

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Arizona Precious Metals, Inc.,	)	No. CV-07-707-PHX-MHB
Plaintiff,	)	<b>OPINION</b>
vs.	)	
Accept Erste Rohstoff Beteiligungs KG; et	)	
al.,	)	
Defendants.	)	

---

On April 5, 2007, Plaintiff Arizona Precious Metals (“APM”) brought suit against Defendants for breach of contract and fraud in the inducement. The Clerk of the Court entered default against Defendants on August 20, 2007. Plaintiffs subsequently moved for default judgment. On May 2, 2008, the Court held a hearing for APM to prove its damages. The Court will grant in part and deny in part APM’s request for default judgment, as set forth in the Judgment filed concurrently herewith. The Court’s findings of fact and conclusions of law are set forth below.

**BACKGROUND**

The Silver King Mine was opened in the 1870s, but has not operated profitably since 1922. On August 22, 2006, APM and the Silver King Mining Company of Arizona (“SKM”) entered a joint venture agreement (“Joint Venture Agreement”). Under such agreement, SKM would contribute its mining rights in the Silver King Mine, and APM would provide

1 up to \$10 million, but no less than \$2 million, in financing to commence production of the  
2 “Silver King Mine Project.” APM was a 60% interest holder in the joint venture, and SKM  
3 was a 40% interest holder.

4 APM’s promise to provide start-up capital for the Silver King Mine Project was based  
5 on a pending loan agreement (“Loan Agreement”) with Defendant Accept Erste Rohstoff  
6 Beteiligungs KG (“Accept”), which was executed on September 5, 2006. Under the Loan  
7 Agreement, Accept would loan APM \$2 million for various mining projects, including  
8 \$500,000.00 for the Silver King Mine Project. The Loan Agreement enabled APM to  
9 reallocate loan proceeds to different projects in the exercise of good faith business judgment.<sup>1</sup>  
10 The Loan Agreement was arranged through Defendants Karl-Heinz Rauball and Bernhard  
11 Puttke, who independently promised to make the loan in exchange for stock interests in  
12 APM. At the time of the execution of the Loan Agreement, Defendants did not have the  
13 ability to fund the loan.

14 Despite their continued assurances to provide funding, Defendants defaulted on the  
15 loan agreement. APM made efforts to locate other investors, but was unable to obtain  
16 alternative financing. Because APM was unable to provide the financing required by the  
17 Joint Venture Agreement, it lost its interest in the mine in June 2007. APM claims  
18 \$26,961,043.00 in lost profits and \$5,000,000.00 in punitive damages.<sup>2</sup>

---

23 <sup>1</sup> APM does not seek damages for Defendants’ failure to provide funding for the other  
24 mining projects, conceding that damages would have been too speculative since APM had  
25 not yet entered joint venture projects concerning those projects.

26 <sup>2</sup> At the May 2, 2008 hearing, the Court repeatedly encouraged APM to offer evidence  
27 regarding other measures of damages, including incidental damages. However, APM only  
28 offered evidence concerning alleged lost profits.

1 **JURISDICTION**

2 The Court has jurisdiction under 29 U.S.C. § 1332 (diversity jurisdiction): APM is a  
3 Nevada corporation with its principle place of business in Arizona; Defendants are citizens  
4 of Germany; and the amount in controversy exceeds \$75,000.00.

5 **APPLICABLE LAW**

6 “[F]ederal courts sitting in diversity jurisdiction apply state substantive law and  
7 federal procedural law.” Freund v. Nycomed Amersham, 347 F.3d 752, 761 (9th Cir. 2003).  
8 Arizona substantive law applies to this diversity action.

9 **DISCUSSION**

10 **I. Consequential Damages**

11 “Consequential damages are those reasonably foreseeable losses that flow from a  
12 breach of contract,” including lost future profits. McAlister v. Citibank, 829 P.2d 1253, 1257  
13 (Ariz. Ct. App. 1992). “The traditional measure of damages for breach of a contract to loan  
14 money is the additional interest required for a replacement loan.”<sup>3</sup> United Cal. Bank v.  
15 Prudential Ins. Co. of Am., 681 P.2d 390, 447 (Ariz. Ct. App. 1983). This is due to the well-  
16 known principle that “[d]amages are not recoverable for loss that the party in breach did not  
17 have reason to foresee as a probable result of the breach when the contract was made.”  
18 Restatement (Second) of Contracts § 351(1) (1979).<sup>4</sup> “Because credit is so widely available,  
19 a lender often has no reason to foresee at the time the contract is made that the borrower will  
20 be unable to make substitute arrangements in the event of breach.” Id. § 351(1) cmt. e.  
21 However, a party may be able to recover consequential damages for breach of a contract to  
22 loan money where:

23  
24  
25 <sup>3</sup> APM concedes that the measure of damages for breach of contract and fraud in the  
inducement are the same.

26  
27 <sup>4</sup> Absent controlling Arizona law the contrary, Arizona courts generally follow the  
Restatements. Powers v. Taser Int’l., Inc., 174 P.3d 777, 782 (Ariz. Ct. App. 2007).

1 'the specific purpose for which the loan was made was communicated to the  
2 lender at the time the contract was entered into, and where it further appears  
3 that the borrower has suffered special damages by the breach, which are  
4 pleaded and proved, the damages recoverable are such as may fairly and  
reasonably be supposed to have been in the contemplation of the parties at the  
time of making the contract, as the probable result of a breach of it.'

5 Higgins v. Arizona Sav. and Loan Ass'n, 365 P.2d 476, 482 (Ariz. 1961) (quoting Shurtleff  
6 v. Occidental Bldg. & Loan Ass'n, 181 N.W. 374, 375 (Neb. 1921)).

7 These principles were recently applied in Basic Capital Management. v. Dynex  
8 Commercial, Inc., — S.W.3d —, No. 05-04-01358-CV, 2008 WL 509385 (Tex. App. Feb.  
9 22, 2008). In Basic Capital Management, a real estate lender breached an agreement to lend  
10 \$160 million for real estate investment, and the jury awarded the real estate investor  
11 \$256,233.00 in lost profits. Id. at \*8. The trial court, however, granted the real estate  
12 lender's post-verdict motion and entered a take-nothing judgment. Id. The trial court's  
13 ruling was affirmed on appeal. Id. at \*10. The appellate court explained:

14 [I]n the event of a breach of contract to lend money, the borrower can recover  
15 consequential damages, i.e., expenses and lost profits, if the breaching lender  
16 knew, at the time it entered into the contract: (1) that the contracted financing  
17 was for a specific venture; and (2) that in the event of its breach the borrower  
probably would be unable to obtain other financing in a manner that would  
permit the borrower to carry out that venture.

18 Id. at \*9. Although the real estate lender was aware of the specific purpose for which the  
19 loan was sought, there was no evidence that, at the time the parties entered the contract, the  
20 real estate lender was aware that the real estate investor would be unable to obtain alternative  
21 financing. Id. at \*10.

22 Here, Defendants were aware of the specific purpose for which the loan was sought.  
23 However, like Basic Capital Management, APM has not offered credible evidence that, at  
24 the time it entered the Loan Agreement, Defendants were aware that no alternative financing  
25 would be available. Thus, the Court finds that APM's lost profits are not recoverable  
26

1 because Defendants did not have reason to foresee when the contract was made that APM  
2 would be unable to obtain alternative financing as a probable result of their breach.

3 Even if Defendants could have foreseen that alternative financing would be  
4 unavailable, APM has not proved by a preponderance of the evidence that it suffered lost  
5 profits. APM's claim that the present value of its 60% share of the net profits over the next  
6 ten years in the Silver King Mine would be \$26,961,043.00 is nothing more than a hopeful  
7 anticipation. The Silver King Mine has not operated profitably since 1922. Instead of  
8 relying on the past performance of the mine, APM bases its claim of lost profit on inherently  
9 unreliable marketing material and projections not supported with any or sufficient  
10 foundation. In addition, the lost profit calculations are based on \$10 million in start up  
11 capital, not the lesser amount Defendants were obligated to fund. APM's claim to lost profits  
12 is entirely speculative. Thus, the Court finds that APM did not suffer lost profits.<sup>5</sup>

## 13 **II. Punitive Damages**

14 "Punitive damages are not usually awarded in contract actions, unless there is an  
15 accompanying tort." Miscione v. Bishop, 130 Ariz. 371, 374–375 (App. 1981); see also  
16 Restatement (Second) Contract § 355 (1981) ("Punitive damages are not recoverable for a  
17 breach of contract unless the conduct constituting the breach is also a tort for which punitive  
18 damages are recoverable."). APM has brought the tort claim of fraud in the inducement.  
19

---

20  
21 <sup>5</sup> The Court also notes that, under the Joint Venture Agreement, APM was obligated  
22 to provide at least \$2 million in financing for the Silver King Mine Project. However, under  
23 the Loan Agreement, Defendants were only obligated to loan APM \$500,000.00 for the  
24 Silver King Mine Project. Although the Loan Agreement enabled APM to reallocate loan  
25 proceeds to different projects in the exercise of good faith business judgment, APM offered  
26 no evidence that it would have allocated the entirety of the \$2,000,000.00 loan to the Silver  
27 King Mine or that such an allocation would have been an exercise of good faith business  
28 judgment. Thus, even if Defendants had provided \$500,000.00, APM would still have to  
come up with an additional \$1.5 million for the Silver King Mine Project. APM has offered  
no evidence that it was able to provide the additional \$1.5 million it was obligated to fund  
under the Joint Venture Agreement.

1 In Arizona, “[t]o recover punitive damages, a plaintiff must prove by clear and  
2 convincing evidence that the defendant engaged in aggravated and outrageous conduct with  
3 an ‘evil mind.’” Hyatt Regency Phoenix Hotel Co. v. Winston & Strawn, 907 P.2d 506, 518  
4 (Ariz. Ct. App. 1995) (quoting Thompson v. Better-Bilt Aluminum Prod. Co., 832 P.2d 203,  
5 209 (Ariz. 1992)). “A defendant acts with the requisite evil mind when he intends to injure  
6 or defraud, or deliberately interferes with the rights of others, ‘consciously disregarding the  
7 unjustifiable substantial risk of significant harm to them.’” Id. (quoting Linthicum v.  
8 Nationwide Life Ins. Co., 723 P.2d 675, 680 (Ariz. 1986)). When evaluating conduct  
9 regarding an evil mind, a court considers: “(1) the reprehensibility of defendant’s conduct  
10 and the severity of the harm likely to result, (2) any harm that has occurred, (3) the duration  
11 of the misconduct, (4) the defendant’s awareness of the harm or risk of harm, and (5) any  
12 concealment of it.” Hyatt Regency, 907 P.2d at 518. In addition, “the conduct giving rise  
13 to punitive damages must be a proximate cause of the harm inflicted.” Saucedo ex rel.  
14 Sinaloa v. Salvation Army, 24 P.3d 1274, 1279 (Ariz. App. Ct. 2001).


15 At the May 2, 2008 hearing, APM offered no evidence justifying an award of punitive  
16 damages. The only possible basis for awarding punitive damages is the allegation in the  
17 Complaint that, at the time of the execution of the Loan Agreement, Defendants did not have  
18 the ability to fund the loan. The Court finds this allegation, by itself, is insufficient to  
19 support an award of punitive damages.

## 20 CONCLUSION

21 In conclusion, the Court finds that APM is not entitled to compensatory or punitive  
22 damages, but will be awarded nominal damages of one dollar. APM will also be awarded  
23 its costs and reasonable attorney’s fees.  
24

25  
26 DATED this 2nd day of September, 2008.  
27

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



---

Roslyn O. Silver  
United States District Judge