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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: LANDMARK HOMES AND DEVELOPMENT, INC., Debtor.	BAP No. NV-09-1355-PaDH Bk. No. 09-50197-GWZ Adv. No. 09-05025-GWZ
W. DONALD GIESEKE, Chapter 7 Trustee,[1] Appellant, v. BCB VENTURES, INC., Appellee.	**M E M O R A N D U M**[2]

Submitted Without Oral Argument[3]
on September 10, 2010

Filed - November 30, 2010

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Bankruptcy Judge, Presiding

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[1] This appeal was initiated by Landmark Homes and Development, Inc. while it was a Chapter 11 debtor in possession. On April 2, 2010, the bankruptcy case was converted to Chapter 7 and W. Donald Gieseke was appointed Chapter 7 Trustee. As successor-in-interest to Landmark Homes and Development, Inc., W. Donald Gieseke, Chapter 7 Trustee was substituted as appellant herein.

[2] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1

[3] With the consent of the parties, the Panel ordered on September 10, 2010, that this appeal be submitted on the briefs without oral argument.

Before: PAPPAS, DUNN and HOLLOWELL, Bankruptcy Judges.

Chapter 11 debtor Landmark Homes and Development, Inc. ("Landmark") appeals a summary judgment entered by the bankruptcy court holding that a provision in a limited liability company operating agreement was not an unenforceable penalty, and enforcing that provision. Because we agree that the provision is not a penalty clause, and is also not a liquidated damages provision, we AFFIRM.

FACTS

Landmark filed a chapter 11 bankruptcy petition on January 28, 2009. It operated as a debtor in possession until April 2, 2010 when its case was converted to Chapter 7 and W. Donald Gieseke was appointed Chapter 7 Trustee ("trustee").[4]

Landmark and BCB Ventures, Inc. ("BCB") are the sole members of Chase Development, LLC ("Chase"), a real estate development limited liability company. Chase was organized by the parties in 2000 to acquire, develop and sell or lease approximately 1,532 acres of industrial, commercial and residential land, and nineteen "Glen Vista lots," with water rights and sewer effluent ("the Property"), all located in Lyon County, Nevada. An operating agreement (the "Operating Agreement") executed on September 1, 2000, governs Chase, and defines the responsibilities of, and relationship between, Landmark and BCB. The parties acknowledge that the Operating Agreement, which includes important

[4] This matter was fully briefed when Landmark's case was converted. The trustee was substituted as appellant and the case was subsequently submitted on the briefs.

provisions allocating responsibility, power and money between the two members, was an arms-length, negotiated agreement.

Article V of the Operating Agreement addresses the members' capital contribution obligations. The salient provisions of the Operating Agreement for purposes of this appeal are §§ 5.2[5] and 5.4, which identify Landmark's required capital contributions to Chase, and the consequences of a failure by Landmark to make those contributions.

Under the Operating Agreement, as its capital contribution, BCB conveyed the Property to Chase. In return, BCB received a credit to its Capital Account in the amount of $7,735,430.[6] BCB had no further capital contribution obligations.

Landmark, however, had both initial and continuing capital contribution obligations. Under § 5.2.1, Landmark received an $812,000 credit to its Capital Account for its initial cash contributions.[7] Landmark's obligations to make continuing capital contributions can, roughly, be broken into three categories: (1) Landmark's obligations prior to Chase obtaining a development and construction loan for the project, § 5.2.2; (2) Landmark's

[5] All "section" or "§" references in this memorandum are to sections of the Operating Agreement unless otherwise indicated.

[6] When contributed, the Property was encumbered only by a lender's deed of trust in the amount of $3,441,800. § 5.1.1.

[7] Landmark made an initial cash contribution to Chase of $300,000, which was to be used by Chase in paying amounts owed on, and relating to, the Property. Landmark was also credited for a prior $300,000 contribution that was used for similar purposes. Finally, Landmark was credited $211,000 for two payments made on BCB's behalf: a $200,000 payment towards the construction of a fire station and an $11,000 payment for construction of a park. The reason why Landmark was credited for $812,000, and not the $811,000 sum of its contributions and payments, is not clear in the record.

obligations to contribute all additional operating capital necessary to obtain any construction or development loans for the project, to provide any personal guaranty necessary to obtain such loans, to construct project improvements, and to make "payments on outstanding balances owed on the Property" not covered by proceeds of construction and development loans, § 5.2.3; and (3) Landmark's guaranty to pay an amount up to BCB's initial Capital Account to cover any Chase losses that might decrease that account, § 5.2.4. Any time either member of Chase made a capital contribution, their respective Capital Account was to be increased by the amount of the contribution. § 5.5.

Landmark was appointed to serve as Chase's initial manager, with management responsibilities as provided in Article IV of the Operating Agreement. Those responsibilities relate to the acquisition, development, management and sale of the Property.

Section 5.4 of the Operating Agreement outlines the consequences if Landmark defaults under its § 5.2 capital contribution obligations. It provides:

> In the event LANDMARK fails to make any capital contributions required by Section 5.2 above, BCB may elect upon written notice to LANDMARK either (I) to make a loan to the Company in accordance with Section 5.3 hereof, or (ii) to make a Default Capital Contribution. Prior to making such election, BCB shall notify LANDMARK in writing that LANDMARK is in default of its obligation to contribute capital to the Company, and LANDMARK shall have the right to cure such default within ten (10) business days after receiving such written notice. In the event LANDMARK fails to make such contribution prior to the expiration of said ten (10) business day period, BCB may either make a loan to the Company in accordance with Section 5.3 or contribute such capital as BCB determines is required to pay the current obligations of the Company, or any portion thereof, including the funding of reasonable reserves, and such contribution shall be deemed a "Default Capital Contribution". In addition, LANDMARK may, in the sole and absolute

> discretion of BCB, be removed as Manager and BCB shall be substituted as Manager. In the event BCB shall elect to make a Default Capital Contribution, from and after the date of such contribution, the Percentage Interest of LANDMARK in the Company shall be decreased, and BCB's Percentage correspondingly increased in an amount equal to the Initial Percentage Interest of LANDMARK multiplied by ten percent (10%) for each Twenty Thousand Dollars ($20,000.00) in Default Capital Contributions made by BCB. All Default Capital Contributions shall be returned to BCB prior to any Distributions to LANDMARK. The reasonable determination by BCB in good faith that a Capital Contribution is required to be made by LANDMARK shall be binding on the Members. If LANDMARK disagrees with any determination by BCB hereunder, LANDMARK shall have the right to arbitrate such matter in accordance with Article XIV hereof, but no election by LANDMARK to arbitrate such matter shall delay BCB's right to proceed with making a loan to the Company under Section 5.3 or a Default Capital Contribution under this Section 5.4 and to invoke all other rights and remedies hereunder pending the determination of the arbitrator. The foregoing remedies provided to BCB shall be in addition to all other rights and remedies of BCB under Nevada law.

§ 5.4 (capitalization in original).

As can be seen, per § 5.4, BCB's payment of a capital contribution that Landmark failed to make could result in both an increase in BCB's membership percentage interest in Chase, and, at BCB's election, Landmark's removal as Chase's manager. Initially, under § 1.37 and Exhibit 1.37 of the Operating Agreement, the membership percentage interests were evenly allocated between Landmark and BCB, each receiving a 50% interest. The membership percentage interests apportion the members' rights to income distributions, loss allocations, and voting power.

If BCB makes a default capital contribution on Landmark's behalf, Landmark's percentage interest is to be "decreased, and BCB's percentage correspondingly increased, in an amount equal to the Initial Percentage Interest of Landmark multiplied by ten percent (10%) for each Twenty Thousand Dollars ($20,000.00) in

Default Capital Contributions made by BCB." § 5.4. Because Landmark's initial percentage interest was 50%, its percentage interest in Chase would decrease by 5% (50% Initial Percentage Interest x 10%) for every $20,000 in default capital contributions made by BCB. Correspondingly, BCB's percentage interest in Chase would increase by 5% for every $20,000 in default capital contributions made by BCB.

Nearly six years passed after the parties' execution of the Operating Agreement before a construction or development loan was obtained for the Property. In May 2006, Chase arranged a $5.1 million loan from Sierra Financial Mortgage ("Sierra"), secured by the Property. Landmark paid all monthly interest payments on the loan from May 2006 through December 2008,[8] though it had to take out a separate loan from Sierra[9] in order to make the October and November 2008 payments. Landmark also paid all property taxes on the Property through sometime in 2008. Landmark's Capital Account should include each of those payments.

When Landmark stopped making loan and property tax payments in January 2009, BCB sent Landmark letters indicating that it intended to pay: (1) the property taxes on the Property due through January 2009, in an amount of $57,282.50; and, (2) loan interest payments to Sierra for January, February, and March 2009, in the amount of $47,750.67 per month. Those payments were made,

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[8] The loan was increased to $5,200,000 and extended several times during that period. Payments for July 2007 through May 2008 were $47,666.67 per month, and payments for June 2008 through April 2009 were $47,750.67 per month.

[9] The loan used to pay the October and November 2008 Chase loan payments was made by Sierra Financial Mortgage to "J.F. Bawden, LLC." James F. Bawden is Landmark's president and is manager of J.F. Bawden, LLC.

and, pursuant to §§ 5.4 and 5.5, BCB's Capital Account should have increased accordingly. As a result of BCB's January 2009 letters and payments, which BCB considered default capital contributions, Landmark filed its chapter 11 petition on January 28, 2009. BCB filed a motion for relief from the automatic stay on March 18, 2009, to pursue its § 5.4 remedies. Through enforcement of those remedies, BCB sought to have Landmark removed as Chase's manager, and to have Chase's membership percentage interests adjusted in favor of BCB.

In response, Landmark not only opposed the motion for stay relief, but also, on March 23, 2009, initiated the adversary proceeding leading to this appeal. Through the adversary proceeding, Landmark sought declaratory, injunctive, and other relief from the bankruptcy court to establish that Landmark had not breached any obligations under § 5.2 of the Operating Agreement and to prevent BCB from exercising its remedial rights under § 5.4.

A hearing to address BCB's motion for relief from the automatic stay was scheduled for March 30, 2009. At that hearing, the bankruptcy court determined that it would not grant the preliminary injunction sought by Landmark. The court also determined that it would lift the automatic stay so that the § 5.4 ten-day default window, which had been suspended by the filing of Landmark's chapter 11 petition, could run. However, the bankruptcy court declined to grant stay relief for BCB to pursue its § 5.4 remedies through a state court action. Instead, the court stated that BCB should file a counterclaim in the adversary proceeding seeking bankruptcy court enforcement of its remedies.

BCB filed its answer to Landmark's adversary proceeding complaint on April 13, 2009, together with a counterclaim against Landmark seeking enforcement of its right to remove Landmark as Chase's manager and adjustment of the Chase membership percentage interests. After Landmark replied to BCB's counterclaim, BCB moved for summary judgment on July 6, 2009. Through its motion, BCB sought a determination by the bankruptcy court that Landmark had failed to make required capital contributions, that BCB made default capital contributions, and, as a result, that Landmark should be removed as Chase's manager and membership percentage interests should be shifted. The bankruptcy court conducted a hearing on September 25, 2009. It issued its decision granting Summary Judgment in BCB's favor on October 22, 2009.

In its decision and Summary Judgment, the bankruptcy court determined that Landmark had defaulted under § 5.2 of the Operating Agreement. While expressing doubt whether § 5.4 was a liquidated damages provision, the bankruptcy court applied Nevada case law to distinguish whether a contract provision was an enforceable liquidated damages provision, or an unenforceable penalty clause, as Landmark urged, and determined that § 5.4 was not a penalty clause. Under § 5.4, the bankruptcy court ordered that Landmark be removed as Chase's manager, and that Chase's membership percentage interests be altered so that BCB would hold a 90.66% interest, and Landmark would hold a 9.34% interest in Chase.

Landmark filed a timely appeal of the Summary Judgment on November 2, 2009.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (O). The Panel has jurisdiction under 28 U.S.C. § 158.

ISSUES ON APPEAL

1. Whether the bankruptcy court erred in determining that § 5.4 of the Operating Agreement was not an unenforceable penalty.
2. Whether, upon concluding that § 5.4 was not an unenforceable penalty, the bankruptcy court erred in enforcing § 5.4 of the Operating Agreement.

STANDARDS OF REVIEW

We review a bankruptcy court's grant of summary judgment and conclusions of law de novo. New Falls Corp. v. Boyajian (In re Boyajian), 367 B.R. 138, 141 (9th Cir. BAP 2007). In Nevada, a determination of whether a contract provision is a liquidated damages clause or an unenforceable penalty is a question of law. Loomis v. Lange Financial Corp., 865 P.2d 1161, 1163 (Nev. 1993). De novo means review is independent, with no deference given to the bankruptcy court's legal conclusions. Rule 8013. A grant of summary judgment may be affirmed on any basis supported by the record. Johnson v. Neilson (In re Slatkin), 525 F.3d 805, 810 (9th Cir. 2008) (citing Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 995 (9th Cir. 2007).

DISCUSSION

Fed. R. Bankr. P. 7056 directs that, in adversary proceedings, Fed. R. Civ. P. 56 applies. See also Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702, 707 (9th Cir. 2008).

Civil Rule 56(c) instructs that a summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Because there is no dispute on appeal regarding the material facts, we proceed to examine the bankruptcy court's interpretation of the parties' contract, and whether BCB was entitled to judgment as a matter of law. We agree with the bankruptcy court that § 5.4 is not an unenforceable penalty clause, or a liquidated damages provision but, rather, is an arms-length agreement governing the relationship between the members of a Nevada LLC.

A. Operating Agreements Under Nevada Law

Landmark and BCB, in creating the Chase Operating Agreement, intended it to "govern the affairs of [Chase]." § 2.3. While an operating agreement is not required for every Nevada LLC, if one is created, the agreement is binding and enforceable. NEV. REV. STAT. § 86.286(1) and (2)(b) (2009); see generally JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp.2d 1013, 1026 (D. Nev. 2009) (interpreting a Nevada LLC operating agreement). A Nevada LLC's operating agreement "must be interpreted and construed to give the maximum effect to the principle of freedom of contract and enforceability." NEV. REV. STAT. § 86.286(4)(b); see also JPMorgan Chase Bank, 632 F.Supp.2d at 1019–20 (explaining that, under Nevada law, when interpreting a contract, courts should effectuate the contracting parties' intent).

B. Rights and Duties Under the Chase Operating Agreement

Nevada LLC operating agreements can bestow rights and impose

duties upon the members. NEV. REV. STAT. § 86.286(4)(a), (5); see, e.g., JPMorgan Chase Bank, 632 F.Supp.2d at 1021, 1025 (analyzing operating agreement that established "member rights" and "members' duties"). Chase's Operating Agreement provides four primary rights and duties to Landmark and BCB that may be affected by § 5.4. Three of those rights and duties are affected by § 5.4's potential impact on Chase's membership percentage interests. See §§ 1.37, 6.1.1, 6.1.2 The fourth is Landmark's duty to manage Chase. Where a Nevada operating agreement imposes duties on a member, either to the LLC or to another member, those duties may be expanded, restricted, or eliminated by the operating agreement. NEV. REV. STAT. § 86.286(5); see, e.g., JPMorgan Chase Bank, 632 F.Supp.2d at 1025–26 (explaining that certain liabilities or duties may be limited or eliminated by an operating agreement).

Section 5.4 influences the parties' membership percentage interests, and thereby potentially impacts three of the members' rights and duties. First, per § 6.1.2, a modification in the members' percentage interests will, eventually, influence their income distributions. Any income made from Chase's sale of land, under § 7.1, must first be utilized to compensate the members for their capital contributions. Only then can any excess cash be distributed to members, and such distributions must be in accordance with members' percentage interests. In other words, it is not until the Property is sold, and all of BCB's and Landmark's capital contributions are repaid, that their percentage interests will affect distributions.

Nevertheless, § 5.4's shifting of percentage interests could, potentially, impact members' income at some future point. By

tying the receipt of eventual future income to membership percentage interests, and by tying percentage interests to the fulfillment of duties to Chase, Landmark and BCB provided an incentive to Landmark to satisfy its obligations for payment of capital contributions, or for BCB to make default capital contributions on Landmark's behalf, thereby presumably keeping Chase afloat. So structured, § 5.4 provides that the member actually paying the capital contributions necessary for Chase's survival is the member rewarded with a corresponding proportion of any future Chase income. Seen in this way, § 5.4 is not a damages provision, but, rather, is an appropriate means of allocating LLC member obligations and rewards.

Second, under § 6.1.1, § 5.4's shifting of percentage interests will also influence the allocations of losses to the members. Initial Chase losses, up to $7,735,430, are to be paid by Landmark, because it agreed to guarantee payment of losses up to the amount of BCB's initial Capital Account. § 5.2.4. If, however, losses exceed that amount, those losses are to be shared proportionately by Chase's members based on their percentage interests. § 6.1.1. Any decrease in Landmark's percentage interest reduces Landmark's responsibility for Chase's losses beyond $7,735,430. At the same time, BCB's liability to bear Chase's losses increases. If § 5.4 were intended to be a damages provision to compensate BCB for a Landmark breach, it is counterintuitive that BCB's liability for losses would also increase through the provision's enforcement. Yet, enforcement of § 5.4 indeed increases BCB's liability. Again, structuring the risk of future losses in this manner indicates that § 5.4 governs

Chase's members' rights and duties and does not provide for damages.

Third, the members' voting rights and duties are determined by their respective percentage interests. § 1.37. Where actions are required to be approved by a vote of the members, § 3.6 dictates that majority consent is required. Under the Operating Agreement's original allocation of member interests, where each member held a 50% interest, effectively both members would have to agree to certain actions. However, if percentage interests are adjusted via operation of § 5.4, the LLC's balance of power and control are shifted. In this fashion, § 5.4 provides the member fulfilling its Operating Agreement duties greater control over company affairs than the member failing to fulfill its duties. Simply put, if Landmark failed to make agreed capital contributions, and BCB was required to make up the difference on Landmark's behalf, BCB gained greater voting control through an increased share of percentage interests.[10]

As noted, a fourth potential impact of § 5.4 enforcement, which is unrelated to the issue of membership percentage interests, deals with the removal of Landmark as Chase's manager if Landmark defaults. BCB's option to remove Landmark as manager appears both to benefit Chase and to increase both members' chances of capital contributions repayment. By ensuring that Chase's manager is capable of fulfilling its duties to Chase and its members, § 5.4 improves Chase's prospects for success.

[10] Even with a shift in percentage interests, however, certain actions, such as decisions to dissolve Chase, to amend the Operating Agreement, or to merge with another company, require unanimous consent. § 3.6.

While Landmark asks the Panel to characterize § 5.4 as a damages provision, thereby casting itself as the victim of an unenforceable penalty clause, we are bound to respect the parties' freedom to contract and create an enforceable operating agreement. The shift in the parties' percentage interests under § 5.4 may reduce the amount of income that Landmark may receive at some future date. At the same time, though, that reallocation reduces Landmark's liability for Chase's losses, and imposes greater liability for those losses on BCB. The shifting of percentage interests also modifies the company's balance of voting power to reflect the members' responsiveness to their duties. If Chase's initial manager does not make required capital contribution payments, § 5.4 provides for removal of that manager. Fairly construed, the arrangement of Landmark and BCB memorialized in § 5.4 is simply one of the ways in which the two members agreed to cooperate for Chase's success. There is no basis for the Panel to ignore the parties' design in promoting their mutual interests.

C. Liquidated Damages/Penalty Clause Analysis

That it is inappropriate to view § 5.4 as a damages provision becomes even more apparent when attempting to make the distinction between § 5.4 as a liquidated damages provision and as a penalty clause, as requested by Landmark.

Under Nevada law,[11] liquidated damages are "the sum which a

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[11] While the bankruptcy court relied on Hubbard Bus. Plaza v. Lincoln Liberty Life Ins. Co., 649 F.Supp 1310 (D. Nev. 1986) as providing three tests for distinguishing between a liquidated damages provision and a penalty clause, only one of those three tests has ever been applied by a Nevada state court. See, e.g., Mason v. Fakhimi, 865 P.2d 333, 335 (Nev. 1993); Joseph F. Sanson Inv. Co. v. 268 Ltd., 795 P.2d 493, 497 (Nev. 1990); Haromy v. Sawyer, 654 P.2d 1022, 1023 (Nev. 1982). In developing the other (continued...)

party to a contract agrees to pay if he fails to perform, and which, having been arrived at by a good faith effort to estimate the actual damages that will probably ensue from a breach, is recoverable as agreed-upon damages should a breach occur." Mason, 865 P.2d at 335 (citing Joseph F. Sanson Inv. Co., 795 P.2d at 496-97). Liquidated damages provisions are, generally, prima facie valid. Joseph F. Sanson Inv. Co., 75 P.2d at 496-97 (citing Haromy, 654 P.2d at 1023). In certain circumstances, however, liquidated damages provisions rise to the level of unenforceable penalties:

> As distinguished from liquidated damages, the term "penalty," as used in contract law, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of non-performance, and it involves the idea of punishment . . . . [The] distinction between a penalty and liquidated damages is that a penalty is for the purpose of securing performance, while liquidated damages is the sum to be paid in the event of non-performance.

Mason, 865 P.2d at 335 (quoting 22 AM.JUR.2d Damages § 684 (1980)).

A party challenging a liquidated damages provision must prove that the provision is not valid, and that application of the provision amounts to a penalty. Haromy, 654 P.2d at 1023 (citing Silver Dollar Club v. Cosgriff Neon, 389 P.2d 923, 925 (Nev. 1964)). To prove that a provision is a penalty, the party asserting such must "persuade the court that the liquidated damages are disproportionate to the actual damages sustained by

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[11](...continued)
two tests, Hubbard Bus. Plaza cites to the Restatement (Second) of Contracts and a legal encyclopedia, and not to Nevada case law. The Panel's analysis applies the sole test actually utilized by Nevada state courts.

the injured party." Mason, 865 P.2d at 335 (citing Haromy, 654 P.2d at 1023).

Where a liquidated damages figure is fixed or accruing by a static factor, the comparison of liquidated damages to actual damages is primarily a mathematical endeavor. The liquidated damages figure in the disputed provision is compared to the actual damages. See, e.g., Haromy, 654 P.2d at 1023–24 (comparing contract damages figure to actual damages). If the actual damages are considerably smaller than the stipulated liquidated damages, this may be adequate to show that the liquidated damages are sufficiently disproportionate so that the provision is really a penalty. See Silver Dollar Club, 389 P.2d at 925. The problem in applying that rubric in this case, however, is that BCB did not suffer any actual damages as a result of Landmark's defaults, and, even if it did, there is no liquidated damages figure against which to compare those damages.

The event that triggers § 5.4's shifting of percentage interests, and the divestiture of Landmark as company manager, is BCB's uncured payment of default capital contribution obligations on Landmark's behalf. Landmark argues that BCB's actual damage in this case is $362,670.84, the amount that BCB paid on Landmark's behalf. According to § 5.5, however, each time a member contributes money to the company, its Capital Account correspondingly increases. As BCB paid $362,670.84 on Landmark's behalf, BCB's Capital Account was increased by $362,670.84. Under the parties' contract, BCB cannot recover that amount until an undefined future date when Chase sells land. § 7.1. Even so, BCB is not necessarily "out" $362,670.84; BCB has essentially

"deposited" that amount for Chase's benefit, and will recover the payment at a later date if distributions are made. Id. Section 5.4 makes this clear by indicating that "[a]ll Default Capital Contributions shall be returned to BCB prior to any Distributions to LANDMARK." Therefore, if the default capital contributions were viewed as damages, BCB could potentially receive a windfall, or double payment, if distributions were later made.

Moreover, there is no liquidated damages figure within § 5.4 against which actual damages, if any, could be measured. Section 5.4 provides that membership percentage interests are adjusted if BCB pays an uncured default capital contribution on Landmark's behalf. However, the impact of the shifting percentage interests may not fully materialize, if at all, for years. In other words, before the change in percentage interests can impact income, there must be a sale of land for a sufficient amount to repay all capital contributions. §§ 7.1, 7.2. Only then will any excess cash distributions be based on members' percentage interests. Likewise, losses must exceed $7,735,430, the value of the Property initially contributed to Chase by BCB, before the members' percentage interests influence loss allocations. §§ 5.2.4, 6.1.1.

Landmark insists that the bankruptcy court's order reallocating the parties' percentage interests damages it to the extent of approximately $10.1 million. However, its calculation is based on a belief that the value of the Property is currently between $23,000,000 and $25,000,000, and that Landmark is somehow entitled to a damages reckoning based on a hypothetical present

day sale of all of the Property.[12] Nothing in § 5.4, however, indicates that the parties agreed that a shift in membership percentage interests would result in an immediate accounting for damages based on a date-of-enforcement property valuation.

In short, BCB suffered no damages as a result of paying default capital contributions on Landmark's behalf. In addition, § 5.4 fails to contain a liquidated damages provision against which any actual damages could be measured. While some of the language in § 5.4 hinges on a Landmark default, it is BCB's payment of uncured default capital contributions that triggers § 5.4's percentage interest shifting and the removal of Landmark as manager. BCB's payment of default capital contributions results in reduced potential future income for Landmark. § 7.1. It also results in BCB carrying an increased liability for Chase's losses. § 6.1.1. Of the two Chase members, if BCB pays Landmark's promised capital contributions, BCB gains greater Chase voting power. §§ 1.37, 3.6. BCB's § 5.4 payment of capital contributions on Landmark's behalf also entitles BCB to remove Landmark as manager. No BCB default capital contribution, however, ever affects the members' Capital Accounts. Section 5.4 is not a damages provision of any kind but, rather, is a mutually agreed upon organization of the members' relationship, rights, and duties as pertaining to Chase.

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[12] Even if Landmark's analytical approach were correct, which it is not, both members' capital contributions would have to be backed out of the theoretical sale price before determining the impact of a shift in percentage interests. §§ 7.1, 7.2. Landmark seems to forget that step in positing its alleged damages. Accounting for the members' capital contributions would significantly reduce the amount to which Landmark would be entitled even if its formula were justified.

CONCLUSION

Under § 5.2 of the Operating Agreement, Landmark was required to make $362,670.84 in payments that it did not make. BCB, after notice to Landmark, made those payments on Landmark's behalf as default capital contributions. Enforcement of § 5.4 of the Operating Agreement by the bankruptcy court was, therefore, appropriate.[13]

The bankruptcy court correctly decided that § 5.4 is not an unenforceable penalty clause, and we add that it is also not a liquidated damages provision. Because § 5.4 is an enforceable Operating Agreement provision defining the relationship between two members of a Nevada LLC, we conclude the bankruptcy court did not err in its decision to enforce it.

The Summary Judgment entered by the bankruptcy court is AFFIRMED.

[13] Arguably, pursuant to the language of § 5.4, the members' percentage interests should have been shifted from an initial 50%/50% split, instead of from the 0%/100% split that was, apparently, used by the bankruptcy court. However, neither party appealed the manner in which the court applied § 5.4 in determining the post-enforcement percentages. Instead, the sole issue on appeal was whether § 5.4 should have been enforced. We therefore express no opinion on the mathematical mechanics used by the bankruptcy court to implement § 5.4.