COLUMBIA ASSOCIATION, INC.	:	IN THE
	:	CIRCUIT COURT
Plaintiff		
	:	FOR HOWARD COUNTY
v.		
	:	
TSP AT HAVEN ON THE LAKE, LLC		
	:	Case No.: 13-C-17-113757
Defendant		
	:	

DEFENDANT'S SECOND MOTION TO REVISE JUDGMENT AND TO STAY REMAND TO DISTRICT COURT AND REQUEST FOR HEARING OR, IN THE ALTERNATIVE, DEFENDANT'S AMENDMENT OF DEFENDANT'S MOTION TO ALTER, AMEND, OR REVISE JUDGMENT AND TO STAY REMAND TO DISTRICT COURT AND REQUEST FOR HEARING AND MOTION FOR LEAVE TO AMEND

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Defendant TSP at Haven on the Lake, LLC, by and through its counsel Gregory A. Dorsey, Esquire, Syed Shaun A. Bokhari, Esquire, and the law firm of Kelly | Dorsey, P.C, pursuant to Maryland Rules 2-535 and 2-342 hereby files the instant filing based on newly-discovered evidence in the form of:

- An on-the-record statement of Robert Goldman, who was a Vice President of Plaintiff Columbia Association, Inc. and General Manager of Haven on the Lake, at a November 13, 2014 Board of Directors Meeting for Plaintiff, in which Mr. Goldman states in part "CA and Stillpoint will share equally in the profits and losses of the wellness spa" (the "Goldman Admission", attached hereto as Ex. A); and
- An on-the-record statement of Dan Burns, who is the Director of Sport of Fitness of Plaintiff, at a December 10, 2015 Board of Directors Meeting, in which Mr.

Burns states that Plaintiff expected the wellness spa to lose money during its first year of operations, but instead received $37,000 from its operations to date (the "Burns Admission."[1])

Both Admissions of agreed terms by which Plaintiff and Defendant would co-own and co-operate the wellness spa -- or at least of an agreement other than the terms set forth in the so-called "lease" -- occurred after the so-called "lease" was executed and clearly demonstrate that the parties did not mutually assent to be bound by the purported "lease", but by an agreement by which the parties would equally allocate profits and losses. Even assuming *arguendo* that the "lease" is somehow binding, the Goldman and Burns Admissions demonstrate that Plaintiff waived any requirement for Defendant to pay "Rent" and "Percentage Rent" under the so-called "lease" and accepted substitute performance of equal allocations of actual profits and losses of the spa.

This newly-discovered evidence completely repudiates Plaintiff's claims before this Honorable Court upon which Plaintiff relied in arguing that Defendant's jury trial demand should be stricken – namely, that the parties mutually assented to be bound by the so-called "lease", which purportedly references a jury trial waiver provision in a

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[1] The Burns Admission is in an audio format. Defendant will produce the audio at the Court's request and/or at hearing should one be scheduled.

lease between Plaintiff and its landlord, and that the amount in controversy is not based on fifty-fifty allocations of actual profits and losses between the parties.

Without waiving or conceding any argument made in Defendant's pending Motion to Alter or Amend, had Plaintiff been truthful and candid with the Court and in discovery, this Court could not have reasonably stricken Plaintiff's jury trial demand. Accordingly, in addition for the relief sought in Defendant's pending Motion to Alter or Amend, Defendant requests this Honorable Court to (a) VACATE its order dated March 29, 2018 (entered on April 3, 2018) granting Plaintiff's Motion to Strike Demand for Jury Trial and Remand the Case to the District Court ("Plaintiff's Motion to Strike"), or (b) REQUIRE discovery to continue in this matter and HOLD a hearing as to Plaintiff's Motion to Strike Defendant's Jury Trial Demand.

Defendant requests that the Court treat this filing as a second motion to revise judgment pursuant to Rule 2-535, as it is being filed within thirty (30) days of entry of the judgement Defendant seeks to revise. In the alternative, Defendant requests this Court treat this filing as an amendment to Defendant's previously-filed Motion to Alter, Amend, or Revise Judgment and to Stay Remand to District Court and Request for Hearing, and, to that end, Defendant requests leave to make the foregoing amendment pursuant to Rule 2-342 for the reasons stated in the Argument section below.

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INCORPORATION BY REFERENCE

Defendant incorporates by reference Defendant's Opposition to Plaintiff's Motion to Strike Demand for Jury Trial and Remand Case to the District Court and Defendant's Motion to Alter, Amend, or Revise Judgment and to Stay Remand to District Court and Request for Hearing as though they are fully stated herein, and in addition states as follows:

FACTS

1. Through numerous filings before this Honorable Court and the District Court of Maryland for Howard County in this matter, Plaintiff repeatedly asserted that the parties mutually assented to be bound by a "lease" to persuade the Court to strike Defendant's Verified Demand for Jury Trial. The Goldman and Burns Admissions demonstrate that Plaintiff understood at all relevant times that the parties were not bound by the so-called "lease" and were bound instead by an agreement pursuant to which the parties would co-own and co-operate the spa in the subject premises, and share equally in the profits and losses of the spa.

2. During discovery, Plaintiff and Plaintiff's counsel sought to conceal evidence of Plaintiff's internal records reflecting Plaintiff's adherence to the real agreement between the parties and explicitly refused to respond to discovery requests related to their partnership, without any justification. At the deposition of Rob

Goldman, who is a former officer of Plaintiff and has direct knowledge of the real agreement between the parties, Plaintiff's counsel repeatedly instructed Mr. Goldman not to answer questions related to the partnership or the formation of the so-called "lease" without any justification, and Mr. Goldman refused to answer these questions.

3. Below are examples of Plaintiff concealing evidence of the true nature of the relationship between Plaintiff and Defendant, and presenting the so-called "lease" as a binding agreement between the parties, to defeat Defendant's Verified Demand for Jury Trial:

- In Plaintiff's Opposition to Defendant's Demand for Jury Trial and Request for Hearing dated November 10, 2017 before the District Court, Plaintiff argued "the parties entered into a Lease pursuant to which Defendant leased certain Premises from Columbia Association" and Defendant "defaulted" under the "Lease." (Pl.'s Opp. To Def.'s Jury Trial Demand at 2.) Plaintiff referenced an action Defendant had previously filed against Plaintiff wherein the Defendant alleged the parties expressed mutual intent not to be bound by the so-called "lease" but mutually intended to be bound by an oral Partnership Agreement to co-operate and co-own the wellness spa and allocate actual profits and losses equally; the case is styled as *The Still Point Wellness Centers, LLC, et al. v. Columbia Association, Inc.*, Case No. 13-C-17-110850 ("the Partnership Lawsuit.") In its Opposition to Defendant's Jury Trial Demand, Plaintiff claims that it rejected a prior payment tendered by Defendant because "it was inconsistent with the amounts due under the Lease and was proffered by Defendant as a payment of partnership profits, despite the fact that the existence of a partnership was rejected by the Circuit Court and Columbia Association." (Pl.'s Opp. To Def.'s Jury Trial Demand at 6 fn. 4.) During the Partnership Lawsuit and the present lawsuit, Plaintiff failed to disclose to the Court the Goldman Admission and the Burns Admission.

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- In Plaintiff's Motion in Limine to Exclude from Evidence any Attempt to Contradict the Legal and Factual Determinations Made by the Circuit Court in the Prior Action Between the Parties dated December 5, 2017 before the District Court, Plaintiff protested that "any attempts by Tenant to introduce evidence to the contrary [evidence of a partnership] would not only unnecessarily confuse the issues in this ejectment action and waste this Court's time, but would be barred by doctrines of *res judicata* and collateral estoppel." (Pl.'s Mot. In Limine at 2.) Plaintiff claimed that, in the Partnership Lawsuit, "Landlord filed a motion to dismiss arguing, in pertinent part, that the Lease governs the parties' relationship and any allegations of partnership would fail as a matter of law." (*Id.* at 4.) Plaintiff argued that collateral estoppel prevented consideration of evidence of a partnership because "the issue of whether the Lease is in fact a lease and whether it is the document that governs the relationship between the parties was decided in the Prior Action [the Partnership Lawsuit.] Tenant presented evidence and argument in the Prior Action to support its position that the parties had a partnership agreement as opposed to a Lease." (*Id.* at 6-7.) By suggesting that the Court's decision in the Partnership Lawsuit was based on "evidence" – which it was not -- Plaintiff wrongfully suggests that there was no evidence of a partnership or of an agreement that the parties would share equally in the profits and losses of the spa as opposed to Defendant paying rent.

- In its Motion in Limine in the instant action, Plaintiff claims Defendant "presented evidence and argument in the Prior Action [the Partnership Lawsuit] to support its position that the parties had a partnership agreement as opposed to a Lease" and argues that collateral estoppel bars consideration of any evidence of a partnership. (Def.'s Mot. In Limine at 7.) Again, this claim is patently false and disingenuous, as Plaintiff failed to disclose the Goldman Admission and Burns Admission to the District Court in this action and in the Partnership Lawsuit.

- In Plaintiff's Motion to Strike Demand for Jury Trial and Remand Case to the District Court dated January 5, 2018 (Doc. No. 8/0), Plaintiff claimed that Defendant "waived its right to a jury trial" because it was bound to the purported lease, which "is expressly subject to the terms of the Columbia Association's master lease which contains a jury trial waiver", and there is not $15,000 or more in controversy because the action is purportedly only

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one of "ejectment." (Mem. In Supp. Of Pl.'s Mot. To Strike at 1-2.) Plaintiff characterized the so-called "lease" as binding. However, as the undisclosed Goldman Admission and Burns Admission make clear, the parties never intended to perform the so-called "lease." Plaintiff also claimed that the amount in controversy was less than $15,000 because Defendant's "allegations" of "a rent calculation supposedly based upon 'fifty percent' of Defendant's net income as opposed to the rental amounts specified in the Lease" had "failed" in the Partnership Lawsuit. (*Id.* at 12 fn. 6.) Thus, Plaintiff demanded that this Honorable Court strike Defendant's jury trial demand on the false assertion that there was no evidence of a partnership or of an agreement that the parties would share equally in the profits and losses of the spa as opposed to Defendant paying rent.

- On or about January 10, 2018, Defendant served Plaintiff with Requests for Production of Documents and Interrogatories. As detailed *infra*, several interrogatories requested information pertaining to communications regarding formation of a partnership agreement or the so-called "lease", amendments to the "lease", and certain payments made by Defendant to Plaintiff that did not conform to the "Rent" and "Percentage Rent" provisions of the so-called "lease."

- In Plaintiff's Motion to Compel Defendant to Pay All Rent Due Under the Lease Into Escrow and Request for Hearing dated January 11, 2018 (Doc. No. 11/0), Defendant requested that this Court order Plaintiff to pay into the Court's registry $8,833.33 per month "for the first year of the first renewal term" and $14,666.66 per month "for the second year of the first renewal term, which began in January 2018, plus Percentage Rent due based upon Gross Sales by the tenth (10^{th}) day of each month[.]" (Pl.'s Mot. To Compel at 7-8.) Essentially, Plaintiff requested this Court to modify the District Court's order and order Defendant to pay increased monthly amounts into escrow while failing to disclose that Plaintiff, through Goldman and Burns, admitted that the parties did not mutually assent to the "lease" or the amount, if any, Defendant should pay into escrow should be governed by an agreement other than the so-called "lease."

- In desperation to avoid disclosing irrefutable evidence that mutual assent to the "lease" was never formed, Plaintiff filed a Motion for Protective Order and Request for Hearing dated February 9, 2018 (Doc. No. 15/0). Plaintiff

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insisted that this Court preclude discovery "regarding any alleged partnership or any arguments that the Lease subject of the instant action does not govern the relationship between the parties", falsely claiming that such evidence "is not relevant to this ejectment action and would not lead to the discovery of admissible evidence." (Mem. In Supp. Of Pl.'s Mot. For Prot. Order at 3.) Plaintiff, again, falsely claimed that *res judicata* and collateral estoppel applied because "[t]hose factual issues and legal claims already have been litigated and decided by entry of a final judgment" (*id.* at 3), even though Plaintiff knowingly failed to disclose the Goldman and Burns Admissions in the Partnership Lawsuit, just as Plaintiff has knowingly failed to disclose the same in this action. Plaintiff proceeded to falsely claim that Defendant was seeking information to "undermine the fully integrated lease in an attempt to avoid its clear terms and create a partnership" (*id.* at 10), even though Plaintiff, through the Goldman and Burns Admissions and other statements, unequivocally indicated that the parties had agreed and were in fact allocating actual profits and losses of the spa contrary to the "Rent" and "Percentage Rent" provisions of the so-called "lease."

- On or about February 9, 2018, Plaintiff served Defendant with a document titled "Answers to Interrogatories." (Answers to Interrogatories, attached hereto as Ex. B.) However, this title is misleading, as Plaintiff explicitly refused to answer nine out of twenty-five interrogatories seeking discovery of communications pertaining to allocations of actual profits and losses and agreement thereto between the parties, including the issue of whether a partnership was ever formed or discussed. (Ex B.) Plaintiff included in the response to each of the foregoing that "[t]he interrogatory seeks information that is not relevant to the subject matter involved in this action" and "not admissible based upon the doctrines of *res judicata* and collateral estoppel" such as "the partnership between them could be established by allocation of actual profits and losses"; and "a Motion for Protective Order has been filed contemporaneously herewith" as justification for Plaintiff's refusal to answer the foregoing interrogatories. Plaintiff's willful and wanton disregard of its discovery obligations to avoid disclosing evidence relevant to this matter and to falsely represent to the Court that Plaintiff and Defendant have a landlord-tenant relationship governed by the so-called "lease" is inexcusable and intolerable.

- In Plaintiff's Reply in Support of Motion to Strike Demand for Jury Trial and Remand Case to the District Court dated February 13, 2018 (Doc. No. 11/2), Plaintiff – again – failed to disclose the Goldman and Burns Partnership Admissions to prop up its baseless argument that the "lease" is binding, Defendant "waived" its jury trial right, and there is less than $15,000 in controversy.

4. Plaintiff's campaign of deception and concealment to give Plaintiff's Motion to Strike a veneer of truthfulness continued into Defendant's deposition of Mr. Goldman. Defendant issued a Subpoena and Notice of Deposition on or about March 14, 2018 for Mr. Goldman's deposition on March 28, 2018 at 10:00 a.m. In an e-mail dated March 23, 2018 at 5:10 p.m. from Megan Burnett, Esquire, counsel for Plaintiff, to Gregory A. Dorsey, Esquire, counsel for Defendant, cc'ing Jessica duHoffman, Esquire, counsel for Plaintiff, Ms. Burnett stated "[u]ntil the Court rules on the pending motions for protective orders, we plan to object and to instruct Mr. Goldman not to answer any deposition questions that deal with any of the matters raised therein." (March 23, 2018 E-mail from Burnett to Dorsey, attached hereto as Ex. C (emphasis supplied.)) Plaintiff's assertion that it is entitled to instruct Mr. Goldman not to cooperate in deposition merely because Mr. Goldman filed a Motion for a Protective Order is not only baseless, but also demonstrates the utter contempt Plaintiff and Plaintiff's counsel have for the rules of discovery and the fundamental principle of candor.

5. During Mr. Goldman's deposition on March 28, 2018, Plaintiff and Mr. Goldman's counsel, Ms. duHoffman, instructed Mr. Goldman not to answer a pending

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question approximately sixty-six (66) times. Ms. duHoffman gave such improper instruction all throughout the deposition, from beginning to end, regarding, among other things, payment allocations between the parties pertaining to the operation of the spa. By way of example, and without exclusion, Ms. duHoffman instructed Mr. Goldman not to answer the following questions:

- "Did you describe it [operation of the spa at Haven on the Lake] as a strategic partnership?", "Did you describe it as a general partnership?", and "Did you describe it as a potential landlord-tenant relationship?" (Goldman Dep. Tr., attached hereto as Ex.D, at 53:19-21, 54:1-12.)
- Concerning an e-mail from Mr. Goldman to Defendant dated August 7, 2013, "[w]hat did you mean by 'I think we are very close to finalizing a successful partnership'?" (*Id.* at 58:12-21, 59:1-8);
- "Now, here it [a proposed partnership outline sent to Plaintiff] appears to describe that the Columbia Association and the spa/integrated health partner, the income would be allocated on a 50 percent basis between the two entities, correct?" (*Id.* at 60:1-13);
- "At some point, Ms. Paide and Ms. Peoples requested a written partnership agreement with the Columbia Association, correct?" (*Id.* at 61:21, 62:1-5);

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- "And at some point you suggested that CA and The Still Point sign a document titled A Lease, correct?" (*Id.* at 62:13-18);

- Concerning an e-mail dated November 13, 2013 from Mr. Goldman to Defendant attaching a draft "lease", "[n]ow, in the second paragraph you say: 'Marla [Peoples], regarding the projections versus actuals discussions, although projections [of profits and losses] are used to calculate the percentage rent in the agreement, actuals [actual profits and losses] will be used to do the ongoing calculations.' What does that mean that actuals will be used to do the ongoing calculations?" When counsel for Defendant noted that the question "goes specifically to what you contend to be rent", Ms. duHoffman replied "the lease speaks for itself." When counsel for Plaintiff noted that the question goes "specifically to the payment arrangements that were under the purported lease agreement", Ms. duHoffman replied "[y]ou can file a motion with the court. I'm instructing him not to answer." (*Id.* at 67:16-21, 68:1-21, 69:1-11);

- Concerning the "Rent" provision in the so-called "lease", "[n]ow, the next line states 'CA shall pay to lessee the amount of $25,000 on or before July 1, 2014 and an addition $25,000 on or before September 10, 2014.' So what did – these payments that I just read off to you, did they constitute rent or what did they constitute?" (*Id.* at 74:5-14);

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- Ms. duHoffman instructed Mr. Goldman not to answer questions concerning Mr. Goldman's statements included in an article dated December 5, 2013 (the date of the purported "lease") in the Columbia Flier titled "CA to partner with The Still Point & Fitness Club". (*Id.* at 81:5-21, 82:1-21, 83:1-21, 84:1-9);

- Regarding the Columbia Flier article, "[d]id you describe The Still Point as a partner of CA [to the article's author]?" (*Id.* at 86:6-10);

- After the so-called "lease" had been executed and therefore not concerning so-called "pre-Lease negotiations", "[a]nd it's true that some of the marketing that came from CA described CA and The Still Point as a partnership, correct?" (*Id.* at 94:14-19);

- Regarding January 29, 2015 meeting notes summarizing a meeting among employees of Plaintiff, "on item number 5 in this document it states 'Still Point was [sic] write CA a check for 50 percent of the monthly profit based on month end financials.' Now, you agree that that's inconsistent with the rent provisions in the document titled Lease, correct?" (*Id.* at 105:13-21, 106:1-21, 107:1-7.) Notwithstanding Mr. Goldman's refusal to answer this question upon Ms. duHoffman's instruction, Mr. Goldman admits in the Goldman Admission "CA and Stillpoint will share equally in the profits and losses of the wellness spa." However, Defendant did not become aware

of the existence of the Goldman Partnership Admission until after Mr. Goldman's deposition had adjourned;

- "So do you know if The Still Point, in fact, provided 50 percent of monthly profit based on month end financials to CA?" (*Id.* at 115:15-20);
- "Do you know if they [Defendant] provided 50 percent of the monthly profit based end monthly financials as rent?" (*Id.* at 115:21, 116:1-17);
- "Did the collection, the monthly financial statements, have anything to do with CA writing Still Point – I'm sorry, Still Point writing CA a check for fifty percent of the monthly profit based on month end financials?" (*Id.* at 124:20-21, 125:1-10);
- Ms. duHoffman instructed Mr. Goldman not answer questions as to the basis of Plaintiff invoicing Defendant for "Marketing" pursuant to the terms of the so-called "lease", even though such invoicing purportedly concern performance of the so-called "lease." (*Id.* at 129:21, 130:1-21, 131:1-7.)
- "Now, turning to Exhibit 5 – and that's the document titled Lease, looking at 3.1 on page 4, it states, 3.18: 'During the first year of the lease term lessee shall not pay any annual rent.' I believe you testified that 2015 was the first year of the lease term. If The Still Point was not required to pay rent under the terms of this document, why then was [Paul] Papagjika [Plaintiff's Treasurer] discussing with you

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the bottom lines for December and January [of 2015]?" (*Id.* at 135:7-19.) As the Burns Admission reveals, Plaintiff received $37,000 from Defendant as of December 10, 2015, despite the "lease" stating that Defendant "shall not pay any annual rent" during the first year of the so-called "lease" term;

- Whether Plaintiff's monthly accounting statements including line items for allocations of profits or losses. (*Id.* at 140:14-20);

- "Did you ever discuss a partnership with Milton Matthews [the President of Plaintiff] between The Still Point and CA?" (*Id.* at 141:19-21, 142:1-2.) Notably, in the Goldman Admission, Mr. Goldman stated in a Board Meeting – which included Milton Matthews as President – "revenue for the facility will come from memberships, class programs, and the wellness spa. CA and Stillpoint will share equally in the profits and losses of the wellness spa, and CA expects Haven on the Lake to break even financially during the third or fourth year of operation. Marketing efforts include television interviews, email blasts, newspaper ads, and coupons for classes." (Ex. A); and

- Concerning an e-mail dated February 24, 2015 from Mr. Matthews to Defendant, in which Mr. Goldman was cc'd, "[g]oing down to the third paragraph, Mr. Matthews states 'I am working with CA's chief financial officer and general counsel to

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develop an agreement that clearly separates the consulting services from The Still Point's partnership with CA.' What does that mean?" (Ex. D at 145:19-21, 146:1-10.)

6. Defendant was preparing a Motion to Compel Discovery when, on April 3, 2018, this Court entered an Order granting Plaintiff's Motion to Strike Demand for Jury Trial and Remand to District Court based on Plaintiff's incomplete representations to the Court and during discovery.

7. Defendant filed a first Motion to Alter or Amend Judgment on or about April 4, 2018.

8. Defendant's counsel discovered the existence of the Goldman and Burns Admissions on or about April 16, 2018.

9. On April 17, 2018, counsel for Defendant e-mailed Ms. duHoffman and cc'd Ms. Burnett the following:

> Counsel,
>
> This case is not going away; for you or your client. There is such overwhelming evidence to refute your client's position concerning the so-called "lease" document that I question whether there have been willful violations of Rules 1-311 and 1-341. I can only surmise the deposition testimony of Mr. Goldman, and your repeated instructions to him to refuse to cooperate in the deposition and answer questions, are in furtherance and concealment of a more elaborate scheme of Columbia Association, Inc. (CA) and raise the specter there has been fraud upon the court.

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By way of example, I attach the Minutes of the CA Board of Directors Meeting held November 13, 2014 (approved December 11, 2014). Paragraph 5 (President's Report) of the closed session minutes provides, in pertinent part:

At Mr. Matthews' request, Mr. Goldman gave a Haven on the Lake update…He said the facility is scheduled to be ready in early December…In response to questions, Mr. Goldman said revenue for the facility will come from memberships, class programs, and the wellness spa. CA and Stillpoint will share equally in the profits and losses of the wellness spa, and CA expects Haven on the Lake to break even financially during the third or fourth year of operation.

The Minutes confirm knowledge of the equal sharing in the profits and losses of the wellness spa existed at the highest levels of CA, including, with its Board of Directors. A year later, Dan Burns testified at the CA Board of Directors meeting held December 10, 2015. A snippet of his testimony is attached. Mr. Burns confirms CA expected the wellness spa to lose money during its first year of operations, but surprisingly received $37,000 from its operations year to date leading to his testimony. The full testimony of Mr. Burns is quite a listen as he lays the groundwork for CA's plans heading into the third year of its relationship with my clients.

As an officer of the court, I write to implore you to take a second look at the position your client is advancing in this case – before both the Circuit and District courts. It is inconsistent with the facts borne out in the evidence you have artfully kept from the Court's purview. You know it; I know it; your client knows it; and there are no good grounds to support your client's position. Should we continue down this path, as I suspect, I will have no choice but to file the appropriate motions under Rules 1-311 and 1-341.

(April 17, 2018 e-mail from Dorsey to duHoffman, attached hereto as Ex. E.)

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10. In a reply e-mail dated April 17, 2018, Ms. duHoffman claimed that Mr. Dorsey's description of the Goldman and Burns Partnership Admissions constituted "misstatements" but did not elaborate. Ms. duHoffman mischaracterized Mr. Dorsey's e-mail as "threats" that "will not lead to any meaningful settlement negotiations" as an obvious ploy to subsequently misrepresent the nature of Mr. Dorsey's e-mail to the Court and distract the Court from Plaintiff and Ms. duHoffman's false representations to the Court. Ms. duHoffman concluded by threatening to seek "legal fees with any motion you have threatened to file." (April 17, 2018 e-mail from duHoffman to Dorsey, attached hereto as Ex. F.)

11. On April 23, 2018 – one week after Mr. Dorsey notified Ms. duHoffman and Ms. Burnett that he was aware of the Goldman and Burns Admissions -- Plaintiff filed an Opposition to Defendant's first Motion to Alter, Amend, or Revise Judgment and to Stay Remand to District Court. Noticeably, Plaintiff did <u>not</u> affirmatively state that Defendant was bound by a "lease" or a "lease" governs the parties' relationship, as Plaintiff had previously asserted in numerous filings, including its Motion to Strike. Rather, Plaintiff appears to back away from such claims, and instead mildly states in only one instance that "Columbia Association made two principal arguments in its Motion to Strike: 1) Defendant waived its right to a jury trial pursuant to the <u>operative sublease</u> [not a binding "Lease" as Plaintiff had previously asserted many times]

between the parties; and 2) the Circuit Court lacked jurisdiction because the amount in controversy did not satisfy the statutory threshold of $15,000." (Pl.'s Opp. To Def.'s First Mot. To Alter and Amend at 7 (emphasis and bracketed material supplied.)) Knowing that Defendant will disclose to the Court the Goldman and Burns Admissions and omissions of the same, as Defendant does here, Plaintiff meekly stated "[n]either party in any of the briefing on the Motion to Strike ever argued that any of Defendant's defenses were at issue." (*Id.* at 8.) Of course, this is a disingenuous argument, as Plaintiff sought to obtain (and did obtain) an order striking Defendant's jury trial demand based on an incomplete representation of the factual underpinnings of Defendant's defenses.[2]

12. Nonetheless, Plaintiff <u>again</u> failed to disclose to the Court the Goldman and Burns Admissions, failed to retract its prior false representations that the "Lease" was binding and the parties had mutually assented to Defendant paying "rent", and

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[2] Should the Circuit Court remand this action to the District Court, the methods of discovery available to Defendant will be relatively limited. Defendant would not be able to serve interrogatories "later than ten days after the time for filing a notice of intention to defend." Md. Rule 3-421(b). Moreover, Defendant would be unable to depose Messrs. Goldman and Burns, and any other witness with direct knowledge of the real agreement between Plaintiff and Defendant, unless Defendant obtains "leave of court for good cause shown[.]" Md. Rule 3-431. Defendant would be unjustly deprived of substantially broader discovery procedures available in the Circuit Court because of Plaintiff's lack of candor to the Circuit Court and refusal to obey the rules of discovery.

continues to seek remand to the District Court based on its false representations to this Honorable Court. (*See id.*)

LEGAL STANDARD

Maryland Rule 2-535(a) states "on motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534."

Maryland Rule 2-534 empowers the Court to "open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment." *See, Morton v. Schlotzhauer*, 449 Md. 217, 114 A.3d 592 (2016) (abuse of discretion in denying motion to alter or amend when legal effect of Bankruptcy Court decision incorrectly applied); *Wormwood v. Batching Systems, Inc.*, 124 Md. App. 695, 723 A.2d 568 (1999) (denial of motion for reconsideration was abuse of discretion where dismissal of underlying workers' compensation appeal was a product of legal and procedural error); *Garliss v. Key Federal Sav. Bank*, 97 Md.App. 96, 627 A.2d 64 (1993)(denial of motion to alter or amend was abuse of discretion where moving party was denied right to present evidence of credits against amounts owed on confess judgment); *Triplin v. Jackson*, 326

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Md. 462, 605 A.2d 618 (1992) (trial court abused its discretion in denying defendants motion to strike and/or revise default judgment against them, where defendants' timely motion was supported by affidavits).

ARGUMENT

For the reasons stated in Defendant's Opposition to Motion to Strike and Defendant's first Motion to Alter or Amend Judgment, Defendant is entitled to a jury trial and this Honorable Court must VACATE its March 29, 2018 Order.

Moreover, this Honorable Court must VACATE or STAY the foregoing Order because it was obtained by Plaintiff and Plaintiff's counsel's willful failure to disclose the Goldman and Burns Partnership Admissions to this Court and to Defendant and the repeated and knowingly false representations to this Honorable Court that Defendant supposedly "waived" its jury trial right or failed to establish a sufficient amount in controversy because it was bound by a so-called "lease."

As the newly-discovered evidence of the Goldman and Burns Admissions establish, the parties mutually expressed their intent not to be bound by the "Rent" and "Percentage Rent" provision of the so-called "lease." *See, e.g., Catholic Univ. of Am. v. Bragunier Masonry Contractors, Inc.*, 139 Md. App. 277, 304 (2001) ("parol" evidence admissible to show the parties to a purported integrated and executed agreement did

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not mutually assent to be bound by the same), aff'd sub nom. *Bragunier Masonry Contractors, Inc. v. The Catholic Univ. of Am.*, 368 Md. 608 (2002).

The foregoing admissions by Messrs. Goldman and Burns, both of whom were officers of Plaintiff at the time, made clear and unequivocal statements *after* the so-called "lease" was executed that the parties intended to allocate actual profits and losses from the spa pursuant to an agreement other than the so-called "lease", which contradicts the "Rent" and "Percentage Rent" provisions of the so-called "lease." Indeed, neither Mr. Goldman nor Mr. Burns mentioned any lease, rent payments, or landlord-tenant relationship with Defendant. Rather, both officers of Plaintiff describe plans to ensure that Plaintiff's partnership with Defendant becomes increasingly profitable to ensure greater profits and equal allocations thereof. Plaintiff, Plaintiff's counsel, and Mr. Goldman's willful and wanton refusal to cooperate during discovery and refuse to answer interrogatories and questions pertaining to the parties' agreement not to be bound by the so-called "lease" notwithstanding execution of the same clearly speaks to a guilty conscience.

Because the "lease" is not binding or Plaintiff waived its rights thereto, Defendant cannot be bound to any jury trial waiver provisions purportedly incorporated into the so-called "lease." Moreover, the amount in controversy cannot be based on the difference of the fair market value and rental value of the premises, as

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Plaintiff falsely claims, but on Defendant's losses of profit pursuant to its agreement with Plaintiff to equally allocate monthly profits and losses, which greatly exceed $15,000 in controversy. Thus, had Plaintiff showed candor to the tribunal and cooperated during discovery as required by the Maryland Rules of Civil Procedure, this Court would have been apprised of all relevant facts and denied Plaintiff's motion to strike.

As noted above, Plaintiff has asserted in numerous filings that the Partnership Lawsuit should not be re-litigated. However, it is not necessary to re-litigate the same to grant the instant motion; the Court needs only to determine that the arguments raised in Plaintiff's Motion to Strike are invalid because the Goldman and Burns Admissions constitute evidence that the parties agreed not to be bound by the so-called "lease."

Should the Court not accept this filing as a Second Motion to Revise Judgment and to Stay Remand to District Court and Request for Hearing, this Court should grant Defendant leave to Amend pursuant to Rule 2-342 and treat this filing as an Amended Motion to Alter, Amend, or Revise Judgment and to Stay Remand to District Court and Request for Hearing. Rule 2–342 states: "With leave of court and upon such terms as the court may impose, any motion or other paper may be amended. "As with amendments to the answer and other pleadings…the court may allow modifications in

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its discretion, and such discretion may be exercised liberally, provided that other parties are not prejudiced." *Schmerling v. Injured Workers' Ins. Fund*, 139 Md. App. 470, 499, 776 A.2d 80, 98 (2001), rev'd and remanded on other grounds, 368 Md. 434, 795 A.2d 715 (2002), citing *Ski Roundtop, Inc. v. Wagerman*, 79 Md.App. 357, 371, 556 A.2d 1144 (1989) ("it would most likely have been an abuse of discretion not to allow" amendment of interrogatory answers.)

As established *supra*, Defendant has demonstrated that the newly-discovered evidence is material and would have likely resulted in a denial of Plaintiff's Motion to Strike, as the newly-discovered evidence tends to establish that the parties mutually assented not to be bound by the purported "lease" but by an agreement to allocate actual profits and losses equally. Therefore, Defendant did not agree to a jury trial waiver, and the amount in controversy should be calculated using Defendant's losses of its share of actual profits. Defendant's counsel did not discover the Goldman and Burns Admissions until after the Court had granted Plaintiff's Motion to Strike and Defendant had filed its Motion to Alter and Amend. Plaintiff will not be prejudiced by the Court granting Defendant leave to amend because Plaintiff has willfully concealed the Goldman and Burns Admissions from Defendant, despite Plaintiff's discovery obligations, and failed to show candor to the Court. Moreover, should leave be

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granted, Plaintiff will have the opportunity to address Defendant's arguments regarding the Goldman and Burns Admissions in an opposition filing.

CONCLUSION

For the foregoing reasons and the reasons stated in Defendant's Opposition to Motion to Strike and Defendant's Motion to Alter or Amend Judgment and Stay Remand, this Honorable Court should:

A. GRANT the instant motion;

B. If necessary, GRANT Defendant leave to amend the Motion to Alter and Amend and accept this filing as such amended motion;

C. STAY remand of this action to the District Court of Maryland for Howard County until disposition of the instant Motion;

D. VACATE the March 29, 2018 Order;

E. EXTEND discovery by three months past the date of disposition of the instant motion;

F. DENY Defendant and Mr. Goldman's motions for protective order;

G. ORDER Plaintiff, Mr. Goldman, and any other former and current officers, employees, and agents of Plaintiff to fully cooperate in discovery;

H. ORDER Mr. Goldman to submit to continuation of deposition at a date, time and location to be determined by Defendant;

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I. ORDER any former or current officer, employee, or agent of Plaintiff to submit to deposition;

J. MODIFY the escrow order issued by the District Court to require Defendant to deposit on a monthly basis into escrow fifty percent (50%) of the profits realized through the spa operations, and to require Plaintiff to pay Defendant on a monthly basis fifty percent (50%) of the losses realized through the spa operations; and

K. ENTER any other and further relief as justice and this cause may require.

REQUEST FOR HEARING

Pursuant to Rule 2-311, Defendant requests a hearing on the instant motion.

Respectfully submitted,

KELLY | DORSEY, P.C.

Dated: April 30, 2018

By: */s/ Gregory A. Dorsey*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this April 30, 2018, I served the foregoing using Maryland's E-File system upon:

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