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Superior Court of Massachusetts,
Suffolk County.

Elizabeth BENINATI et al.
v.
Steven BORGHI et al.

Nos. SUCV201201985BLS2,
SUCV201301772BLS2. | July 9, 2014.

FINDINGS OF FACT, RULINGS OF LAW AND ORDER OF JUDGMENT

JANET L. SANDERS, Justice.

***1** This litigation arises from a dispute between members of fourteen limited liability companies (LLCs), each of which operates a health club in New England as a licensee of the Work Out World ("WOW") trade name (collectively, the WOW New England Clubs or WOW New England). Plaintiffs Elizabeth Beninati (Elizabeth) and Joseph Masotta assert claims alleging among other things that the defendant Steven Borghi breached his fiduciary duties as a result of his business dealings with co-defendant Harold Dixon, specifically by opening similar health clubs (the "Blast Clubs") in the same geographic area. The case came before this Court for a jury-waived trial, which lasted twenty days. Based on that testimony that this Court finds to be credible, together with close to 1,000 exhibits, this Court makes the following findings and rulings.

FINDINGS OF FACT

The WOW New England Clubs began as a conversation between Anthony Beninati (Tony), Elizabeth's husband, and his longtime friend Steven Borghi (Borghi). Borghi and Tony met in high school, had been roommates and at one time sold cars together. In 1999, Borghi approached Tony about opening a gym at a location he had found in Randolph. Borghi knew a building contractor, plaintiff Joseph Masotta, who was interested in doing the build-out work in return for an ownership share. Tony brought in a fourth person, Christopher Sherwood, to assist in the legal work necessary to set up the business. In late 1999, the Randolph club opened under the name of "World Gym." At that time Tony and Elizabeth (who had met Tony at a gym) had been married two years.

A. The LLCs, Their Operating Agreements and the "WOW" Trade Name

It was decided that the Randolph club would be owned by an LLC named Cardio Fitness. Sherwood, an attorney three years out of law school, was asked to draw up the legal papers. Using a template, he drafted the first in what would become a series of Operating Agreements or OAs. This first agreement (the Cardio Fitness OA) was dated October 29, 1999 and designated Tony and Borghi as managers. The two were also identified as members, along with Masotta, Sherwood, and four other individuals. Steven and Tony held the largest ownership share of 26 percent each, followed by Sherwood, with 15 percent. Elizabeth was not identified as a member nor was she a signatory of the Cardio Fitness OA. This Court nevertheless credits her testimony that she agreed with Tony to use the couple's joint assets to get the business up and running and that it was her understanding from the outset that she and Tony held his percentage interest in the Randolph club jointly.

In 2000, a second gym opened, this time in Norwood. It was owned by a separate LLC called One Fitness, LLC, operating under a written OA executed in November 2000. (Exhibit 75.) The OA identified the members as Borghi and Tony—each holding an equal percentage of shares—with others (including Sherwood and Masotta) holding lesser percentages. By this time, Elizabeth had had the first of three children and although she talked to her husband about the business and continued to agree to use the couple's assets, she was not an active participant—and would remain on the sidelines until her husband's untimely death from a rare and apparently incurable disease in January 2005.

***2** Early on in the development of the business, a decision was made to obtain the name "Work out World" ("WOW") from WOW Licensing, LLC, a company owned and operated by Stephen Roma. Roma owned his own set of health clubs in New Jersey and had trademarked the "WOW" name for use by others in exchange for an annual fee. In written contracts (the Licensing Agreements), first with One Fitness and then with Cardio Fitness, Roma granted the two LLCs the right to use the WOW name. The Licensing Agreements further stated that WOW Licensing would not grant to any other entity within five miles of the Randolph and Norwood clubs

the same right to use the WOW name. [1] The stated term of each agreement was five years.

Before Tony died, the threesome (Borghi, Tony and Masotta) opened ten more health clubs in the New England area. Each club was owned and operated through a separate LLC. Of those ten, eight are still in existence. In chronological order, the locations of those clubs, the date each of them opened, and the names of their related LLC are as follows:

Too Fitness, operating a club in Fall River, Massachusetts that opened February 2001;

Tree Fitness, operating a club in Methuen, Massachusetts that opened September 2002;

Fore Fitness, operating a club in Warwick, Rhode Island, that opened December 2002;

V Fitness, operating a club in Waltham, Massachusetts, that opened March 2003;

Nine Fitness operating a club in Medford, MA that opened October 2003;

X Fitness, operating a club in New Bedford, Massachusetts, that opened December 2003;

SVN Fitness (f/k/a WOW Massachusetts), operating a club in Brockton, Massachusetts that opened in June 2004;

Snowman Fitness, operating a club in Nashua, New Hampshire opening October 2004.

Borghi and Tony were majority owners in all of them, holding equal percentage interests in the LLCs, with Masotta holding the third largest ownership stake. There were different minority investors in each of the LLCs; these individuals were generally friends and acquaintances of Tony and Borghi. Although they received a percentage of the profits, these minority investors played no role in the operation of the clubs or the decision-making in connection with opening new ones.

Each of the LLCs entered into the same licensing arrangement with WOW Licensing as One Fitness and Cardio Fitness had. With the exception of V Fitness (which simply paid the licensing fee without a written contract), this arrangement was memorialized in written Licensing Agreements with WOW Licensing that had the same term of five years from the effective date. Whether in writing or not, the understanding was the same for all the LLCs: in return for an annual fee, each LLC was granted the right to use the WOW name in return for WOW Licensing's promise not to grant a license to any other entity intending to use the name to open a fitness center within five miles of a WOW New England club. But see footnote 1, *supra.*

***3** During this period of growth, the business continued to run as it had before: Borghi would scout for locations, Masotta contributed his contracting skills to build out the clubs, and Tony ran the day to day business. Steve's wife, co-defendant Linda Borghi (Linda), also took an active role, given a salaried position with the clubs. Elizabeth remained in the background, although she would on occasion accompany her husband to check out new locations. None of these eight LLCs had written operating agreements until December 2004.

In December 2004—just a month before Tony's death—Fred Zayas, the WOW New England Clubs' accountant, was asked to draw up Operating Agreements for the eight new LLCs; he also went about drafting another updated agreement for One Fitness. Tony told Zayas that he wanted to make sure that the OAs for the WOW New England LLCs agreements reflected the fact that his interests were held jointly with Elizabeth. Tony was also increasingly concerned about Borghi, who had developed a serious drinking problem in or around that time. As to their own interests in the LLCs, both Borghi and Masotta specifically instructed Zayas not to include their wives.

There was also a discussion among the three about whether they wanted to limit members (including themselves) from opening up competing clubs. The Cardio Fitness and One Fitness OAs executed in 1999 and 2000 (the only written agreements in existence at that point) did not have any restriction on competition: indeed, they expressly permitted any member or manager to "engage in and possess interests in other business ventures and investment opportunities of every kind and description, independently or with others ..." and stated that "[n]either the LLC nor any other Member or Manager shall have any rights in such ventures or opportunities or the income or profit therefrom." See Section 6.08(a) of those OAs. By late 2004, the clubs were having real financial success under the WOW logo, however. It was agreed that a noncompetition clause was a good idea: Borghi, Masotta and Tony would either open up new WOW clubs together or not at all.

Zayas was not a lawyer nor did he have any legal training. Like Sherwood, however, he used a template and prepared

OAs for the eight clubs that had no written agreement as well as for One Fitness (collectively, the 2004 OAs). (Inexplicably, the Cardio Fitness OA was not rewritten.) Since a template was used and the apparent intent was that all nine OAs would be substantially the same, one would suppose that they would be identical. They are not.

The Operating Agreement for One Fitness lists in its first paragraph the "Members" of the LLC. They are identified as Borghi, "Anthony Beninati," Masotta, Sherwood, and other minority investors. The Operating Agreements for each of the eight LLCs opened after One Fitness (but drafted and executed at the same time as the One Fitness OA) contains a different first paragraph. In each of these eight agreements, the members are identified as Borghi, "Anthony (Elizabeth) Beninati," and Masotta together with others.

***4** A second difference among the nine agreements relates to their dates. The Too Fitness OA states that it was entered into on February 16, 2001, even though the testimony at trial was that Too Fitness did not have a written operating agreement until Zayas was asked to draw one up in December 2004. Moreover, even though the testimony was that all nine agreements were executed on the same date in December 2004 before Tony died, three of them contain a date of February 15, 2005, after Tony's death. This Court is not sure what to make of this difference except that it suggests a rush to get the signatures of all members on all nine of the 2004 OAs before Tony died and before all the paperwork had been completed. [2] Although defendants suggest that the differences in dates indicate the documents were changed or tampered with after Tony died, this Court does not so find.

In certain important respects, the 2004 OAs are the same, however. First, each of them identifies Linda Borghi as the "Manager" whereas the Cardio Fitness OA had identified Borghi (along with Beninati) as the Managers. This change made sense, since at that point, Borghi was less and less involved in the business—and would remain so for the next two years. [3] Second, each OA provides that the "Members" would receive periodic distributions, in the "sole discretion" of the Manager, "in accordance with their percentage interest as set forth in # 28 ("Percentage Interests")." Section 28 of each OA identifies Tony and Borghi as having the largest ownership shares in the LLC, with equal percentage interests; Masotta is listed as holding the third largest percentage interest. Elizabeth's name does not appear on that list, nor was she a signatory to any of the 2004 OAs. [4]

Third (and perhaps most important for purposes of this litigation) each of the 2004 OAs contained a non-competition clause, which states as follows:

> During the tenure of the LLC, the Members shall not establish, operate, own, consult, or be employee of a health fitness center/gym providing facilities and services substantially [sic] to those within 50 miles of any WOW (Work out World) and within one year of termination of ownership. The member agrees that this restrictive covenant and noncompete set forth herein is reasonable in nature, duration and geographical scope ...

Section 12(c) of the 2004 OAs. This provision was intended to reflect what had already been agreed to verbally between Borghi, Tony and Masotta: no one of them would use the WOW name to open a club in competition with the WOW New England Clubs. [5]

Fourth, each of the 2004 OAs addressed a member or manager's right to indemnification from the LLC. Specifically, Section 12(a) states:

> The Manager and each member shall be entitled to indemnity from the LLC for any liability incurred and/or for any act performed by him or it within the scope of the authority conferred by this Agreement, and/or for any act omitted to be performed except for his or its gross negligence or willful misconduct, which indemnification shall include reasonable expenses incurred, including reasonable legal and other professional fees and expenses.

***5** This was different from the Cardio Fitness OA, which stated in Section 6.07(c) as follows:

> Each Manager and its Affiliates shall be indemnified by the LLC against any losses, judgments, liability, expense and amounts paid in settlement of any such claims sustained by it with respect to actions taken by

> such Manager or its Affiliates on behalf of the LLC, provided that no indemnification shall be provided for any person with respect to any matter as to which he or she shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his or her action was in the best interests of the LLC ... Without limiting the foregoing, the LLC shall cause such indemnification to include payment by the LLC of expenses incurred in defending a civil or criminal action or proceeding ...

Finally, the 2004 OAs contained two provisions that also appeared in the Cardio Fitness OA—provisions which would not be given any importance until much later. Section 7 of the 2004 OAs stated that:

> No Member may sell, assign, give, pledge, hypothecate, encumber or otherwise transfer, including without limitation any assignment or transfer by operation of law or by order of Court, such Member's interest in the LLC or any part thereof, nor all or any part of the assets of the LLC without the unanimous written consent of all of the Members, and any such purported assignment without such consent shall be null and void and of no effect whatsoever.

Section 18 provided that the transferee or assignee of any Voting Membership "shall receive only ... a Non Voting Interest unless all of the Voting Members expressly agree in writing that such Member shall receive a Voting Membership Interest." The 2004 OAs, like the Cardio Fitness OA, contained an integration clause. See Section 15(d) of 2004 OAs.

Despite their inclusion in the 2004 OAs and in the Cardio Fitness OA, Sections 7 and 18 were essentially ignored in practice. Interests were transferred from one person to another without any formal approval by other members, much less their consent in writing. The transferee was then treated no differently than the transferor. Thus, although formal meetings were rarely (if ever) held until this litigation, the general assumption was that the transferee had the same voting rights as the person from whom he had purchased his interest. For example, Chris Sherwood sold his interest in V Fitness to his brother-in-law Chad Koski without any formal written approval from V Fitness Members. And Borghi acquired a small percentage interest in Cardio Fitness from one of the original investors without seeking written consent from other members and yet still exercised voting rights for those shares.

In public filings, Borghi himself drew no distinction between his membership status and that of Elizabeth. For example, in a 2009 action filed by a former employee, pleadings filed on behalf of WOW New England—with Borghi's authorization—identify Elizabeth as a full member of WOW New England along with Borghi and Masotta. Federal tax returns filed between 2006 and 2010 on behalf of the LLCs all identified Elizabeth as a "Member/manager." Indeed, it was not until April 2011 (when each of the principals had hired their own lawyers) that anyone even noticed Sections 7 and 18—and then only because it was called to their attention by codefendant Dixon's attorney. Certainly, there was no suggestion that Elizabeth did not have voting status.

***6** For the three years following Tony's death, no new clubs were opened. [6] Then, beginning in July 2008 and into 2010, Borghi, Masotta and Elizabeth launched four new health clubs in New England. As with the original clubs, each of these clubs was owned by a separate LLC. Each LLC also paid an annual fee to WOW Licensing in order to use the WOW trade name, although this licensing arrangement was never committed to writing. As these new clubs opened, the Licensing Agreements for the older clubs were expiring. The LLC that owned each club continued to pay the annual fee to WOW Licensing and used the WOW trade name, however. As Roma testified at his deposition, as long as he was receiving the fee, he regarded the licensing arrangement to be the same, with the same five-mile geographical limitation placed on the use of the WOW name by others.

The locations of each of these four new clubs, the date it opened, and the name of its related LLC are as follows:

WAMP Fitness, operating a club in East Providence, Rhode Island that opened July 2008;

SJBB Fitness, operating a club in Bellingham, Massachusetts, that opened November 2009;

Uno Dos Fitness, operating a club in Peabody, Massachusetts that opened in March 2010;

FTN Fitness (f/k/a WOW Taunton) operating a club in Taunton, Massachusetts that opened March 2010.

There was no written Operating Agreement for any of these new clubs. There was a verbal agreement, however, that Elizabeth was a full voting member, holding an equal interest with or the second largest percentage to Borghi, followed by Masotta.[7] Again, there were minority investors unique to each LLC who receive distributions but played no role in the operation of the club that the LLC owned.

B. How the Clubs Worked: Management and Operations

Although the owners of the WOW New England Clubs were inattentive, to say the least, to the legal formalities that needed to be followed to set up their corporate structure, they were astute—or simply lucky—in the business decisions they made. When Tony and Borghi opened up their first club, fitness memberships were becoming more popular as public concern with obesity and a concomitant desire for better physical health were on the rise. But for many people, these memberships were too expensive, requiring payment of an up-front initiation fee, along with hefty monthly fees that did not fit a working class budget. The WOW New England Clubs had no initiation fee, and the monthly costs began at an affordable nineteen dollars. “We were called bottom feeders,” Elizabeth testified. The clubs made their money on volume.

The owners also hit on a system whereby new clubs were opened by way of loans at no interest from already existing clubs. Consequently, Tony and Borghi (the key decision makers before Tony died) did not have to come up with additional capital from their own pockets to expand the business. This arrangement continued after Tony's death. The result was that Elizabeth, Borghi and Masotta were able to receive profits from the new clubs without having to make any capital contributions to open them. They did not think to inform the minority investors of the lending clubs about these inter-company loans or to formally offer them an opportunity to invest in the new one or concern themselves with the fact that these loans would have an impact on the distributions that these minority investors received in the old clubs, at least in the short term. With business good, however, no one complained. And the profits were indeed sizable.

***7** By way of example, Cardio Fitness (operating the Randolph club) was profitable enough to make distributions to Borghi alone of close to $1 million between 2004 and 2012; Tony and/or Elizabeth received distributions over that same period in roughly the same amount. One Fitness (operating the Norwood club) was even more profitable: the Beninatis received distributions of approximately $1.4 million between 2003 and 2012, with Borghi receiving close to that. Both Borghi and Elizabeth received approximately $950,000 in distributions in connection with Nine Fitness (operating the Medford club); Masotta as the third largest shareholder received $250,000. All told, Elizabeth received a total of $13,702,694 between 2005 and 2012 as a result of her ownership interest in the WOW New England Clubs without having made any capital contributions aside from a one-time payment for overdue taxes owed by Snowman Fitness. Borghi, with an equal ownership interest in the clubs, has done similarly well.

The clubs were able to minimize costs by centralizing management and administration through a fifteenth LLC, Fitness Capital, with offices currently in Taunton. Billings and collections for all fourteen health clubs were done through this single company; expenses and fixed costs for all the clubs were paid from a single account. This shared overhead, including advertising costs, allowed the organization to achieve some economies of scale.

This centralization also promoted uniformity. Staff for each of the clubs was trained in the same way, and thus could be moved from one club to another as needed. They were specifically trained in how to sell memberships, working from a script that was the same for all. All the clubs shared membership data—including demographic information, cancellations and new memberships, and comparisons in the different clubs' performance—through nightly reports distributed to upper management. This information proved to be valuable in determining the success of a particular location and in deciding whether—and if so, where—to open a new health club under the WOW logo.

Most important, this centralized structure allowed the WOW New England Clubs to offer their members the benefit of a “multi-club pass.” Clients with one WOW club near their homes could attend another WOW club near their work—a benefit that attracted new clients and, because there was an additional charge for this privilege, increased profits overall. Finally, the use of a common trade name allowed each club to take advantage of the goodwill built up by other clubs:

customers knew what to expect. Each club offered classes, personal training, and even babysitting, all for an additional fee. Most were open 24 hours a day.

C. Elizabeth's Role in WOW New England Clubs from 2005 to 2010

Up until Tony's death in January 2005, Elizabeth played virtually no role in the management or operation of the WOW New England Clubs. By necessity, that changed when he died. Borghi was wrestling with an alcohol problem, exhibiting erratic behavior and frequently absent from the office. Although Linda as manager essentially ran the business, she needed help. “I put my boots on,” recalled Elizabeth, and, as her husband had advised her before he died, essentially shadowed Linda to learn the ins and outs of the clubs. At her request, Masotta also began to play a more active role.

***8** Initially, Elizabeth handled marketing and promotions with Linda doing the administrative work; when Linda was pushed out of the organization by her husband in 2006, Elizabeth assumed more management responsibilities. On behalf of the WOW New England Clubs, she signed equipment finance agreements, advertising contracts, and leases. She was the person designated as “tax matters partner” on certain federal tax returns and was listed as “member/manager” on various K1s. Elizabeth also worked on personnel issues, setting hours and pay, developing employee policies, and approving employee-related expenditures. She helped develop the clubs' website.

As to the major decisions, Elizabeth was treated on a par with Borghi, who returned to work for good in 2008. There were weekly upper management meetings at the clubs' main office where these matters would be discussed; when Elizabeth and Borghi disagreed, Masotta would be brought in to cast the deciding vote. Accordingly, when Borghi wanted to change the pricing structure of the clubs so as to include a $10 plan in 2009, he first consulted Elizabeth and Masotta in order to convince them to go along. When Borghi wanted to fire a key sales manager (Darren Martin) and replace him with his own candidate, he had to get Elizabeth's and Masotta's agreement first. Sometimes, Borghi was not so successful: for example, he wanted to get rid of their collection agency (ABC) and on another occasion wanted to cut a manager's pay; neither occurred when Elizabeth and Masotta voted against the idea. Most important, any decision to open a new club was always made jointly: Borghi would find a location, then Masotta and Elizabeth would visit the site and agree—or not. Thus, Borghi wanted to open a WOW club in Middleton, Rhode Island, but that did not happen because Elizabeth and Masotta opposed it. If a decision was made to open a new club, the three would reach agreement as to what percentage interest each would hold. Although these agreements would not be reduced to writing, the percentages that been decided would be reflected in that club are annual K1. Sometimes, Borghi's and Elizabeth's ownership interests would be the same; on other occasions, Borghi received a greater percentage. See footnote 7, *supra.*

The three principals did not feel any obligation to consult with or offer other members of the LLCs the opportunity to participate in any new club they decided to open. This was in spite of the fact that the written OA for each of the LLCs (except for Cardio Fitness) prohibited any member on his or her own from opening up a club within a fifty-mile radius of a WOW New England club. See Section 12(c) of the 2004–2005 OAs. All of the clubs opened between 2005 and 2010 were within fifty miles of one or more of the WOW New England Clubs. On the other hand, the three principals did not keep their decision to open a new club secret. Indeed, some of the same members who held minority positions in the old LLCs elected to take part in new clubs. That is, they were not excluded; they just did not take part in any of the decision-making.

D. Harold Dixon and His Alliance with Borghi

***9** As Borghi, Elizabeth and Masotta were expanding the reach of WOW New England Clubs, defendant Harold Dixon was purchasing Dunkin Donuts franchises. Dixon had begun his career at EMC, doing software management and then moving into sales. He left in 2000 and, after a series of efforts with startup companies, put together a group of investors to purchase his first Dunkin Donuts franchise in 2007. He was looking for other investment opportunities when he met Dave Laird in 2010 at their children's soccer game. Laird owned six Planet Fitness clubs, similar to and in competition with WOW New England Clubs; the two men discussed their businesses, and Dixon's interest was piqued. Dixon took a tour of Laird's clubs and then, through Laird, was introduced to Borghi.

At that point in time, Borghi was thinking in larger terms than either Elizabeth or Masotta, and there was increasing

disagreement, particularly between Borghi and Elizabeth. Borghi had already opened up his own low cost health clubs in Minnesota under the WOW trade name; he was anxious to build more clubs in New England but was meeting with opposition from his co-owners. In 2009, for example, the owner of Gold's Gyms had approached Borghi about WOW New England taking over, but Elizabeth and Masotta, concerned about Gold's debt, were against it. When Dixon appeared on the scene in the fall of 2010, Borghi saw an opportunity to put Dixon's business acumen and capital to work so as to expand his own health club holdings. Dixon too saw an opportunity: Borghi had valuable information —information which Dixon, a novice in the health club industry, desperately needed if he were to be successful in the field. In January 2011, Dixon together with Borghi formed Blast Fitness Group, LLC (Blast Fitness or Blast). Dixon and Borghi, through Blast Fitness, would ultimately own and operate thirteen health clubs in Massachusetts and Rhode Island, all operating under the WOW trade name and in competition with WOW New England.

When Dixon first arrived at WOW New England in the fall of 2010, he did not announce any plan to create his own business, however, even though that was indeed his intention at that point. Instead, Borghi hired Dixon to act as his "consultant"—an arrangement that was formalized in a written Services Agreement dated October 28, 2010. The Services Agreement stated that its purpose was for Dixon to assist Borghi "with respect to strategic planning and organization management matters" related to health fitness clubs in which Borghi had an ownership interest. Borghi (who paid Dixon a fee out of his own pocket) kept this Services Agreement secret from both Elizabeth and Masotta. Nevertheless, the two almost immediately became aware of Dixon, who started meeting regularly with Borghi at WOW New England's corporate headquarters. Masotta saw him as someone with a "ton of money" who was there to "help us grow." Elizabeth was less clear about his role, and was more wary of his presence.

***10** Beginning in November 2010 and continuing into 2012, Dixon, through Borghi, was given direct access to proprietary and otherwise confidential information belonging to the WOW New England Clubs that he would ultimately use for his own and for Borghi's benefit. Dixon asked for and obtained all the membership data on the WOW New England Clubs, including cancellations and new memberships for the previous year on a monthly basis dating back two years. He received spread sheets on the revenue each of these clubs generated as well as revenue projections. He received WOW New England Clubs Profit & Loss statements. The information Dixon obtained included reports containing comparison data about each club's performance and analyzing the demographics of its membership base. These reports—circulated only to top management before Dixon's arrival—were important not only for marketing and advertising but also to any management decisions to open new clubs.

Given unfettered access to WOW New England records, Dixon was also able to review employee training manuals, payroll data, and a list of the clubs' vendors. These records included templates for equipment leases and other forms that would prove helpful to Dixon when he started his own competing line of clubs. Even more significant, WOW New England staff, with whom Dixon dealt directly on a regular basis, shared their expertise and experience with him. Eventually, many of these employees would actually work for Blast Fitness—providing their services even when they were still on the WOW New England payroll.

Although Elizabeth was not aware of the scope of the access that Dixon was being given to WOW information, she did know early on that Dixon and Borghi wanted to increase the number of clubs in New England operating under the WOW name, with or without her. She was very much opposed to this; consequently, her relationship to Borghi became more and more strained. She was no longer invited to management meetings and her access to company books and records was restricted. She did not have an office at the Taunton facility. Concerned about what Dixon and Borghi were doing, Elizabeth retained a lawyer, George McLaughlin, in early 2011.

Masotta, on the other hand, was interested in Dixon's and Borghi's push to expand the business and actually recruited his own lawyer, Joseph Zoppo, to look into ways of getting financing for such an effort. In the fall of 2010, Zoppo attended a meeting at the Taunton offices with Dixon, Borghi and Masotta, and everyone seemed to be in agreement that expansion was a good idea. Not present was Elizabeth, however, and she remained unbending in her opposition.

E. The Formation of Blast Fitness

In January 2011, Borghi and Dixon executed the Operating Agreement that set up Blast Fitness. Its stated purpose was to own and operate health fitness centers in New England and beyond. Borghi held a 51 percent interest in the LLC;

the remainder was held by Auburndale Fitness, LCC, created as an investment vehicle for Dixon.[8] A Dixon associate, Frank Hennessey, owned a minority interest in Auburndale Fitness and by this time had become actively involved in Borghi's and Dixon's efforts to open new health clubs. Neither Elizabeth nor Masotta knew about Blast Fitness at the time of its creation.

***11** Elizabeth and Masotta were similarly not aware of the fact that Borghi had separately contacted Roma with WOW Licensing and negotiated an agreement with Blast (the Master Licensing Agreement) whereby Blast obtained the *exclusive* right to use the WOW name in New England. This written agreement, dated January 21, 2011, and effective until December 31, 2012, was signed by Borghi in his capacity as managing member of Blast. The Master License Agreement provided that Blast would pay WOW Licensing the annual licensing fee due for 2011 from existing WOW New England clubs (described as those clubs in which "Borghi is an owner/partner/managing member"). As to clubs Blast Fitness intended to open on its own, the Master Licensing Agreement stated that Blast would sign separate licensing agreements for those clubs and would pay WOW Licensing an annual fee of $3,000 for each club as it opened. This Master Licensing Agreement essentially put WOW New England at the mercy of Blast Fitness with regards to use of the WOW name: every one of the written agreements that WOW New England had with Roma had expired by January 2010, and any oral agreement giving WOW New England the exclusive right to the WOW name within a five-mile radius was only by virtue of the LLCs' continuing payment of the licensing fee—an obligation that Blast had now assumed without Masotta's and Elizabeth's knowledge. Dixon was not only aware of Borghi's actions but actively encouraged them, given the benefit it conferred on Blast.

Finally, Elizabeth and Masotta were unaware of the fact that Borghi had already entered into a lease for a property that, in the latter part of 2011, would become the site of a Blast club located in Foxboro, Massachusetts. That lease, dated October 6, 2010, was signed by Borghi in his capacity as manager for an entity called Workout World Foxborough, LLC (an entity that would ultimately be owned by Blast Fitness). On that same date, Borghi signed a guaranty on behalf of Too Fitness, LLC whereby it agreed to pay any rent—up to a maximum of $600,000—not paid by Workout World Foxborough, LLC. Borghi did not inform any member of Too Fitness, LLC (including Elizabeth and Masotta) that he had executed this Guaranty.

Throughout this time period (from the fall of 2010 through February 2011), this Court finds that Dixon not only knew about what Borghi was doing on behalf of Blast Fitness that was in conflict with the interests of WOW New England but he also actively encouraged and assisted him. Dixon was also aware, at least as of early 2011, of the restriction agreed to among the three principals of WOW New England that no one of them on his or her own could open up a competing club within a fifty-mile radius. Dixon aided and abetted Borghi in violating this restriction.

Blast Fitness' first foray into actually operating a health fitness club began with the three Gold's gyms in Mashpee, Needham and West Roxbury—the same gyms Borghi had been anxious to purchase for WOW but which Masotta and Beninati had vetoed. Rather than purchase the gyms outright, Blast Fitness instead entered into a management agreement with the owners in return for a 50 percent cut of the gross revenues. Borghi signed this agreement in January 2011 in his capacity as manager of Blast Fitness. Shortly thereafter, the three gyms changed their names to Workout World, New England.[9] Although Masotta and Elizabeth became aware that these gyms were using the WOW name, they did not know about the written agreement that Borghi had executed with the Gold's owners on behalf of Blast Fitness. Borghi did not offer to share any of the profits with WOW New England, and indeed made it clear, in a February 2011 letter to Masotta and Elizabeth, that he regarded any arrangement that he had with other parties to be "confidential" and entirely separate from the WOW New England clubs. Nevertheless, at his direction, the Gold's gyms were added to the WOW New England website, and used the same business model that had been so successful for the WOW New England clubs. All three of the Gold's gyms (now WOW) were located within 50 miles of at least one of the WOW New England Clubs.

F. The Amended and Restated Operating Agreements

***12** Although Borghi was ready and willing to throw in his lot with Dixon without regard to his obligations to WOW New England, Dixon (the savvier of the two) realized that Elizabeth and Masotta could cause problems for the new business venture in light of his affiliation with Borghi and use of WOW New England information. Elizabeth had retained a lawyer by early 2011 and, after initially expressing some interest in joining Dixon to build new clubs together, threatened to sue over her exclusion from WOW New

England affairs and what she regarded as Borghi's betrayal. Masotta too was beginning to realize the extent to which Dixon stood to benefit from having access to WOW New England records.

Dixon's personal lawyer was John LeClair at Goodwin Procter & Hoar, and Dixon went to LeClair for advice. Dixon introduced LeClair to Borghi, who hired LeClair as his own lawyer in April 2011. With both Dixon and Borghi as his clients, LeClair set about reviewing the business records and organizational documents of the WOW New England Clubs. He discovered that four LLCs (those opened after Tony's death) had no written OAs, and that one club would lend money to a new club interest free without informing the lending club's minority members. LeClair made note of the 50–mile territorial restriction in the 2004 OAs, and realized that this would be a problem if Borghi intended to open up clubs with Dixon under the WOW name. The 2004 OAs also designated Linda Borghi as manager even though Linda had not been involved in the business since 2006. Finally, Sections 7 and 18 of the written OAs seemed to call into question Elizabeth's status as a voting member. [10] LeClair set about drafting agreements for the LLCs that would deal with all of these issues in line with the interest of his clients.

In connection with that work, LeClair talked directly to Elizabeth's lawyer at the time, McLaughlin, and with the attorney representing Masotta, John Zoppo. Whereas Elizabeth's antagonism toward Borghi was clear, Masotta was at that point somewhat neutral in his position, attempting to avoid conflict at the same time that he looked after his own interests. On two separate days in May 2011, LeClair, Borghi and Dixon negotiated first with Masotta and his lawyer Zoppo and then with Elizabeth and her lawyer McLaughlin. From LeClair's perspective, the purpose of these meetings was to forge an agreement between all of them that would allow Dixon and Borghi to proceed with their expansion plans and permit Masotta and Elizabeth to take part in some fashion in that expansion effort. It also provided an opportunity to clean up and make consistent with each other the OAs for the fourteen existing WOW New England Clubs.

The meeting with Masotta on May 4, 2011 went well: he expressed support for expansion of the WOW clubs so long as there was some restriction on Borghi's role as manager of WOW New England, and provided that Elizabeth was included. The meeting with Elizabeth on May 6 also seemed to go well: LeClair proposed clarifying her status as a voting member of the WOW New England LLCs and reviewed other issues relating to the business, including the 50–mile restriction, the inter-club loans, and Elizabeth's compensation and title. Dixon outlined his plan to build fitness centers in New England and how he would compensate WOW New England for any resources that he had already used or otherwise stood to benefit from in connection with that expansion. Elizabeth expressed a willingness to work with Dixon. [11] At the end of the meeting, LeClair thought they had reached agreement on everything except for Elizabeth's percentage interest in two WOW New England clubs for which there were no existing written OA—those located in Taunton and East Providence. [12] LeClair communicated his understanding as to the outcome of the May 6 meeting to Zoppo, Masotta's attorney.

***13** On May 9, 2011, McLaughlin emailed LeClair asking him if he was "going to take a crack at drafting what we discussed on Friday [May 6]." LeClair did, and on May 16, 2011, circulated to all parties the first draft of new Operating Agreements for the fourteen WOW New England LLCs. This draft (the May 16 Draft) clarified Elizabeth's status as a voting member and set her salary at $320,000 a year. Although it did away with the 50–mile territorial restriction and permitted any member to own and operate a competing health fitness center, the May 16 Draft required that certain payments would be made to WOW New England out of the competing club's profits. See II ¶ 8 of the May 16 Draft. This provision reflected what LeClair saw as a way to meet everyone's needs: it permitted Dixon and Borghi to go forward on their plan to expand at the same time that it compensated Masotta and Elizabeth (as members of WOW New England) with regard to the advantages Dixon had obtained as a result of his affiliation with Borghi and his access to WOW confidential information.

On May 26, 2011, McLaughlin informed LeClair that the May 16 Draft was unacceptable; he did not suggest what, if any changes could be made, leading LeClair to believe that getting Elizabeth's agreement was now futile. [13] LeClair communicated this to Zoppo and also voiced his opinion that new operating agreements could be entered into without her so long as Masotta was on board. (As explained below, this Court is not of the same view.)

On May 31, 2011, LeClair sent Zoppo a second draft (the May 31 Draft). Like the May 16 Draft, it eliminated the 50–mile territorial restriction and put in its place the same formula by which WOW New England would be compensated by any competing clubs within a certain distance; it also waived any restrictions on the ability of any member to participate in

any competing venture. Unlike the May 16 Draft, the May 31 Draft omitted any reference to Elizabeth as a salaried employee. It also stated that Elizabeth would be recognized as a voting member of WOW New England but *only* if she executed the proposed new Operating Agreements and had the written approval of a majority of its voting members. In other words, if she did not sign, this provision would essentially strip her of any voting rights which she claimed to have. In all other respects (at least with regard to those issues relevant to this litigation), the May 16 and May 31 Drafts were substantially the same.

Zoppo suggested certain revisions to the May 31 Draft, none of them relating to Elizabeth, the absence of a territorial restriction, or the waiver regarding any member's participation incompeting clubs.[14] For example, Masotta wanted distributions to members to be mandatory and not discretionary, wanted some additional restriction placed on Borghi's powers as the designated Manager of WOW New England, and favored a provision that would allow a majority of its members to remove him without cause. LeClair agreed to all of these changes and incorporated them into what would be the final draft for the Amended and Restated Operating Agreements governing all LLCs.

***14** At the same time, Zoppo and LeClair negotiated a separate side agreement between Masotta, Dixon and Borghi whereby they (through Auburndale Fitness and Blast Fitness) agreed to give Masotta a certain percentage interest in any health clubs that they opened in the future (the Side Agreement). (Ex. 309.) This compensation was in addition to payments that Masotta would receive as a member of WOW New England pursuant to the payment formula set forth in II ¶ 8 of the draft Amended and Restated Operating Agreements. A check made payable to Masotta for $10,182.07 signed by Hennessey on behalf of Blast Fitness accompanied this Side Agreement. Essentially, this Side Agreement was a "sweetener" offered as a further inducement to get Masotta to sign new Operating Agreements for the WOW New England Clubs. It also called into question Masotta's disinterestedness: was he signing with the interest of WOW New England in mind or because it was in his own self-interest?

The final details of both this Side Agreement and the revisions that LeClair agreed to with respect the WOW New England Operating Agreements were hammered out in telephone calls between LeClair and Zoppo on June 3, 2011, with the plan being to execute the documents on that same day.[15] LeClair sent Zoppo an email attaching the final version of all documents. Late that afternoon, however, Zoppo informed LeClair that other business prevented him from attending the planned closing himself; he expressed no misgivings about Masotta attending on his own. LeClair told Zoppo that he would be open to making changes even after they had been executed in order to make Masotta feel comfortable with the business arrangement going forward. When Masotta did show up at LeClair's office, LeClair informed him that he was not his lawyer and that he should himself review all the documents before signing them. Masotta did not express any reluctance or hesitation in going forward with the closing, and executed all fourteen copies of the Amended and Restated Operating Agreements as well as the Side Agreement. Although this Court finds that Masotta signed these agreements voluntarily, with a full understanding as to their contents, this Court also finds that Masotta did not know the extent to which Borghi and Dixon had already obtained WOW New England confidential information, nor did he realize that they had already put into place all that was necessary to begin a competing business venture—one that would place the future of WOW New England clubs in jeopardy.

The day after Masotta signed, Zoppo did suggest a few changes. LeClair attempted to set up a time to discuss those changes, but no meeting was held and Masotta brought in separate counsel, Robert O'Regan of Burns & Levinson. O'Regan simply requested copies of the agreements. The Amended and Restated Operating Agreements were then circulated to the remaining members of the LLCs for their signature over the next few months. It is not clear to this Court how many (if any) of the other members of' the different LLCs signed; certainly, there is no evidence that any member (other than Masotta and Borghi) were consulted or had a chance to review anything ahead of time. Masotta and Borghi together did constitute the majority in each of the LLCs, however. Linda Borghi also signed the Amended and Restated Operating Agreements, purportedly in her capacity as manager of WOW New England.

***15** Although the defendants now maintain that these Amended and Restated Operating Agreements were validly executed, the fact remains that no attempt was made to comply with certain of their critical terms. Specifically, there is no evidence that the payouts of gross revenue (which were in exchange for the abolition of the fifty-mile territorial restriction on competition) were ever made to Masotta, Elizabeth or any other WOW New England member. Indeed, in explaining his change of heart and his decision to become a

plaintiff in this litigation after first being named a defendant, Masotta testified that it was because too many "promises had broken ." In short, LeClair may have viewed his role at the time as dealmaker, not litigator. In hindsight, however, the Amended and Restated Operating Agreements were the first of what would a series of unsuccessful attempts to reach a settlement among the parties, with LeClair representing one side of the dispute and with the interests of his clients Dixon and Borghi in mind.

G. Blast Takes Off, Using WOW New England Resources and Information

One month after the signing of the Amended and Restated Operating Agreements, Blast Fitness opened its first club, located in Cambridge. It was two miles from the Medford club operated by Nine Fitness, LLC, within four miles of the Waltham club operated by V Fitness; it was within fifty miles of ten more WOW New England Clubs. The Cambridge club used the WOW name, had the same member fee structure as WOW New England and offered the same benefits (e.g. free group exercise, babysitting). Cambridge members were also told that they could access WOW New England Clubs free of charge. At the direction of Borghi, the Cambridge club was listed on the WOW New England website, where prospective customers could enroll online. Its advertising budget (the largest component of overhead) was paid by WOW New England.

Over the next year, Blast Fitness would open up three more clubs in the New England area, each operated by its own LLC. They are:

> Blast Fitness Saugus, LLC, operating a club in Saugus, Massachusetts that opened in November 2011;
>
> Workout World, Foxboro, LLC, operating a club in Foxboro that opened August 2011 (the same club for which Borghi had executed a lease in October 2010);
>
> Blast Fitness, Lawrence, LLC, operating a club in Lawrence that opened October 2011.

The Saugus club was within six miles of two WOW New England Clubs (Medford and Peabody) and within fifty miles of nine more. The Foxborough Club was within fifty miles of all fourteen WOW New England Clubs, and the Lawrence club was within fifty miles of nine of the WOW New England Clubs. Thus, Borghi was in violation of the fifty-mile restriction on competition contained in the OAs for the LLCs that operated each of the WOW New England Clubs within that fifty-mile radius; Dixon was not only aware of that violation, but aided and abetted in it.

Like the Cambridge Club, the Saugus, Foxborough and Lawrence clubs all used the WOW name; for the same low cost membership fee, each gave members free access to WOW New England Clubs without additional charge. The clubs also advertised on the WOW New England website. Indeed, a Business Plan for Blast Fitness circulated in July 2011 describes the marketing strategy to be the same as that which has in the past "proved extremely successful for WOW New England." That plan also identifies key services that Blast Fitness intended to feature at its clubs—features which are virtually identical to those offered by the WOW New England Clubs.

***16** In May 2012, Blast purchased 38 health fitness clubs operated nationwide by Bally's. The Bally's acquisition was funded by capital contributions and loans from the Dixon Family Limited Partnership. Of those clubs, three were located in New England—specifically in Medford, Downtown Crossing in Boston, and East Providence. [16] With one small exception, all four clubs fell within the fifty-mile radius of all of the WOW New England Clubs. [17] Whereas the clubs outside the region went under the Blast name, each of the New England clubs that Blast acquired or opened used the WOW name. Like the other Blast investments, these three Blast clubs advertised on the WOW New England website, offered their members access free of charge to WOW New England Clubs, and had the same features and benefits.

Ultimately, Blast Fitness or another Dixon controlled entity [18] would own a total of thirteen fitness clubs in Massachusetts and Rhode Island, all operating under the WOW name. All of them were within fifty miles of one or more WOW New England Clubs. In using the WOW name, the Blast clubs were able to capitalize on WOW New England's good will. More important, as a consequence of his affiliation with Borghi and the access that gave him to inside information, Dixon was able to make informed decisions about club locations and prospective profitability and build a solid business model without having any background in health fitness. The clubs also did not have to incur any advertising costs—piggybacking as they did on WOW New England marketing efforts—and avoided certain personnel costs entirely, since some WOW New England employees were devoting time to Blast matters while still on the WOW

New England payroll. Finally, the fact that Blast members could access all WOW New England clubs free of charge had to be attractive to those considering enrolling and permitted the clubs owned by Blast to hit the ground running.

On the other hand, it would not be accurate to say that the establishment of the Blast Clubs and any later success any of them subsequently enjoyed can be entirely attributed to WOW New England Clubs and what Dixon was able to learn about them through his association with Borghi in his capacity as a member of WOW New England. Both Borghi and Dixon made substantial financial investments in order to open Blast clubs both in New England and elsewhere. For example, in June 2011, Dixon loaned Blast Fitness $3 million to build out and open Blast clubs at the Cambridge and other locations. To acquire the Bally's clubs (three of which were in New England), Dixon made a capital contribution of $4 million. Borghi made contributions or loans approaching $1 million in connection with clubs in Plymouth, Foxboro, and Worcester. This stands in sharp contrast to the way WOW New England would do business: in clear disregard of their obligations to minority owners, the three principals would simply use the profits of one club to open another, without risking their own money.

***17** In addition to contributing money, Dixon, Borghi and Hennessey also put in their own time to building the Blast clubs: Hennessey estimated that he and Dixon worked 40 to 60 hours a week in 2011 and 2012. This was often without pay, since the clubs generally did not show a profit until after the first year or so. The Blast Clubs at the Cambridge location, for example, was in the red $100,000 the first year, after the operating expenses were covered and loan payments were made. The three gyms that had once been Gold's were never profitable, with one of them eventually closing. In short, both Dixon and Borghi risked their own money and invested their own time to building the Blast clubs, with little financial return, at least initially. Finally, 49 of the Blast Fitness clubs are outside New England and do not compete in any way with WOW New England Clubs.

H. The Role of Linda Borghi

Linda Borghi played an active role at WOW New England as a salaried employee when Tony Beninati was alive. After his death, she continued to assist in administrative matters, but ultimately resigned her salaried position (or was forced out of it by her husband) in 2006. For a time, she ran her own health fitness clubs, under the name Women's Workout World. Under the 2004 OAs for WOW New England, Linda remained the person designated as titular Manager, but (as stated above) there was no evidence that she played any role in the business between 2006 and late 2010, when Dixon entered the picture.

Linda met Dixon for the first time at WOW New England's Taunton offices, and she started attending those meetings that Borghi had with Dixon and Hennessey regarding Blast Fitness and their expansion efforts. Sometime in 2011, Dixon recruited her to work for Blast; indeed, the Blast Fitness Business Plan described Linda Borghi as “Director of Club Operations.” Although working for Blast, Linda Borghi remained in close touch with WOW New England employees and, when her husband or Dixon requested it, Linda would use these contacts to access WOW New England's confidential information, funneling that information to Blast representatives.

In the fall of 2011, Linda Borghi returned to WOW New England and was named Chief Operating Officer by her husband. Linda continued to assist Dixon and Blast, however, and in fact kept her Blast email address. She also allowed Blast employees (some of whom had formerly worked for WOW New England) to keep their WOW email addresses so that they could be included on the circulation list when information about WOW New England was distributed among WOW New England management.

Although Linda may very well have simply been doing what she was told (either by Dixon or by her husband), the fact remains that she assisted Dixon and Blast Fitness in ways that were contrary to the interest of WOW New England. For example, when Dixon was negotiating with Roma to acquire exclusive rights to the WOW name, Linda was told to hold up on WOW New England's payment of its annual fee so as to give Dixon some leverage, on behalf of Blast, in those negotiations. At no time did Linda Borghi think to disclose to any WOW New England member what Dixon was up to, and ultimately, the agreement he struck with Roma would be one clearly not in the best interest of WOW New England. When Dixon did obtain the right to the WOW trade name, it was Linda Borghi who signed a sublicense agreement (in February 2013) that obligated WOW New England to pay a dramatically increased fee that Dixon imposed, primarily to put the squeeze on WOW New England (see below). In summary, Linda Borghi, like her husband, not only failed to live up to her obligations to act in the interest of WOW New

England but also actively assisted entities (Blast Fitness and Dixon) in direct competition with it.

I. Dixon Distances Himself from Borghi and Uses the Carrot and Stick as to WOW New England

***18** With a lawsuit looking likely as early as the summer of 2011, Dixon started to distance himself in various ways from Borghi. In August 2011, Borghi's equity position in Blast Fitness was reduced from 51 percent to 49 percent interest; in April 2012, it was reduced again, to 32 percent. Between December 2012 and February 2013, two new entities were created—NewFit, where the Dixon Family Partnership is the controlling interest, and LexFit, controlled by Cape Capital, LLC another Dixon entity. Blast's interest in four New England clubs (Cambridge, Saugus, Lawrence, and Foxborough) was transferred to NewFit, in which Borghi had no interest. Although he did have an interest in LexFit, Borghi ultimately redeemed his interests in that entity as well as in Blast Fitness in July 2013 in return for obtaining ownership interests in five clubs, two of which (Foxborough and Worcester) are in New England. He received a 49 percent interest in a sixth club, the one owned by Auburndale Fitness in Plymouth. Accordingly, between January 2011 and January 2013, Borghi went from holding the majority position in a company that now runs sixty clubs nationwide to being the owner of a small handful of those clubs. This Court does not credit the testimony that these transactions had nothing to do with this litigation.

At the same time that Dixon was distancing himself from Borghi, he was using a carrot and stick strategy to deal with WOW New England. The “stick” came in the form of the licensing agreement with Roma to use the WOW name. Borghi had in January 2011 obtained, on behalf of Blast, the exclusive right to use the WOW name in New England, effectively eviscerating the agreement that WOW New England had with Roma not to permit use of the WOW name by any other club within five miles of a WOW New England Club. Within months thereafter, Dixon began negotiating with Roma himself at the same time that he began to put some distance between himself and Borghi. The upshot of the negotiations was a Master Facilities Licensing Agreement (the MFLA) between WOW Licensing and Auburndale Fitness dated January 20, 2012. (Exhibit 25.) Under the MFLA, Auburndale Fitness (an entity in which Borghi had no interest) obtained the exclusive right to use and sublicense the WOW name in New England for the next two years. On October 7, 2012, WOW Licensing and Auburndale executed an amendment that extended the MFLA until 2018.

In February 2013 (well after the first of the two consolidated actions had been instituted) Dixon, using this MFLA, notified Fitness Capital (the entity that paid the licensing fees for all WOW New England Clubs) of Auburndale's exclusive rights and informed it that, if it wanted to continue to use the WOW name, the licensing fee was now $4,000 per month per club —a radical increase from the $4,000 *annual* amount that each club had paid Roma in the past. Linda Borghi on behalf of WOW New England signed off on the sublicense agreement between Auburndale Fitness and Fitness Capital committing it to pay this increased amount on behalf of all WOW New England Clubs. Although Dixon backed off within a month and ultimately amended the MFLA to permit WOW New England to pay Auburndale the fee it had previously paid directly to Roma ($4,000 a year per club instead of $4,000 a month), he had sent a clear message to WOW New England members about where the power lay. Moreover, the arrangement whereby Dixon permitted WOW New England to use the WOW name is contained in a written agreement, dated July 24, 2013 which is terminable on thirty days' notice. The sword was therefore left dangling over WOW New England's head.

***19** At the same time that he flexed his muscle, Dixon also sought to bring WOW New England into his fold by extending a carrot—specifically, invitations to its members that they participate in the Blast Fitness business venture. Thus, on May 9, 2013, Dixon extended an offer to all WOW New England members to buy into all Blast's New England clubs on the same “cost” basis as Dixon himself. Another similar offer was extended on June 4, 2013. Although all of these offers were made after litigation in this case had commenced, none of them were contingent on the outcome of the litigation. None of them were accepted by any member.

J. The Revolt within WOW New England

The first of the two consolidated actions before this Court (Civ. No. 12–1985) was filed on May 24, 2012. Early on in the case, it became apparent that the suit was going to be costly to WOW New England's members: the Borghis' legal fees were paid by Fitness Capital, pursuant to a provision in the WOW New England OAs, conditioned on the repayment of those fees if a Court later finds that their conduct was in breach of their fiduciary duties. See 6.07 of Cardio Fitness OA and

Section 12(a) of the 2004 OAs. As these fees mounted, so did the concerns of other LLC members. The last straw came when, in March 2013, Dixon sought to raise the licensing fees that each WOW New England club had to pay.

On March 28, 2013, Elizabeth and Masotta (who by that time had hired new counsel and was seeking to ally himself as a plaintiff in this lawsuit) sent out notice to members of all fourteen LLCs that a meeting would be convened on April 2, 2013. This Court finds that the notice was in order. The purpose of the meeting was to determine if the Borghis would remain as managers and if not, whether they should be replaced by Elizabeth and Masotta. Initially, Borghi stated that he would not attend, but then showed up at the meeting with his lawyers. There is no evidence that the meeting was conducted in an improper fashion.

As explained in Part A, *supra*, this Court finds that Elizabeth did have a voting interest in the LLCs. Counting her vote with that cast by other members, the majority of the members in each of the fourteen LLCs cast votes to remove the Borghis, with a single exception. Borghi held a 50.25 percent membership interest in Uno Dos Fitness and so could not be removed as manager of that LLC.

Borghi declined to honor the vote removing him, his counsel disputing Elizabeth's status as a voting member and the validity of the vote generally. Elizabeth and Masotta brought a second lawsuit, Civ. No. 13–1772, seeking an order from the Court to enforce the vote. This Court declined to rule and instead consolidated this second lawsuit with the first one and ordered an expedited trial on the merits.

RULINGS AND CONCLUSIONS OF LAW

I. Preliminary Issues

Before turning to the merits of the plaintiffs' claims, this Court must deal with certain preliminary issues. The first is whether Elizabeth is a voting member of the LLCs. Second, this Court must address the validity of the Amended and Restated Operating Agreements, since they purported to make changes which, if effective, would have a major impact on the substantive claims asserted here. Finally, this Court must determine whether plaintiffs' claims are direct or derivative, and if derivative, whether they are properly asserted. This Court will address each of these preliminary issues separately.

A. Elizabeth's Status as Voting Member

***20** Defendants do not contest that, as to those WOW New England Clubs for which there is no written agreement—those created after Tony's death—Elizabeth was a full voting member. Certainly, the evidence would not support a different position. After Tony's death, Elizabeth was treated on a par with Masotta and Borghi: the three regularly consulted on all major decisions and there was a general understanding that, unless Borghi was able to obtain Masotta's support for a decision, Elizabeth could veto his proposals. Accordingly, this Court concludes that Elizabeth was a full voting member of WAMP Fitness, Uno Dos Fitness, SJBB Fitness and FTN Fitness.

As to those LLCs which did have a written OA (the nine entered into in 2004), eight identify in their preamble that the members of the LLC included "Anthony (Elizabeth) Beninati." On its face, this reference is ambiguous; accordingly, this Court looks to what the parties said and did during the negotiation of these agreements so that the meaning of this reference can be construed in line with their intent. The 2004 OAs were entered into when it was apparent that Tony was going to die: with Borghi drinking heavily by that time, Tony was particularly concerned about how Borghi might run the business once Tony passed. With this concern in mind, Tony instructed Zayas that the LLCs' Operating Agreements should reflect the fact that his interest in the WOW New England was held jointly with his wife Elizabeth. This was also made known to Borghi and Masotta, who considered and rejected the idea of their own wives being included. Although Zayas (not a lawyer) was not the most skillful drafter, this Court concludes that, in line with this expressed intent of the parties, the LLCs containing this parenthetical reference to Elizabeth should be construed to mean that she held an interest in WOW New England jointly with Tony and thus was a full voting member in these eight LLCs once Tony died.

That is not to say that there was no evidence supporting defendants' position; indeed, there was. For example, the estate tax returns filed shortly after Tony's death list his interest in the WOW New England Clubs as individual interests and not as interests held jointly with Elizabeth. Also, Elizabeth was not a signatory on the 2004 OAs and was not listed together with her husband in that section of each agreement which specifies the ownership interest

percentage of each of the members. This Court has considered this evidence, however, and adheres to its conclusion that Elizabeth was indeed a voting member. This conclusion is reinforced by the subsequent dealings among the parties: up until 2011, when a rift developed between Borghi and Elizabeth, no one questioned Elizabeth's voting status.

There still remain, however, two LLCs with written OAs which make no mention of Elizabeth as a member, much less a voting member. Those are the Cardio Fitness, LLC, and the One Fitness, LLC. The latter was drafted by Zayas in 2004 pursuant to the same instructions that Tony had given him about Elizabeth's voting status; the failure to reference her could arguably be chalked up to a simple oversight on Zayas' part. No such similar explanation is available for Cardio Fitness, LLC, which was drafted in 1999 and operated the first WOW New England Club that was opened. The defendants argue that this Court (particularly in the face of the integration clause that is in each OA) must construe these two agreements in accordance with their terms and without regard to the extrinsic evidence.

***21** Notwithstanding the terms of these two agreements and their failure to reference Elizabeth, this Court nevertheless concludes that she is a full voting member of these two LLCs as well. I reach that conclusion based on the words and conduct of the parties following the execution of these documents. Particularly given the fact that the parties largely appear to have disregarded corporate formalities for many years, their conduct and course of dealings are important—maybe even more important—than the four corners of an agreement that was drafted based on a template. Moreover, Massachusetts courts recognize that the terms of a written agreement can be altered or waived based on clear and unequivocal conduct of the parties. See e.g. *Porter v. Harrington*, 262 Mass. 203, 207 (1928) (finding waiver by conduct). In the instant case, both the words and the actions of the parties clearly and unequivocally demonstrated that Elizabeth had voting status. Partnership Income Returns (or K–1s) identified her as "Member–Manager," and the federal tax returns listed her as "Tax Matters Partner." Elizabeth attended all management meetings, had free access to all WOW New England records, and was viewed by both Masotta and Borghi as being one of the three controlling principals in the clubs responsible for making all important business decisions. She was identified as a member in a lawsuit instituted by Borghi and in loan applications. As to the provision drawing a distinction between voting and nonvoting members, this provision was not only ignored but also appears to have been forgotten entirely until LeClair spotted it in his review of the 2004 OAs in the spring of 2011. Indeed, Borghi himself had received ownership interests as a result of transfers or assignments, and at all times saw this interest to carry with it full voting rights.

B. The Validity of the Amended and Restated Operating Agreements

The defendants argue that the Amended and Restated Operating Agreements are valid and therefore superseded the earlier Operating Agreements for the WOW New England LLCs. Certainly, if that were true, it would have a major impact on this Court's conclusions with respect to the substantive claims. If, on the other hand, the Agreements are not valid, then the governing agreements are the 1999 Cardio Fitness OA, the nine 2004 OAs, and the oral agreements for the four clubs opened after 2005, the terms of which are described in Part A of this Court's Findings of Fact. The Amended and Restated Agreements make major changes in the fourteen LLCs, and yet they were not discussed with any members of the LLCs other than the three principals, much less agreed to by them. Indeed, there is no evidence that the Agreements were signed by anyone other than Masotta, Borghi, and Linda Borghi.

The defendants first contend that Linda Borghi's signature alone is enough. They rely on Section 13 in the 2004 OAs, entitled Reservation of Right to Amend Operating Agreement. That section states:

> ***22** Notwithstanding anything to the contrary contained in this Operating Agreement, without the written consent of all of the Members, the Limited Liability Company shall not amend, alter, change or repeal any of the following Sections: Section 2, 3, 7, 13 and 14. Subject to the foregoing limitation of this Section 13, the Limited Liability Company reserves the right to amend, alter, change or repeal any provisions contained in this Operating Agreement in the manner now or hereafter prescribed by law and all the provisions of this Operating Agreement and all rights and powers conferred in this Operating Agreement

> on Members, stockholders, directors, and officers are subject to this reserved power.

The 2004 OAs go on to designate Linda Borghi as the Manager and gives her near exclusive authority to act on behalf of the clubs. The fifty-mile restriction is contained in section 12(c) of the written OAs for WOW New England. Because this is a section which may be repealed or altered pursuant to Section 13, then (the argument goes), the Amended and Restated Operating Agreements became effective with her signature alone, given Linda Borghi's broad grand of power to make changes without any members' consent.

There are two major problems with this position, however. First, although the 2004 OAs did designate Linda Borghi as "manager" of WOW New England, the evidence is undisputed that she had resigned her salaried position in 2006 and did not resume working for WOW New England until November 2011. Clearly she was not acting as a manager in any sense of the word when she signed the Amended and Restated Operating Agreements. Second, Linda Borghi was almost as involved as her husband in assisting Dixon in the formation of Blast and the promotion of its interests over those of WOW New England. Thus, to the extent she was purporting to exercise the authority conferred upon her by Section 13 of the 2004 OAs, she was doing so to advance the interests of Dixon and her husband's business interest in Blast, not in compliance with her own duties and responsibilities to WOW New England. Indeed, when she signed the Amended and Restated Agreements, she was an employee of Blast. Under all of these circumstances, this Court concludes that Linda's signature is not itself enough for the Amended and Restated Operating Agreements to have any legal effect.

The defendants next argue that the Amended and Restated Operating Agreements could be adopted by a majority vote of the LLC members, and that Borghi and Masotta together represented that majority interest. There are problems with this argument as well. First, there is no evidence that the defendants in any way complied with the Agreements' terms. Most notably, no member of a WOW New England LLC received any payout from the Blast Clubs pursuant to II.8 and that payout was critical, since it was the *quid pro quo* for the abolition of the fifty-mile territorial restriction. Without evidence of substantial performance, this Court sees no reason why defendants should be able to use the Amended and Restated Operating Agreements as a shield against liability. Second, although Masotta read through the Amended and Restated Operating Agreements and was represented by counsel at the time, neither he nor counsel were aware of the full extent to which Dixon and Borghi had mined WOW New England resources and confidential information and had already set the wheels in motion to set up a competing enterprise which would place the future of WOW New England in jeopardy. Moreover, his cooperation was essentially paid for: at the same time that he signed the Amended and Restated Operating Agreements, he entered into a Side Agreement with Dixon whereby he would receive $10,182.07. He was acting less as a WOW New England member with the corresponding obligations that carries and more in his self-interest, thus undermining his ability to bind WOW New England generally.

***23** Perhaps most significantly, the Amended and Restated Operating Agreements in their final form promoted the interest of Borghi over that of WOW New England Clubs, particularly in the event the payout of gross revenues was not honored. The plaintiffs argue that this conflict of interest in which Borghi found himself disqualified him from voting to amend the Operating Agreements. This Court agrees. The Supreme Judicial Court reached a similar conclusion in *Am. Disc. Corp. v. Kaitz*, 348 Mass. 706 (1965). In that case, a director had improperly dissipated corporate assets, and then exercised his vote on a Board matter in a way which would have had the effect of hiding his activities. The SJC held that he was disqualified from voting on the matter because of his divided loyalties. Twenty years later, the Appeals Court reached the same conclusion in the case of *JRY Corp. v. LeRoux*, 18 Mass.App.Ct. 153 (1984). Emphasizing the fact that the defendant, as a general partner, owed a duty of utmost good faith and loyalty to the other general partners, the Appeals Court refused to recognize the defendant's right to vote where that vote was destructive of the rights of the general partners and advantageous to his own financial position. The same is true in the instant case.

The Amended and Restated Operating Agreements were drafted by LeClair who, as the lawyer for Borghi and Dixon, had their interests in mind. The fifty-mile restriction in the prior OAs was a real stumbling block to Dixon's and Borghi's plan to open Blast Clubs in New England together; the Amended and Restated Operating Agreements removed this restriction and allowed competing clubs using the same WOW name to open within two to three miles—something that was clearly not in the interest of WOW New England. The Amended and Restated Operating Agreements

also stripped Elizabeth of her voting status by conditioning it on her execution of the agreements—itself a questionable provision in light of this Court's conclusion that she had full voting rights up until that time. The Amended and Restated Operating Agreements designated Borghi as Manager, and permitted him to be removed only for cause. And they also contained a provision that could arguably be used to absolve him of any past breaches of his fiduciary duty—more specifically for any diversion of corporate opportunities or violation of the fifty-mile territorial restriction that had been in place earlier. Such major changes to the LLCs should at least have been discussed with other LLC members other than Masotta (whose support, as noted, was essentially bought as a consequence of the Side Agreement). Instead, the finalized versions were simply presented to the membership as a *fait accompli.* Manifest justice and fairness require that this Court not recognize these Agreements as binding.

C. Derivative or Direct Action?

There are two consolidated actions before this Court. In the first, Civ. No. 12–1985, filed on May 24, 2012 (the Lead Action) the plaintiff was originally only Elizabeth Beninati; the defendants were Steven Borghi, Linda Borghi, Harold Dixon, Joseph Masotta, and other Dixon-controlled entities. The WOW New England, LLCs were listed as "nominal defendants." The second lawsuit, Civ. No. 13–1772, filed on May 14, 2013, was brought by Joseph Masotta, Elizabeth Beninati, and other members of WOW New England's fourteen LLCs. The Second Action requests only injunctive and declaratory relief, seeking to enforce a vote by the WOW New England members to remove the Borghis. This Court is less concerned with how the Second Action is classified, and indeed, defendants do not raise any issue as to plaintiffs' standing. Rather the question before the Court is whether the Lead Action—at least as to those claims seeking damages, since that would affect how damages would be distributed—is direct or derivative, and if derivative, if it is properly before the Court. [19]

***24** It is settled law in Massachusetts that "the difference between derivative and direct actions depends, in the first instance, on the nature of the injury inflicted: wrongs that affect the corporation or all of its shareholders generally must be remedied through the derivative device. Shareholders who have sustained injuries that are unique or special to them may maintain a direct cause of action." R. Southgate, & D. Glazer, MASS.CORP LAW & PRAC., 1–16–17–17 (2d.ed .2013). "The distinction between derivative and direct actions also depends on the nature of the duty whose violation is clamed to affect the plaintiff's interest. When harm results from breach of an obligation owed to the corporation or its shareholders generally, the action is derivative; when the duty violated is owed uniquely to a single shareholder, the action is direct." *Id.* at 17–17. Although plaintiffs have included everything but the kitchen sink in their Complaint, it is clear to this Court after trial that the focus of their claims that seek damages (particularly as outlined by their own expert, Christopher Barry) is on the alleged diversion of corporate opportunities, a breach of a non competition clause in the Operating Agreements, self-dealing and misappropriation of WOW New England's confidential information and assets. These are all wrongs committed against WOW New England and its members generally and are thus derivative in nature.

Although Elizabeth also alleges that she was the victim of a corporate freeze out and such claims may be regarded as direct rather than derivative, see e.g. *Donahue v. Rodd Electrotype Co. of New England,* 367 Mass. 578, 579 n. 4 (1975), she failed to prove at trial that she suffered any damages separate and distinct from the derivative claims. She was not deprived of any compensation as a result of any freeze out, and she received all that she was entitled to receive at all times as to any capital distributions due her. This is therefore quite different from *Donahue,* where the defendants, majority shareholders in a closely held corporation, were offered the opportunity to sell their shares to the corporation for a price that was not made equally available to plaintiff, a minority shareholder, thus causing her to suffer harm that was unique to her.

Having concluded that those claims seeking damages in the Lead Action are derivative in nature, this Court turns to the question of whether they have been properly asserted. Arguably, any issue with regard to Elizabeth's standing has been waived, since it was not raised by way of a motion to dismiss or for summary judgment. See e .g. *Diamond v. Pappathanasi,* 78 Mass.App.Ct. 77, 89 (2010). Even had such a motion been brought, however, it would have failed. A derivative action must be brought in compliance with G.L.c. 156C, § 56 and Mass.R.Civ.P. 23.1. Both were satisfied here.

The statute permits any member of an LLC to sue on its behalf provided that such member is authorized to sue by "the vote of members who own more than fifty percent of the unreturned contributions," and those members have no interest in the outcome of the suit that is adverse to the interest

of the LLC. At all relevant times, Elizabeth was a member of all fourteen LLCs and, when suit was filed, those who made up a majority of the LLCs—Masotta and Borghi—were not disinterested (Masotta having been named as a defendant); thus, their failure to authorize suit is irrelevant. *Billings v. GTFM*, 449 Mass. 281, 289–90 (2007). Rule 23.1 requires that a derivative action be instituted by a Verified Complaint which, among other things, alleges "with particularity, the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." The Complaint for the Lead Action was verified and included allegations sufficient to demonstrate that any demand to sue on behalf of the LLCs would have been futile.

II. Liability

***25** As noted, there are two separate cases before the Court. The Second Amended Complaint in the Lead Action exceeds 90 pages in length and sets forth thirty-nine counts in all. [20] Testimony at trial, however, focused almost exclusively on claims that the Borghis, aided and abetted by Dixon, breached their fiduciary duties, such that all three should be held jointly liable. To the extent that the Second Amended Complaint alleges other causes of action, this Court sees not reason to address those claims separately, with one exception; that is because any damages awarded on the principal claim would fully and fairly compensate WOW New England LLCs for the harm that plaintiffs seek to recover on their behalf. [21] Indeed, plaintiffs make no attempt to distinguish these other claims in any way. The single exception is the G.L.c. 93A claim which carries with it the right to attorneys fees and multiple damages if the defendants' conduct is found to be willful. That claim is discussed below.

A. Breach of Fiduciary Duty

To prevail on this claim, plaintiffs must establish that: a) a fiduciary relationship existed; b) there was a breach of that duty; and c) such breach caused some harm to the plaintiff (here WOW New England, since the claim is derivative). *Hanover v. Sutton*, 46 Mass.App.Ct. 153, 164 (1999). This Court concludes that all of these elements have been satisfied. A limited liability company is a closely held business entity; accordingly, "the relationship among the shareholders must be one of trust, confidence and absolute loyalty if the enterprise is to succeed." *Donahue v. Rodd Electrotype Co.*, 367 Mass. at 587. "They may not act out of avarice, expediency or self interest in derogation of their duty of loyalty to the other stockholders and to the corporation." *Id.* at 593. This same obligation extends to those not themselves members but who occupy management positions by which they exercise control over the affairs over the corporation. See e.g. *Chelsea Industries, Inc. v. Gaffney*, 389 Mass. 1, 11 (1983). As a principal in WOW New England, Borghi owed this duty of loyalty to the LLCs of which he is a member. As a manager of WOW New England, Linda Borghi assumed these same fiduciary obligations.

In opposition, the Borghis make two arguments. First, they rely on Section V.8(d) of the Amended and Restated Operating Agreements, which expressly disavows any fiduciary obligation by any member of the WOW New England LLCs. As explained above, this Court finds and concludes that these agreements are of no legal effect. Consequently, the controlling agreements are those that predated them. That would include the written OA for Cardio Fitness, LLC, the 2004 OAs (which include the OA for One Fitness, LLC), and the oral agreements for those LLCs relating to clubs opened after Tony's death. With the exception of the Cardio Fitness OA, none of these agreements expressly disavow any fiduciary duty or obligation on the part of the LLCs' members. Since the damages sought are not limited to the harm inflicted on Cardio Fitness, LLC (and excluding Cardio Fitness, LLC does not appear to affect the overall damages calculation in any measurable way) this Court concludes that this exception is of no significance.

***26** Second, the Borghis maintain that, even if the Amended and Restated Agreements are not valid, the provisions in the earlier written agreements permitting members to engage in other business ventures except for those within a fifty-mile radius expressly circumscribe the Borghis' fiduciary obligations and permit WOW New England to recover damages only to the extent there has been a breach of this contractual provision. In support, they rely on *Blank v. Chelmsford, Ob/Gyn, P.C.*, 420 Mass. 404 (1995) and its progeny. In *Blank*, the allegations of wrongdoing related solely and exclusively to the termination of plaintiff, a shareholder and employee of the corporation. Since the circumstances under which he could be terminated were expressly dealt with in two written agreements and the

complaint did not state any facts showing any breach of those agreements, it was held that plaintiff could not separately maintain an action for breach of fiduciary duty and that the complaint was properly dismissed. See also *Chokel v. Genzyme Corp.*, 449 Mass. 272, 278 ((2007) ("When a director's contested action falls *entirely* within the scope of a contract between the director and the shareholders, it is not subject to question under fiduciary duty principles") (italics supplied). On the other hand, the SJC has made it equally clear that "the presence of a contract will not always supplant a shareholder's fiduciary duty," see *Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721, 727–28 (2013), and that, "unless the contract clearly and expressly indicates a departure from those obligations, general fiduciary principles apply." *Selmark Associates, Inc. v. Ehrlich*, 467 Mass. 525, 537–38 (2014). Here, the challenged conduct goes well beyond allegations that the Borghis engaged in other business ventures within a fifty-mile radius of WOW New England clubs. Moreover, this Court does not interpret the fifty-mile restriction on competition in the written OAs as an express indication that members are otherwise freed from their fiduciary obligations so long as any business they engage in is outside the fifty-mile radius, regardless of what they do to initiate that business.

While the Borghis clearly had a fiduciary duty, that cannot be said of Dixon, who was never a member of any LLC that owned a WOW New England club. Although Steven Borghi did hire him as a consultant, the evidence showed that Borghi paid him personally for any services he rendered and that whatever services he did perform were not for the benefit of WOW New England but to advance his and Borghi's own separate business interests. Although a fiduciary relationship can exist as a result of special circumstances showing that one party placed a high degree of confidence and trust in the other, the facts here show quite the opposite. From his first appearance in the Taunton office, Elizabeth viewed Dixon with suspicion: not only was she unaware of any consulting arrangement that Dixon had with Borghi but she very quickly became concerned that he was working against WOW New England's interests. Although initially more welcoming of Dixon, Masotta saw him only as a source of capital for expansion and did not place any special confidence or trust in him. There is no indication that any other member of the WOW New England LLCs felt any differently.

***27** That does not mean that Dixon is off the hook on this claim, however, since he may be held jointly and severally liable with the Borghis on this claim if plaintiffs demonstrate that Dixon aided and abetted the Borghis in committing a breach of their fiduciary obligations. That requires proof that he not only played a substantial supporting role in the commission of the tort but had actual knowledge of his role—that is, that he knew that the Borghis breached their fiduciary obligations and actively participated in or encouraged the breach such that he could not reasonably be found to have acted in good faith. *Arcidi v. National Association Government Employees, Inc.*, 447 Mass. 616, 623–24 (2006) see also *Maruho Co, v. Miles, Inc.*, 13 F.3d 6, 10 (1st Cir.1993). With respect to that conduct of the Borghis which constituted a breach of their fiduciary duties, this Court concludes that Dixon (individually and through his various business entities) not only knew of that conduct but provided the Borghis with substantial assistance so as to be held jointly and severally liable with them.

Having concluded that the plaintiffs have established the first element regarding the requisite duty, this Court also concludes that the plaintiffs have proved by a preponderance of the evidence numerous breaches of the fiduciary duties by the Borghis (aided and abetted by Dixon), and further concludes that such breaches caused harm to WOW New England. First and foremost, the Borghis together with Dixon misappropriated confidential information of WOW New England and used that information to build a business in direct competition with WOW New England. As set forth in my fact findings, this information included WOW New England club membership data, revenue information, reports that analyzed the demographics of the WOW New England membership base, employee training manuals, payroll data, and a list of the clubs' vendors. Before obtaining this information, Dixon had no experience in the fitness industry; as a consequence of his alliance with Borghi, Dixon was essentially handed the blueprint he needed to open his own line of low cost health clubs in the best locations, with a tried and true business model, a list of vendors, and templates to use to get the business off the ground. Moreover, Dixon acquired this information by infiltrating WOW New England under the guise of being a consultant, and then essentially bought the Borghis' cooperation by making Stephen Borghi his business partner in Blast Fitness. None of this was revealed to the other members of WOW New England. Dixon, with his business background and work in startups, knew or reasonably should have known that the Borghis were in breach of the obligations that they owed to WOW New England by virtue of their affiliation with Dixon and his companies. Armed with this confidential information, the defendants were able to open fitness clubs that, because of their close proximity to WOW

New England clubs, posed a threat to WOW New England's customer base and its ability for future expansion.

***28** Second, Dixon together with the Borghis, used WOW New England assets to open and operate competing clubs; they also engaged in other activities that promoted the interest of Blast at the expense of WOW New England. Thus, WOW New England employees performed work for Blast while they were on the WOW New England payroll. At the direction of Borghi and with Dixon's blessing, New England clubs opened by Blast were listed on WOW New England's website. Blast piggy-backed on WOW New England advertising and marketing efforts. Blast members were given access to all WOW New England clubs free of charge, thus allowing Blast to build up its customer base at WOW New England's expense. On at least one occasion, Borghi, with Dixon's knowledge and assistance, actually obtained a loan in connection with the opening of one Blast club by making one of the WOW New England LLCs a guarantor. On another occasion, Linda Borghi, at Dixon's direction, was instructed to hold back payment of a licensing fee to Roma of WOW Licensing so that Dixon could obtain leverage in his bargaining with Roma over a Blast licensing arrangement. Dixon then used the deal that he struck with Roma to attempt to hike WOW New England's licensing costs tenfold.

Finally, the Borghis, with Dixon's knowledge and substantial assistance, violated the restrictive covenant that prevented any member of WOW New England from opening up a competing venture within a WOW New England club. This covenant essentially defined the corporate opportunities that WOW New England principals wanted to protect: without it, any one of them could take what they had worked together to build over a decade and open up a competing club that used precisely the same business model, offered the same services, and used the same name. In violating this covenant, Borghi, with Dixon's assistance, did precisely that.

There are thirteen fitness clubs owned by Blast that operate under the WOW name in Massachusetts and Rhode Island. Every single one of those is within at least fifty miles of at least one WOW New England club. The close proximity of the clubs is particularly advantageous to Blast, since it was able to capitalize on the good will developed among WOW New England customers, who would have no reason to know that the Blast clubs are separately owned. To the extent that Blast is able to offer its own customers reciprocal membership in WOW New England clubs, that benefit is most attractive where the different clubs are grouped in the same general area.

In reaching a conclusion that locating Blast clubs within fifty miles of a WOW New England club constituted a breach of fiduciary duty, this Court rejects the defendants' argument that this restrictive covenant was unreasonable in scope. This Court understands that such covenants must be scrutinized carefully and are enforceable only to the extent that they are necessary to protect the legitimate business interests of the employer. *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 716 (1961). Those interests are apparent in the instant case: WOW New England had a legitimate business interest in preventing any single member of WOW New England from exploiting for his own personal benefit any opportunity to expand the business that belonged first to WOW New England.[22] Plaintiff's expert, Mark Ryseman, a professor of Economics, pointed out that the restriction made particular sense in the context of the health fitness industry, given the value of the corporate opportunities that exist with regard to developing additional clubs that are part of the same chain. As he explained, having multiple locations in the same geographic area not only allows the chain's owners to gain an economy of scale by spreading fixed costs but it also means that the clubs are better able to attract and keep customers, since they can offer them multiple locations from which to choose. As to the time (one year) and the covenants' geographic reach (fifty miles), that falls well within the standard suggested in Massachusetts cases that have upheld similar restrictions. See *Marine Contractors, Co., Inc. v. Hurley*, 365 Mass. 280, 287–88 (1974).

***29** This Court also finds unpersuasive the defendants' argument that the covenant should not be enforced because the three principals—Masotta, Elizabeth and Borghi—did not themselves adhere to it in practice—that is, that they had in the past opened up other clubs under the WOW name without first consulting minority members. As discussed by the three principals when the covenant was first included in the LLCs' OAs in 2004, the purpose of the covenant was to make sure that expansion of WOW New England occurred only if the three principals agreed. It was never contemplated that the minority members had to agree as well. In any event, the minority members of each LLC generally knew when a new club opened, since many of the same people were offered a membership stake in a new club.[23] That they may not have been aware that new clubs were funded by loans from existing clubs does not mean that the restrictive covenant in each LLC's OA is unenforceable as to the Borghis and Dixon.

Having concluded that WOW New England suffered some harm as a result of defendants' actions, this Court would hasten to add that it does not agree with the plaintiffs as to the extent of that harm, nor (as discussed more fully below) as to what amount of damages would reasonably compensate WOW New England for any harm that has resulted. Although it is true that Dixon may have used what he learned from Borghi to open heath fitness clubs outside the New England area, those other clubs do not pose any threat to WOW New England's customer base nor do they benefit in any way from WOW New England's good will: indeed, they do not even use the WOW name. Moreover, it was always contemplated that any member of WOW New England could undertake his or her own business ventures outside of the fifty-mile radius of any WOW New England club; in fact, Borghi had, well before these lawsuits, opened his own line of health clubs in Minnesota. Although he could not do so without regard to his other fiduciary obligations, any advantage obtained by any breach of duty was for all practical purposes limited to the New England area.

B. Violation of Chapter 93A

Counts XXIV and XXV allege that the defendants violated G.L.c. 93A, § 11. That statute applies only to arms-length commercial transactions between distinct business entities, however. *Szalla v. Locke*, 421 Mass. 448, 451 (1995). It does not apply to intracorporate disputes or wrongs that are purely private in nature. *Manning v. Zuckerman*, 388 Mass. 8, 12 (1983) (93A held not to apply to dispute between employer and employee); see also *Riseman v. Orion Research, Inc.*, 394 Mass. 311, 313, (1985) (93A not intended to redress wrongs asserted by stockholder against corporation regarding its internal governance). That is in part because the aggrieved party has available an alternative avenue of relief in the form of a suit for breach of fiduciary duty. *Zimmerman v. Bogoff*, 402 Mass. 650, 663 (1988) (part owner of a close corporation alleging breach of fiduciary duty by his fellow owner could not also assert a claim under 93A § 11). Clearly, that would prevent the plaintiffs from asserting a 93A claim against the Borghis: their liability arises directly from the duties that they owed the LLCs and is driven by an internal dispute among WOW New England members. Because any wrongdoing by Dixon is only as a result of his aiding and assisting the Borghis in breaching their fiduciary and contractual obligations that they owed WOW New England, the plaintiffs cannot assert a 93A claim against Dixon either.

II. The Remedies

A. Damages

***30** Plaintiffs put forward three theories as to damages: 1) an award, based on a constructive trust theory, that would equal the market value of each of the Blast Clubs; 2) a reallocation of WOW New England overhead so as to require Blast to pay its share; and 3) an assessment of “royalties” owed to WOW New England for the Blast Clubs' misappropriation of confidential information. In support, plaintiffs offered the testimony of Christopher Barry. This Court will discuss each theory and its factual underpinnings in turn.

1. Constructive trust

In seeking an award of *damages* under this theory,[24] plaintiff's attempt to put a dollar value on that portion of the harm suffered by WOW New England as a consequence of diverted corporate opportunities and Borghi's breach of the noncompetition covenant. If this Court were to adopt plaintiffs' position, I would have to engage in a two-step process. First, this Court would have to conclude that 100 percent of the fair market value of the Blast Clubs should be transferred to WOW New England without any capital contribution coming from plaintiffs.[25] Second, in order to award damages, this Court would in effect be forcing a cash buyout of that equity so as to require defendants to pay WOW New England that amount of money which would be received if the Blast Clubs were sold on the open market. This approach has two fundamental flaws.

First, Barry's methodology for calculating damages under this theory did not take into account what the defendants themselves contributed to the success of the Blast Clubs. Plaintiffs are entitled to restitution, not a windfall; an award that does not take into account the defendants' own investments in the Blast Clubs would go well beyond what is necessary to prevent unjust enrichment of the defendants. See e.g. *Demoulas v. Demoulas Super Mkts., Inc* . 424 Mass. 501, 556 (1997); see also *Shulkin v. Shulkin*, 301 Mass. 184, 193 (1938) (the innocent party should be put in the same position he would have been in had there been no wrongdoing). Testimony showed that both Borghi and Dixon made substantial capital contributions, risked their own money in the form of loans to the business venture,

and invested a large amount of time in developing the clubs, much of it uncompensated. As the defendants point out, if a constructive trust were applied, its scope should be limited to the opportunity that would have been afforded to plaintiff (inclusive of the breaching party's participation) and nothing more. In asking that WOW New England be awarded 100 percent of the fair market value of each Blast club, the plaintiffs' request goes far beyond that. [26]

Second, the plaintiffs' attempt to use a constructive trust theory as a vehicle for damages is not supported by case law. As the defendants correctly state, plaintiffs are seeking not only the imposition of a constructive trust but an accompanying order that would force the defendants to then buy them out. But if WOW New England had been able to take advantage of the corporate opportunities that the defendants diverted from it, it would have had no reasonable expectation that it could readily convert that opportunity into cash. The SJC's decision in *Brodie v. Jordan*, 447 Mass. 866 (2006), is particularly instructive in this regard. In that case, the SJC held that the lower court had correctly concluded that the defendants breached their fiduciary duty to the plaintiff, a fellow shareholder in a close corporation, by depriving her of certain benefits that came with her ownership stake. The SJC reversed the lower court's ruling, however, to the extent that it required a forced buy out of her shares from the majority at a price determined by an expert's estimate of their shares' value. Not only was this "a remedy that no Massachusetts appellate court has previously authorized," but, since there was no ready market for plaintiffs' shares, "it placed the plaintiff in a significantly better position than she would have enjoyed absent the wrongdoing and well exceeded her reasonable expectations of benefit from her shares." *Id.* at 871–72. The same is true here.

2. Reallocation of Overhead

***31** As to this theory, this Court is not so much troubled by the legal basis for it as it is concerned with the factual assumptions that Barry made in making his calculations. Barry's intent was to put a dollar figure on that portion of the overhead expenses that were paid by WOW New England and that should have been paid by Blast. These overhead expenses fall into two categories: the first is for payroll expenses, and the second is for advertising costs. Although this Court agrees that Blast essentially piggy-backed on WOW New England advertising without having to pay for it, I do not find a factual basis for Barry's calculations regarding payroll expenses.

Barry testified that he made his payroll calculations based on the assumption that certain key management personnel —among them Vincent Antonuccio, Priscilla Giroux and Agnes Murray—were spending large amounts of time on Blast business while being paid by WOW New England. He testified that the sources for this information were conversations he had had with Elizabeth, review of the Verified Complaint in this case, and certain emails showing that WOW New England personnel had funneled information to Dixon. Barry's assumptions that he made based on these sources were not supported by the trial testimony, however. Antonuccio (portions of whose deposition were admitted into evidence) denied doing Blast work while he was on the WOW New England payroll. Priscilla Giroux was not a witness at trial. Although Murray collected information for Dixon for some period of time between 2011 and 2012, there was no evidence showing how much time this took her, much less what her salary at WOW New England was. [27] Moreover, to the extent that her actions led to the defendants' misappropriation of information and knowledge, then that is covered by the third theory of recovery, discussed below. Finally, Barry's calculations assume that WOW New England personnel devoted large amounts of time to Blast business through April 2013, well after this lawsuit was commenced. In fact, there was no evidence whatsoever that any WOW New England employee performed any work at all for Blast in 2013. Without a factual basis, Barry's calculations as to reallocation of payroll expenses, plaintiffs are not entitled to damages stemming from payroll costs.

As to advertising costs, there is a factual basis for Barry's opinions: Blast opened clubs and had those locations on the WOW New England website where customers could enroll online. It used the WOW name, thus benefitting from WOW New England's advertising, yet paid nothing for that benefit. This was because Borghi, aided and abetted by Dixon, not only permitted that to occur but did so with the specific purpose of obtaining something for nothing. Also, the defendants were able to acquire the right to use the WOW name as a result of Borghi's position with WOW New England: without informing Roma at WOW Licensing about his dual role, Borghi persuaded Roma to enter into a Master Licensing Agreement that essentially gave Blast permission to open clubs that were within a five-mile radius of WOW New England clubs, in contravention of the understanding that WOW Licensing had with WOW New England whereby it agreed not to do so. It does not matter that there has been no showing that WOW New England spent more on

advertising during the years that Blast was getting started: having received the benefit of the advertising, Blast should be required to pay for that benefit.

***32** Barry calculated Blast's share of the advertising expenses from 2011 through April 2013 to be $1,552,455. This Court credits the methodology by which he reached that number and concludes that damages should be awarded to WOW New England in that amount.

3. Royalties

This theory of recovery, as explained by Barry is designed to compensate WOW New England for the defendants' wrongful misappropriation of confidential information. As a result of Dixon's alliance with Borghi, Dixon (who had no prior experience in the health fitness industry) was able to get everything he needed before opening a single club. He obtained a list of vendors, employee training manuals, and scripts for sales pitches. He received profit and loss statements and revenue projections of WOW New England's existing clubs, allowing him to make informed financial decisions immediately. Dixon, with Borghi's assistance, was also funneled reports that compared each WOW New England club's performance and analyzed the demographics of its membership base, thus allowing him to select the best locations for his own clubs. Dixon was educated by Borghi and (other WOW New England personnel to whom Borghi gave him access) in the look and feel of the business model that had proved so profitable for WOW New England. Although any single piece of information would not necessarily be regarded as protectable, together, this information was invaluable and would not have been obtainable without Dixon's having insinuated himself into the inner workings of WOW New England as effectively as he did.

These benefits would not be reflected in concrete losses to WOW New England or any corresponding profits to Blast: indeed, when each Blast club opened, it was not expected to make any profit for the first two years. Accordingly, this Court finds and concludes that the proper approach to making WOW New England whole for the wrong done is the one articulated by Barry as the royalties theory. See *Jet Spray Cooler, Inc. v. Crampton,* 377 Mass. 159, 171, n. 10 (1979). Under this theory, Blast is viewed much like a franchisee that obtains a blue print for the business from the franchisor and in return pays the franchisor some percentage of its revenues. Examining five comparable arrangements in the market place (all involving health fitness clubs), Barry came up with a base royalty of five percent. This Court accepts Barry's methodology and analysis and therefore concludes that this percentage is reasonable.

Using Profit and Loss Statements from Blast, Barry then applied this five percent fee to revenues generated by the thirteen Blast clubs in the New England area. He used actual revenue for 2011 and 2012; he used projections from 2013 and through 2017, relying on Hennessey's calculations as to what he expected Blast's profit margin to be for those clubs. Barry then reduced these projected revenues to present value. This Court finds and concludes that Barry's calculations are sound. Five percent of the Blast revenues from 2012 through 2017 equal $2,559,921. In the event that this Court ends up ordering equitable relief in the form of a constructive trust (see below), then that figure should be reduced so that damages are cut off at the point that any constructive trust is imposed going forward. It is simply noted at this point that five percent of Blast revenues between 2011 and 2014 are $1,458,289, which would be the damages awarded to WOW New England if such a trust were imposed by the end of this year.

B. Other remedies

***33** The plaintiffs request a panoply of other remedies in addition to damages. Although further hearings will be required to determine the nature and scope of some of these remedies, several can be decided now, partially or entirely, in light of this Court's fact findings, and those not resolved can still be narrowed.

1. Declaratory Relief

Count I of the Second Amended Verified Complaint seeks a declaration that Elizabeth is a full voting member of all fourteen WOW New England LLCs. In light of this Court's findings and rulings above, plaintiffs are entitled to declaratory relief as requested in that count.

Count II seeks a declaration that the Amended and Restated Agreements are null and void. In light of this Court's conclusion that they have no legal effect, plaintiffs are entitled to judgment in their favor on this count.

2. Rescission

Certain allegations in the Complaint that were in turn supported by the evidence at trial relate to defendants' conduct with respect to the arrangements that WOW New England had with WOW Licensing. Before Dixon entered the picture and allied himself with Borghi, each WOW New England LLC had the exclusive right, in return for an annual fee, to use the WOW name within a five-mile radius of the club that the LLC operated. Although written licensing Agreements as to each WOW New England LLC had expired by 2010, oral agreements on the same terms were in effect when Dixon and Borghi formed Blast Fitness. Borghi together with Dixon then undermined these agreements by separately negotiating Master Licensing Agreements with WOW Licensing on behalf of Blast.

Borghi, with Dixon's knowledge and encouragement, also improperly used WOW New England assets for the benefit of Blast when he executed a guarantee whereby Too Fitness, LLC became the guarantor on a lease for property housing a Blast club.

Because all of this conduct was in breach of Borghi's fiduciary duty to WOW New England and because Dixon aided and abetted him in breach of that duty, the defendants are not entitled to the benefits of those agreements. In their post-trial briefs, the plaintiffs request that this Court rescind those agreements. This Court is not convinced that it has the authority to unilaterally rescind agreements where one of the parties to the agreement is not a party to this lawsuit and has done nothing wrong. That does not mean, however, that this Court is powerless to fashion any remedy.

As to the use of the WOW brand, this Court concludes that it does has the authority—and hereby exercises that authority—to enjoin the defendants from using the WOW name anywhere in New England. They are also enjoined from receiving the benefits conferred by any contract that they did execute with WOW Licensing whereby they obtained certain rights to use the WOW name. That means, of course, that the defendants necessarily have no right to charge WOW New England any licensing fees; WOW New England should instead pay annual licensing fees directly to WOW Licensing, not to Blast. This Court also orders that the defendants secure a different guarantee (to the extent one is still necessary) from that underwritten by Too Fitness.

3. Enforcement of the Vote to Remove the Borghis

***34** On March 28, 2013 well after the Lead Action had been filed, all members of the fourteen WOW New England LLCs were duly notified of a meeting scheduled for April 2, 2013 to vote on whether the Borghis should be removed from their positions as managers. That meeting was held. If Elizabeth's vote is counted, the majority of the membership interests in thirteen of the fourteen LLCs voted to remove the Borghis and to appoint Elizabeth and Masotta in their place as co-managers. As to Uno dos Fitness, LLC, Borghi held a 50.25% interest and thus maintained his position in that LLC along with his wife. The Borghis refused to recognize the validity of the vote and plaintiffs brought the Second Action seeking a preliminary injunction. This Court deferred ruling on that request until after trial.

Now that the trial has concluded, the defendants' sole basis for opposing the issuance of an injunction is that Elizabeth did not have voting status. [28] Having concluded that she does, this Court concludes that plaintiffs are now entitled to a permanent injunction enforcing the vote that was taken. This Court declines to enter an injunction, however, that goes beyond the scope of that vote: specifically, I see no basis for preventing the Borghis from entering any premises belonging to WOW New England.

4. Imposition of a Constructive Trust

Although this Court has concluded that the plaintiffs are not entitled to an award of damages under a constructive trust theory, this Court does conclude that some equitable relief may be in order to compensate WOW New England for Borghi's breach of the non competition covenant present in most (but not all) of the WOW New England OAs. That covenant defined the scope of corporate opportunities that belonged to WOW New England and that Borghi, with Dixon's assistance and encouragement, diverted and exploited for their own personal benefit. Under a constructive trust theory, WOW New England is entitled to receive, *going forward*, some portion of the profits in the thirteen Blast clubs that are within fifty miles of any WOW New England club. [29]

This Court does not agree with the defendants that the constructive trust should be limited to Borghi's interest, since Dixon was as much a part of the wrongdoing as

Borghi was: he was able to open and operate the Blast clubs only because he misappropriated WOW New England confidential information, used its assets, and interfered with its relationship with WOW Licensing. It is thus entirely irrelevant that Borghi currently has no stake in many of those clubs. It is equally irrelevant that Dixon personally does not own these clubs but does so through various investment vehicles.

On the other hand, this Court does agree with the defendants that the relief that the Court awards must take into account any capital contributions that Borghi and Dixon made in the Blast club development. The constructive trust would also be limited to net profits, thus taking into account any liabilities, including loan payments that any Blast club is required to make. WOW New England members are entitled to be made whole; they are not entitled to be placed in a better position than they would have been in had no wrongdoing occurred.

***35** There are a number of obstacles in the way of this Court's fashioning such relief at this time, however. First, WOW England is not a single entity but is composed of fourteen separate LLCs. Although damages awarded to WOW New England could be distributed through Fitness Capital in accordance with each members' percentage interest in the LLCs (as plaintiffs suggest), this Court cannot order an equitable remedy under a constructive theory where the beneficiary is simply "WOW New England." [30] Second, the restrictive covenant is not present in the Cardio Fitness OA: thus, members of its LLC should not benefit from this remedy. Third, as to those OAs (written and oral) that do contain this restriction, clubs opened by Borghi and Dixon were within a fifty-mile radius of only *certain* WOW New England clubs: it would seem that the LLCs of those WOW New England clubs outside that radius must be excluded as beneficiaries. Finally, this Court is troubled by the notion that WOW New England members will be able to enjoy the profits of Borghi's and Dixon's efforts without themselves having made any capital contribution to the development of any Blast club —a contribution that would necessarily have to be made for WOW New England to take advantage of this corporate opportunity.

Defendants argue that all of these problems are insurmountable such that a constructive trust may not be imposed. This Court is not so sure: further hearings on this request are required to determine if this Court can fashion an appropriate order.

5. Attorneys Fees

Shortly after the Lead Action was instituted, plaintiff (at that time, only Elizabeth) sought a preliminary injunction to prevent WOW New England funds from being used to pay the Borghis' legal expenses. This Court (Roach, J.) denied that motion, citing the indemnity provisions in the written OAs. To be sure, those provisions did carve out exceptions to the indemnification obligation. Thus, the Cardio Fitness OA states that that there is no right of indemnification in the event that the indemnitee is adjudicated "not to have acted in good faith in the reasonable belief that his or her action was in the best interest of the LLC." See 6.07(c) of the Cardio Fitness OA. The 2004 OAs states that any member who acts with "gross negligence or [engages in] willful misconduct" may not be indemnified for expenses, including attorneys fees incurred in defending such conduct. Although plaintiffs relied on these exceptions in their request to prevent the payment of the Borghis' legal fees, the Court concluded (quite properly) that it was simply too early to determine if the defendants' actions fell within those exceptions at that preliminary stage in the litigation.

With all the facts now before it, this Court can make those findings: Borghi's conduct in forming Blast and in opening competing health clubs with Dixon, as well as Linda Borghi's assistance in that effort, were not only in bad faith but was also willful and intentional and clearly not in the best interests of WOW New England. This finding also means that the Borghis are barred from indemnification by statute. See G.L.c. 156C, § 8 ("No indemnification shall be provided for any person with respect to any matter as to which he shall have been adjudicated in any proceeding not to have acted in good faith in the reasonable belief that his action was in the best interest of the limited liability company"). Because the legal expenses of the Borghis were paid with WOW New England funds at Borghi's behest while this litigation was ongoing, they must now be repaid. Accordingly, the Borghis are required to reimburse WOW New England for the expenses that were paid by WOW New England to Borghis' attorneys in defending them *in this litigation* .

***36** This Court does not agree that this extends to any expenses that WOW New England paid *before* this litigation was instituted. Specifically, I see no basis to require Borghi to repay WOW New England for any amounts paid to Goodwin Procter & Hoar in connection with the negotiation and drafting of the Amended and Restated Operating Agreements.

That effort was undertaken in large part to settle the dispute before it erupted into litigation. It was also an attempt to cure some of the problems presented by the various OAs and bring some clarity to the LLCs' organizational structure.

As to whether *plaintiffs* are entitled to be reimbursed for their attorneys fees, that is dealt with in G.L.c. 156C, § 57. That statute states that, on termination of a derivative suit, the court may order the limited liability company to pay plaintiff's "reasonable expenses, including counsel fees, incurred in the proceeding if it finds that the suit has resulted in a substantial benefit to the limited liability company." In light of the damages awarded together with other relief, this Court does find that this litigation resulted in such a benefit and exercising the discretion conferred on me by statute, concludes that an award of attorneys fees is appropriate here. As to what those fees are and whether they are reasonable, that will require a further hearing. In any event, any fees awarded to the plaintiffs shall be paid from the proceeds that WOW New England receives. See *Martin v. F.S. Payne Co.,* 409 Mass. 753, 758 (1991).

6. Other Injunctive Relief

Plaintiffs request that this Court enjoin the defendants from opening or operating competing health clubs within fifty miles of a WOW New England club as long as Borghi is a member of WOW New England and for one year after any such membership terminates. Clearly, such an injunction is warranted as to Borghi, since it simply enforces what he already agreed to as a WOW New England member. Although this Court's award of damages as to existing health clubs (and the imposition of a constructive trust with regard to the profits from those clubs going forward) will fully compensate WOW New England as to those clubs Borghi has already opened with Dixon, WOW New England is entitled to some assurance that further violations of the restrictive covenants in the OAs will not continue in the future.

This Court also concludes that this injunction should extend to Dixon: he misappropriated WOW New England confidential information and knowingly assisted and encouraged the Borghis in violating fiduciary duties in order to advance his (and the Borghis') own self-interest. Without this wrongdoing, he would not have the knowledge or the experience to open fitness clubs which are in essence a carbon copy of WOW New England clubs. Neither he nor any of the entities through which he operates should be able to profit from that misconduct in the future. He and Borghi are also enjoined from using the WOW New England name for any Blast New England club going forward.

7. Miscellaneous Relief

***37** The laundry list of plaintiffs' remedies concludes with a request for various orders directed at the Borghis only. This Court declines to rule on these requests until further hearings on the scope of damages and other equitable relief is concluded, with one exception. I see no legal basis for Steven Borghi to repay any capital distributions he received from WOW New England.

CONCLUSION AND ORDER

For all the foregoing reasons, this Court concludes that WOW New England is entitled to judgment in its favor as to those counts alleging a breach of fiduciary duty and is entitled to an award of damages and other relief. However, because certain issues remain unresolved, it is hereby *ORDERED* that the parties appear before this Court on July 28, 2014 at 10:00 a.m. to identify those issues that remain and to suggest a framework within which they can be decided in an expeditious manner.

Footnotes

1 The Licensing Agreement actually describes the geographic restriction to be a "5.0 (three) mile radius." The evidence at trial was that this was typographical error and that the understanding between the parties from the outset was that the restriction was five miles. This error would continue to appear in all subsequent Licensing Agreements with the WOW New England Clubs.

2 It is also emblematic of the sloppiness that is apparent in the drafting of the organizational documents for these different LLCs.

3 This would not continue to be true, however. Linda resigned her salaried position in 2006 and Borghi took over her responsibilities. She would not become involved again in the business until 2011.

4 Borghi's name with a signature over it appears on all nine of the 2004 OAs; according to the testimony, Linda signed for her husband. This Court does not credit Borghi's testimony that she did so without his authority or permission.

5 As noted earlier, the Cardio Fitness QA, which was not rewritten, did not contain any territorial restriction.

6 This hiatus was in part due to an agreement among the group that there would be no changes in the six months following Tony's death. This was also the period in which Borghi's drinking problem became so serious that he was not involved in the running of the clubs at all.

7 As best this Court can determined from the testimony and the exhibits, the precise percentages are as follows:

WAMP Fitness: Elizabeth (40 percent), Borghi (45 percent), Masotta (15 percent);
SJBB Fitness: Elizabeth and Borghi each with 35 percent, Masotta (20 percent);
Uno Dos Fitness: Elizabeth (34.75 percent), Borghi (50.25 percent) Masotta (15 percent);
FTN Fitness: Elizabeth (35 percent), Borghi (40 percent), Masotta (15 percent).

8 A second Dixon-owned entity, Cape Capital, was also a member/manager of Blast Fitness.

9 The club in Needham, Massachusetts has since closed.

10 LeClair was not aware that Elizabeth had in fact been treated as a full voting member or that she had been designated tax partner for the LLCs.

11 LeClair's testimony on this issue was in stark contrast to Elizabeth's testimony. Although this Court does credit much of Elizabeth's testimony in other areas, I find that LeClair's account of this meeting is the more credible of the two.

12 That issue is not particularly relevant to the instant litigation.

13 He was right: McLaughlin never got back to him and he was replaced as Elizabeth's counsel by the firm representing her in the current action.

14 Zoppo and LeClair gave quite different accounts at trial as to what occurred between May 31 and June 3, 2011. For example, Zoppo denies actually reviewing the May 31 Draft, whereas LeClair testified that not only did Zoppo review it but that he suggested changes which LeClair incorporated. This Court finds that LeClair's account of events during this time period is the more credible.

15 There was some urgency to the situation because Blast Fitness had already begun the “build out” work on the Cambridge club, which was only two miles from the WOW New England club in Medford.

16 The club at Downtown Crossing has since closed.

17 The Blast club in East Providence was sixty miles away from the WOW New England clubs in Methuen and Nashua New Hampshire but within fifty miles of twelve WOW New England clubs.

18 Health clubs in Providence, Plymouth and Worcester were owned by Auburndale Fitness, in which Dixon was the majority owner.

19 As to the claim in the Lead Action seeking declaratory and injunctive relief as to Elizabeth's voting status, that is clearly a direct claim and is excluded from discussion in this section.

20 This kitchen sink approach to pleading is not only ineffective but actually makes it more difficult for this Court to determine what is relevant and important and what is not. Indeed, the sheer volume of paper showered upon the Court—particularly by plaintiffs' counsel—throughout these proceedings has imposed an enormous burden on this Court at the same time that it has promoted delay and confusion of the issues.

21 For example, although plaintiffs did prove that Borghi breached his contractual obligation not to open up a competing business venture within a fifty-mile radius, that conduct also constituted a breach of his fiduciary duty, making the contract counts duplicative.

22 This Court is not convinced by the defendants' argument that WOW New England had no good will that it could legitimately protect because of earlier written agreements with WOW Licensing stating that the good will belonged to WOW Licensing. Moreover, this Court concludes that whatever the agreement was with WOW Licensing, that agreement cannot be used by some other entity or individual as an excuse for the kind of conduct at issue here.

23 This is in contrast to how Borghi and Dixon proceeded: they did not reveal to any other WOW New England member what they were up to until it was too late.

24 As to the propriety of this remedy in the form of equitable relief, this Court will discuss that in Part IIB herein.

25 As already noted, this Court limits its consideration to the thirteen Blast Clubs in the New England area.

26 It is difficult to say what that value would be. Barry outlined no less than three methods by which such a value could be ascertained. His findings were challenged by defense witness Peter Resnick, a CPA in charge of the forensics group at Grant Thornton who has developed some expertise in business valuations. Fortunately, this Court need not decide which witness is correct in his approach.

27 Barry himself admitted that his approach attempted only to achieve “rough justice.”

28 In opposing the Motion for a Preliminary Injunction, the defendants also contended that, even if Elizabeth's vote is counted, Borghi has a majority stake in Wamp Fitness. This Court does not so find. See footnote 7, *supra.*

29 With respect to damages already incurred, plaintiffs have been made whole by this Court's award of damages using the “royalties” theory.

30 Plaintiff's suggestion that the profits could be placed in a special LLC with only Beninati and Masotta as members unfairly cuts out minority members of the various LLCs, who are equally entitled to share in any proceeds received as a result of a constructive trust.

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