2021 IL App (2d) 191088-U
No. 2-19-1088
Order filed February 2, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JEFFREY ROBERTS, an Individual, and JOHN JOSSUND, an Individual, Derivatively on Behalf of OUR WOOD LOFT, LTD.,	)	Appeal from the Circuit Court Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 2016-CH-934
STEFAN G. ZIMMERMAN a/k/a STEVE or STEVEN ZIMMERMAN, an Individual, THOMAS ZIMMERMAN, an Individual, KATHY A. ZIMMERMAN a/k/a CATHY ZIMMERMAN, an Individual, and LAKE CITY HARDWOOD COMPANY, INC.,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Brennan concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's determination that defendant director did not breach his fiduciary duty to the corporation because defendant's conduct did not result in damages was against the manifest weight of the evidence. We remand for a determination of damages. Also, we reverse the trial court's section 2-615 dismissal of plaintiffs' shareholder-oppression claim and its section 2-615 dismissal of plaintiffs' claim that defendant's son aided and abetted in the underlying breach of fiduciary duty. We affirm the trial court's section 2-615 dismissal of plaintiffs' claim that

defendant's wife aided and abetted in the underlying breach of fiduciary duty. Reversed in part and remanded; affirmed in part.

¶ 2 In their fourth amended complaint, plaintiffs, Jeffrey Roberts and John Jossund, minority shareholders in Our Wood Loft, Ltd. (OWL), pleaded a shareholder-derivative action on behalf of OWL and against defendant, Stefan G. Zimmerman, the president, director, and majority shareholder of OWL, for breach of fiduciary duty. As this was a derivative suit, the harm alleged was to OWL, and plaintiffs filed the suit on behalf of OWL. Specifically, plaintiffs alleged that Stefan diverted approximately $800,000 in profits from OWL to Lake City Hardwood (Lake City), a company owned by Stefan's son, Thomas Zimmerman. This was the sole claim that went to trial. Plaintiffs also repleaded, for the purposes of preserving the issues for appeal: (1) a shareholder-oppression claim against Stefan; and (2) an aiding-and-abetting claim against Stefan's wife, Kathy Zimmerman, and son, Thomas, as to the underlying breach-of-fiduciary-duty claim against Stefan. The trial court ruled in favor of Stefan, finding that there were no diverted profits, and, therefore, no breach. Plaintiffs appeal this, as well as the trial court's earlier rulings. For the reasons that follow, we reverse and remand, except as to the dismissal of the aiding-and-abetting claim against Kathy. Reversed in part and remanded; affirmed in part.

¶ 3 I. BACKGROUND

¶ 4 The parties own three companies involved in the purchase of lumber products at wholesale prices and the resale of those lumber products at retail stores. The first company, Outstanding, is owned equally by plaintiffs and was incorporated in 1981. Stefan has no interest in Outstanding. The second company, OWL, is owned two-thirds by Stefan and one-sixth each by plaintiffs and was incorporated in 1985. The third company, 3 Corp. Lumber Co., is owned one-half by Outstanding and one-half by OWL, was incorporated in 2004, and is not central to this suit. A fourth company, Lake City, is owned by Thomas and was incorporated in 2012. Lake City had a

different business model, as it purchased lumber at wholesale prices and then resold it not at retail stores, but to its only customer, OWL.

¶ 5 In 1985, Outstanding helped OWL get started and become profitable. Outstanding supplied OWL with approximately $400,000 in start-up inventory, including materials, cash, infrastructure, a customer base, and an accounting system.

¶ 6 In 1986, the two companies cemented their relationship in a contract. The 1986 Agreement provided in relevant part:

> "16.2 It is understood and agreed that JEFFREY ROBERTS and JOHN JOSSUND currently solely own and operate [OUTSTANDING] and that their joint and individual efforts primarily will be devoted to that business; however, insomuch as the parties agree to serve as may be reasonable and necessary in mutual assistance for the common purpose and success of the instant business operation; and in recognition of the fact that [OUTSTANDING] shall serve as primary supplier to the instant business, the parties agree that, from time to time, certain of the equipment, inventory, products, services and/or personnel of one may be called upon to serve the other. All products and inventory purchased from [OUTSTANDING] shall be paid for by the instant business at the rate of 'best price possible' as determined by the Frank Paxton Lumber Catalogue.[]"

¶ 7 The parties agree that the Agreement's reference to the "best price possible," which is set forth in quotation marks, does not literally mean the best price possible, or the lowest price available on the open market, and is, instead, a term of art defined by the Paxton catalogue. The parties agree that the Paxton price is higher than the lowest price available on the open market and that, for practical purposes, the last sentence of the above-quoted provision could simply read: "All

products and inventory purchased from [OUTSTANDING] shall be paid for by [OWL] at the [Paxton price]."

¶ 8 At OWL, Stefan, as the president, majority shareholder, and director, oversees and is responsible for day-to-day operations, lumber purchases, and managing employees. Kathy, as an employee, performs bookkeeping and accounting functions. Plaintiffs do not participate in the day-to-day operations of OWL.

¶ 9 The facts precipitating the instant lawsuit began in 2011. At that time, Stefan approached plaintiffs and asked if Thomas could purchase shares in OWL. Plaintiffs declined. Plaintiffs agreed, however, that Thomas be hired as a manager at OWL. Thomas's duties at OWL included purchasing lumber at wholesale prices from various vendors for OWL to resell at its retail location.

¶ 10 In 2012, while still working for OWL, Thomas incorporated Lake City. Lake City purchased lumber at wholesale prices from seven vendors and then resold the lumber to its only customer, OWL, at a higher-than-wholesale price—*i.e.*, at approximately the Paxton price. Lake City obtained a profit (the difference between the wholesale price and the approximate Paxton price), and OWL obtained a profit (the difference between the approximate Paxton price and the retail price). Stefan did not disclose OWL's dealings with Lake City to plaintiffs, nor did he inform them that Thomas owned Lake City.

¶ 11 In 2016, plaintiffs became concerned enough about a downward trend in profits to investigate the matter. It was then that Stefan disclosed OWL's dealings with Lake City and that Thomas owned Lake City. Plaintiffs also came to believe that Stefan increased the rental payments on OWL's commercial property and made capital improvements with OWL funds, even though OWL was not required by lease to do so. The property was owned by a trust in which Kathy had a beneficial interest.

¶ 12 A. Third Amended Complaint

¶ 13 Plaintiffs initiated the instant lawsuit. For the purposes of this appeal, we begin with plaintiffs' four-count, third amended complaint.

¶ 14 In count I, plaintiffs alleged that Stefan breached his fiduciary duty to OWL by: (1) diverting a portion of OWL's profits to Lake City by allowing Lake City to serve as an unnecessary middleman between OWL and the seven vendors at issue; and (2) failing to disclose OWL's dealings with Lake City and put the matter to a vote as required by section 8.60 of the Business Corporations Act of 1983 (Act) (805 ILCS 5/8.60 (West 2018))[1], particularly where, plaintiffs

[1] Section 8.60, addressing a director's conflict of interest, provides:

"(a) If a transaction is fair to a corporation at the time it is authorized, approved, or ratified, the fact that a director of the corporation is directly or indirectly a party to the transaction is not grounds for invalidating the transaction or the director's vote regarding the transaction; provided, however, that in a proceeding contesting the validity of such a transaction, the person asserting validity has the burden of proving fairness unless:

(1) the material facts of the transaction and the director's interest or relationship were disclosed or known to the board of directors or a committee of the board and the board or committee authorized, approved or ratified the transaction by the affirmative votes of a majority of disinterested directors, even though the disinterested directors be less than a quorum; or

(2) the material facts of the transaction and the director's interest or relationship were disclosed or known to the shareholders entitled to vote and they authorized, approved or ratified the transaction without counting the vote of any

alleged, Stefan personally, or OWL, provided Lake City with $110,000 in start-up funds. Plaintiffs sought compensatory and punitive damages, as well as costs and fees.

¶ 15 In counts II and III, plaintiffs alleged shareholder oppression by Stefan. Count II was pleaded as an individual claim, and count III was pleaded in the alternative as a derivative claim. In both counts, plaintiffs alleged shareholder oppression pursuant to sections 12.56(a)(3) (oppressive conduct) and 12.56(a)(4) (misapplication of corporate funds and/or waste) of the Act. 805 ILCS 5/12.56(a)(3), (4) (West 2018). The underlying facts pleaded were similar to those pleaded in count I (with the addition of the alleged self-dealing to Kathy). However, the relief sought was different: Stefan's removal as director, appointment of a custodial replacement, and an accounting of the business, pursuant to sections 12.56(b)(3), (4), (5), and (6) of the Act. 805 ILCS 5/12.56 (b)(3), (4), (5), and (6) (West 2018).

¶ 16 In count IV, plaintiffs alleged that Thomas and Kathy aided and abetted Stefan in his breach of fiduciary duty. Plaintiffs alleged that Thomas started Lake City after being denied the opportunity to buy shares in OWL, that Thomas still worked at OWL as the purchasing manager when he formed Lake City, that OWL was Lake City's only customer, and various allegations concerning Lake City's status as an unnecessary middleman.

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shareholder who is an interested director.

(b) For purposes of this Section, a director is 'indirectly' a party to a transaction if the other party to the transaction is an entity in which the director has a material financial interest or of which the director is an officer, director or general partner." 805 ILCS 5/8.60 (West 2018).

¶ 17 Defendants moved to dismiss the four-count, third amended complaint. The court granted the motion, except as to the first part of count I, breach of fiduciary duty based on the diversion of profits.

¶ 18 As to the remainder of count I, breach of fiduciary duty based on the failure to disclose OWL's dealings with Lake City, the court did not believe section 8.60 applied. The court did not believe the family relationship or the source of Lake City's start-up funds mattered.

¶ 19 As to counts II and III, for shareholder oppression, the court appeared to accept Stefan's argument. Stefan had argued that plaintiffs' individual claim could not survive, because plaintiffs did not allege an injury specific to themselves as shareholders as opposed to OWL as a corporation. The devaluation of shares that would result from the alleged conduct would constitute a harm to the corporation, not to plaintiffs individually. Then, Stefan argued that the derivative claim could not survive, because shareholder-oppression actions are meant to be brought as individual claims, not derivative claims.

¶ 20 The court was unpersuaded by plaintiffs' response. Plaintiffs acknowledged that they did not expect both shareholder-oppression claims, individual and derivative, to survive. They pled both because, over the course of the litigation, Stefan attacked both. "In prior motions to dismiss, they just kept going back and forth. ***[If] we pled it individually[, they said,] [n]o. It's a derivative claim. If we pled it as a derivative claim, [they said] oh, no, oppression claims can't really be a derivative claim." Plaintiffs reminded the court that, since the inception of this case in 2016, the court "clearly noted that there is at the very least here a valid cause of action for shareholder oppression of some kind." Then, in response to each pleading, Stefan has raised a new argument to seek that claim's dismissal, culminating in a game of back-and-forth between individual and derivative claims. Whichever claim survived, they believed that Stefan engaged in

oppressive conduct, and they sought relief in the form of Stefan's removal as director, appointment of a custodial replacement, and an accounting of the business.

¶ 21 As to count IV, aiding and abetting, the court again appeared to accept defendants' argument. Defendants had argued that the aiding and abetting claim was merely a dressed-up version of the previously dismissed conspiracy claim that had been set forth in the second amended complaint. Members of a corporation could not conspire with one another. The court further added that Thomas's decision to start Lake City was not a tortious act.

¶ 22 The court issued the following conclusion:

> "I can summarize this case in one sentence. The plaintiffs are complaining that Stefan Zimmerman as the manager of day-to-day operations and a director of the corporation breached his fiduciary duty by purchasing materials at a higher wholesale price than could have been purchased from other vendors, thereby reducing the profit to the corporation, period. That is it.
>
> There is no tort of setting up a corporation to accomplish a lawful purpose that would be setting up Lake City by Thomas Zimmerman.
>
> It doesn't matter where the money [to start Lake City] came from. If it came from [Stefan] personally, that is not a tortious act.
>
> The fact that they were all related is of absolutely no consequence.
>
> ***
>
> I don't believe that this is an individual claim that can be brought by two shareholders. And if I ever said that I thought there was oppression against the shareholders, I have changed my mind, and I don't believe anything in this complaint sets out a cause of action individually for shareholder oppression.

I think [plaintiffs] can set out a complaint for breach of fiduciary duty, as I just referenced. ***.

***

I will allow you to file a fourth amended complaint, a one-count fourth amended complaint alleging breach of fiduciary duty as a derivative action ***."

¶ 23 B. Fourth Amended Complaint and

Trial on the Derivative, Breach-of-Fiduciary-Duty Claim

¶ 24 In their fourth amended complaint, plaintiffs pleaded the derivative, breach-of-fiduciary-duty claim, alleging that Stefan diverted profits from OWL to Lake City. This claim went to trial. Plaintiffs also repleaded counts II, III, and IV, for the purposes of preserving their ability to appeal the dismissal of those claims. Among other responses, Stefan raised the business judgment rule as an affirmative defense.

¶ 25 1. Stefan

¶ 26 At trial, Stefan testified that he first approached plaintiff Jossund in 1985 about starting a lumber business. Stefan, who had been a high school wood shop teacher, was interested in lumber. Stefan's understanding in 1985 was that OWL, though technically a separate business, would "basically" serve as a second location for Outstanding.

¶ 27 OWL, like its related companies, were competitors of Home Depot's. The difference, in Stefan and Thomas's view, was quality. OWL's boards were dry, not bowed, and not damaged in any way. OWL is open to the public, and customers can get their boards cut on site. Typically, OWL serves homeowners, trim carpenters, and small cabinet shops.

¶ 28 Stefan acknowledged that it is his duty to monitor all transactions, and he feels that he has done so faithfully. Stefan is ultimately responsible for all lumber purchases and making sure that

OWL gets the best price. However, price is not the only factor. Other factors include the relationship with the company and the contact person at the company, the shipping logistics, the speed at which the product can be delivered, and the quality of the product.

¶ 29 Stefan explained the nuances of the Paxton price. Paxton is a highly regarded company within the lumber industry. Historically, Paxton published a catalogue with five columns of prices for various types and volumes of lumber. Now, Paxton e-mails OWL prices applicable to OWL, based on its status as a lumber retailer and the types and volumes of its purchases.

¶ 30 In 1986, OWL purchased lumber primarily from Outstanding. OWL may have utilized three other vendors. As to the 1986 Agreement, Stefan acknowledged that, in his deposition, he had testified that Outstanding was the *only* company that could take "the benefit" of selling lumber to OWL at the Paxton Price.

¶ 31 Contrary to his deposition testimony, Stefan testified at trial that OWL could purchase from *any* company at the Paxton price. The Paxton price, even if not the lowest price on the open market, always allows for a profit margin. For this reason, and for Paxton's historic standing in the industry, Stefan thinks of the Paxton price as the "benchmark" price for all of OWL's purchases.

¶ 32 The 1986 Agreement has never been altered. Nevertheless, in approximately 2007, OWL ceased purchasing lumber primarily from Outstanding. Plaintiffs agreed to, or at least did not formally dispute, this change. By 2019, OWL utilized approximately 70 vendors. One of those vendors was Lake City, owned by Thomas. Between 2012 and 2019, Lake City sold OWL over $4 million in lumber.

¶ 33 2. Thomas

¶ 34 Thomas testified to his background and the formation of Lake City. In 2002, then in his early 20's, Thomas worked as a salesman for OWL. Between 2006 and 2011, Thomas worked for Paxton in Colorado as a general manager. There, he learned the nuances of Paxton pricing. He also made several business contacts, including Pike Lumber, MacBeath Hardwoods, Tom's Quality Millwork and Hardwood, and J. Gibson McIlvaine. (Stefan agreed that, when Thomas returned to OWL, he brought with him a "nice circle" of contacts.)

¶ 35 In 2011, Thomas returned to OWL. He was one of four managers, each of whom earned approximately $100,000 per year, plus bonuses. His duties included procuring lumber for OWL at wholesale, which OWL would then sell at its retail location. He found that several sawmills would not sell directly to a retailer like OWL. These companies included: Columbia Forest Products, Timber Products, and Tumac Industries.

¶ 36 Thomas testified that he started Lake City while still working at OWL to purchase from the sawmills that would not sell directly to OWL, like Columbia, Timber, and Tumac. However, Thomas never purchased from these companies. Instead, he purchased from seven vendors who would have sold directly to OWL: Pike, MacBeath, Tom's Quality, J. Gibson, Matson Lumber, Richmond International Forest Product, and Cole Hardwood. Two of these sawmills, MacBeath and J. Gibson, were already selling to OWL. The seven sawmills were Lake City's only suppliers. By affidavit, representatives of each of the seven sawmills averred that they would have sold the same product directly to OWL at the same or lesser price than they sold to Lake City.

¶ 37 Plaintiffs asked Thomas to explain why he did not facilitate OWL's direct purchase from each of these seven vendors. Each had averred that they were willing to sell directly to OWL. Thomas first answered that they were not willing to sell directly to OWL in 2012, when he started the business. The reason for their change of position must be the "Chinese tariffs," which have

changed the export market for all sawmills. Plaintiffs reminded Thomas that each of the seven vendors averred that they would have sold directly to OWL in 2012. Thomas replied that none of them told him that. Thomas then conceded that he has been aware, since at least 2016, that the seven vendors would sell directly to OWL.

¶ 38 Thomas is the sole owner and employee of Lake City. According to Thomas, the $110,000 to start Lake City came from his personal bank account. (Similarly, Stefan testified that the start-up funds did not come from him or from OWL. The trial court had not allowed discovery to verify these claims.)

¶ 39 Thomas operates Lake City out of a room in his house, and he uses his personal e-mail account to conduct Lake City business. (He created a separate, Lake City e-mail account, but he never used it.) Thomas uses his cell phone to conduct Lake City's, as well as OWL's, business. Lake City has no website or social media presence. Lake City does not advertise; *Lake City's only customer is OWL*. Thomas directs Lake City's goods to be delivered to OWL's business address.

¶ 40 Lake City purchases the lumber from the seven sawmills at a wholesale price. Upon purchase, Lake City does not improve or process the product in any way. It does not have to deliver the product to OWL, because the sawmills have already done so. Lake City then sells the product to OWL at approximately the Paxton price. Thomas testified that the Paxton price has been the "benchmark" price that OWL has used when assessing purchases from any customer.

¶ 41 Though Lake City and OWL shared as many as three vendors at the same time, Lake City did not buy the same products from those vendors. For example, from J. Gibson, Lake City bought interior hardwoods and OWL bought outdoor decking. Lake City was able to procure products for OWL, such as "Rustic" wood, that OWL's existing vendors did not supply.

¶ 42 3. Plaintiffs' Expert: Charles Murdock

¶ 43 Plaintiffs called Charles Murdock, a dean at Loyola University Law School (where he co-founded the Loyola Family Business program), as an expert witness to testify both to Lake City's status as an unnecessary middleman operation siphoning profits from OWL and to damage formulas.

¶ 44 Murdock opined that Lake City had no legitimate business purpose, referring to it as a "sham" corporation. Before Murdock was able to explain his opinion in any detail, Stefan objected to the testimony, arguing that it was: (1) irrelevant; and (2) an impermissible legal conclusion, which invades the province of the court. In particular, Stefan objected to the term "sham." The trial court agreed that the testimony was not relevant: "Tom Zimmerman is not a party to this litigation. *** I am going to strike Mr. Murdock's testimony's testimony because it is not germane to any issue in this case."

¶ 45 Plaintiffs explained that Murdock's testimony was relevant to evaluate Stefan's conduct, not Thomas's or Lake City's. That Stefan allowed OWL to purchase from Lake City rather than directly from Lake City's seven vendors spoke to Stefan's fidelity to OWL.

¶ 46 The court then seemed to accept that the testimony was relevant, but maintained that it should be excluded because it constituted an impermissible legal conclusion:

> "[PLAINTIFFS]: Judge, he is talking about the conduct of Stefan Zimmerman and his knowledge of Lake City. [He] is not talking about Lake City and Tom now. He is talking about the defendant directly and he is—
>
> THE COURT: And that invades the province of the Court. It is for the court to determine whether Mr. Stefan Zimmerman's actions were a breach of his fiduciary duty, not the standard in the industry, in the lumber industry, but whether they breached the case law and any statutes that may be involved.

[PLAINTIFFS]: Okay.

THE COURT: That opinion invades the province of the court."

¶ 47 Plaintiffs disagreed:

"[Murdock] is not testifying to the law. He is testifying to his knowledge of the customs and practice. And the case law is clear that you can have an expert that can testify to the customs and practice and whether, as a result, the standards such as fiduciary duty are breached. It is not a legal [conclusion]."

¶ 48 Plaintiffs then made an offer of proof. Murdock would have testified, *inter alia*, that: (1) OWL had no legitimate business interest in purchasing from Lake City rather than purchasing directly from Lake City's seven vendors, doing so resulted in the siphoning of OWL's profits to Lake City, and doing so violated ethical custom and practice within the industry; and (2) Lake City's tax returns were relevant to assess OWL's damages (because the spread between Lake City's costs and revenues, as stated on its tax returns, is a reasonable approximation of damages where OWL was its only customer). Murdock also opined that, while Outstanding had a basis to charge OWL the Paxton price, Lake City did not. Outstanding performed a variety of services for OWL—in addition to the initial start-up capital and loans—including inventory, warehousing, and processing. Lake City maintained no inventory and had no processing capability, so Lake City was not justified in charging OWL the Paxton price to reflect services it did not perform.

¶ 49 4. Damages: Plaintiffs' Experts Wojcik and Ploskonka

¶ 50 Plaintiffs then called John Wojcik and Michael Ploskonka, both certified public accountants of Seldon Fox Accounting, as experts to testify to damages. The accountants compared invoices from Lake City's vendors to invoices showing purchases by OWL from Lake City. (Prior to Thomas's dismissal from the suit, plaintiffs had obtained invoices from Lake City,

as well. As the case proceeded to trial against Stefan only, however, the trial court limited discovery and testimony concerning Lake City's financials, so the experts were unable to use Lake City's invoices to confirm the corresponding seven-vendor and OWL invoices.) Based on the obtained invoices, the accountants determined that, between February 2012 and July 2019, OWL would have saved, on average, 23%, if it had purchased lumber directly from the seven vendors instead of through Lake City. Given that OWL purchased more than $4 million in lumber from Lake City, the 23% markup over seven-plus years translated to $799,192.62.

¶ 51 5. Damages: Stefan's Report

¶ 52 Stefan testified that he compiled data in response to plaintiffs' claim of $800,000 in damages. To make his chart, he looked back at years of OWL purchases from its other 70 vendors. He compared the price paid to Lake City to the price paid to other vendors for "similar" products. In his view, the chart showed that, as compared to what OWL would have paid other vendors for similar products, OWL paid Lake City the same or less. When asked if he *tried* to purchase lumber from other vendors at prices lower than paid to Lake City, Stefan answered, "Hopefully, yes."

¶ 53 Separately, Stefan compared the price paid to Lake City to the Paxton price. He asserted that Lake City exceeded the Paxton price only 20 times in seven years, or in .002 percent of its purchases.

¶ 54 Stefan acknowledged that, in comparing the Lake City price to the Paxton price, he did not account for bulk pricing. For example, he compared a Lake City purchase of 5038 units to a Paxton price set for 342 units. When asked whether the Paxton price might have been lower had it been set for a bulk purchase, Stefan said that it was "possible, yes." He later elaborated that bulk pricing on a 1500% volume difference is significant, but bulk pricing on a 300% volume difference is not.

¶ 55 Stefan also conceded that there were several numerical errors in his chart. Some of the check numbers and their respective amounts were not aligned. For example, check number 38838 was for $36,000, but, in one portion of the chart, Stefan represented that it was for $54,000. Stefan explained that his task had been difficult, stating, "lots of columns, lots of numbers."

¶ 56 C. Trial Court Ruling

¶ 57 The trial court ruled in favor of Stefan, on the ground that it could not find damages to OWL:

> "The court is *** lacking information as to the amount or percentage of sales from [OUTSTANDING] to [OWL] during the relationship of the parties. The witnesses were vague as to how long [OUTSTANDING] continued to be *the* primary supplier to [OWL], or became only one supplier of many, and if or when that relationship changed. Without such information, the Court is unable to determine whether [OWL's act of] continuing to purchase from Lake City at the Paxton price was beneficial, harmful, or neutral. *If it was obligated to purchase from OUTSTANDING at the Paxton price, but instead purchased from Lake City at the Paxton price, then there is no damage to the corporation.* Jossund and Roberts may suffer the consequence of any shift in supplier from [OWL] to Lake City, but that consequence falls onto them in their capacities as shareholders of [OUTSTANDING], not shareholders of [OWL]." (First emphasis in original; second emphasis added.)

¶ 58 The court also addressed Stefan's actions in allowing OWL to purchase from Lake City:

> "All parties have submitted case law regarding breach of fiduciary duty and have proffered expert testimony in support of their positions. *Under ordinary circumstances, the action of buying a substantial amount of product to benefit a family member (rather*

> *than buying at the best market price) would indeed constitute a breach of duty to the corporation and its shareholders*. However, this case does not present an ordinary circumstance. [OWL] was under a contractual duty to buy product from [OUTSTANDING] at the Paxton price, rather than at the best price available in the marketplace. That contractual obligation was never modified in any formal manner. Under the facts presented at trial, the Court is unable to rule that [Stefan] breached [his] fiduciary duty to [OWL] or its shareholders. The Plaintiffs have failed to meet their burden of proving that the actions of [Stefan] constitute a breach of fiduciary duty.
>
> By this ruling, the Court does not condone the actions of [Stefan] in allowing the purchase of lumber from the corporation set up by his son [Thomas] while [Thomas] is an employee of OWL. However, given the complexities presented by the organization of these three corporations and their intricate relationships, the Court finds that the actions of [Stefan] do not rise to the level of a breach of fiduciary duty to [OWL] or its shareholders." (Emphasis added.)

¶ 59 The trial court did not expressly comment on Stefan's affirmative defense, the business judgment rule. This appeal followed.

¶ 60 II. ANALYSIS

¶ 61 On appeal, plaintiffs challenge the trial court's: (1) determination that Stefan did not breach his fiduciary duty to OWL by allowing the diversion of profits to Lake City; (2) section 2-615 dismissal of their shareholder-oppression claim against Stefan; and (3) section 2-615 dismissal of their aiding-and-abetting claim against Thomas and Kathy as to the underlying breach-of-fiduciary-duty claim. Plaintiffs preserved their right to appeal the section 2-615 dismissals by realleging the shareholder-oppression and aiding-and-abetting claims in their fourth amended

complaint. See *Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 176-77 (2010) (a party wishing to preserve a challenge to an order dismissing fewer than all of the counts in its complaint may, among other options, file an amended complaint setting forth the surviving claims and also realleging, incorporating by reference, or referring to the dismissed claims that had been set forth in the prior complaint).

¶ 62 A. Breach of Fiduciary Duty: The Merits

¶ 63 We first review the trial court's determination that Stefan did not breach his fiduciary duty to OWL by allowing the diversion of profits to Lake City. This question requires us to assess both Stefan's conduct and damages. The question of whether Stefan breached his fiduciary duty is one of fact, which is subject to the manifest-weight standard of review. *1515 North Wells, L.P., v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). A decision is against the manifest weight of the evidence, and must be reversed, when the opposite result is clearly apparent, or when the decision is arbitrary, unreasonable, and not based on the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). To the extent that the trial court's interpretation of the 1986 Agreement led to its determination that there were no damages, we review the terms of the 1986 Agreement *de novo*. See *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 285 (2007) (contract interpretation presents a question of law, subject to *de novo* review).

¶ 64 1. Stefan's Conduct

¶ 65 In reviewing Stefan's conduct, it is important to note that, even though Stefan prevailed at trial, the trial court did not condone his conduct: "By this ruling, the Court does not condone the actions of [Stefan] in allowing the purchase of lumber from the corporation set up by his son [Thomas] while [Thomas] is an employee of OWL." The court also stated: "Under ordinary circumstances, the action of buying a substantial amount of product to benefit a family member

(rather than buying at the best market price) would indeed constitute a breach of duty to the corporation and its shareholders.

¶ 66 Indeed, corporate officers owe a fiduciary duty of loyalty to the corporation and are precluded from actively exploiting their positions within the corporation for their own personal benefits or hindering the ability of the corporation to conduct the business for which it was developed. *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514, 529 (1993). Therefore, Stefan, as a corporate officer of OWL, owed OWL a fiduciary duty of loyalty to act in OWL's best interest, deal on behalf of OWL fairly and honestly, and seek to maximize OWL's profits.

¶ 67 Stefan acknowledged at trial that it was his duty to monitor all transactions and ensure that OWL got the best price. The manifest weight of the evidence establishes that, in purchasing from Lake City, OWL did not get the best price. Stefan allowed profits that could have gone to OWL to go to Lake City, a company owned by his son. Thomas started Lake City after plaintiffs declined Stefan's request to let Thomas buy OWL shares. Lake City served no purpose other than to serve as a middleman between OWL and seven vendors who were willing to sell the same products directly to OWL. Two of Lake City's vendors were already selling to OWL, MacBeath and J. Gibson. Stefan had hired Thomas to procure lumber for OWL at wholesale prices, noting that Thomas came with a "nice circle" of contacts. Stefan allowed Thomas to use those contacts on behalf of Lake City, instead of OWL. Lake City's only customer was OWL. In his procurement role at OWL, Thomas knew exactly what OWL needed, purchased the product on behalf of Lake City at wholesale prices, and then sold it back to OWL at higher than wholesale prices. Thomas and Lake City did not, as urged by defendants at oral argument, provide an additional service to OWL that would justify the markup in price by serving as a broker between OWL and the seven

vendors. It was Thomas's job at OWL to procure the same product. Stefan approved the transactions between Lake City and OWL, and, in so doing, breached his fiduciary duty to OWL.

¶ 68 Stefan does not argue with the general fiduciary principles set forth in *E.J. McKernan*. Instead, citing to *Polikoff v. Dole*, 37 Ill. App. 2d 29, 35-36 (1962), he argues that the business judgment rule insulates him from a charge of breach under the facts of this case. The business judgment rule provides that the courts will not interfere with the business decisions of the corporate officers charged with making them, even if it seems that a wiser decision might be adopted. *Id*. Stefan also cites section 7.71 of the Act (805 ILCS 5/7.71 (West 2018), which generally requires shareholders to follow their operating agreements, and he notes that, here, the 1986 Agreement authorized him to manage OWL's day-to-day operations. Additionally, he cites to section 8.85 of the Act (805 ILCS 5/8.85 (West 2018)), which vests corporate officers with discretion in handling actions concerning suppliers. Finally, he asserts that OWL always obtained a profit under his tenure, and, elsewhere in his brief, he states that price is not the only factor.

¶ 69 Neither the business judgment rule, nor Stefan's citation to statutory provisions generally observing an officer's discretion in handling business matters, applies here. This case does not concern activities over which an officer has discretion, such as whether an officer "spent too much or too little on advertising, or for salaries, or for rehabilitation of the premises." *Id*. at 38. The business judgment rule does not apply to situations where the challenged action is "subversive to the rights and interests of the corporation." *Id*. at 36. This case concerns an act that is subversive to the interests of the corporation, the diversion of profits. Stefan does not have discretion to divert profits.

¶ 70 Moreover, the purpose of the business judgment rule is "to protect corporate directors who have been diligent and careful in performing their duties from being subjected to liability from

honest mistakes in judgment." *Davis v. Dyson*, 387 Ill. App. 3d 676, 694 (2008). Directors may not use the business judgment rule as a shield for their conduct when they have failed to exercise due care. *Id*. (business judgment rule cannot protect a condominium association that did not review any monthly bank statements, which would have shown the property manager's embezzlement).

¶ 71 The facts of this case rise above the baseline set forth in *Davis*. It is clear that, with minimal diligence, Stefan would have uncovered that Thomas secured a profit for Lake City that should have been captured by OWL. Indeed, defendants admit that they *knew*, from at least 2016 on, that Lake City's seven vendors would have sold directly to OWL at the same or lesser price. Thus, Stefan knowingly allowed the diversion of profits. In asking this court to affirm, he essentially seeks our permission to continue diverting profits.

¶ 72 Stefan's remaining points are equally unpersuasive. That OWL remained profitable is irrelevant. It is not Stefan's duty to seek *any* profit. All factors being equal—and, here, they are, as we will next discuss—it is Stefan's duty to seek a maximum profit. The existence of a profit may have enabled the Lake City purchases to go unnoticed by plaintiffs for a time, but that does not mean that Stefan fulfilled his duty to maximize profit.

¶ 73 Also, while OWL may consider factors other than price when purchasing lumber, none of those factors apply here. Stefan testified that, in addition to price, OWL should consider the relationship with the vendor, the shipping logistics, the speed at which the product can be delivered, and the quality of the product. The relationship with the vendor does not apply here. Thomas returned to OWL with a set of contacts, including Pike, MacBeath, Tom's Quality, and J. Gibson. Instead of using these contacts to buy lumber on behalf of OWL, Thomas used these contacts to buy lumber on behalf of Lake City, and then sell it to OWL. The shipping logistics do

not apply here. Thomas, on behalf of Lake City, had the lumber shipped directly to OWL's premises. Thomas could have done the same on behalf of OWL. The speed at which the product can be delivered does not matter here. Again, Thomas, on behalf of Lake City, had the lumber shipped directly to OWL's premises. Finally, quality does not matter here. Lake City did not improve or process the product to enhance the quality in any way. The vendors would have sold the same products directly to OWL.

¶ 74 The business judgment rule does not protect Stefan under the facts of this case.

¶ 75 2. Damages

¶ 76 We now address the trial court's determination that Stefan did not cause OWL to incur damages. Again, the trial court determined that OWL's contractual obligation to purchase from Outstanding at the Paxton price created an unusual circumstance whereby Stefan was able to engage in improper conduct without harming OWL. The court stated: "However, this case does not present an ordinary circumstance. [OWL] was under a contractual duty to buy product from [OUTSTANDING] at the Paxton price, rather than at the best price available in the marketplace." So, "[i]f [OWL] was obligated to purchase from OUTSTANDING at the Paxton price, but instead purchased from Lake City at the Paxton price, then there is no damage to the corporation." The court also stated that, if there *were* any damages, they were borne by plaintiffs individually, as shareholders of Outstanding: "Jossund and Roberts may suffer the consequence of any shift in supplier from [OWL] to Lake City, but that consequence falls onto them in their capacities as shareholders of [OUTSTANDING], not shareholders of [OWL]."

¶ 77 Two premises underly the trial court's ruling: (1) OWL was contractually required to pay *Outstanding* the Paxton price; and (2) OWL was entitled, based on its course of conduct, to pay

any of its other vendors, including Lake City, the Paxton price, even if a lower price was available. The first of these premises is correct; the second is not.

¶ 78 First, Owl was required to pay Outstanding the Paxton price, as is set forth in the 1986 Agreement. We turn to the 1986 Agreement, the terms of which we review *de novo*. See *Dowling*, 226 Ill. 2d at 285. When interpreting a contract, our primary objective is to ascertain and give effect to the intent of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). To determine the parties' intent, we look to the plain language of the contract. *Id*. If the language of the contract is clear and unambiguous, we look only to the four corners of the contract to determine the parties' intent. *Id*. If, however, the language is reasonably susceptible to more than one meaning, then it is ambiguous, and the court can consider extrinsic evidence to determine the parties' intent. *Id*. Particularly relevant to the instant contract is the principle of *expressio unius est exclusio alterius*, meaning that the mention of one thing excludes another. *Krause v. GE Capital Mortgage Services, Inc.*, 314 Ill. App. 3d 376, 386 (2000).

¶ 79 Again, the 1986 Agreement provides:

> "16.2 It is understood and agreed that JEFFREY ROBERTS and JOHN JOSSUND currently solely own and operate [OUTSTANDING] and that their joint and individual efforts primarily will be devoted to that business; however, insomuch as the parties agree to serve as may be reasonable and necessary in mutual assistance for the common purpose and success of the instant business operation; and in recognition of the fact that [OUTSTANDING] shall serve as primary supplier to the instant business, the parties agree that, from time to time, certain of the equipment, inventory, products, services and/or personnel of one may be called upon to serve the other. All products and inventory *purchased from [OUTSTANDING]* shall be paid for by the instant business at the rate of

> 'best price possible' as determined by the Frank Paxton Lumber Catalogue.[]" (Emphasis added.)

¶ 80 The 1986 Agreement speaks only to the rate at which Outstanding is to be paid. Its plain language establishes that OWL is to pay Outstanding the Paxton price. It does not speak to the rate at which other vendors are to be paid. That question is, at best, outside the scope of the agreement. As both parties essentially agree to this interpretation, we need not address it further.

¶ 81 Second, we consider the trial court's implicit finding that OWL was permitted to pay *any* vendor the Paxton price, even if a lower price was available. The evidence does not support this finding.

¶ 82 At trial, Stefan and Thomas both testified that the Paxton price was a "benchmark" price. Stefan testified:

> "Well, if [the Paxton price] is the standard, I can buy from Aetna Plywood. I can buy from Rayner. I can buy from Lake City. I can buy from Weekes Lumber. If I'm getting as good a product at the same *or better price than Paxton*, that's the benchmark we go buy. It's the same with all my vendors." (Emphasis added.)

¶ 83 Stefan and Thomas are using the word "benchmark" in two different ways. First, the Paxton price was a "benchmark" in the sense that it allowed for a standard profit margin and point of comparison. We accept this use. Second, the Paxton price was a "benchmark" in the sense that OWL was permitted to pay any vendor the Paxton price, even if a lower price was available. As exemplified in the quote above, Stefan's own testimony undermined the legitimacy of this second use. Stefan elsewhere testified that, when dealing with OWL's 70 vendors, it sought the lowest possible price. For example, when asked if he tried to purchase lumber from other vendors at prices lower than paid to Lake City, Stefan answered, "Hopefully, yes." Therefore, when Stefan

and Thomas conclusorily testified that the Paxton price is the "benchmark," we do not take that to mean that OWL may pay the Paxton price to any of its 70 vendors, even when a lower price is available.

¶ 84 Stefan has a fiduciary duty to seek the lowest possible price from each of OWL's 70 vendors. As to one vendor only, Outstanding, OWL was contractually obligated to pay the Paxton price. There was a reason for this. Plaintiffs negotiated for the payment of the Paxton price to their company, Outstanding. Indeed, Outstanding provided OWL with $400,000 in start-up costs. As Stefan acknowledged, the two companies had a special relationship. Stefan initially thought of OWL as "basically" a second location for Outstanding. Nothing in the contract or the evidence release Stefan from his duty to maximize OWL's profit when dealing with the other 69 vendors, however. As to the other 69 vendors, including Lake City, OWL had no obligation to pay the Paxton price, and Stefan should have sought the lowest possible price when dealing with those vendors.

¶ 85 We reject the trial court's logic that "[i]f [OWL] was obligated to purchase from OUTSTANDING at the Paxton price, but instead purchased from Lake City at the Paxton price, then *there is no damage to the corporation*." (Emphasis added.) Simply put, OWL's arrangement with Lake City allowed Lake City to obtain a profit (the difference between the wholesale price and the price charged by Lake City), and OWL to obtain a profit (the difference between the price charged by Lake City and the retail price). Given that Lake City's vendors would have sold directly to OWL at the wholesale price, that first profit margin, the difference between the wholesale price and the price charged by Lake City, belongs to OWL. As such, the trial court's determination that OWL suffered no damages is against the manifest weight of the evidence.

¶ 86 We also disagree with the trial court's assessment that, if there *were* any damages, they were borne by plaintiffs individually, as shareholders of Outstanding: "Jossund and Roberts may suffer the consequence of any shift in supplier from [OWL] to Lake City, but that consequence falls onto them in their capacities as shareholders of [OUTSTANDING], not shareholders of [OWL]." Here, the trial court appears to have focused on a portion of the 1986 Agreement not under dispute. The 1986 Agreement stated that OWL's primary supplier would be Outstanding. Outstanding ceased being the primary supplier in approximately 2007. Also, at some point between 1986 and the time of trial, Outstanding went from being 1 of 4 suppliers to 1 of 70 suppliers. Plaintiffs do not complain that Outstanding is no longer the primary supplier, however. Moreover, they cannot complain that *Outstanding* is no longer the primary supplier in a derivative suit on behalf of *OWL*. They have not alleged any harm to Outstanding as a result of the change. They *have*, as we have discussed, successfully proved a harm to OWL resulting from OWL's purchase of lumber from Lake City at a higher price than was available to it had it purchased directly from Lake City's seven vendors at the wholesale price.

¶ 87 In sum, when Stefan did not maximize OWL's profit and allowed Lake City to take a portion of it, OWL incurred damages. We remand for a determination of compensatory damages. Additionally, the trial court may decide in the first instance whether to award punitive damages and costs.

¶ 88 B. Breach of Fiduciary Duty: Ancillary Issues

¶ 89 We now address several of plaintiffs' ancillary arguments on appeal that are related to the breach-of-fiduciary-duty claim. These arguments include challenges to the trial court's handling of the Paxton price evidence and its exclusion of Murdock's opinion testimony.

¶ 90 1. Paxton Price Evidence

¶ 91 Plaintiffs argue that, even if this court were to accept that OWL suffered no harm because the Paxton price was a benchmark price, which, if met, satisfied Stefan's duty to ensure OWL's profitability, Stefan did not establish that OWL paid Lake City the Paxton price. Plaintiffs note that the chart Stefan constructed to show that OWL paid Lake City the Paxton price contained errors: Stefan did not account for bulk pricing and several of his check numbers were incorrect, some by nearly $20,000. Certainly, that Stefan's chart was self-serving and contained errors only strengthens this court's position that Stefan allowed OWL's profits to be taken by Lake City. However, because we have already determined that the Paxton price was not a benchmark price, which, if met, satisfied Stefan's duty to ensure OWL's profitability, we need not further consider whether OWL paid Lake City the Paxton price, or whether OWL deviated from the Paxton price to a greater degree than Stefan claimed.

¶ 92 Plaintiffs also argue that the trial court should have excluded as irrelevant all evidence concerning the Paxton price, an issue they raised in a pretrial motion *in limine*. All relevant evidence is admissible, unless otherwise provided by law. Ill. R. Evid. 401 (eff. Jan. 1, 2011). Evidentiary rulings are within the sound discretion of the trial court and will be upheld absent an abuse of discretion that resulted in prejudice to the objecting party. *Stallings v. Black and Decker (US), Inc.*, 342 Ill. App. 3d 676, 683 (2003).

¶ 93 We hold that the trial court did not abuse its discretion in denying the plaintiffs' motion *in limine* based on the information that it had at that time. While clear even then that the 1986 Agreement obligated OWL to pay the Paxton price only to Outstanding, the court had yet to hear Stefan's theory that, independent of the 1986 Agreement, the Paxton price served as a benchmark in all of OWL's purchasing decisions. Of course, upon review of the whole record, we necessarily conclude that Stefan breached his fiduciary duty to OWL and that Stefan cannot point to the Paxton

price in defense of his conduct. The Paxton price has no relevance to the court's calculation of damages on remand except in those instances where it happens to be the Lake City purchase price.

¶ 94 2. Murdock

¶ 95 Plaintiffs challenge the exclusion of Murdock's expert opinion testimony. Despite our having resolved the breach-of-fiduciary-duty issue, Murdock's testimony on the question of damages remains relevant on remand. We also examine the trial court's error here, because doing so aids our overall understanding of the case. A trial court's decision to exclude expert opinion testimony is reviewed for an abuse of discretion. *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2004).

¶ 96 At trial, the court excluded Murdock's testimony, explaining that it: (1) was not relevant; and (2) constituted a legal conclusion. The court later appeared to concede that the testimony was relevant—indeed, Murdock sought to testify that Stefan's conduct violated ethical custom and practice within the industry and resulted in the siphoning of OWL's profits to Lake City—but maintained that it constituted a legal conclusion.

¶ 97 On appeal, the parties focus on whether Murdock's testimony constituted a legal conclusion. Stefan accurately notes that an expert may not state his or her opinion as a legal conclusion. See *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1058 (2001). Plaintiffs, in turn, urge that Murdock did *not* state his opinion as a legal conclusion; rather, Murdock offered ultimate-issue testimony. See *Merchants National Bank of Aurora v. Elgin Joliet & Eastern Railway Co.*, 49 Ill. 2d 118, 122 (1971). As we will explain, plaintiffs are correct.

¶ 98 To understand plaintiff's argument, we must review the difference between ultimate-issue testimony, which is permitted, and legal conclusions, which are not. We begin with ultimate-issue testimony. Earlier in Illinois jurisprudence, experts were not allowed to offer an opinion on an ultimate issue. See *Richardson v. Chapman*, 175 Ill. 2d 98, 107-08 (1997). Such testimony was

thought to invade the province of the trier of fact in its duty to resolve the ultimate issue. *Id*. However, this prohibition has since been abolished. *Id*. Since the trier of fact is not required to accept the expert's testimony, the expert's testimony on the ultimate issue does not invade the province of the trier of fact. *Merchants*, 49 Ill. 2d at 122. Ultimate-issue testimony is permitted. Ill. R. Evid. 704 (eff. Jan. 1, 2011); *Merchants*, 49 Ill. 2d at 122.

¶ 99 Ultimate-issue testimony does not come without limits, however. As stated in the committee comments to the federal counterpart to Ill. Rule Evid. 704:

> "The abolition of the ultimate issue rule does not lower the bar[ ] so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. * * * [These provisions] * * * stand ready to *exclude opinions phrased in terms of inadequately explored legal criteria*. Thus[,] the question, 'Did T have capacity to make a will?' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed." (Emphasis added.) Fed. R. Evid. 704 advisory committee's note on proposed rules; see also Michael H. Graham, Handbook of Federal Evidence § 704.1 (8th ed. 2019).

¶ 100 While an expert may offer an opinion on an ultimate issue, the expert may not couch that opinion as a legal conclusion. *Brettman v. Virgil Cook & Son, Inc.*, 2020 IL App (2d) 190955, ¶ 84. The line between permissible ultimate-issue testimony and impermissible legal conclusions can be difficult to discern. *Id*. ¶ 85. As a guiding principle, courts should exclude testimony that is phrased in terms that have a special meaning in the law that is different from their meaning in the common vernacular. *Id*. Examples from the case law include: excluding testimony that the defendant was "negligent," but not that the defendant's conduct fell below the standard of care;

excluding testimony that the defendant used "unjustified" "deadly force;" and excluding testimony that an event was "foreseeable." *Id*. ¶¶ 85-86. Each of these terms have a special meaning within the law. *Id*. Also prohibited are attempts to define the law or attempts to interpret a statute. *Chicago Title and Trust, Co. v. Brescia*, 285 Ill. App. 3d 671, 682 (1996).

¶ 101 As we recently explained in *Brettman*:

> "The problem with testimony containing a legal conclusion is that it can convey the witness's unexpressed, and perhaps erroneous, legal standards to the jury. [Citation.] An expert is uniquely qualified by his or her experience to assist the trier of fact, but an expert cannot compete with the judge in its responsibility to instruct the jury. [Citation.]" *Brettman*, 2020 IL App (2d) 190955, ¶ 84.

¶ 102 When an expert does cross a line while providing an opinion on the ultimate issue by using impermissible legal terminology, the better practice is to strike or qualify the offending phrase, not to strike the expert's testimony in total. For example, in *McHale v. Kiswani Trucking Inc.*, 2015 IL App (1st) 132625, ¶ 98, when the lay witness used the term "agent," the court admonished the jury that when a lay person, or even an attorney (*i.e.*, an expert), uses the term "agent," he or she does so only in a conversational sense, and he or she may not define the term in a legal sense.

¶ 103 In sum, testimony containing a legal conclusion invades the province of the court in its duty to instruct the jury on the law. Ultimate-issue testimony was once thought to invade the province of the jury to determine the outcome of the case. It does not, however, because the jury is not required to accept the expert's opinion.

¶ 104 Here, we determine that the trial court erred in excluding Murdock's testimony, because it mistook permissible ultimate-issue testimony for an impermissible legal conclusion. In excluding Murdock's testimony, the trial court explained: "[T]hat invades the province of the court. It is for

the court to determine whether Mr. Stefan Zimmerman's actions were a breach of his fiduciary duty, not the standard in the industry, in the lumber industry, but whether they breached the case law and any statutes that may be involved." The trial court is addressing its role, in a bench trial, as a trier of fact to make a factual determination on the ultimate issue—breach of fiduciary duty. However, Murdock may express an opinion on that ultimate issue without usurping the trial court's role as the trier of fact, because the trial court is not required to accept Murdock's opinion. Murdock sought to testify to the customs and standards in the industry, opine that Stefan did not follow those standards, and, as a result, did not act with fidelity to OWL. These statements were not couched in legal terms, Murdock did not attempt to use or define a "breach of fiduciary duty," or any statute. Murdock did not seek to define the law for the court. He did not offer an impermissible legal conclusion. His testimony should have been admitted. To the extent that Murdock did cross a line and use legal terminology, the court could have stricken any borderline testimony and considered the overarching content of Murdock's opinion testimony concerning the ultimate issue.

¶ 105 This is especially true in the context of a bench trial, where there is less danger that a slight usurpation by the witness of the court's role to instruct the fact-finder as to the law will result in confusion or prejudice, for the obvious reason that the court is the fact-finder. In a bench trial, the trial court is presumed to know the law and consider only proper evidence in making its judgment. *People v. Duff*, 374 Ill. App. 3d 599, 605 (2007). Of course, even in a bench trial, the court may, and should, strike improper testimony. The court's near absolute exclusion of Murdock's testimony here, however, was an abuse of discretion.

¶ 106 The trial court extended its rationale to exclude large portions of Murdock's proposed testimony, including testimony regarding the calculation of damages. To the extent that this testimony is relevant to the calculation of damages on remand, it should be allowed.

¶ 107 C. Shareholder Oppression

¶ 108 We next review the trial court's section 2-615 dismissal of plaintiffs' shareholder-oppression claims against Stefan set forth in the third amended complaint. 735 ILCS 5/2-615 (West 2018). When reviewing a section 2-615 dismissal, we take all well-pleaded facts in the complaint as true, but we disregard any conclusions left unsupported by factual allegations. *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 78. We then consider whether the allegations in the complaint, viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Doe v. McKay*, 183 Ill. 2d 272, 274 (1998). We review section 2-615 dismissals *de novo*. *Id.*

¶ 109 Counts II and III in the third amended complaint each alleged shareholder oppression pursuant to sections 12.56(a)(3) (oppressive conduct) and 12.56(a)(4) (misapplication of corporate funds and/or waste) of the Act. 805 ILCS 12.56(a)(3), (4) (West 2018). Count II was a direct claim, alleging individual harm to plaintiffs. Count III, pled in the alternative, was a derivative claim, alleging harm to the corporation. On appeal, plaintiffs focus only on section 12.56(a)(3).

¶ 110 Section 12.56(a)(3) provides:

> "In an action by a shareholder in a corporation that has no shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national or affiliated securities association, the Circuit Court may order one or more of the remedies listed in subsection (b) if it is established that:
>
> * * *

(3) The directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder whether in his or her capacity as a shareholder, director, or officer[.]"

¶ 111 Section 12.56(b), concerning remedies, provides:

"The relief which the court may order in an action under subsection (a) includes but is not limited to the following:

* * *

(3) The removal from office of any director or officer;

(4) The appointment of any individual as a director or officer;

(5) An accounting with respect to any matter in dispute;

(6) The appointment of a custodian to manage the business and affairs of the corporation to serve for the term and under the conditions prescribed by the court[.]"

¶ 112 Though not requested here, section 12.56 also allows for the payment of damages or, when the other listed remedies are insufficient to resolve the matters in dispute, the dissolution of the corporation. 805 ILCS 12.56(b)(10), (12) (West 2018).

¶ 113 Section 12.56 provides remedies to shareholders who are oppressed by the conduct of their fellow shareholders. *Id*. Shareholders in non-public, closely held corporations are especially vulnerable to acts of shareholder oppression, because they are likely to have a heavy personal investment in the corporation and cannot easily sell their stock and leave the company. See Benjamin Means, *A Voice Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, Georgetown Law Journal, 1208 (October 15, 2008); see also

Hager-Freeman v. Spircoff, 229 Ill. App. 3d 262, 277 (1992) (the plaintiff's vulnerability stemmed from her heavy personal investment in the company).

¶ 114 As explained in *Hager-Freeman*, 229 Ill. App. 3d at 276-77, shareholder oppression need not be limited to actions where the alleged oppressor has acted illegally, fraudulently, or has mismanaged funds. Rather, shareholder oppression may include a continued course of heavy-handed and exclusionary conduct. *Id.* (citing *Compton v. Paul K. Harding Realty Co.*, 6 Ill. App. 3d 488, 499 (1972) (the president shareholder engaged in an overbearing and heavy-handed course of conduct, which included a failure to consult with plaintiff or allow plaintiff to participate in the business)). Courts have found the following actions to constitute shareholder oppression: the failure to call policy-making board meetings (*Compton*, 6 Ill. App. 3d at 499); raising one's own salary or engaging in other types of self-dealing (*Kovac*, 2014 IL App (2d) 121100, ¶ 72); and conducting corporate affairs in a manner "indicative of an arbitrary course of conduct" (*Jaffe Commercial Finance Co. v. Harris*, 119 Ill. App. 3d 136, 146 (1983)). In reviewing these cases, it appears that, the more extreme the remedy sought, damages versus a liquidation, for example, the more extreme the alleged wrongdoing by the defendant need be. See, *e.g.*, *id*. (alleged conduct not sufficiently oppressive to justify the dissolution of the corporation).

¶ 115 Here, plaintiffs' pleading was sufficient to survive a section 2-615 motion to dismiss. Plaintiffs alleged specific facts, which, if true, demonstrated Stefan's oppressive acts under section 12.56(a)(3): Stefan overpaid for lumber at OWL's expense and to his son's benefit. These overpayments and self-dealings not only deprived OWL of significant profits, as in *Kovac*, but they constituted a continued course of heavy-handed treatment, wherein Stefan kept secret OWL's transactions with Lake City. These transactions were objectively significant, totaling over $4 million. Stefan should have known that plaintiffs would have reservations about working with a

company owned by Thomas (for which OWL was the only customer), because plaintiffs earlier refused to allow Thomas to purchase OWL's shares. Also, we disagree with the trial court that "it doesn't matter where the money [to start Lake City] came from." If the money came from Stefan, then Stefan is an "indirect party" to any transaction with Lake City, requiring him to seek approval from the other directors or prove the fairness of the transaction. See 805 ILCS 5/8.60(b) (West 2018) (a director is "indirectly" a party to a transaction if the other party to the transaction is an entity in which the director has a material financial interest).

¶ 116 Stefan argues, as he did below, that plaintiffs' individual, shareholder-oppression claim cannot survive, because plaintiffs did not allege an injury specific to themselves as shareholders as opposed to an injury OWL as a corporation. Citing *Small v. Sussman*, 306 Ill. App. 3d 369 (1999), Stefan notes that the devaluation of shares that would result from the alleged diversion of profits would constitute a harm to the corporation, not to plaintiffs individually. We disagree with Stefan's argument.

¶ 117 It is a well-established principle in corporate law that, to bring an *individual* claim, the shareholder must allege a harm that is separate and distinct from that suffered by other shareholders, and the shareholder must allege something more than a wrong to the corporate body. *Davis*, 387 Ill. App. 3d at 689. On the other hand, a *derivative* claim is appropriate if the direct injury is to the corporation, and the individual shareholder suffers injury only because the value of her shares have been diminished as a result of the injury to the corporation. *Id.* It is possible for the same set of facts to give rise to both an individual and a derivative claim. *Id.*

¶ 118 Here, plaintiffs *have* pleaded an individual harm distinct from the harm to the corporation: pursuant to section 12.56(a)(3), their rights as individual shareholders and directors have been oppressed. They were not informed of OWL's transactions with Lake City, nor were they given

the opportunity to vote on it. Stefan excluded plaintiffs, thus causing plaintiffs to suffer a harm separate and distinct from that suffered by other shareholders, *i.e.*, separate and distinct from that suffered by Stefan. That plaintiffs suffered a harm distinct from Stefan is apparent from the relief sought: Stefan's removal as director, appointment of a custodial replacement, and an accounting of the business. This set of remedies aims to correct the harm done to plaintiffs, as individual shareholders, not to correct for the diminution of the value of their shares. Plaintiffs' section 12.56(a)(3) claim for shareholder oppression (oppressive conduct) may proceed as an individual claim.

¶ 119 Because plaintiffs have abandoned their section 12.56(a)(4) claim for shareholder oppression (waste), we need not decide whether that claim should have been brought individually or derivatively. We do note, however, that Stefan cites no authority for the proposition that a shareholder-oppression claim cannot be brought derivatively. In fact, the secondary source that Stefan cites for the proposition that shareholder-oppression claims must be brought individually itself acknowledges that, *depending on the injury alleged*, the claims may be brought derivatively. See Principles of Corporate Governance: Analysis and Recommendations (ALI 1994) § 7.01, Direct and Derivative Actions Distinguished, comment C.

¶ 120 In this case, the facts alleged have given rise to a *derivative* claim for breach of fiduciary duty, based on the diversion of profits (count I of the fourth amended complaint), and an *individual* claim for shareholder oppression under section 12.56(a)(3) (oppressive conduct) based on Stefan's exclusionary conduct and self-dealing (to a family member) (count II of the third amended complaint). Per *Davis*, it is perfectly acceptable for a lawsuit to include both derivative and individual claims. In fact, given that the relief sought for each respective claim is different, plaintiffs' delineation of claims makes sense. We have already found that Stefan breached his

fiduciary duty and that plaintiffs are entitled to compensatory and, possibly, punitive, damages. It follows that a claim for shareholder oppression, which, in this case, seeks less extreme bookkeeping and management remedies, compliments the first claim and should proceed. To the extent that plaintiffs need to amend their pleadings to reflect that the section 12.56(a)(3) shareholder-oppression claim survives as an individual claim, they may.

¶ 121 D. Aiding and Abetting

¶ 122 Finally, plaintiffs argue that the trial court erred in dismissing count IV of its third amended complaint, which alleged that Kathy and Thomas aided and abetted Stefan in his breach of fiduciary duty to OWL. We focus the claim against Thomas, and we dispose of the claim against Kathy at the end of the analysis. The three elements of an aiding-and-abetting claim are: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware in his or her role as part of the overall or tortious activity at the time he or she provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation. *Johnson v. Filler*, 2018 IL App (2d) 170923, ¶ 16; *Thornwood Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27 (2003). We review *de novo* whether plaintiffs sufficiently pled facts to establish a claim of aiding and abetting. See *Doe*, 183 Ill. 2d at 274.

¶ 123 *Thornwood* and *Johnson* are instructive. In *Thornwood*, the plaintiff was a golf-course developer. His partner purchased his interest in the partnership, and the partner purposely kept secret that his pending deal with the PGA would greatly increase the value of the golf course. In so doing, the partner breached his fiduciary duty. This constituted the underlying breach. The plaintiff then filed a complaint against the partner's attorneys, alleging, among other claims, that they aided and abetted the underlying breach. The appellate court determined that the plaintiff sufficiently pleaded a claim for aiding and abetting against the attorneys. *Thornwood*, 344 Ill.

App. 3d at 29. The attorneys did not merely accept letters from the partner exposing the partner's breach. *Id*. Rather, knowing that the partner had a fiduciary duty to the plaintiff, they communicated the partner's interest in purchasing the plaintiff's share in the partnership without disclosing key information to the plaintiff. *Id*. They also executed documents, including releases from liability for themselves and for the partner, knowing that the plaintiff did not have all relevant information. *Id*. These acts, if true, were sufficient to constitute "knowing and substantial" assistance. *Id*.

¶ 124 *Johnson* also involved an aiding-and-abetting claim against an attorney. There, a son sued the attorney who prepared his father's will, alleging that the attorney aided and abetted the co-trustee and successor executor in interfering, by undue influence, with the son's expectancy inheritance. The son alleged that the attorney knew that the father was susceptible to undue influence, should have known that a certain conveyance was legally unsound, and should have made a good-faith determination as to whether the co-trustee was exerting undue influence. These allegations, even if true, were *not* enough to substantiate an aiding-and-abetting claim. *Johnson*, 2018 IL App (2d) 170923, ¶ 20. Distinguishing the facts before it from those in *Thornwood*, the court noted that the attorney had not "actively participated" in the alleged tortious activity. *Id*. Rather, the allegations implied that the attorney "did *not* know of any undue influence but would have found out if he had investigated." (Emphasis added.) *Id*. Aiding-and-abetting claims require actual knowledge, not constructive knowledge. *Id*. ¶ 21. Where the attorney merely had cause to suspect undue influence, he cannot have "substantially assisted" in it. *Id*.

¶ 125 Turning to the instant case, we determine that plaintiffs have pleaded facts, if true, that are sufficient to substantiate an aiding-and-abetting claim against Thomas. Plaintiffs pleaded facts similar to those underlying the breach-of-fiduciary duty claim. These included allegations that

Thomas started Lake City after being denied the opportunity to buy shares in OWL, that Thomas still worked at OWL as the purchasing manager when he formed Lake City, that OWL was Lake City's only customer, and all the various allegations concerning Lake City's status as an unnecessary middleman.

¶ 126 These allegations, if true, satisfy the three elements of an aiding-and-abetting claim. First, the party whom Thomas aided, Stefan, performed a wrongful act that causes an injury. We have already established that Stefan breached his fiduciary duty to OWL by allowing the diversion of profits. Second, the allegations are sufficient to show that Thomas was generally aware in his role as part of the overall or tortious activity at the time he provided the assistance. If true, the allegations show that Thomas was aware that profits that went to Lake City should have gone to OWL. Thomas was tasked with purchasing lumber for OWL at wholesale. Instead, knowing exactly what goods OWL needed, Thomas purchased lumber for Lake City at wholesale and then sold it back to OWL, Lake City's only customer, at a profit. Unlike *Johnson*, this is not a case where Thomas would have been aware of his role in the underlying tort only upon investigation. Thomas had actual knowledge of the diverted profits. Third, the allegations are sufficient to show that Thomas knowingly and substantially assisted the principal violation. Indeed, if true, the allegations show that the underlying breach would not have been possible but for Thomas and the creation of Lake City. The pleaded facts show that, like the attorneys in *Thornwood*, Thomas actively participated in the principle violation.

¶ 127 Thomas responds that plaintiffs have not sufficiently briefed their position, an assertion we will address at the end of our analysis. As to the third element, specifically, Thomas responds that plaintiffs have failed to show how Thomas "assisted," let alone "substantially assisted," Stefan's

failure to disclose OWL's dealings with Lake City. This argument ignores plaintiffs' claim that Thomas substantially assisted Stefan's *diversion of profits*.

¶ 128 Thomas also raises a host of other arguments, similar to those raised below, which we find unconvincing. These include: (1) there is no underlying breach of fiduciary-duty-claim; (2) Thomas cannot aid and abet a breach of fiduciary duty, because he himself is a fiduciary; and (3) the aiding-and-abetting claim is merely a dressed-up version of an earlier, properly dismissed conspiracy claim. The thrust of these latter two arguments is not that plaintiffs did not plead facts substantiating the elements of the claim but, rather, that Thomas, due to his status as a fiduciary and agent of OWL, cannot be subject to an aiding-and-abetting claim.

¶ 129 Thomas argues that there can be no claim for aiding and abetting where there is no underlying breach of fiduciary duty. See *Chada v. North Park Elementary School Association*, 2018 IL App (1st) 171958, ¶ 58 (aiding and abetting is not an independent tort and requires underlying conduct that is tortious). In Thomas's view, the breach-of-fiduciary-duty claim set forth in the third amended complaint, upon which the aiding-and-abetting claim was based, was dismissed and not repleaded. We disagree. In the fourth amended complaint, plaintiffs again alleged a breach of fiduciary duty based on the diversion of profits. Also, for the purposes of preserving the issue on appeal, plaintiffs repleaded the aiding-and-abetting claim.

¶ 130 Next, Thomas argues that he cannot be subject to an aiding-and-abetting claim, because he himself is a fiduciary to OWL. Thomas cites to a federal case, *A Communication Co., Inc. v. Bonutti*, 55 F Supp 3d 1119, 1125 (2014), for the proposition that, because aiding and abetting is not a separate tort, it applies only when the defendant alleged to have aided and abetted a breach of fiduciary is not also a fiduciary. The rationale is that the aiding and abetting claim would be duplicative of a direct claim for breach of fiduciary duty against that same defendant. *Id.* Here,

however, the fiduciary duties of the underlying tortfeasor, Stefan, were different than those of Thomas. Stefan was a corporate officer with a duty to maximize profits for the shareholders. Thomas was a mere employee, who did not have a duty to the shareholders to maximize profits. As Thomas did not have a duty to shareholders to maximize profits, he may aid and abet Stefan's breach of duty to the shareholders to maximize profits.

¶ 131 Finally, Thomas argues that the aiding-and-abetting claim is merely a dressed-up conspiracy claim, which was properly dismissed. This argument goes back to the second amended complaint. There, plaintiffs alleged that Thomas conspired with Stefan to divert profits from OWL. Thomas responded, and the court apparently agreed, that officers and employees of a corporation cannot conspire with one another as a matter of law.

¶ 132 Thomas takes this principle out of context. In the case upon which Thomas relies, *VanWinkle v. Owens-Corning Fiberglass Corp*., 291 Ill. App. 3d 165, 173 (1997), the corporation was the defendant. Members of the corporation could not conspire with one another, because they were all agents of the wrongdoing corporation. *Id*. Here, Stefan, an individual officer, is the alleged wrongdoer and—a critical difference—the corporation is the entity alleged to have been wronged. Therefore, the rationale behind *VanWinkle* does not apply. Stefan and Thomas were not acting as agents of OWL. Rather, they were acting for their own benefit in subversion of OWL's interest.

¶ 133 Similarly, we are not convinced by the trial court's stated rationale in dismissing the count: "There is no tort of setting up a corporation to accomplish a lawful purpose that would be setting up Lake City by Thomas Zimmerman." Contrary to the trial court's statement, plaintiffs pleaded, in effect, that Lake City was a sham corporation set up for the illegitimate purpose of siphoning profits from OWL.

¶ 134 We acknowledge Thomas's position that plaintiffs' briefing on this issue is insufficient to the point of forfeiture. An argument without proper citation to authority is forfeited. Ill. R. 341(h)(7) (eff. May 25, 2018). In an appellate brief, a plaintiff may not merely set forth the elements of the tort at issue and fail to provide citation to the record, authority, and argument. *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 305-06 (1991). "This court is not a depository in which a party may dump the burden of argument and research." *Id*. at 306. *De novo* review does not relieve an appellant from its burden to persuade this court that it should prevail. See, *e.g.*, *Yamnitz v. William J. Diestelhorst Co., Inc.*, 251 Ill. App. 3d 244, 250 (1993) (the appellant carries the burden of persuasion on appeal).

¶ 135 Certainly, as to Kathy, plaintiffs' brief is insufficient to persuade us that the trial court erred. Generally, the administrative facilitation of financial transactions actions cannot substantiate a claim for aiding and abetting. See, *e.g.*, *Time Savers, Inc. v. LaSalle Bank*, 371 Ill. App. 3d 759, 772 (2007) (the bank did not aid and abet an officer when it allowed the officer to make unauthorized transfers that would allow the corporation to lose profits). Plaintiffs' brief states no more than "Kathy knowingly paid the invoices, with markup included, to Lake City from OWL assets." As such, we do not further consider plaintiffs' claim against Kathy.

¶ 136 Still, forfeiture is a limitation on the parties, not the courts. *Jill Knowles Enterprises, Inc. v. Dunkin*, 2017 IL App (2d) 160811, ¶ 22. The court may overlook forfeiture and address the merits when necessary to achieve a just result or maintain a sound and uniform body of precedent. *Id*. Here, plaintiffs did provide the elements of the offense and cite to *Thornwood* and *Johnson*, two cases that proved helpful in our analysis. While we might have hoped for better briefing on this issue, we choose to overlook any potential forfeiture in favor of a just result. We do this mindful of the history of this case, the trial court's repeated, erroneous limitations on plaintiffs'

arguments, and that the current procedural posture is a review of a section 2-615 dismissal. To the extent that plaintiffs wish to amend their pleading to better align the pleaded facts with the elements of the cause of action, they may.

¶ 137 Because we are allowing the claim against Thomas to survive dismissal, the trial court will be in a position on remand to reconsider its evidentiary rulings related to the claim against Thomas.

¶ 138 III. CONCLUSION

¶ 139 For the aforementioned reasons, we reverse the trial court's judgment and remand for proceedings consistent with this opinion. Specifically, the trial court's determination that there was no breach of fiduciary duty is reversed. We remand for the determination of damages. The section 2-615 dismissal of the individual, section 12.56(a)(3) shareholder-oppression claim (oppressive conduct) is reversed. That claim may proceed. On remand, the trial court may reconsider its evidentiary rulings pertaining to that claim. Also, the section 2-615 dismissal of the aiding-and-abetting claim against Thomas is reversed. That claim may proceed. On remand, the trial court may reconsider its evidentiary decisions pertaining to that claim. Should that claim prove successful, plaintiffs will have another avenue by which to seek damages for the underlying breach. However, we affirm the trial court's section 2-615 dismissal of the aiding-and-abetting claim against Kathy.

¶ 140 Reversed in part and remanded; affirmed in part.