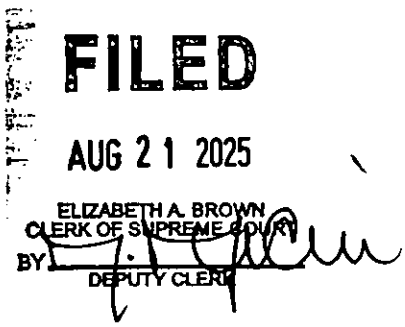
IN THE SUPREME COURT OF THE STATE OF NEVADA

ROYAL ESSEX, LLC, A NEVADA LIMITED LIABILITY COMPANY; MARLON STEELE AS TRUSTEE OF THE ROYAL UNION TRUST; MARLON STEELE, JR. AS TRUSTEE OF THE ROYAL UNION TRUST; VINCE HESSER, AN INDIVIDUAL; DAVID WEEKS, AN INDIVIDUAL; AND ROYAL UNION PROPERTIES, LLC, A NEVADA DOMESTIC LIMITED-LIABILITY COMPANY,
Appellants,
vs.
AZTECA REAL ESTATE PARTNERS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND DANON BLEA, AN INDIVIDUAL,
Respondents.

No. 87401



ORDER OF AFFIRMANCE

This is an appeal from a district court judgment following a bench trial in a business court matter. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This case arises from the anticipated disbursement of funds after Essex Real Estate Partners, LLC's ("Essex") bankruptcy. Essex was formed in 2007 to purchase, develop, and resell real property in the Inspirada community in Henderson. Essex's operating agreement ("OA") created membership classes, including Class A Common Units ("CAC") and Series A Preferred Units ("SAP"). The SAP class investors provided Essex's initial funding. The CAC class was comprised of Essex's "working"

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partners, including: (1) Landco Partners, LLC, which was owned and controlled by George Holman and held 61% of the CAC total; (2) respondent Azteca Real Estate Partners, LLC, which was owned by respondent Danon Blea (collectively "Azteca") and held 15% of the CAC units; and (3) Furthest South, LLC, which held 15% of the CAC units. Under the OA, SAP members were entitled to a preferred return and prioritized distribution of net cash. CAC members were entitled to a distribution only after the SAP members were paid in full. The OA designated Holman's other entity, Las Vegas Development Associates ("LVDA"), as the non-member manager of Essex. The OA required the manager to act in good faith, to promote the best interest of Essex and its members, and to keep members reasonably informed on all matters concerning Essex.

In 2008, Essex was unable to resell the real property it had purchased, defaulted on its loans, and fell into default status with the Nevada Secretary of State. The Secretary of State revoked Azteca's company charter around this time. In 2018, Holman dissolved Landco and LVDA and successfully petitioned for the reinstatement of Essex's company charter. That same year, Holman assigned Landco's interests in Essex to his and his wife's separate trusts. Despite Essex's defaults, its lenders never foreclosed on the property. Holman's attorney friends told him about NRS 106.240—which they asserted extinguishes deeds of trust ten years after default if the lender does not foreclose—and that without foreclosures, Essex maintained ownership of and resale rights for the Inspirada land. Holman and appellants Vince Hesser and David Weeks from the Royal entities (collectively "Royal") then discussed Royal purchasing the Holman trusts' CAC units, selling the Inspirada land, and settling with Essex's creditors through bankruptcy. As required by his term sheet executed with

Royal, Holman, acting as manager of Essex, amended the OA to allow for the sale of the Holman trusts' CAC interests without notice and a right of first refusal for the other members.

In November 2019, appellant Royal Union Properties sent letters to SAP members stating that it was in position to acquire a majority of the CAC units and outlining Royal's plan to put Essex through Chapter 11 bankruptcy. In exchange, Royal asked SAP members to limit their distribution to 20% of proceeds "up to a maximum" of their initial investment (which collectively amounted to $27 million) and assign their voting rights to Royal. Alternatively, Royal offered to purchase the SAP members' units.[1] Most SAP members agreed to the first alternative.

On December 17, 2019, Holman, acting as manager, signed a second amendment to the OA to implement the cap on the SAP return and distribute the remainder to CAC members. Despite gathering several signatures, Royal did not obtain enough CAC votes to approve this amendment, nor did they inform anyone that Royal was no longer pursuing this amendment. On December 18, Jerri Coppa-Knudson, who was trustee for Holman's personal bankruptcy, became Essex's manager. On December 22, the Holmans and Royal Union Properties executed a membership interest purchase agreement consistent with the term sheet.

On December 24, Royal drafted another second amendment to the OA. The December 24 amendment created a new "Class B Preferred" category of membership units ("CBP"), to be held entirely by Royal and enjoy the same voting rights as CAC and SAP members. The December 24 amendment changed the distribution formula of the OA such that after

[1]Several SAP members successfully sued Royal over the sales of their SAP units. The district courts ordered the return of those units.

paying the SAP members the first 20% of distributions (and after expenses for the bankruptcy proceedings), the remaining 80% would go to the new CBP member (Royal) up to the accrued preferred return of $27 million, then the remainder to CAC members. Therefore, since there would not be more than $27 million available for distribution, the December 24 amendment effectively eliminated any potential return to CAC members. This amendment purportedly received a majority vote of the SAP and CAC members. However, Azteca did not receive notice of any of the above events in Essex's business, nor did Royal, Holman, or Coppa-Knudson solicit Azteca's votes for the amendments.

Following the sale of the Inspirada land, the bankruptcy court confirmed Essex's reorganization plan and deemed Essex's creditors satisfied, which left $18,739,360.80 for Essex to distribute. In February 2021, Essex named Weeks and Hesser as managers. Royal filed the underlying complaint against Azteca in district court, seeking a declaration that Azteca was not entitled to any distribution from the bankruptcy estate. Azteca asserted various counterclaims seeking damages based on Royal's conduct in keeping Azteca in the dark about retention of interest in the Inspirada land and amending the OA to wrongfully secure a distribution from the Essex bankruptcy estate and deny Azteca its first refusal, voting, and purchase option rights. Royal moved for dismissal and alternatively summary judgment multiple times, arguing that Azteca could not prevail on its counterclaims because it could not prove damages under any set of facts, all of which the district court denied.

Following a bench trial, the district court found against Royal on its declaratory relief claim and in Azteca's favor on every counter- and cross-claim, concluding that Hesser and Weeks breached their fiduciary

duties and Royal aided and abetted Holman and Coppa-Knudson in breaching the OA and their fiduciary duties as managers of Essex. As a result, the district court concluded that all agreements under which Royal sought to receive a share of Essex's bankruptcy proceeds were void and declared that Royal had no interest in Essex. The court awarded Azteca all proceeds that Royal stands to gain from Essex's bankruptcy estate. Royal appeals.

Damages

We review de novo the district court's legal conclusions following a bench trial. *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018). This court "will not overturn the district court's findings of fact unless they are clearly erroneous or not supported by substantial evidence." *Hi-Tech Aggregate, LLC v. Pavestone, LLC*, 140 Nev., Adv. Op. 59, 555 P.3d 1184, 1188 (2024) (internal quotation marks omitted). The "party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages." *Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000).

Royal levies three arguments on appeal pertaining to revocation of Azteca's company charter, Azteca's lack of entitlement to a distribution vis-à-vis its status as a CAC holder, and Azteca's damages claim being impermissibly speculative. We address each argument in turn.

Charter revocation

Royal argues that the 2009 revocation of Azteca's charter dissolved the Azteca business entity, rendering it an affected unit holder under the OA and terminating Azteca's voting and option rights. Royal therefore argues that Azteca cannot claim to have incurred damages from its inability to exercise rights that it had already forfeited. Royal also contends that the revocation rendered Azteca unable to conduct any

business in Nevada, which impaired Azteca's first refusal rights. The district court held that because the OA did not specifically mention a member's status with the Secretary of State, "being in default or revoked with the Secretary of State is not an event of default that would render a member an Affected Unit Holder." We agree.

Per the OA, a member becomes an affected unit holder if they dissolve, liquidate, or file for bankruptcy. Upon becoming an affected unit holder, the member loses its voting and transfer rights, and its units must be offered to the non-defaulting CAC members, who have the right and option to purchase the affected units. NRS 86.491(1) provides a list of "[e]vents requiring dissolution and winding up of affairs" and does not include charter revocation among those events. Further, NRS 86.5467 and NRS 86.580 provide reinstatement and revival procedures for defaulting LLCs that have previously forfeited their rights to transact business, so long as the entity fulfills certain statutory requirements. And as Azteca points out, the Essex entity itself defaulted with the Secretary of State and subsequently had its charter reinstated. Several SAP members also had their entities' charters revoked or fell into default—yet Royal solicited these members to participate in Essex's business. So, the district court did not err by determining that revocation of Azteca's charter did not dissolve Azteca or render it an affected unit holder. For similar reasons, the district court correctly determined that the revocation of Azteca's company charter did not preclude Azteca from participating in Essex's business because if Holman and Coppa-Knudson had complied with their information-sharing duties under the OA, Azteca could have availed itself of NRS Chapter 86's reinstatement procedures—despite Weeks and Hesser's attempt to block

Azteca from doing so.[2] Therefore, Azteca's 2009 charter revocation did not preclude its damages claims.

OA amendments

Next, Royal argues that Azteca cannot claim to have suffered lost profit damages because, as a CAC member, Azteca would not receive a distribution from the bankruptcy proceeds under any version of the OA, per this court's disposition in *Further South, LLC v. Royal Essex, LLC*, No. 84544, 2023 WL 8009062 (Nov. 17, 2023) (Order of Affirmance) (unpublished). Royal contends that prior to the challenged second amendment to the OA, SAP members were entitled to their total Essex distribution before any CAC member, and Essex had $18,739,360 in its bankruptcy estate—an amount insufficient to pay SAP members the $27,300,000 they were due and leaving none for CAC members. Thus, Royal argues Azteca needed to prove with reasonable certainty that it could have purchased the Holman trusts' CAC units, negotiated with SAP members to cap their return, and amended the OA to secure a distribution from the Essex bankruptcy estate, like Royal did. We disagree.

As the district court found, the majority of SAP members independently executed written agreements to limit their distribution, thereby creating a fund for CAC members to receive a distribution from Essex's bankruptcy estate. These agreements were not challenged in this case, and the district court explicitly recognized that they remain in place. Instead of acting in the best interest of all Essex members and amending the OA to ensure that all CAC members would receive a distribution—as

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[2]The district court found that Weeks and Hesser sought to prevent Blea from reinstating Azteca's company charter by registering a new LLC under the Azteca Real Estate Partners name.

the scrapped December 17 amendment would have accomplished—Royal devised a distribution formula in the December 24 amendment that effectively cut out CAC members and secured for Royal the entire remainder of Essex's bankruptcy proceeds. The district court properly concluded that these acts constitute a breach of fiduciary duty that directly damaged Azteca as a CAC member, and we are not persuaded by Royal's argument that Azteca had to prove it could have performed each of the steps that Royal took to secure a distribution from Essex's bankruptcy. That Royal only accomplished this outcome by conspiring with Holman and Coppa-Knudson and aiding and abetting their breaches of contract and fiduciary duties owed to other Essex members underscores this point. *See Mkt. St. Assoc. Ltd. P'ship v. Frey*, 941 F.2d 588, 592 (7th Cir. 1991) ("[A] contracting party cannot be allowed to use his own breach to gain an advantage by impairing the rights that the contract confers on the other party."). Moreover, Royal conditioned its purchase of the Holman trusts' CAC units on the elimination of Azteca's contractual rights, evidencing a separate breach that effectively prevented Azteca from participating in Essex's renewed business. Accordingly, the district court did not err in concluding that Azteca was damaged by Royal's conduct. Though we arrived at a contrary conclusion as to a different CAC member in *Further South*—to which Azteca was not a party—that case did not address Royal's conduct in acquiring the Holman trusts' units and Holman and Coppa-Knudson's breaches in relation to the second amendment. And as the district court concluded, neither claim nor issue preclusion applies here where Azteca is not in privity with Further South. *See Alcantara ex. rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257-58, 321 P.3d 912, 915-16 (2014) (explaining both claim and issue preclusion require showing that

"the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation" and that the prior litigation addressed the same claim or issue).

The district court's award of damages

Though speculative, remote, or contingent damages are generally unrecoverable, "[t]he rule against the recovery of uncertain damages is directed against uncertainty as to the *existence of damage* rather than as to measure or extent." *Fireman's Fund Ins. Co. v. Shawcross*, 84 Nev. 446, 453, 442 P.2d 907, 912 (1968) (emphasis added). "A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of the facts." Restatement (Second) of Contracts § 352 cmt. a (Am. L. Inst. 1981). Indeed, when a defendant, by violating the plaintiff's rights, makes it difficult for them to prove damages, all reasonable doubts about the damages amount are resolved in the plaintiff's favor. *See Thermo Electron Corp. v. Schiavone Constr. Co.*, 958 F.2d 1158, 1166 (1st Cir. 1992) ("[W]here the defendant's wrongdoing created the risk of uncertainty, the defendant cannot complain about imprecision.") (internal quotation marks omitted); Restatement (Second) of Contracts § 352 cmt. a; Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) (Am. L. Inst. 2011).

The district court awarded Azteca "any and all amounts [Royal] may stand to gain as a result of any distribution from Essex's business proceeds," based on "the well-established law prohibiting parties from profiting or benefitting from their breaches." While Royal contends that the legal standard for lost profit damages should apply, the district court's damages award properly operates as a disgorgement of Royal's ill-gotten

profits. Disgorgement is a form of "[r]estitution measured by the defendant's wrongful gain rather than by the plaintiff's loss, and is often described as an accounting for profits." *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 663 (9th Cir. 2019) (alteration in original) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. a). Disgorgement serves "to eliminate the possibility of profit from conscious wrongdoing" and "is one of the cornerstones of the law of restitution and unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. e. Thus, "[t]he case law holds with conspicuous clarity that when a fiduciary has secured an undue advantage by virtue of his position, equitable relief is available *even in the absence of direct economic loss* to the complaining party." *In re PHC, Inc. S'holder Litig.*, 894 F.3d 419, 436 (10th Cir. 2018) (emphasis added).

Though Azteca did not specifically request disgorgement in its prayer for damages, district courts have broad discretion in fashioning equitable remedies. *See Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010); *see also* NRCP 54(c) (providing that except for a default judgment, a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings"). Disgorgement is an appropriate remedy under these circumstances, where there is substantial evidence in the record supporting the district court's findings regarding Royal's inequitable conduct. *See Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 859 (Del. Ch. 2022) (explaining that "[a] proven breach of fiduciary duty also causes the remedial aperture to widen to encompass remedies other than the standard legal solution of compensatory damages"). The district court found that

Royal knowingly committed, conspired, and aided and abetted several breaches of contract and fiduciary duty, including stealing a company opportunity belonging to the original Essex members and using insider information against those members' interests. The court further found that Royal aided and abetted Holman in breaching the OA and his fiduciary duties to CAC members by conditioning the purchase of the Holman trusts' units on the elimination of CAC members' OA rights, and Coppa-Knudson, Hesser, and Weeks breached their fiduciary duties after becoming Essex's managers by failing to inform CAC members about the recovery opportunity. In addition, the district court found that Royal and Coppa-Knudson ultimately amended the OA's distribution formula to funnel the lion's share of Essex bankruptcy proceeds to Royal in disregard of Azteca's contractual rights. These findings are supported by substantial evidence, and Royal does not meaningfully challenge them on appeal.

We recognize that the district court's judgment is atypical in that it did not assign a dollar amount to Azteca's damages. However, the judgment properly accounts for the uncertainty in the stayed bankruptcy court proceeding and Royal's separate lawsuits with other Essex members, which may alter the amount that "[Royal] may stand to gain" from Essex's bankruptcy estate. Moreover, any residual uncertainty in calculating damages created by Royal's wrongdoing should be resolved in Azteca's favor as the nonbreaching party. Therefore, we conclude that substantial evidence supports that Azteca suffered damages and was entitled to any

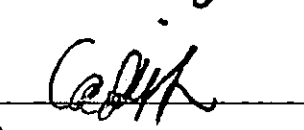
proceeds that Royal may stand to gain from the Essex bankruptcy estate.[3]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Herndon

_____, J.
Pickering



_____, J.
Cadish

cc: Hon. Mark R. Denton, District Judge
Thomas J. Tanksley, Settlement Judge
Claggett & Sykes Law Firm
Law Offices of Byron Thomas
Fox Rothschild, LLP/Las Vegas
Eighth District Court Clerk

[3]For the same reasons, we also reject Royal's argument that the district court erred by denying Royal's motions for summary judgment.