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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1695**

ROA, Inc.,  
Appellant,

Daniel Ashbach,  
Plaintiff,

vs.

Timothy J. Nicholson, et al.,  
Respondents,

North Star Processing, LLC,  
Respondent,

and

North Star Processing, LLC, Counterclaim Plaintiff,  
Respondent,

vs.

ROA, Inc., Counterclaim Defendant,  
Appellant,

Daniel Ashbach, Counterclaim Defendant.

**Filed June 10, 2013  
Affirmed in part, reversed in part, and remanded  
Johnson, Chief Judge**

Ramsey County District Court  
File No. 62-CV-10-1734

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Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Hooten, Judge.

### **UNPUBLISHED OPINION**

**JOHNSON**, Chief Judge

This case arose from a dispute between members of a limited liability company. At trial, appellant proved that respondents breached fiduciary duties. As a remedy, appellant received \$615,600 in a buy-out of its interest in the company. Appellant also was awarded \$36,686 in attorney fees. Appellant now argues that both the amount of the buy-out and the award of attorney fees should be larger. We conclude that appellant has not established an abuse of discretion with respect to the amount of the buy-out. But we conclude that appellant is entitled to a larger award of attorney fees because appellant obtained a greater benefit for the company and its members than is recognized by the existing fee award. Therefore, we affirm in part, reverse in part, and remand for further proceedings with respect to the award of attorney fees.

### **FACTS**

The parties' briefs contain a thorough recitation of the history of their business dealings and the disputes between the parties when the case was commenced and when it

was tried. For purposes of this appeal, we will provide an abbreviated version of the facts, as necessary to resolve the issues raised.<sup>1</sup>

North Star Processing, LLC (NSP) is a limited liability company, organized under Delaware law. During the relevant time period, NSP had five members with direct and/or indirect interests in the company. Appellant ROA, Inc., is owned by Daniel Ashbach and had a 24% interest in NSP through direct and indirect interests. Prior to this dispute,

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<sup>1</sup>It is appropriate to describe the record on which our recital of the facts is based. The district court issued a stipulated protective order that permitted papers to be filed under seal. The order that determined the merits was filed with the district court administrator under seal. Appellant's counsel submitted that order to this court by including it in a confidential addendum that was filed with the Clerk of Appellate Courts under seal, as required by the rules of appellate procedure. *See* Minn. R. Civ. App. P. 112.01, subd. 1; *see also* Minn. R. Civ. App. P. 112.02, 112.03.

Generally, parties should refrain from including confidential information in their briefs. Minn. R. Civ. App. P. 112.03. If, however, a party wishes to include confidential information and ensure that confidential information is protected, a party may seek leave to file two versions of each appellate brief. Minn. R. Civ. App. P. 112.03 advisory comm. cmt. If leave is granted, a complete version of the brief is filed under seal, and a redacted version is filed in a manner that makes it accessible to the public. *Id.* An appellate court will grant such leave if "the inability to discuss confidential information" in the brief "would cause substantial hardship or prevent the fair presentation of a party's argument." *Id.*

In this case, appellant's briefs cite and quote liberally from the order that was filed under seal in both the district court and in this court. Respondents' brief does likewise. Neither party sought leave to file two versions of an appellate brief. Because the parties' briefs were not filed under seal, we are not constrained in disclosing information contained in the briefs. *See* Minn. R. Pub. Access to Recs. of Jud. Branch 4; *see also* *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 655-56 n.1 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

Accordingly, the factual statements in this opinion are limited to those that appear in the parties' briefs and in other documents in the record that are not under seal. We do not disclose information that is found only in documents that were filed under seal in both courts and, thus, are not a matter of public record. *See* Minn. R. Civ. App. P. 112.01, subd. 1; Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 1(g)(2). We have, of course, reviewed and fully considered all relevant materials when analyzing the parties' respective arguments and deciding the issues raised by the appeal.

Ashbach had been an officer of NSP but was not involved in the operations of the company after 2007. Respondent Peter Duddleston is the president of NSP and indirectly had a 24% interest in NSP. Respondent Michael Doolan is the secretary of NSP and indirectly had a 24% interest in NSP. Respondent Timothy Nicholson is the CEO and chairman of the board and directly and indirectly had a 14% interest in NSP. Respondent Douglas Lundberg is the treasurer and in charge of operations and directly and indirectly had a 14% interest in NSP.

In 2005, NSP's management wished to expand the company's operations by building a second facility with additional equipment. The company could obtain financing only if all members with more than a 20% interest in the company provided loan guaranties. ROA owned 24% of NSP, but Ashbach refused to guarantee a loan unless ROA received certain payments from the company, which the other members were not willing to provide.

In April 2007, the other members of NSP formed NSH Group, LLC, as an alternative means of facilitating NSP's expansion. NSH built a warehouse and installed equipment that was useful to NSP's business. NSH borrowed money to fund the construction and the acquisition of equipment, and NSP guaranteed NSH's loan by pledging all of NSP's assets as collateral. NSH then leased both the warehouse building and the equipment to NSP.

In November 2009, ROA and Ashbach commenced this action against NSP, the other NSP members, and NSH, alleging, among other theories, breach of fiduciary duties. The complaint included derivative claims brought on behalf of NSP. While the case was

pending, respondents essentially conceded that NSP provided NSH with unduly favorable terms in their contracts. An expert appraiser retained by NSP determined that NSP had transferred real estate to NSH at a price that was below market value. The expert also determined that the rental rates in the real-estate lease and the equipment lease were above fair market value. Based on the expert's findings, NSH reimbursed NSP to the extent that past payments deviated from fair market value, and NSH waived its right to future payments in excess of fair market value, including its right to receive a portion of NSP's profits.

In November 2011, the parties stipulated to a trial before a consensual special magistrate. *See* Minn. Gen. R. Prac. 114.02(a)(2). The case was tried over eight days in February and March 2012. In June 2012, the magistrate issued his findings of fact, conclusions of law, and order. The magistrate, applying Delaware law, concluded that respondents breached their fiduciary duties in four ways: (1) by causing NSP to convey real estate to NSH for less than its market value; (2) by causing NSP to guarantee NSH's loan without consideration; (3) by pledging all of NSP's assets as security for NSH's loan without consideration; and (4) by causing NSP to lease real property and equipment from NSH at above-market rates.

As a remedy, the magistrate ordered an equitable buy-out of ROA's interest in NSP. The magistrate ordered a buy-out at the fair value of the company as of December 31, 2010, without discounting for lack of marketability or lack of control. The undisputed evidence is that the fair value of ROA's interest in NSP on December 31, 2010 was \$643,000. After accounting for ROA's debts, the magistrate ordered a buy-out

in the amount of \$615,600. The magistrate also awarded \$115,000 to NSP as damages for the underpayment of real estate on the transfer of NSP's property to NSH. In July 2012, the magistrate awarded \$36,686 in attorney fees to ROA based on a calculation of the benefit to the company and its members due to ROA's action. The district court entered judgment on the magistrate's order.

ROA appeals, challenging only the amount of the buy-out and the amount of attorney fees.

## **D E C I S I O N**

### **I. Amount of Buy-Out**

ROA argues that the magistrate erred in determining the amount of the buy-out of ROA's interest in NSP. Specifically, ROA contends that the magistrate should have considered the value of NSH as well as the value of NSP.

The parties disagree on the standard of review that applies to this issue. ROA contends that the question whether the value of NSH should be included for purposes of the buy-out is a question of law that is subject to a *de novo* standard of review. Respondents contend that the question is a matter of equity that is subject to an abuse-of-discretion standard of review. Delaware courts recognize a trial court's "broad discretion" to fashion an equitable remedy in actions involving claims of breach of fiduciary duty. *See, e.g., International Telecharge, Inc. v. Bomarko, Inc.*, 766 A.2d 437, 442 (Del. 2000); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983). The Delaware Supreme Court has held that a trial court may be within its discretion in not ordering disgorgement if disgorgement would lead to a double recovery. *International*

*Telecharge*, 766 A.2d at 442. Likewise, this court applies an abuse-of-discretion standard of review to a trial court's decision to remedy a breach of fiduciary duty by ordering a buy-out. *See, e.g., Pedro v. Pedro*, 489 N.W.2d 798, 802 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). In light of the caselaw from both Delaware and Minnesota, we will apply an abuse-of-discretion standard of review.

As a general rule, if a party breaches a fiduciary duty, the party should “not profit personally from his conduct,” and the beneficiary should not be “harmed by such conduct.” *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996). Damages flowing from a breach of a fiduciary duty “are to be liberally calculated” but must be proximately caused by the breach. *Id.* at 444.

ROA's argument rests on the theory that a party who breaches a fiduciary duty should be required to disgorge all profits that flow from the breach. *See id.* at 437. ROA asserts that respondents should be required to disgorge the value of NSH because NSH was formed by respondents' breaches of their fiduciary duties toward ROA. ROA cites no authority for the principle that a trial court should, in these circumstances, include the value of a company in which it has no ownership interest when ordering a buy-out of its interest in a company in which it does have an ownership interest. The magistrate perhaps may have discretion to order such relief in some cases, but ROA cannot establish that the magistrate was required to do so in this case. To the contrary, the magistrate's chosen remedy was reasonable for at least two reasons.

First, the magistrate was within his discretion in not ordering disgorgement of the value of NSH because the formation of NSH and its value as a separate business entity

are not the direct results of respondents' breaches of fiduciary duties. The magistrate specifically found that the formation of NSH did not constitute self-dealing. ROA does not dispute this finding or any other finding of fact.

ROA nonetheless contends that the formation of NSH was an indirect result of respondents' breaches of fiduciary duties. It is true that respondents breached their fiduciary duties by causing NSP to engage in transactions with NSH that were unduly favorable to NSH. But it does not follow that NSH's value must be considered in determining the value of NSP. The NSP member agreement would have allowed respondents to cause NSP to engage in those transactions even without ROA's consent. The NSP member agreement allows a supermajority to engage in various actions, including "[t]he granting of any material lien, charge or encumbrance upon any of the Company's assets" and "[t]he borrowing of money in excess of \$125,000." NSP's guarantee of NSH's loan and the pledge of assets as collateral are such actions, and the NSP members who formed NSH constituted the necessary supermajority. In *Thorpe*, the Delaware Supreme Court did not require disgorgement for a corporation's failure to sell a subsidiary because the controlling shareholders had the necessary votes to block the sale. *Id.* at 444. Accordingly, respondents' breach of fiduciary duties was not a proximate cause of the formation of NSH and its value as an independent company.

Second, the magistrate was within his discretion in not ordering disgorgement of the value of NSH because NSP increased in value significantly through its transactions with NSH in a way that benefitted ROA when its interest in NSP was bought out at the increased value. Before the parties' business relationship deteriorated, NSP was

operating at full capacity and, thus, had limited potential for growth in income and value. After the establishment of NSH, NSP expanded its operations and reaped greater profits, thus increasing its value. The 2010 valuation of NSP was significantly more than the 2006 valuation. The magistrate ordered a buy-out of ROA's interest in NSP using the 2010 valuation. Disgorgement is most appropriate when the breaching party gains while the other party loses. *See id.* at 445. Because ROA benefitted from the formation of NSH by receiving a larger buy-out, the magistrate reasonably declined to consider the value of NSH when determining the amount of the buy-out. *See International Telecharge*, 766 A.2d at 442. ROA cites no authority for its assertion that a trial court should, in these circumstances, require a defendant to disgorge benefits even if the plaintiff also receives benefits from a breach of fiduciary duty. Rather, the cases cited by ROA in support of its disgorgement theory arise from circumstances in which a defendant received a benefit at the expense of the plaintiff. *See, e.g., Thorpe*, 676 A.2d at 439 (requiring disgorgement of fee received to extend negotiations in connection with usurpation of corporate opportunity); *Triton Constr. Co. v. Eastern Shore Elec. Servs., Inc.*, 2009 WL 1387115, at \*28 (Del. Ch. May 18, 2009) (requiring disgorgement of compensation received from competitor while still employed by plaintiff).

Thus, we conclude that the magistrate did not abuse his discretion by declining to consider the value of NSH when determining the amount of the buy-out of ROA's interest in NSP.

## II. Attorney Fees

ROA also argues that the magistrate erred in determining the amount of the award of attorney fees. Specifically, ROA contends that its award of attorney fees does not reflect the full benefit received by the company and its members in this action, which includes both direct and derivative claims.

Under Delaware law, a plaintiff may receive an award of attorney fees in a successful derivative action that results in a recovery of money for a company and its owners. *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1253 (Del. 2012). The “common fund doctrine” is “founded on the equitable principle that those who have profited from litigation should share its costs.” *Id.* Delaware courts look to a variety of factors in calculating fees, but they typically give “the greatest weight to the benefit achieved in litigation.” *Id.* at 1254. In fact, Delaware courts use a formula, the “percentage of the fund” calculation, to determine whether attorney fees are appropriate and the amount of fees to be awarded. *Id.* at 1253-54. If a case settles early, Delaware courts typically award 10% to 15% of the monetary benefit in fees. *Id.* at 1259. If a case settles after more extensive litigation, Delaware courts typically award 15% to 25% of the monetary benefit in fees. *Id.* at 1259-60. A determination of attorney fees under this formula is a matter of “sound judicial discretion.” *Id.* at 1255.

In this case, the magistrate found that “ROA’s prosecution of this case did confer a benefit on NSP.” The magistrate made findings concerning the financial benefits to NSP from ROA’s derivative action and calculated a “reasonable percentage of the benefit” as follows:

<b>Benefit</b>	<b>Amount</b>	<b>%</b>	<b>Fees</b>
NSH's reimbursement for its underpayment for real estate	\$115,000	25%	\$28,750
NSH's reimbursement for NSP's overpayments on leases	\$125,208	10%	\$12,521
NSH's waiver of profit sharing	\$70,000	10%	\$7,000
<b>Subtotal</b>			<b>\$48,271</b>
Discount for ROA's 24% interest			(\$11,585)
<b>Total Fee Award</b>			<b>\$36,686</b>

The magistrate awarded a higher percentage for NSH's below-market acquisition of the real estate because respondents opposed that allegation throughout the trial. The magistrate awarded a lower percentage for the other benefits because NSP voluntarily reimbursed NSH for those items prior to trial. The magistrate also specifically explained that he was not awarding fees for future potential benefits because some amounts were speculative, because NSH had not actually collected some amounts from NSP in the past, and because the assurance of market rents was factored into the buy-out of ROA's interest.

ROA contends that its award of attorney fees does not reflect the full benefit of this derivative action for two reasons. First, ROA contends that the magistrate erred by not including in his fee calculations the benefit to NSP arising from NSH's waiver of its right to a share of NSP's profits (38% of the amount that exceeds \$300,000). It appears that the magistrate did not include this item in his benefits calculation on the ground that

it is speculative because NSH had never enforced that provision of the lease agreement. In light of the undisputed fact that NSH did not receive any profit-sharing payments from NSP before ROA's derivative action, the magistrate did not abuse his discretion by declining to characterize NSH's waiver of the profit-sharing term as a "benefit" for purposes of awarding attorney fees.

Second, ROA contends that the magistrate erred by not including in his fee calculations the benefit to NSP arising from NSH's waiver of the above-market rent rates for the remainder of the terms of the leases. In his order on the merits, the magistrate explicitly found that this item was of benefit to NSP: "As a result of ROA's derivative lawsuit, NSP will benefit by the difference between the amounts that would have been paid under the leases as written and the amount NSH has now agreed it will charge after October 1, 2011." But the magistrate ultimately did not include this item in his benefits calculation. It is unclear why the magistrate did not do so; it may be because the benefit is speculative or because ROA already had benefitted from NSH's waiver through the buy-out of its interest in NSP.

This particular benefit does not appear to be speculative. There is no indication in the record that NSP was unlikely to continue renting real estate and equipment from NSH for the duration of the lease terms. The other possible reason given, that ROA already had benefitted from NSH's waiver, also does not support the magistrate's ruling. It is true that ROA obtained a benefit (in the form of a buy-out of its interest in NSP) that can be attributed to NSH's waiver of above-market rent payments. But ROA's receipt of that benefit does not mean that ROA is not entitled to an award of attorney fees for the

benefit. In fact, ROA's attorney fees *should* reflect the value of the benefit to the company due to NSH's waiver of future above-market rent payments because its derivative action provided a benefit to the company. *See Theriault*, 51 A.3d at 1253. Thus, we conclude that the magistrate erred by not including this benefit in the calculation of attorney fees.

Because the benefit arising from NSH's waiver of above-market rent payments was obtained before trial through NSH's voluntary action, the appropriate fee percentage is 10%. That is the percentage the magistrate used for other benefits that were received before trial through NSH's voluntary action. ROA has not challenged the 10% factor that the magistrate applied to those benefits. What remains unclear, however, is the value of the benefit received by NSP due to NSH's waiver of future above-market rent payments. The expert determined that the real-estate lease exceeded market value by \$5,002 per month and that the equipment lease exceeded market value by \$2,584 per month. But it appears that NSH reimbursed NSP for above-market rent payments in the amounts of only \$1,865 per month on the real-estate lease and only \$550 per month on the equipment lease. (For the 45-month period from January 1, 2008, to October 1, 2011, NSH reimbursed NSP \$83,915, plus interest, for overpayments on the real-estate lease and \$24,740, plus interest, for overpayments on the equipment lease.) Given the limited information in the appellate record, we are unable to determine how the magistrate calculated the value of the benefit related to NSH's waiver of above-market rent payments and, thus, how the magistrate would calculate the value of that particular benefit for purposes of attorney fees.

We note that ROA does not challenge the magistrate's 24% discount to account for ROA's interest in NSP.

Accordingly, we remand the case so that the district court or the magistrate can calculate the value of the benefit the company received due to NSH's waiver of future above-market rent payments on the real-estate lease and the equipment lease, through the end of the lease period, December 31, 2013. After determining the value of that benefit, the district court or the magistrate shall increase ROA's award of attorney fees by an amount equal to 10% of the amount of the additional benefit, discounted by ROA's 24% interest.

**Affirmed in part, reversed in part, and remanded.**