus, Mr. Zorzit was not unjustly enriched at the expense of Mr. Balsamo as a result of BNP paying the costs of Mr. Zorzit's defense of this litigation.

¹⁶² *Id.* at 72.

payment of its value.¹⁶³ The plaintiff must show not only that the defendant was enriched, but also that enrichment was so unjust that considerations of natural justice and equity require a recovery by the plaintiff.¹⁶⁴

a. Mr. Balsamo's unjust enrichment claim as it relates to Mr. Parks' compensation is barred by the statute of limitations.

A civil action, such as the claim for unjust enrichment *sub judice*, must be filed within three years from the date the cause of action accrues.¹⁶⁵ Statutes of limitations are intended simultaneously to provide adequate time for diligent plaintiffs to file suit and to grant repose to defendants when plaintiffs have tarried for an unreasonable period of time.¹⁶⁶ In general, the cause of action accrues when the plaintiff knows or should know of the potential claim.¹⁶⁷ In essence, the plaintiff is put on inquiry notice when it possesses facts sufficient to cause a reasonable person to investigate further, and that a diligent investigation would have revealed that the plaintiff was the victim of the alleged wrong.¹⁶⁸

There is overwhelming evidence that Mr. Zorzit disclosed to Mr. Balsamo that BNP was reimbursing Mr. Parks' salary and compensation beginning in June 2004. Mr. Zorzit provided volumes of BNP ledgers showing weekly payments of \$2,000 for the reimbursement of Mr. Parks' salary.¹⁶⁹ Mr. Zorzit contemporaneously provided the ledgers to Mr. Balsamo. As early as June 2004, Mr. Balsamo either knew or should have known BNP was paying Mr. Parks'

¹⁶³ *Cnty. Comm'rs. of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83 n.7 (2000).

¹⁶⁴ *Mass Transit Admin. v. Granite Constr. Co.*, 57 Md. App. 766, 773-74 (1984).

¹⁶⁵ Md. Code Ann., CTS. & JUD. PROC. § 5-101; *Ver Brycke v. Ver Bryke*, 379 Md. 669, 696 (2004).

¹⁶⁶ *Doe v. Maskell*, 342 Md. 684 (1999).

¹⁶⁷ *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 167.

¹⁶⁸ *Id.* at 167-68.

¹⁶⁹ Joint Exs. 10-12.

salary – well before 2009. The Court does not accept Mr. Balsamo’s testimony that he did not know BNP was paying Mr. Parks’ salary. Thus, Mr. Balsamo’s claim is barred by the statute of limitations. Accordingly, the relief Mr. Balsamo seeks as it relates to the unjust enrichment of Mr. Parks’ compensation is denied.

b. The Tydings Litigation

Mr. Balsamo contends Mr. Zorzit was unjustly enriched because BNP was charged \$199,707.49 for the prosecution of the Tydings litigation.¹⁷⁰ Mr. Zorzit responds, arguing his pursuit of claims on behalf of BNP was the result of reasonable business judgment.¹⁷¹

Though Maryland case law on LLCs and the business judgment rule is thus far silent, Maryland cases regarding corporations are instructive.¹⁷² The business judgment rule presumes:

[T]hat in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.¹⁷³

However, corporate fiduciaries may not invoke the business judgment rule if they breach their fiduciary duties.¹⁷⁴ For the reasons set-forth *supra*, the Court does not find Mr. Zorzit, as managing member of BNP, breached his fiduciary duties through self-dealing. As a result, Mr. Balsamo must make a showing Mr. Zorzit abused his discretion by involving BNP in the Tydings litigation.

¹⁷⁰ Pl.’s Proposed Findings of Fact and Conclusions of Law 12.

¹⁷¹ Def. John Zorzit’s Proposed Findings of Fact and Conclusions of Law 40.

¹⁷² Like corporate directors, managing members of LLC’s owe common law fiduciary duties to the LLC. See *Wasserman v. Kay*, 197 Md. App. 586, 616 (2011).

¹⁷³ *Boland v. Boland*, 423 Md. 296, 328 (2011).

¹⁷⁴ *Id.* at 329.

The parties agree that, prior to 2009, BNP, like all of Mr. Zorzit's companies, had a good banking relationship with Bank of America. Mr. Balsamo contends Mr. Zorzit abused his discretion by including BNP as a plaintiff in the Tydings litigation because the Civil Forfeiture Action, not Ms. Zorzit's counsel's allegations of forgery, caused the decline of the banking relationship.¹⁷⁵ Further, Mr. Balsamo argues there is no evidence BNP's banking relationship with Bank of America suffered as a result of Ms. Zorzit's allegations.¹⁷⁶ In support of his position, Mr. Balsamo produced Bank of America's Notice of Default, which the bank issued on April 23, 2009.¹⁷⁷ The Notice of Default was addressed to Norino Properties, Nick's Amusements, Norino Management, LLC, and Norino Properties and Construction, Inc.¹⁷⁸ As a result of the default, Bank of America placed an administrative hold on certain accounts.¹⁷⁹ The notice of the administrative hold was not sent to BNP.¹⁸⁰

Mr. Zorzit contends the good business relationship ended when Ms. Stillman sent a letter to Bank of America suggesting that Mr. Zorzit forged Ms. Zorzit's signature on four Assignments of Deposit Account for a Cash Secured Letter of Credit.¹⁸¹ In April 2009, Bank of America gave notice that it would not be extending letters of credit that it had issued to serve as security in connection with Norino Properties & Construction's development of the lots located at 12312 Greenspring Avenue in Baltimore, Maryland (hereinafter "Porter Property").¹⁸²

¹⁷⁵ Pl.'s Proposed Findings of Fact and Conclusion of Law 12.

¹⁷⁶ *Id.*

¹⁷⁷ Pl.'s Ex. 339.

¹⁷⁸ *Id.*

¹⁷⁹ Pl.'s Ex. 340.

¹⁸⁰ *Id.*

¹⁸¹ Def.'s Ex. 163.

¹⁸² Def.'s Ex. 167. Mr. Balsamo asserts in his Fourth Amended Complaint that the Porter Property is titled in the name of Norino Properties & Construction, Inc., which is a nominee for the *benefit of BNP*. Pl.'s Fourth Am. Comp. 12 (emphasis added).

Mr. Balsamo produced evidence that Mr. Zorzit's banking relationship suffered as a result of the Civil Forfeiture Action; however, he did not produce sufficient evidence Mr. Zorzit acted unreasonably when he included BNP as a plaintiff in the Tydings litigation. Whether the banking relationship was damaged more by the Civil Forfeiture Action than by Ms. Stillman's alleged wrongful actions is irrelevant. As evidenced by filing the Complaint, Mr. Zorzit had a good faith belief that Ms. Stillman's accusations caused damage to BNP. Indeed, BNP would no longer receive the benefit of developing the Porter Property. It is immaterial that the prosecution of the case was unsuccessful. As a result, Mr. Balsamo did not meet his burden proving Mr. Zorzit abused his discretion. Accordingly, the unjust enrichment claim sought by Mr. Balsamo as it relates to the Tydings litigation is denied.

c. The Civil Forfeiture Action

On January 27, 2009, the federal government initiated a forfeiture action against five properties owned by BNP worth in excess of \$6.5 million and three BNP Bank of America accounts holding \$141,657.50.¹⁸³ The Civil Forfeiture Action was eventually settled for \$1 million. BNP paid \$91,657.50 toward the settlement. The BNP properties and bank accounts were released as a result of the settlement.¹⁸⁴

The volumes of BNP ledgers reflecting the deposit of vending proceeds indicate Mr. Balsamo knew and acquiesced to Nick's Amusements using BNP to launder its illegal gambling revenue. Mr. Balsamo also accepted the benefits of the vending proceeds. Certainly, Mr. Balsamo knew there were ramifications to these actions. Mr. Zorzit's decision to retain legal counsel to negotiate a settlement and defend BNP's property was reasonable. BNP paid

¹⁸³ Joint Ex. 19.

¹⁸⁴ Def.'s Ex. 155.

\$91,657.50 to receive the benefit of having the IRS release its property and bank accounts. Thus, neither Mr. Zorzit, nor any of his companies, were unjustly enriched at the expense of BNP as a result of the Civil Forfeiture Action.

d. The Tax Lien

Pursuant to the Nick's Amusements Agreement, BNP paid at least \$191,070.66 in attorney's fees related to the Tax Lien.¹⁸⁵ As previously stated, the Nick's Amusements Agreement is unenforceable and BNP is not responsible for indemnifying Nick's Amusements for those attorney's fees.¹⁸⁶ Unlike the Civil Forfeiture Action, BNP did not have any of its property or assets frozen as a result of the Tax Lien. Nick's Amusements and Mr. Zorzit are liable for Nick's Amusements' failure to remit the proper taxes. BNP received no benefit from paying to defend this action. As a result, the Court finds Mr. Balsamo, as 50% owner of BNP, conferred a benefit upon Mr. Zorzit, as 100% owner of Nick's Amusements, that Mr. Zorzit knew or appreciated the benefit, and that it is unjust for Mr. Zorzit to retain the benefit. Accordingly, Nick's Amusements must refund the benefit it received from BNP as it relates to the Tax Lien in the amount of \$191,070.66.

3. Breach of Contract

Mr. Balsamo contends Mr. Zorzit breached his agreement to manage and operate BNP as a lawful business enterprise for their mutual benefit by breaching his fiduciary duties relating to Mr. Parks' Compensation, the Tydings Litigation, the Civil Forfeiture Action, and the Tax Lien.¹⁸⁷

¹⁸⁵ Joint Exs. 39–42.

¹⁸⁶ See Part (II)(1)(c)(i).

¹⁸⁷ Pl.'s Proposed Findings of Fact and Conclusions of Law 70.

a. Mr. Parks' Compensation

For the reasons stated in Part (II)(2)(a), Mr. Balsamo's claim relating to Mr. Parks Compensation is barred by the three-year statute of limitations.¹⁸⁸ Accordingly, the relief sought by Mr. Balsamo related to this claim is denied.

b. The Tydings Litigation

For the reasons stated in Part (II)(2)(b), Mr. Zorzit acted reasonably in his decision to include BNP in the Tydings litigation and he did not breach his fiduciary duties.¹⁸⁹ Accordingly, the relief sought by Mr. Balsamo related to this claim is denied.

c. The Civil Forfeiture Action

For the reasons stated in Part (II)(2)(c), Mr. Zorzit did not breach his fiduciary duties regarding BNP's involvement in paying legal fees associated with the Civil Forfeiture Action.¹⁹⁰ Accordingly, the relief sought by Mr. Balsamo relating to this claim is denied.

d. The Tax Lien

As previously stated, Mr. Zorzit, as managing member of BNP had authority to enter into the Nick's Amusements Agreement. The Court finds that Mr. Zorzit's attempt to reimburse Nick's Amusements pursuant to the Agreement was based on his reasonable belief that the contract was enforceable. Accordingly, Mr. Zorzit did not breach his agreement to manage and operate BNP the parties' mutual benefit.

¹⁸⁸ See Part (II)(2)(a). Breach of Contract has a three year statute of limitations. Md. Code Ann., CTS. & JUD. PROC. § 5-101.

¹⁸⁹ See Part (II)(2)(b)

¹⁹⁰ See Part (II)(2)(c).

4. Negligence

Mr. Balsamo also contends Mr. Zorzit negligently breached his fiduciary duties of loyalty, care, and to his duty to maximize BNP's properties and assets when he engaged in negligent and reckless conduct relating to Mr. Parks' Compensation, the Tydings Litigation, the Civil Forfeiture Action, and the Tax Lien.¹⁹¹

a. Mr. Parks' Compensation

For the reasons stated in Part (II)(2)(a), Mr. Balsamo's claim relating to Mr. Parks Compensation is barred by the three-year statute of limitations.¹⁹² Accordingly, the relief sought by Mr. Balsamo related to this claim is denied.

b. The Tydings Litigation

For the reasons stated in Part (II)(2)(b), Mr. Zorzit acted reasonably in his decision to include BNP as a plaintiff in the Tydings litigation and he did not breach his fiduciary duties.¹⁹³ Accordingly, the relief sought by Mr. Balsamo related to this claim is denied.

c. The Civil Forfeiture Action

For the reasons stated in Part (II)(2)(c), Mr. Zorzit acted reasonably regarding BNP's payment of legal fees associated with the Civil Forfeiture Action.¹⁹⁴ Accordingly, the relief sought by Mr. Balsamo relating to this claim is denied.

d. The Tax Lien.

As previously stated, Mr. Zorzit, as managing member of BNP had authority to enter into the Nick's Amusements Agreement. The Court finds that Mr. Zorzit's attempt to reimburse Nick's

¹⁹¹ Pl.'s Proposed Findings of Fact and Conclusions of Law 69.

¹⁹² See Part (II)(2)(a).

¹⁹³ See Part (II)(2)(b).

¹⁹⁴ See Part (II)(2)(c). Negligence has a three year statute of limitations. Md. Code Ann., CTS. & JUD. PROC. § 5-101.

Amusements pursuant to the Agreement was based on his reasonable belief that the contract was enforceable. Accordingly, Mr. Zorzit did not negligently breach his fiduciary duties.

5. Mr. Balsamo's professional negligence claim against Mr. Parks fails because Mr. Balsamo failed to prove damages, an essential element of his claim.

Count Sixteen of Mr. Balsamo's Fourth Amended Complaint is a derivative action seeking damages arising from the professional negligence of Mr. Parks. Although there is disagreement as to whether Mr. Parks was a BNP employee, from 2004 to present, Mr. Parks regularly performed accounting services for BNP, including maintaining BNP's general ledger and providing information to BNP's outside accountant, Sidney Friedman.¹⁹⁵ From 2005 to Present, Mr. Parks has also prepared his own "notional" schedules to track changes in the member's capital accounts.¹⁹⁶

Mr. Balsamo contends Mr. Parks' negligent maintenance of BNP's books and records and fraudulent conduct caused BNP to incur expenses that it would not otherwise have to incur.¹⁹⁷ Mr. Parks argues, *inter alia*, Mr. Balsamo's claims failed to prove the requisite elements for a professional negligence claim.

In support of Mr. Balsamo's assertions, Mr. Bavis opined as to three failures of Mr. Parks. Specifically, Mr. Bavis stated:

One is there were entries made in BNP's general ledgers, specifically we have seen entries that were categorized as distributions to Mr. Balsamo and Mr. Parks, where in fact those distributions were used to pay legal fees for Mr. Zorzit. Mr. Parks testified when questioned about those entries, that at the time Mr. Zorzit was going through a divorce and Mr. Zorzit did not want to

¹⁹⁵ Trial Tr. 725–26, June 13, 2014. Mr. Friedman also tracked member capital accounts from 1998 to 2004.

¹⁹⁶ Trial Tr. 2139–44, June 25, 214.

¹⁹⁷ Pl.'s Proposed Findings of Fact and Conclusions of Law 73. Mr. Balsamo admits that an accounting is required to ascertain a complete picture of the damages. *Id.*

show income so, consequently, they were treating these that way. So essentially Mr. Parks had knowledge that he was making false entries in, in the books and records of BNP, is one of the reasons in my opinion. Secondly, there, I believe, there's been testimony relative to a number of instances where loan documents had been created, which, among other things, reflected security in the form of assets belonging to BNP. Mr. Parks, it was clear to me, that Mr. Parks had knowledge of, of the BNP assets being exposed in, in this way, in that he notarized those documents, which would be inconsistent, I believe, in, in regards to the responsibilities he owed to BNP. Thirdly, the fact that there has not been adequate books and records maintained for BNP necessitating, in my view, an accounting, would also cause me to conclude that Mr. Parks has not fully fulfilled his commitment to BNP as a CPA.¹⁹⁸

Mr. Balsamo presented evidence that, Mr. Parks, in an effort to reduce Mr. Zorzit's net worth during his divorce, assisted in creating promissory notes evidencing loans purportedly made by Mr. Parks and Mr. Balsamo to Mr. Zorzit.¹⁹⁹ Mr. Parks erroneously identified these loans as distributions.²⁰⁰ Mr. Parks also notarized two indemnity deeds of trust evidencing purported loans made by Mr. Zorzit of \$10 million and \$120,000.00, which were secured by real property belonging to BNP.²⁰¹ In December 2010, Mr. Parks falsely notarized Release Indemnity Deed of Trusts which related to BNP property that was used to secure Mr. Zorzit's purported loans.

Mr. Balsamo presented evidence that information relating to BNP's business transactions as recorded in its general ledger, tax returns, and other financial records have not been consistently reported. For instance, in 2007, Mr. Parks, in his "notional" schedule used to track members' capital accounts, increased Mr. Zorzit's capital account and decreased Mr. Balsamo's capital

¹⁹⁸ Trial Tr. 1591, June 20, 2014.

¹⁹⁹ Trial Tr. 2238-41, June 24, 2014.

²⁰⁰ *Id.*

²⁰¹ Trial Tr. 1591-92, June 20, 2014.

account by \$200,000.²⁰² Further, in 2009, Mr. Zorzit was given credit for \$1,522,423, when \$732,959 of the increase was carried in BNP's books as a loan receivable.²⁰³ Mr. Zorzit's credit was ultimately decreased to zero in 2013.²⁰⁴

However, at trial the following exchange occurred between Mr. Balsamo's counsel and Mr. Bavis:

Mr. Nolan: Now, Mr. Bavis, based upon your analysis of BNP's records and transactions and the deposition testimony and other testimony in this case, and based also on your education, experience, and training, do you have an opinion to a reasonable degree of probability in the field of accounting as to the effect, if any, Mr. Parks' departure from the standard of care has had and will have on BNP?

Mr. Bavis: Well, relative to the, to the, to the first two events that I described, the records and books. Books and records, I'm sorry, the recording of the books and records and the exposure to, to BNP's, of BNP's assets, I'm not aware of any direct damages that have resulted from that. In regards to the, the accounting, the failure to, to have an adequate accounting has, in fact, caused significant professional fees to be incurred at this point in time and if the Court were to determine then that an accounting is to be provided, would also be a substantial contributor to that requirement for an accounting.²⁰⁵

To establish a cause of action for professional malpractice, Mr. Balsamo must prove, by a preponderance of the evidence, the following elements: (1) Mr. Parks owed a duty to Mr. Balsamo; (2) Mr. Parks breached that duty; (3) there is a causal relationship between that breach and the harm; (4) the breach caused damages.²⁰⁶ The standard of care required is that of a

²⁰² *Id.* at 1559–60

²⁰³ Trial Tr. 1561–1562, June 20, 2014.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1592–93.

²⁰⁶ *Walpert, Smullian, & Blumenthal, P.A. v. Katz*, 361 Md. 645, 655 (2000).

similarly situated and reasonably competent accountant.²⁰⁷ It is well settled, and undisputed by the parties, that actual damages are a prerequisite for liability in negligence cases.²⁰⁸

As previously stated, Mr. Bavis, Mr. Balsamo's expert in forensic accounting, stated that he was not aware of any direct damages as a result of Mr. Parks' maintenance of BNP's books and records and his exposing BNP to liability by preparing loans secured by BNP property.²⁰⁹ Thus, through his expert's admission, Mr. Balsamo has failed to prove all the elements of a professional negligence relative to those claims.

The issue left for the Court to resolve is whether Mr. Parks' maintenance of BNP's capital accounts constituted professional negligence. The crux of Mr. Bavis' opinion was that discrepancies exist between BNP's income tax returns and Mr. Parks' "notional" schedules used to track member capital accounts, which led to an improper calculation of member distributions.²¹⁰

Mr. Bavis spent significant time, both in his work preparing for the trial and during his testimony, presenting evidence as to the inconsistencies regarding BNP's capital accounts. However, Mr. Bavis could not and did not opine as to the correct member capital accounts. Indeed, Mr. Bavis stated, in his opinion, that a reconstruction of BNP's books and records was required to determine the correct status of the member capital accounts. Mr. Bavis further stated that a reconstruction was possible by recreating the cash receipts and cash disbursements.²¹¹

²⁰⁷ *Shofer v. Stuart Hack, Co.*, 142 Md. App. 516, 529 (1999).

²⁰⁸ *Id.*; *Peroti v. Williams*, 258 Md. 663, 670 (1970) (applying negligence standard in a personal injury case)

²⁰⁹ Trial Tr. 1592–93, June 20, 2014.

²¹⁰ *See id.*

²¹¹ *Id.* at 1573.

However, Mr. Bavis did not reconstruct BNP's books and records.²¹² Thus, he was unable state an opinion as to the proper calculation of the capital accounts or as to a specific amount of credit Mr. Balsamo should have received in his capital account.

Moreover, the remaining allegation of damages suffered by Mr. Balsamo was the significant professional fees and, if the Court were to require an accounting, further professional fees.²¹³ Indeed, Mr. Balsamo urges the Court to make a determination of damages only after the accounting has been completed.²¹⁴

Mr. Balsamo has failed to prove that Mr. Parks' maintenance of BNP's books and records has caused him specific damages or has resulted in a miscalculated capital account. The Court will not speculate as to the proper amount of damages. Mr. Balsamo has failed to provide, nor is the Court aware of, any authority that allows the Court to determine damages in a professional negligence case after a post-judgment accounting is completed. Moreover, the Court has no evidence that the capital accounts are actually miscalculated, only that there are discrepancies. Accordingly, the relief sought by Mr. Balsamo in Count 16 of his Fourth Amended Complaint is denied.

6. BNP should not be dissolved because it is reasonably practicable to carry on the business in conformity with the articles of organization.

“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

²¹² Trial Tr. 1660, June 20, 2014. Mr. Bavis stated: “To be clear, I have not reconstructed, I have not provided an accounting. I believe one should be provided but that’s not what I was asked to do, that’s not what I’ve done.” *Id.*

²¹³ *Id.* at 1592–93. Mr. Bavis did not provide an estimate of further professional fees.

²¹⁴ Pl.’s Proposed Order 7.

conformity with the articles of organization or the operating agreement.”²¹⁵ Mr. Balsamo alleges it is impracticable for BNP to carry on its business because Mr. Zorzit encumbered BNP assets for his personal benefit and engaged in self-dealing and fraudulent conduct, leading to deadlock between the members.²¹⁶ Specifically, Mr. Balsamo contends the BNP members are deadlocked with regard to whether Mr. Zorzit is the ultimate decision maker in BNP; whether Norino Properties owns the beneficial interest in the Joppa Road Property; whether BNP is obligated under the Nick’s Amusements and Norino Properties agreements; whether Mr. Parks is entitled to an interest in BNP; whether Mr. Zorzit is owed money under the deferred compensation agreement; and, finally, the status of the members’ capital accounts.²¹⁷ Mr. Zorzit counters that BNP is fully capable and able to carry on business in conformity with its articles of organization, the actions of its members at the initial organization meeting, and the affirmation of the actions of the members at the initial organizational meeting.²¹⁸

Maryland case law is thus far silent on the precise definition of the “not reasonably practicable to carry on business” requirement of judicial dissolution. However, Maryland courts often look to Delaware law for guidance.²¹⁹ Indeed, Maryland and Delaware have virtually identical statutes governing the judicial dissolution of an LLC.²²⁰ To warrant dissolution,

²¹⁵ Md. Code Ann., CORPS. & ASS'NS § 4A-903.

²¹⁶ Pl.’s Fourth Am. Compl. 23.

²¹⁷ Pl.’s Proposed Findings of Fact and Conclusions of Law 58. Mr. Balsamo also asserts he desires to retire and, as a result, he has sought to divide BNP’s properties and assets. However, Mr. Balsamo is unable to effectively retire if BNP is not dissolved. *Id.* at 43.

²¹⁸ Def. John Zorzit’s Proposed Findings and Fact and Conclusions of Law 4.

²¹⁹ See *Werbowsky v. Collomb*, 362 Md. 581, 593 (2001) (applying Delaware corporate law in a shareholder derivative action). Mr. Balsamo and Mr. Zorzit rely heavily on Delaware corporate law. See Pl.’s Proposed Findings of Fact and Conclusions of Law 55–58; see Def.’s Proposed Findings of Fact and Conclusions of Law 29–31.

²²⁰ DEL. CODE ANN. tit. 6 § 18-802. Delaware’s LLC statute provides: “[o]n application by or for a member or manager the Court of Chancery may decree dissolution of a [LLC] whenever it is not reasonably practicable to carry on business in conformity with a [LLC] agreement.” *Id.*

Delaware courts have held the disagreement between LLC members must be such that it is practically and financially unfeasible for the company to operate in conformity with its stated purpose.²²¹

In *Haley*, the Court considered several factors when it determined a deadlock between two 50% members of an LLC necessitated judicial dissolution.²²² First, the Court considered that the LLC's members, Haley and Talcott, were equal, 50% members.²²³ Haley and Talcott intended to engage in a joint venture for their mutual benefit, combining their skills, property, and knowledge to actively manage the business.²²⁴ Finally, the LLC agreement provided: "no member/managers may, without the agreement of a majority vote of the managers' interest, act on behalf of the company."²²⁵ Acts of the company expressly included:

[B]orrowing money in the company name; using company property as collateral; binding the company to any obligation such as a guarantor or surety; selling, mortgaging or encumbering any personal or real property of the company except for business purposes for proper consideration; lending company funds; contracting for any debt except for a proper company purpose; and drawing checks on the company account in excess of \$5,000.²²⁶

Most importantly, the Court noted, because Haley never agreed to be a passive investor in the LLC who would be subject to Talcott's unilateral dominion, no important action of the LLC could be taken without Haley's approval.²²⁷ Essentially, the company could take almost no

²²¹ See *Vila v. BVWebTies*, 2010 WL 3866098 (Del. Ch. Oct. 1, 2010)); *Frisk Ventures, LLC v. Segal*, 2009 WL 73957 (Del. Ch. Jan. 13, 2009); *In re Arrow Investment Advisors, LLC*, 2009 WL 1101682 (Del. Ch. Apr. 23, 2009); *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004).

²²² *Haley*, 864 A.2d at 94. The LLC Agreement contained an exit provision. However, the provision would have left Haley liable for the debt of an entity, of which he had no further control. As a result, the exit provision was not an adequate remedy and the Court had to determine whether judicial dissolution was proper. *Id.* at 88.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 95.

²²⁶ *Id.*

²²⁷ *Haley*, 864 A.2d at 95.

action without unanimous agreement from the members. Thus, conflict regarding business strategy and the future of the LLC constituted a deadlock, which necessitated a judicial dissolution.

In *Frisk Ventures, LLC*, the two members, Frisk Ventures, LLC and Segal, were each entitled to appoint two representatives to a four-person board.²²⁸ However, the LLC Agreement required approval of at least 75% to authorize any actions specified in the Agreement.²²⁹ The parties had a five-year history of discord regarding almost every issue facing the Company, including the raising and use of operating capital.²³⁰ Moreover, the Company had no office, no capital funds, no grant funds, and no revenue.²³¹ As a result, the Court found the Company was deadlocked, and it was no longer practicable to carry on this business.²³²

In *Vila*, the LLC Agreement required the assent of both members, Vila and Hill, for business decisions regarding the operation of their home improvement website, BobVila.com.²³³ Shortly after the dotcom bust in 2000, Vila and Hill disagreed on important operational decisions, including the strategic vision for, and the current operation of, their company, as well as failing to reach an agreement on whether to renew its office lease.²³⁴ Further, Vila revoked

²²⁸ *Frisk Ventures, LLC*, 2009 WL 73957, at *4

²²⁹ *Id.* (noting, “[t]his type of charter provision, unless a ‘tie-breaking’ clause exists, is almost always a recipe for disaster.”)

²³⁰ *Id.*

²³¹ *Id.* at *5.

²³² *Id.* at *7.

²³³ *Vila*, 2010 WL 3866098, at *7. Vila and Hill created their company, WebTies, to design and operate BobVila.com, a home improvement website. To run the website, Vila, a well-known home improvement expert, licensed to WebTies the intellectual property rights in his name, image, and likeness.

²³⁴ *Id.*

the license to use his name and likeness, making it impossible for Vila and Hill to operate a website built around Vila's name and reputation.²³⁵

In the instant case, BNP's stated purpose is found in its Articles of Organization, which state, in pertinent part:

To purchase, lease, hire, or otherwise acquire real and personal property, improved and unimproved, of every kind and description, and to sell, dispose of, lease, convey, encumber, and mortgage said property, or any part thereof, to acquire, hold, lease, manage, operate, develop, control, build, erect, maintain for the purpose of said company, construct, re-construct or purchase, either directly or through ownership of stock in any corporation, any lands, buildings, offices, stores, warehouses, mills, shops, factories, plants, easements, privileges, franchises and licenses, and to sell, lease, hire, or otherwise dispose of lands, buildings, or other property of the company, or any part thereof, and engage in any other legal and lawful business enterprises or activity.²³⁶

At the initial organizational meeting, Mr. Zorzit was appointed managing member of BNP.²³⁷ Mr. Balsamo and Mr. Zorzit agreed that Mr. Zorzit would be the sole authorized representative of the company in all business matters conducted by the company to effectuate the conduct of such business.²³⁸ Mr. Zorzit was authorized to: (1) Manage the business and property of BNP; (2) Sign and execute all authorized deeds, mortgages, bonds, contracts or other instruments; (3) Designate financial institutions and determine authorized signatories for accounts held at such institutions; (4) Incur debts or liabilities obligating BNP to pay any amount; (5) Sell or exchange any and all assets of BNP; (6) Relocate BNP's place of business; (7) Offer and compromise any amounts owed to BNP; (8) Appoint other persons to act as representatives of BNP in any capacity; (9) Maintain or appoint responsibility to maintain BNP books and records; and (10)

²³⁵ *Id.* at 8.

²³⁶ Joint Ex. 1.

²³⁷ Joint. Ex. 2.

²³⁸ *Id.*

Take any other action that is required for BNP to conduct business.²³⁹ Indeed, throughout the history of the company Mr. Zorzit acted in his capacity as sole authorized representative of BNP and Mr. Balsamo ratified his conduct.²⁴⁰

Through his agreements and conduct, Mr. Balsamo ceded control of BNP, acting more like a passive investor. Unlike *Halely*, BNP's management agreement does not require unanimous agreement for BNP to make BNP decisions. Indeed, despite the disagreements between Mr. Balsamo and Mr. Zorzit, BNP is still leasing, maintaining, and operating its properties. BNP is operating substantially in the same manner it did upon its formation. Though BNP is not as profitable as it was in the past, it still has yearly revenue of over \$1.8 million. None of the sources of deadlock alleged by Mr. Balsamo has prevented BNP from operating in furtherance of its stated purpose. In fact, all of the disagreements have been adjudicated by this litigation. There is still a question as to the status of member capital accounts; however, that is insufficient to dissolve the LLC. Accordingly, the relief sought by Mr. Balsamo in Count One of his Fourth Amended Complaint is denied.²⁴¹

7. The Court will not appoint a receiver to assist in the windup of BNP.

The Court will not appoint a receiver to assist in the windup of BNP because the Court did not dissolve BNP. Accordingly, the relief sought by Mr. Balsamo in Count Two of his Fourth Amended Complaint is denied.

²³⁹ *Id.*; Joint Ex. 21.

²⁴⁰ *See* Joint Ex. 21.

²⁴¹ Mr. Balsamo is not precluded from withdrawing from BNP. Indeed, Mr. Balsamo may withdraw as a member with six months prior written notice. Md. Code Ann., CORPS & ASS'NS § 4A-605. After Mr. Balsamo withdraws, BNP may, but is not required to, pay Mr. Balsamo the fair value of his economic interest in BNP. Md. Code Ann., CORPS & ASS'NS § 4A-606. If BNP elects not to purchase Mr. Balsamo's interest, Mr. Balsamo may assign his unredeemed economic interest. *Id.*

8. Constructive Trust and Accounting

Count Four of Mr. Balsamo's Fourth Amended Complaint seeks the imposition of a Constructive Trust and for an Accounting.²⁴² For the reasons set forth below, the Court will order an accounting but not a constructive trust.

a. Constructive Trust

A constructive trust may be imposed as a remedy for the improper acquisition of property or as a remedy for the breach of a confidential relationship.²⁴³ For the Court to grant a constructive trust, the plaintiff must prove: (1) there was an acquisition of property in which the plaintiff has some interest; (2) evidence of wrongdoing such as fraud, misrepresentation, or some other improper method; and (3) circumstances which render it inequitable for the holder of legal title to retain the beneficial interest in the property.²⁴⁴

Mr. Balsamo contends there is substantial evidence that Norino Properties acquired title to the Joppa Road Property and BNP assets through fraud and concealment. For the reasons previously stated, Mr. Zorzit did not breach his fiduciary duty or commit any fraudulent acts that would necessitate a constructive trust. Mr. Zorzit's claim to the property is the result of a bona fide dispute. Accordingly, the Court will not order a constructive trust.

b. Accounting

Mr. Zorzit contends that Mr. Balsamo's Fourth Amended Complaint does not allege a need for nor request as relief an accounting as to the BNP member capital accounts.²⁴⁵ Moreover, at trial, the Court allowed Mr. Bavis to express an opinion that the Court should order an

²⁴² Pl.'s Fourth Am. Compl. 27.

²⁴³ *Wimmer v. Wimmer*, 287 Md. 663, 668–71 (1989).

²⁴⁴ *Id.* at 668.

²⁴⁵ Def. John Zorzit's Proposed Findings of Fact and Conclusions of Law 11.

accounting with regard to the capital accounts over Mr. Zorzit's objection.²⁴⁶ In his Proposed Findings of Fact and Conclusions of Law, Mr. Zorzit reasserts his objection, again arguing that because Mr. Balsamo never asserted a claim for such an accounting, and such opinions were not disclosed through Mr. Bavis' report, Mr. Balsamo is not entitled to seek such relief.²⁴⁷

Mr. Balsamo's Fourth Amended Complaint sufficiently requests an accounting. In Count Four, Mr. Balsamo requests that the Court:

(a) Charge upon the Defendant Mr. Zorzit's membership interests in BNP and in the respective Defendant Companies, and each of them, a constructive trust for the benefit of [Mr. Balsamo], and impose a constructive trust over all property and monies which the Defendants, Mr. Zorzit, and the Defendant Companies, acquired by using BNP monies and by using the proceeds of the sales and/or transfers of BNP's assets and property; (b) Order the Defendants Mr. Zorzit and the Defendant companies, and each of them *to account to [Mr. Balsamo]*, for all sums due [Mr. Balsamo] and enter judgment against the Defendants Mr. Zorzit and the Defendant Companies for all sums found to be due to [Mr. Balsamo], *on such accounting*, with attorney's fees, interest, and the costs of this action; and (c) Grant other and further relief as justice may require.²⁴⁸

It is clear, by the language of his pleading, Mr. Balsamo requested the Court to order an accounting.

The Court also renews its ruling that permitted Mr. Bavis to state his opinion as to whether member's capital contributions and loans have been accurately accounted for on

²⁴⁶ Mr. Zorzit objected to Mr. Bavis rendering any opinions regarding the status of the capital accounts on grounds that such opinions had not been disclosed and that Mr. Bavis had testified in his deposition that he would not be rendering an opinion with regard to the accounts. Trial Tr. 1523-31, June 20, 2014. The Court determined that any prejudice to the defense was alleviated by the presence of Mr. Zorzit's expert, Mr. Oliner, in the courtroom. Trial Tr. 1531-33, June 20, 2014. When Mr. Bavis' testimony resumed the next day the defense requested and received a continuing objection to Mr. Bavis rendering opinions regarding the capital accounts. Trial Tr. 1540-41, June 20, 2014.

²⁴⁷ Def. John Zorzit's Proposed Findings of Fact and Conclusions of Law 12.

²⁴⁸ Pl.'s Fourth Am. Compl. 27-28 (emphasis added).

contemporaneously prepared books and record of BNP. Mr. Bavis' report extensively details inconsistencies regarding BNP member capital accounts, giving Mr. Zorzit notice that the capital accounts would be an issue at trial.²⁴⁹ Moreover, Mr. Zorzit's expert, Mr. Oliner, who was present in the Court, had eleven days to review and respond to Mr. Bavis' testimony. There is no basis for excluding Mr. Bavis' expert testimony.

As previously stated, Mr. Balsamo has not provided the proper calculation of the member capital accounts. However, the Court accepts the evidence that there are discrepancies between the member capital accounts and BNP's books and records. Mr. Zorzit contends that Mr. Parks has substantially completed an accounting, thus there is no need for a court ordered accounting to resolve the disputes.²⁵⁰ However, through Mr. Parks' own admission, he has not fully accounted for all member contributions through December 2004.²⁵¹ Indeed, Mr. Parks' effort is reflected on his document entitled "Capital Balances By Source," which had \$379,147.37 left to be identified.²⁵² During the trial, Mr. Parks used information introduced by Mr. Balsamo to narrow the unaccounted money to \$283,000²⁵³ Thus, even though Mr. Oliner reviewed Mr. Parks' accounting and stated that it comported with generally accepted accounting principles, by Mr. Parks' admission, \$283,000 not been accounted.²⁵⁴

In addition to the discrepancies already discussed above, Mr. Bavis has provided credible evidence is that there has not been an accounting for \$7 million in loans from officers.²⁵⁵ There is

²⁴⁹ Trial Tr. 1528, June 19, 2014.

²⁵⁰ Def. John Zorzit's Proposed Findings of Fact and Conclusions of Law.

²⁵¹ Mr. Friedman was charged with tracking member capital accounts from 1998 to 2004. Mr. Friedman has since destroyed those records. Since, he began providing accounting for BNP, Mr. Parks attempted to provide an accounting from 1998 to 2004.

²⁵² Pl.'s Exs. 173 & 296.

²⁵³ Trial Tr. 2183-84, June 25, 2014.

²⁵⁴ Trial Tr. 2757-58, June 30, 2014.

²⁵⁵ Pl.'s Ex. 173.

no indication as to who made the loans and who has been repaid.²⁵⁶ Though there have been attempts to settle the capital accounts, the Court accepts Mr. Balsamo's evidence that there are still discrepancies. Accordingly, the Court will order the parties to choose an independent accountant within sixty (60) days of this order. If the parties cannot agree, the Court will appoint an independent accountant. The independent accountant will determine the proper accounting for member capital accounts and submit a report to the Court detailing necessary adjustments, if any.

²⁵⁶ Trial Tr. 1477-78, June 19, 2014.

III. FINAL ORDER

WHEREFORE, in accordance with the Findings of Fact and Conclusions of Law set forth above, it is this 4 day of March 2015,

ORDERED that the relief sought in Count 9 of the Fourth Amended Complaint as it relates to BNP's payments to Nick's Amusements in reimbursement of Mr. Parks' Compensation is hereby **DENIED**;

ORDERED that the relief sought in Count 9 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Tydings Litigation is hereby **DENIED**;

ORDERED that the relief sought in Count 9 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Civil Forfeiture Action is hereby **DENIED**;

ORDERED that the relief sought in Count 9 of the Fourth Amended Complaint as it relates to the Tax Lien is **GRANTED** in the amount of \$191,070.66 against Defendant Nick's Amusements in favor of Plaintiff Mr. Balsamo;

ORDERED that the relief sought in Count 6 of the Fourth Amended Complaint as it relates to BNP's payments to Nick's Amusements in reimbursement of Mr. Parks' Compensation is hereby **DENIED**;

ORDERED that the relief sought in Count 6 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Tydings Litigation is hereby **DENIED**;

ORDERED that the relief sought in Count 6 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Civil Forfeiture Action is hereby **DENIED**;

ORDERED that the relief sought in Count 6 of the Fourth Amended Complaint as it relates to the Tax Lien is hereby **DENIED**;

ORDERED that the relief sought in Count 5 of the Fourth Amended Complaint as it relates to BNP's payments to Nick's Amusements in reimbursement of Mr. Parks' Compensation is hereby **DENIED**;

ORDERED that the relief sought in Count 5 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Tydings Litigation is hereby **DENIED**;

ORDERED that the relief sought in Count 5 of the Fourth Amended Complaint as it relates to BNP's payment of attorney's fees and expenses in the Civil Forfeiture Action is hereby **DENIED**;

ORDERED that the relief sought in Count 5 of the Fourth Amended Complaint as it relates to the Tax Lien is hereby **DENIED**;

ORDERED that the relief sought in Count 16 of the Fourth Amended Complaint for Mr. Parks' professional negligence is hereby **DENIED**;

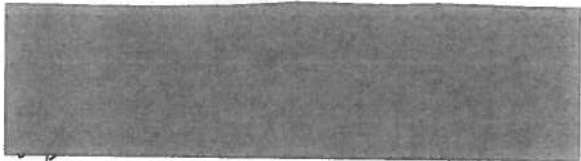
ORDERED that the relief sought in Count 2 of the Fourth Amended Complaint seeking a judicial windup of BNP is hereby **DENIED**;

ORDERED that the relief sought in Count 1 of the Fourth Amended Complaint seeking judicial dissolution of BNP is hereby **DENIED**;

ORDERED that the relief sought in Count 4 of the Fourth Amended Complaint as it relates to the imposition of a constructive trust is hereby **DENIED**;

ORDERED that the relief sought in Count 4 of the Fourth Amended Complaint as it relates to is **GRANTED** and it is hereby **ORDERED** that the parties will choose an independent accountant within sixty (60) days of this order. If the parties cannot agree, the Court will appoint an independent accountant. The independent accountant will determine the proper accounting for member capital accounts and submit a report to the Court detailing necessary adjustments, if any;

ORDERED that the relief sought in Mr. Parks' First Amended Counter Complaint seeking twenty percent (20%) interest in BNP is hereby **DENIED**.



Judge Michael J. Finifter