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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2003-008362 12/17/2015

CLERK OF THE COURT
L. Nelson
Deputy

HONORABLE ARTHUR T. ANDERSON

CAL X-TRA, et al.

v.

PHOENIX HOLDINGS I I, L L C, et al.

DANIEL G DOWD

MAXWELL M BLECHER
515 S FIGUEROA ST 17TH FL
LOS ANGELES CA 90071-3334
RONALD J COHEN
HAROLD R COLLINS
515 S FIGUEROA ST 17TH FL
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RYAN P DYCHES
LAURA H KENNEDY
MICHAEL C MANNING
LAWRENCE C WRIGHT
STEPHEN C NEAL
TIMOTHY S TETER
JEFFREY J GOULDER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court held a 23-day bench trial commencing on January 13, 2015. Based on the evidence presented at trial, the supplemental briefing and argument, the Court makes these Findings of Fact and Conclusions of Law.

Count I, Aiding and Abetting Breach of Fiduciary Duty

10K, L.L.C. (“10K”) alleges that Defendants, W.V.S.V. Holdings, L.L.C. (“W.V.S.V.”) and Conley Wolfswinkel (collectively, “Wolfswinkel”) are liable for aiding and abetting its Manager, Phoenix Holdings II L.L.C. (“PHII”), in the breach of certain duties PHII owed to 10K.

As its manager, PHII was an agent of 10K "for the purpose of carrying on its business in the usual way." *See* A.R.S. § 29-654(B)(2). Thus, PHII owed fiduciary duties to 10K with respect to all matters within the scope of the agency relationship. *See Valley Nat'l Bank of Phx. v. Milmoe,* 74 Ariz. 290, 296-97 (1952), *quoting* Restatement (1st) Agency, § 13 cmt. a; *AMERCO v. Shoen*, 184 Ariz. 150, 157 (App. 1995).

An aiding and abetting cause of action is essentially triggered by a third party's knowledge of and participation in the tortious conduct of another. In *Wells Fargo Bank*, the Arizona Supreme Court explained:

> Arizona recognizes aiding and abetting as embodied in Restatement § 876(b), that a person who aids and abets a tortfeasor is himself liable for the resulting harm to a third person. *Gemstar Ltd. v. Ernst & Young*, 183 Ariz. 148, 159, 901 P.2d 1178, 1189 n. 7 (App. 1995), *vacated on other grounds,* 185 Ariz. 493, 917 P.2d 222 (1996); *Gomez v. Hensley*, 145 Ariz. 176, 178, 700 P.2d 874, 876 (App. 1984); see *also* Restatement (Second) of Torts § 876(b) (1977).
>
> ***
>
> Claims of aiding and abetting tortious conduct require proof of three elements:
>
> (1) the primary tortfeasor must commit a tort that causes injury to the plaintiff;
>
> (2) the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and
>
> (3) the defendant must substantially assist or encourage the primary tortfeasor in the achievement of the breach.
>
> *Gomez,* 145 Ariz. at 178, 700 P.2d at 876 (citing Restatement (Second) of Torts § 876(b)).
>
> ***
>
> Because aiding and abetting is a theory of secondary liability, the party charged with the tort must have knowledge of the primary violation, and such knowledge may be inferred from the circumstances. *See In re American Continental Corp./Lincoln Sav. and Loan Sec. Litig.,* 794 F. Supp. 1424, 1436 (D. Ariz. 1992).

Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund, 201 Ariz. 474, 485 (2002) (en banc).

FINDINGS OF FACT

The Court's findings of fact must be "pertinent to the issues and comprehensive enough to provide a basis for the decision." *Miller v. Bd. of Supervisors of Pinal Cty.,* 175 Ariz. 296, 299 (1993)*, quoting Gilliland v. Rodriguez,* 77 Ariz. 163, 167 (1954). The findings must encompass the ultimate facts – *i.e*., "the controlling facts, without which the court cannot correctly apply the law in resolving the disputed issues in the case." *Miller, id.* at 300 (citations omitted). The Court is not required to support its findings with "subsidiary findings on evidentiary matters upon which such ultimate facts are based." *Gilliland, id.* Nor is the Court required to make findings on undisputed matters. *Picture Rocks Fire Dist. v. Pima Cty.,* 152 Ariz. 442, 444 (App. 1986), *disapproved on other grounds by Republic Inv. Fund I v. Town of Surprise,* 166 Ariz. 143 (1990).

The Sun Valley Investment

1. In the 1990s, Robert Burns was recognized as a highly competent evaluator of real estate in the metropolitan Phoenix west valley market. In 1995, Burns sought investors to acquire approximately 10,000 acres of raw desert land in Buckeye, Arizona.

2. On or about March 28, 1995, Burns provided an investment package to Leo Beus and Paul Gilbert, proposing an investment opportunity to purchase the Buckeye property. Burns proposed that a new limited liability corporation take title to the Buckeye property, and that PHII, which was controlled by Robert Burns and Brett Hickey, be the project manager.

The Operating Agreement

3. In June 1995, 10K was formed and an Operating Agreement was executed (the "Operating Agreement"). The purpose of 10K was to acquire, plan, zone, and sell the Buckeye property as proposed by Burns (the "10K Property" or "Property"). Article 3 of the Operating Agreement provided for 10K's (*i.e.,* the "Company") management:

> **Article 3: MANAGEMENT**
>
> 3.1 Management. The business and affairs of the Company shall be managed exclusively by its designated Manger. The Manager shall direct, manage and control the business of the Company to the best of its ability and shall have full and complete authority, power and discretion to make any and all decisions and to do any and all things that the Manager shall deem to be reasonably required to accomplish the business and objectives of the Company. Except as otherwise expressly provided

herein, the Manager shall have full, exclusive and complete discretion in the management and control of the day today affairs of the Company for the purposes herein stated and shall make all decisions affecting the Company's affairs. No Member shall have the authority to act for or bind the Company, except that the Members may execute a binding management agreement with a Manager (a "Management Agreement"), and otherwise may bind the Company in its dealing with the Manager.

***

3.3 Certain Powers of Manager. Without limiting the generality of Section 3.1 or the terms of any management Agreement, the Manager shall have power and authority, on behalf of the Company in its own discretion (provided that, where specifically stated below, certain acts require the approval of the Members):

***

f. With the consent of a Super Majority-In Interest, to sell or otherwise dispose of all or substantially all of the assets of the Company as part of a single transaction or plan so long as such dispositions does not violate or cause a default under any other agreement by which the Company or its assets may be bound.

***

3.4 Manager Has No Exclusive Duty to Company. The Manager shall not be required to manage the Company as its sole and exclusive function, and it may have other business interests and may engage in other activities in addition to those relating to the Company, provided, however, that in the event the Manager is presented with an opportunity to acquire real property within a five (5) mile radius of the Property during the term of the Agreement, Manager shall offer such opportunity to the Company. If, by action of a Super Majority-In-Interest, the Company does not accept such opportunity within thirty (30) days, Manager shall be free to pursue it without restriction. Neither the Company nor any Member shall have any right, by virtue of this Agreement, to share or participate in such other investments or activities of the Manager or to the income or proceeds derived therefrom.

4. 10K purchased the Property for $9.4 million, paying $2 million in cash and executing a promissory note for $7.4 million to Citibank (the "Citibank Note").

The Management Agreement

5. Burns and Hickey formed PHII to oversee zoning, master planning, marketing, and operation of the 10K Property.

6. In June 1995, Agnes Ellen, Inc. executed a Management Agreement with 10K, which was later assigned to and assumed by PHII (the "Management Agreement"). The Management Agreement reiterated provisions of Article 3 of the Operating Agreement and added:

> 2. Manager's Duties.
>
> 2.1 The business and affairs of the Company shall be managed exclusively by the Manager. Pursuant to this Agreement, the Manager shall direct, manage and control the business of the Company to the best of its ability and shall have full and complete authority, power and discretion to make any and all decisions and to do any and all things which the Manager shall deem to be reasonably required to accomplish the business and objectives of the Company and shall be in compliance with all provisions of the Operating Agreement. Except as otherwise expressly provided herein or in the Operating Agreement, Manager shall have full, exclusive and complete discretion in the management and control of the day to today affairs of the Company for the purposes herein stated and shall make all decisions affecting the Company affairs.
>
> 2.2 Without limiting the generality of the Manager's authority as forth in Sec. 2.1, the Manager shall have full power and authority, on behalf of the Company, to take any or all of the following actions, all of which may be taken in Manager's own discretion (provided, that where specifically stated below, certain acts require the approval of the Members to the extent stated):
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> ***
>
> h. Employ independent accounts, legal counsel, managing agents, consultants or other experts to perform services for the Company and to compensate them from Company funds;
>
> ***
>
> 2.3 Manager will carry out its duties diligently, in a timely fashion and in a good, businesslike manner and will use its reasonable best efforts to perform its duties hereunder. Unless this Agreement is terminated in accordance with Section 4, Manager shall carry out the duties described herein until the Project is completely sold and the Company is dissolved and terminated.
>
> 2.4 Manager is an independent contractor under this Agreement, and nothing herein shall be construed to create a partnership or joint venture relationship between the parties hereto. Manager shall have no further power or authority to bind or obligate the Company in any manner to any third party except as expressly permitted hereby.

7. The Management Agreement also prohibited 10K Members from "tak[ing] any action inconsistent with the terms and conditions" of the Management Agreement "in a manner that affects [PHII's] rights" or its "ability to perform services" for 10K.

8. The grant of authority to PHII was acceptable to the 10K because the parties' economic interests were aligned: PHII's primary compensation would be a share of the distributable proceeds earned by 10K—*i.e.,* PHII made money only if 10K made money.

Spurlock and 10K: Joint Marketing Agreement

9. Spurlock Land, L.L.C., Spurlock Land Investors I Limited Partnership, and Spurlock Land Investors II Limited Partnership (collectively, "Spurlock") owned approximately 3,244 acres of land adjacent to the 10K Property (the "Spurlock Property"). Glen Spurlock was the primary decision maker for Spurlock.

10. The Spurlock Property was more valuable than the 10K Property because it was in the path of progress from east to west, and it did not have some of the physical challenges that the 10K Property had.

11. In 1996, Spurlock and 10K entered into an agreement to jointly market and sell the 10K and Spurlock Properties (the "Joint Marketing Agreement"). Comprising approximately 13,282 acres, these Properties constituted the "Sun Valley Property." 10K was responsible for marketing the Sun Valley Property and advising Spurlock accordingly. Spurlock and 10K continued to own their respective Property.

12. The Sun Valley Property could not be sold to any person or entity affiliated with 10K or Spurlock. Spurlock wanted "full and fair market value" for the Sun Valley Property. This necessitated that the Sun Valley Property be sold to a third party.

13. The Joint Marketing Agreement also provided that PHII or 10K could enter into a separate agreement in connection with the Sun Valley Property with a buyer or venturer after the sale or venture of that Property.

The Buyer: Breycliffe

14. On November 25, 1998, PHII entered into two contracts on behalf of 10K. Pursuant to the "1998 Spurlock Agreement," 10K would buy the Spurlock Property, and, pursuant to the "1998 Breycliffe Agreement," 10K would sell the Sun Valley Property to Breycliffe, L.L.C. ("Breycliffe").

15. Breycliffe agreed to purchase the Sun Valley Property for $5,000/acre, for a total of $66,300,000. Of this amount, $16,220,000 was owed to Spurlock for the Spurlock Property. However, the purchase price for the 10K Property was not due until Breycliffe sought releases of portions of the Sun Valley Property; Breycliffe had up to 20 years to obtain said releases. In lieu of interest, Breycliffe was obligated to pay 10K 20 percent of the "profit" realized by Breycliffe on the ultimate sale, lease, or other disposition of the Sun Valley Property.

16. Pursuant to the 1998 Breycliffe Agreement, Breycliffe had the right to assign, in whole or in part, its rights and duties (before or after the close of Escrow) without the consent of 10K.

Alleged Breaches, Litigation, and Settlement

17. In September 2001, Spurlock informed 10K that Breycliffe was in breach of the 1998 Breycliffe Agreement for failing to comply with Section 12 (Approvals Conditions), and that 10K was in breach of the Spurlock Agreement for failing to enforce the 1998 Breycliffe Agreement.

18. On January 29, 2002, Spurlock, 10K, and Breycliffe entered into a Fourth Amendment, extending the Approvals Conditions Period to February 13, 2002.

19. A difference of opinion arose concerning Breycliffe's right to close under the controlling agreements. PHII hired the Galbut & Hunter law firm as 10K's counsel. On February 13, 2002, a lawsuit was filed against Spurlock to compel the closing of the transaction.

20. With the 10K lawsuit pending, on February 13, 2002, Spurlock, 10K, and Breycliffe entered into a Fifth Amendment, extending the Approvals Conditions Period to February 28, 2002, with a closing date of March 14, 2002.

21. On March 8, 2002, Spurlock sued Breycliffe and 10K, asserting that the transaction should be terminated. The 10K and Spurlock lawsuits (Maricopa County Superior Court Case Nos. CV2002-002933 and CV2002-004470) were consolidated (collectively, the "2002 Action").

22. The parties settled the 2002 Action. Spurlock, Breycliffe, and PHII entered into new agreements (the "2002 Spurlock Agreement" and "2002 Breycliffe Agreement"), and stipulated to a "Final Judgment and Permanent Injunction Order."

23. On June 4, 2002, a Stipulated Judgment was entered by Judge Kenneth Mangum (the "Mangum Judgment"). The Mangum Judgment incorporated the terms of the 2002 Spurlock

and Breycliffe Agreements, and ordered that the parties perform their contractual obligations and responsibilities. The purchase price to 10K in the 2002 Breycliffe Agreement remained the same as in the 1998 Breycliffe Agreement. The 2002 Breycliffe Agreement eliminated a requirement that Breycliffe make a $30 million investment by giving Breycliffe the ability to waive the Approvals Conditions.

PHII Brokers the 2002 Breycliffe Agreement

24. On April 3, 2002, PHII sent GW Holdings (*i.e.,* Garth Wieger) a letter containing information about the Sun Valley Property.

25. On May 28, 2002, Randy Stolworthy (a 10K Member) received a call from a friend who said he had been approached by Wieger about buying into a project that appeared to involve the 10K Property. Stolworthy immediately called Wieger, and a meeting was set for the next day.

26. Stolworthy met with Wieger on May 29, 2002, and they discussed the Breycliffe deal. Wieger explained that the proposal was for him to purchase Breycliffe's position for $7 million. As a condition of the deal, PHII demanded 50 percent of the profits for itself. No portion of the purchase price or profit participation was to go to 10K.

27. The first time that 10K learned PHII was brokering Breycliffe's interest and seeking a profit participation was at the May 29 Stolworthy-Wieger meeting.

28. On May 30, 2002, Stolworthy met with Burns and Hickey and expressed his disapproval of their pitching the Breycliffe deal to Wieger. Stolworthy expressed alarm over PHII not disclosing its relationship with Breycliffe to market the Sun Valley Property, self-dealing to obtain a Wieger profit participation, and role as a dual fiduciary. After learning of Stolworthy's concerns, Burns stated, "That's what I do."

29. On June 7, 2002, Beus (a 10K Member) sent Burns a letter requesting an immediate meeting; the meeting was ultimately held on June 21, 2002.

30. During the June 21 meeting, Burns acknowledged to Beus and Stolworthy that PHII was brokering Breycliffe's interest and attempting to get additional profit participation. Beus explained that Burns was acting contrary to his fiduciary duties to 10K, and that 10K did not countenance any deal in which there was additional profit participation to PHII.

31. Also during the June 21 meeting, Burns indicated he was considering taking the deal to Wolfswinkel. Beus and Stolworthy immediately objected based on Wolfswinkel's

reputation for buying property, placing it into bankruptcy, "stalling out" a deal, and then re-negotiating the contract. Also of concern was the fact that (Conley) Wolfswinkel was a convicted felon with sizeable civil judgments against him.

32. To avoid a Wolfswinkel deal, Beus, Gilbert (via Beus), and Stolworthy offered to purchase the Breycliffe position and invite the other 10K Members to participate; if there was no Member interest, the three were prepared to complete the transaction alone.

33. At the close of the June 21 meeting, PHII was instructed to call a meeting of the 10K Members to discuss the situation; PHII sent a letter to the Members setting a meeting for July 2, 2002.

34. Burns did not disclose during the June 21 meeting that Hickey was meeting with Wolfswinkel at the same time to offer him Breycliffe's interest.

35. Shortly after the June 21 meeting, William Pope (a 10K Member) called Burns, stating that he joined in the instruction to obtain Breycliffe's interest for 10K. Burns confirmed that he would work on it.

PHII Moves Forward With Wolfswinkel

36. Wolfswinkel was first presented with the Breycliffe deal at his June 21, 2002 meeting with Hickey. Wolfswinkel stated that it was "the best deal [he] had ever seen."

37. At the June 21 meeting, Hickey clarified that PHII, acting through Burns and Hickey, was 10K's manager. Wolfswinkel assumed that, as 10K's manager, PHII owed fiduciary duties to it: PHII could not profit at the expense of its principal, be involved in self-dealing, or violate the duty of loyalty. Wolfswinkel also understood that Hickey was presenting the deal as Breycliffe's "middleman" in order to facilitate the transaction.

38. Hickey's offer to Wolfswinkel consisted of Breycliffe's position and a management agreement that gave PHII profit participation.

39. Shortly after listening to Hickey's explanation of the deal, Wolfswinkel wanted in. He agreed to pay a 10.4 percent participation to "someone" when Hickey posed the issue.

40. Following the June 21 meeting, Hickey was confident that PHII would receive some sort of management position and profit participation.

41. Wolfswinkel did not investigate the parties or their relationships because the parties were sophisticated and lawyers were involved. His focus was on completing the deal.

42. Hickey then met with Burns. Stolworthy called during this meeting, and Burns told Stolworthy that Wolfswinkel wanted to buy Breycliffe's interest. Hickey ascertained from the conversation that Stolworthy was upset at the prospect of having Wolfswinkel in the deal.

43. Burns and Hickey had a follow-up meeting with Wolfswinkel later on June 21, at Country Glazed Ham. Burns told Wolfswinkel that 10K Members objected to his participation.

44. On the morning of June 24, 2002, Wolfswinkel met with Dan Cracchiolo to ask Cracchiolo call Beus to soften Beus' perception of Wolfswinkel as a business partner. Beus affirmed to Cracchiolo that 10K wanted nothing to do with Wolfswinkel, and that 10K was prepared to buy the deal itself.

45. Later on June 24, Gilbert received a call from Max Gillian, a close friend; Gillian was also a friend of Wolfswinkel's. Gillian tried to persuade Gilbert to support Wolfswinkel in the deal. Gilbert made it clear he wanted nothing to do with Wolfswinkel because of his history of placing deals into bankruptcy; Gilbert believed Wolfswinkel would learn of Gilbert's objection and stop pursuing the Breycliffe deal.

46. On June 25, 2002, Wolfswinkel gave Hickey $500,000 as earnest money to show that he was ready to make a commitment. Wolfswinkel wanted the deal to move quickly.

47. On June 28, 2002, Breycliffe and W.V.S.V. (a Wolfswinkel family entity) executed a Purchase and Sale Agreement to transfer Breycliffe's rights under the Amended and Restated Breycliffe Agreement to W.V.S.V. (the "Wolfswinkel Agreement"). The Wolfswinkel Agreement contained the following provision:

> Buyer acknowledges it is aware of the risk that transactions contemplated by this Agreement could be subject of litigation involving 10K and /or other parties. Buyer hereby agrees to indemnify, defend and hold harmless Seller and against any claim, judicial proceeding, cost, liability, damage, or expense incurred by Seller as a result of any such litigation.

48. On the day the Wolfswinkel Agreement was signed, Hickey advised Stolworthy in a voice mail that the deal was done. During a follow-up call to Burns, Stolworthy criticized Burns for allowing a deal to be signed and questioned which side Burns was on. In response, Burns told Stolworthy that he "was not on anyone's side."

49. On July 1, 2002, Hickey wrote Stolworthy to cancel the July 2 meeting. Hickey stated that the third-party buyer of the Breycliffe interest was Dan Cracchiolo, Richard Anderson, and Granite Construction, consulted by Wolfswinkel. Hickey was advised of the makeup of this group by Wolfswinkel.

50. The 10K Members met on July 2, 2002; Hickey and Burns did not attend the meeting. To gather information, calls were placed to Burns and Hickey; Burns was unreachable, and Hickey refused to take the call. In this context, Stolworthy was appointed to oversee the activities of PHII.

51. The 10K Members met again on July 23, 2002. Hickey attended the meeting with his attorneys. He admitted that the 2002 Breycliffe Agreement had been his and Burns' idea. He also admitted that he and Burns had sought additional profit participation from Breycliffe and Wolfswinkel.

52. Also on July 23, while on the phone with Wolfswinkel, Beus dictated a letter to Wolfswinkel explaining that Beus believed Burns was behind Breycliffe, that the 2002 Breycliffe Agreement was invalid because the 10K Members had not consented to it, and that Wolfswinkel should not "close this transaction without knowing that [the 10K Members] fully intend on attacking the Breycliffe transaction with 10K." Beus told Wolfswinkel that Wolfswinkel should withdraw, and that Wolfswinkel was proceeding at his own peril if he did not do so.

53. Also on July 23, Stolworthy wrote to Wolfswinkel, reiterating that Breycliffe had no right to enter into a deal with him. Wolfswinkel did not respond to either the Beus or Stolworthy letters.

54. Wolfswinkel apprised Brandon and Ashton Wolfswinkel (principals in W.V.S.V.) of 10K's opposition to the Wolfswinkel Agreement.

55. On July 26, 2002, Wolfswinkel and his attorney attended a meeting of the 10K Members, at which time the 10K Members requested that Wolfswinkel withdraw from the transaction for the reasons Beus stated in his July 23 letter. The 10K Members repeatedly asked Wolfswinkel and his attorney for a copy of the Wolfswinkel Agreement. Wolfswinkel promised to provide it, but failed to do so. 10K did not obtain it until after this action was commenced months later, in May 2003.

56. Wolfswinkel believed that PHII's effort to negotiate the sale of Breycliffe's position was in 10K's interest. Gilbert had told PHII that "it was important that somebody take

over the responsibility of the million dollar pay down," and "it was a high priority for them to figure out a way that [he] didn't have to pay on the Citibank loan."

57. On April 29, 2003, 10K's counsel sent a letter to Wolfswinkel restating that the 2002 Breycliffe Agreement was invalid and offering to return substantiated sums (plus interest) paid to others for or on behalf of 10K or Breycliffe in misplaced reliance on the validity of the 2002 Breycliffe Agreement, in exchange for Wolfswinkel's withdrawal from the deal. Wolfswinkel did not respond to this letter.

58. 10K filed this action on May 1, 2003 seeking, *inter alia*, a declaration that the 2002 Breycliffe Agreement is invalid and damages for Wolfswinkel's aiding and abetting PHII's breaches of fiduciary duties.

59. W.V.S.V. closed escrow on the Wolfswinkel Agreement and the purchase of the Sun Valley Property on July 16, 2003.

CONCLUSIONS OF LAW

PHII, as the manager of 10K, owed fiduciary duties of honesty, loyalty, full disclosure, and obedience to 10K and its Members. *AMERCO v. Shoen*, 184 Ariz. 150, 157 (App. 1995); Restatement (2d) Agency § 13 (1958) (agent is a fiduciary for all matters within scope of agency).

PHII breached its fiduciary duties to 10K by shopping Breycliffe's interest in the 2002 Breycliffe Agreement without informing 10K that its business partner (Breycliffe) was seeking a buyer. PHII further breached its fiduciary duties by ignoring 10K's direction to disregard Wolfswinkel and facilitate the purchase of Breycliffe's interest by 10K.

PHII purposely ignored 10K because PHII knew it would never get additional profit participation from 10K. PHII's targets were buyers open to giving PHII an extra profit interest.

When Wolfswinkel demonstrated his ability to move quickly and willingness to consider additional profit participation for PHII, PHII focused on closing the deal, contrary to 10K's instruction and in further violation of its fiduciary duties.

Even assuming that PHII was acting in 10K's best economic interest (as urged by PHII), that rationale was removed when 10K offered to purchase the Breycliffe interest.

By June 21, 2002, the Wolfswinkel deal moved forward with PHII and Wolfswinkel setting an expedited course to signing before 10K marshalled any roadblocks. After signing, the prospect of a 10K legal challenge was real. The Wolfswinkel Agreement acknowledged as much: "this Agreement could be subject of litigation involving 10K and/or parties."

Wolfswinkel was enamored by the Breycliffe deal from the start. He knew of 10K's objections to his purchase and PHII's conflicting role as a deal facilitator and as 10K's fiduciary. By furthering his own deal through PHII, Wolfswinkel substantially assisted PHII in violating its fiduciary duties to 10K.

10K was damaged by the lost opportunity to purchase Breycliffe's interest and to realize profits from total ownership.

Conley Wolfswinkel was an agent of W.V.S.V., and W.V.S.V. is legally responsible for his actions. *State v. Far W. Water & Sewer Inc.*, 224 Ariz. 173, 195 (App. 2010) ("[W]hen corporate officers or agents act in their representative capacity and within the scope of their authority, such act is deemed to be an act of the corporation.").

Conley Wolfswinkel is also personally responsible for his tortious conduct. *Lombardo v. Albu*, 199 Ariz. 97, 100 (2000).

The Court concludes that W.V.S.V Holdings, L.L.C. and Conley Wolfswinkel are liable for aiding and abetting PHII's breach of fiduciary duty. As a direct and proximate result, 10K has suffered compensatory damages in the amount of $288 million as of March 31, 2014.

The relative degrees of fault are as follows. *See* A.R.S. § 12-2506(C).

Defendants: 30 percent.

PHII, Robert Burns, and/or Brent Hickey: 70 percent.

"Acting in concert" means entering into a conscious agreement to pursue a common plan or design to commit an intentional tort and actively taking part in the tort. A.R.S. § 12-2506(F)(1); *Mein v. Cook*, 219 Ariz. 96 (App. 2008).

W.V.S.V. Holdings, L.L.C. and Conley Wolfswinkel are not jointly and severally liable to 10K. The Court concludes that W.V.S.V. Holdings, L.L.C. and Conley Wolfswinkel did not act in concert with PHII.

IT IS THEREFORE ORDERED awarding 10K compensatory damages of $86,400,000.

Count II, Declaratory Relief

10K seeks to rescind the Wolfswinkel Agreement, obtain the Sun Valley Property, and recoup lost profits damages.[1]

"The doctrine of election of remedies precludes pursuit of two inconsistent remedies based on the same claim." *Phillips v. Adler,* 134 Ariz. 480, 482 (App.1982), *citing Malisewski v. Singer,* 123 Ariz. 195, 197 (App. 1979). "A party who has been defrauded is put to an election of remedies, i.e. he may either rescind the contract or affirm the contract and sue for damages, but he cannot do both." *Jennings v. Lee,* 105 Ariz. 167, 171 (1969).

10K never elected a remedy; rather it contends that there is no inconsistency and no need to elect.

The Court finds that 10K's claim for declaratory relief is precluded because it seeks to rescind the Wolfswinkel contract *and* pursue damages. Furthermore, the damages sought on 10K's tort and declaratory relief claims are duplicative.

IT IS THEREFORE ORDERED denying 10K's Declaratory Relief Claim.

Constructive Trust

"The decision whether to fashion an equitable remedy lies within the trial court's discretion." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.,* 229 Ariz. 377, 409 (App. 2012). In the exercise of that discretion,

IT IS THEREFORE ORDERED denying 10K's request for a constructive trust.

Punitive Damages

Punitive damages require "clear and convincing evidence" of "reprehensible conduct combined with an evil mind over and above that required for commission of a tort." *Linthicum v. Nationwide Life Ins. Co*., 150 Ariz. 326, 332, 723 (1986). A defendant acts with an evil mind when he intends to injure or defraud, or deliberately interferes with the rights of others,

[1] A land appraised value of $66.7 million is subtracted from "but for profits."

"consciously disregarding the unjustifiable substantial risk of significant harm to them." *Sec. Title Agency, Inc. v. Pope*, 219 Ariz. 480, 498 (App. 2008) (citations omitted).

This dispute is about competition to secure rights in the 2002 Breycliffe Agreement. 10K had no contractual or other entitlement to Breycliffe's position. There was nothing in the 2002 Breycliffe Agreement to prevent Wolfswinkel from assuming Breycliffe's interest. Although the result of Wolfswinkel's actions resulted in a lost opportunity to 10K, there is not clear and convincing evidence that Wolfswinkel acted with an evil mind with intent to injure 10K.

IT IS THEREFORE ORDERED denying 10K's request for punitive damages.