

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

HCI INVESTORS, LLC, et al.

**v.
ANTHONY FOX, et al.**

RESPONDENTS,

APPELLANTS.

DOCKET NUMBER WD75831 Consolidated with WD75880

DATE: October 8, 2013

Appeal From:

Jackson County Circuit Court
The Honorable Charles E. Atwell, Judge

Appellate Judges:

Division Three: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

Attorneys:

Charles W. German, Lawrence A. Rouse and Daniel B. Hodes, Kansas City, MO, for respondents.

John C. Aisenbrey and Angela G. Nichols, Kansas City, MO, for appellants.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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RESPONDENTS,

v.

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Before Division Three: Lisa White Hardwick, Presiding Judge, Mark D. Pfeiffer, Judge and Cynthia L. Martin, Judge

Limited liability companies were formed to purchase nonperforming assets held by a bank holding company's subsidiary bank in order to remove the assets from the bank's books prior to an FDIC examination. Shareholders of the bank holding company who agreed to participate became members of the LLCs, obligated to make capital calls to fund the LLCs and to execute personal guarantees of loans obtained by the LLCs to acquire the nonperforming assets. The proposed transaction anticipated that shareholders of the bank holding company who refused to participate would be subject to dilution of their share position by the issuance of warrants permitting participating shareholders to acquire additional stock at an inexpensive price. The Fox Family agreed to participate, and thus became members in the LLCs. The Fox Family later refused to pay capital calls made by the LLCs. The LLCs filed suit against the Fox Family to enforce the obligation to pay capital calls. The Fox Family asserted numerous affirmative defenses and counterclaims challenging the lawfulness and enforceability of the LLCs' operating agreements. Following trial to the court, a judgment was entered in favor of the LLCs and against the Fox Family on the LLCs claims. The judgment rejected all of the Fox Family's affirmative defenses and counterclaims. The Fox Family appeals.

Affirmed.

Division Three holds:

1. The trial court's finding that the transaction, and in particular, the percentage of the warrant issuance, met the entire fairness standard is supported by substantial evidence. The Fox Family's affirmative defense and related counterclaim asserting a breach of fiduciary duty against two shareholders in their roles as directors and controlling shareholders of the bank were without merit.

2. Because the weight of the evidence supports the trial court's rejection of the Fox Family's breach of fiduciary duty counterclaim, we need not address the Fox Family's claims of error involving dismissal of the same claim as barred by the statute of limitations and/or the doctrines of waiver and ratification.

3. The trial court correctly construed the jury waiver provision in the LLCs' operating agreements to apply to the breach of fiduciary duty counterclaim. The jury waiver language applies to parties to the operating agreements without regard to the capacity in which they executed the operating agreements.

Opinion by Cynthia L. Martin, Judge

October 8, 2013

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