

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAN DOMANUS and ANDREW KOZLOWSKI,)
both individually and derivatively on)
behalf of KRAKOW BUSINESS PARK SP.Z)
O.O., KRAKOW BUSINESS PARK SP. Z O.O.,)
KBP-1 SP. Z O. O., KBP-2 SP. Z O.O.,)
KBP-3 SP. Z O. O., KBP-5 SP. Z O.O.,)
KBP-6 SP. Z O.O., KBP-7 SP. Z O.O.,)
KBP-8 SP. Z O.O., and KBP-11 SP. Z O.)
O.,)

Plaintiffs,)

v.)

DEREK LEWICKI, KATARZYNA SZUBERT-)
LEWICKI, RICHARD SWIECH, BOZENA)
SANECKA-SWIECH, ADAM SWIECH, SPECTRUM)
COMPANY, LTD., ORCHARD MEADOWS HOMES,)
INC., ORCHARD MEADOWS HOMES, LLC,)
ORCHARD MEADOWS, LLC, LAKE RIDGE)
TOWNHOMES CORP., LAKE RIDGE, LLC,)
POLCON CONSTRUCTION CORP., PROTORIUS,)
LTD., SAXELBY ENTERPRISES, LTD., and)
ADR ENTERPRISES, INC.,)

08 C 4922

Defendants,)

and)

KRAKOW BUSINESS PARK SP. Z O.O., KBP-)
1 SP. Z O. O., KBP-2 SP. Z O.O., KBP-)
3 SP. Z O. O., KBP-5 SP. Z O.O., KBP-)
6 SP. Z O.O., KBP-7 SP. Z O.O., KBP-8)
SP. Z O.O., and KBP-11 SP. Z O. O.)

Derivative Defendants.)

ORDER

Having considered the parties' submissions on the issue of
plaintiffs' damages pursuant to the default order I entered

against defendants Lewicki, Richard Sweich and Adam Swiech on January 11, 2013, and against Polcon Construction Corp. on February 13, 2013, I conclude that plaintiffs are entitled to the measure of damages explained in their damages memorandum and supporting materials.

At this stage, I take as true the well-pleaded allegations of the complaint relating to liability. *Merrill Lynch Mtg. Corp. v. Narayan*, 908 F.2d 246, 253 (7th Cir. 1990). Plaintiffs now must establish their entitlement to damages, and may recover those that I conclude "naturally flow from the injuries pleaded." *Wehrs v. Wells*, 688 F.3d 886, 893 (7th Cir. 2012). As defendants acknowledge, where "defendants' conduct has made it difficult for the plaintiff[s] to prove the precise extent of [their] damages," plaintiffs are allowed "broad latitude...in quantifying damages." *BCS Services, Inc., v. Heartwood 88, LLC*, 637 F.3d 750, 759 (7th Cir. 2011). There is no question that that is the case here. Accordingly, "[e]ven speculation has its place in estimating damages, and doubts should be resolved against the wrongdoer." *Id.* (internal quotations and citations omitted). "Otherwise, the more grievous the wrong done, the less likelihood there would be of a recovery." *Id.* (internal quotations and citation omitted).

Plaintiffs have proposed a three-step method for calculating the damages they claim naturally flow from the claims asserted in their complaint. Their approach, described below, is endorsed by

their accounting and valuation expert, Eliza G. Cumberland. The substance of their claim is also supported by her expert report, as well as by witness affidavits and documentary evidence.

First, plaintiffs measure the portion of KBP ownership they lost as a result of defendants' dilution of their KBP shares (and, in Domanus's case, as a result of Adam Swiech's conversion of his shares) to determine each plaintiff's "adjusted KBP ownership percentage." Second, plaintiffs multiply each plaintiff's adjusted KBP ownership percentage by the total price at which Orco Property Group had agreed to buy all KBP shares, thus yielding each plaintiff's gross damages, or "Total Orco Loss." Finally, they deduct the current value of each plaintiff's registered (i.e., non-adjusted) KBP shareholdings (which they estimate based on the May 13, 2009, written offer by Apollo-Rida Poland Sp. z o. o. ("Apollo"), an independent third-party, to purchase all shares of KBP) to yield net damages. Pursuant to RICO's treble damages provision, 18 U.S.C. 2964(c), plaintiffs then triple each plaintiff's net damages flowing from defendants' RICO violations.

The sum of these calculations amounts to maximum total recoverable damages on all claims of \$276,000,000 for plaintiff Kozlowski, and of \$137,000,000 for plaintiff Domanus. This number subsumes plaintiffs' maximum total recovery on their common law claims of \$92,000,000 for Kozlowski, and \$45,800,000

for Domanus.¹ Plaintiffs also seek a Rule 54(b) determination that entry of a final judgment against these defendants is appropriate.

Defendants' response is remarkable, first, for what it does not dispute. Defendants raise no objection to plaintiffs' approach to measuring their "adjusted KBP ownership percentages," nor do they object to plaintiffs' use of the adjusted percentages as a baseline for calculating their damages. Defendants do not attack the qualifications of plaintiffs' expert, and, although they criticize certain aspects of her approach, they offer no expert of their own to rebut her analysis. And they object neither to the form of plaintiffs' proposed judgment nor to the appropriateness of a Rule 54(b) determination.

Instead, defendants: 1) complain that plaintiffs lack reliable evidence of KBP's current value (an audacious argument, given that defendants, who control this evidence, flatly ignored

¹ Plaintiffs' proposed order of final judgment, which I adopt, sets forth in detail the damages to which plaintiffs are entitled on each count of their complaint. As that order reflects, plaintiffs first calculate the total damages attributable to the conduct alleged in their common law counts of fraud (Count VII), breach of fiduciary duty (Counts IX and X), and civil conspiracy (Count XIII), then set forth additional, actual damages attributable to defendants' tortious interference with prospective economic damages (Count XI), and, in Domanus's case, conversion (Count VIII). These calculations provide, however, that plaintiffs' actual damages awarded on Count XI are not to be added to the damages awarded on Counts VII, IX, and XIII. Plaintiffs seek no damages for the conduct alleged in Counts X or XII.

multiple judicial orders to produce it in discovery); and 2) argue that plaintiffs cannot recover for the loss of the ORCO deal because they have not shown that defendants caused this loss, or proven its amount with the requisite certainty. Neither of these arguments has merit. Defendants indict the Apollo offer as "very outdated and speculative in nature," but they acknowledge that plaintiffs are entitled to speculate. See *BCS Services*, 637 F.3d at 759. Meanwhile, defendants do not even claim the Apollo offer is inaccurate, much less do they point to any evidence suggesting as much. Having withheld the information necessary to perform the discounted cash flow analysis they now insist is required for accurate valuation, defendants cannot now be heard to complain about plaintiffs' approach, which, in the uncontroverted view of plaintiffs' expert, reasonably uses the evidence at their disposal to estimate KBP's current value. See *Mid-America Tablewares, Inc. v. Mogi Trading Co., Ltd.*, 100 F.3d 1353, 1365 (7th Cir. 1996) ("[w]here the defendant's wrong has caused the difficulty of proof of damages, he cannot complain of the resulting uncertainty.")

Defendants' objection to the use of the Orco offer as a measure of plaintiffs' damages is even less well-taken, as it seeks to undo the liability determinations that inhere in my order of default. In their complaint, plaintiffs alleged that Orco was prepared to purchase all KBP shares for € 140 million,

but that defendants scuttled the deal. These allegations are now taken as true, and defendants cannot now complain that plaintiffs have not proven them. See *Wehrs* 688 F.3d at 892-93. And even if any burden remained on plaintiffs in this respect, they have met it with additional evidence submitted in support of their damages memorandum, including, *inter alia*, the testimony of Jeffrey Alson--Orco's acquisitions manager who was responsible for the KBP deal--that the deal would have proceeded as alleged, but for defendants' conduct. The same evidence adequately substantiates their claim for damages flowing from defendants' wrongful conduct in torpedoing the deal.

Finally, there is no merit to defendants' insistence that a hearing is required to establish plaintiffs' damages. Plaintiffs' damages memorandum is supported by documentary and testimonial evidence to support each of the figures used in the various calculations on which they rely. Their methodology and substantive analysis are both endorsed by an expert whose opinions stand un rebutted. Because plaintiffs' damages are "capable of ascertainment from definite figures contained in the documentary evidence or in detailed affidavits," no hearing is required. *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 603 (7th Cir. 2007). Indeed, defendants fail to explain what such a hearing would accomplish. Plaintiffs are entitled to

judgment in the amounts set forth in the accompanying final judgment.

ENTER ORDER:

A handwritten signature in black ink, appearing to read "Elaine E. Bucklo", written over a horizontal line.

Elaine E. Bucklo

United States District Judge

Dated: May 30, 2013