STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

District IV Appeal No. 2022AP001958
Circuit Court Case No. 2022CV00043

KARIN EICHHOFF, STEVEN SPEER AND RODERICK RUNYAN,

Plaintiffs-Appellants,

v.

NEW GLARUS BREWING COMPANY AND DEBORAH A. CAREY,

Defendants-Respondents.

On Appeal from the Order and Judgment of the Green County Circuit Court, Honorable Faun Marie Phillipson, Branch 1, Presiding, dated October 6, 2022

BRIEF OF PLAINTIFFS-APPELLANTS

PALMERSHEIM DETTMANN, S.C.
Attorneys for Plaintiffs-Appellants
Kevin J. Palmersheim
Wisconsin State Bar #1020726
Cathleen A. Dettmann
Wisconsin State Bar #1048315
Erin E. Rome
Wisconsin State Bar #1083092
P.O. Box 628005
Middleton, WI 53562-8005
(608) 836-6400

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Did the Plaintiffs-Appellants' detailed Amended Complaint state a claim under Wis. Stat. § 180.1430?

   Circuit court answered: No. The circuit court concluded that the Amended Complaint failed to state a claim based on a parenthetical in the "wherefore" clause of the Amended Complaint, which merely explained that the Plaintiffs-Appellants' preferred remedy was not judicial dissolution.

2. Is a circuit court sitting in equity entitled to fashion alternative remedies to dissolution if it finds that the elements of Wis. Stat. § 180.1430 have been established?

   Circuit court answered: No. The circuit court concluded that the only remedy available under Wis. Stat. § 180.1430 is dissolution, despite substantial legal authority to the contrary.

3. Did the Plaintiffs-Appellants' Amended Complaint state a claim for securities fraud under Wis. Stat. § 551.501?

   Circuit court answered: No. The circuit court concluded that the Amended Complaint failed to state a claim for securities fraud because the Defendants set the market for the Plaintiffs' shares, the Plaintiffs agreed to the purchase price, and therefore Defendants did not make any misrepresentations or omissions.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiffs-Appellants do not request oral argument. Publication is appropriate because there is very little published case law regarding Wis. Stat. § 180.1430, particularly the equitable remedies available under the statute. Furthermore, the scope of equitable remedies in the context of judicial dissolution is an issue that has repeatedly arisen in past cases, and resolving this issue will provide guidance to the bench and bar in future disputes.

STATEMENT OF THE CASE

I. Nature of the Case

This appeal concerns whether the Plaintiffs-Appellants' Amended Complaint states a claim under Wis. Stat. § 180.1430 and Wis. Stat. § 551.501. The Defendants-Respondents moved to dismiss the Complaint[1] on various grounds, including failure to state a claim upon which relief may be granted. The circuit court granted the motion to dismiss the claim under § 180.1430 because the wherefore clause of the Complaint contained a parenthetical stating that the Shareholders were not asking the court to dissolve New Glarus Brewing Company (the "Brewery"), but were instead seeking alternative remedies. The circuit court further concluded that judicial dissolution was the only available remedy under § 180.1430. The circuit court held that the securities fraud claim under § 551.501 failed to state a claim because the Brewery "set the market for Plaintiffs' shares in the transactions at issue based upon nothing more than a dollar figure known to both seller and purchaser" and therefore "no material misrepresentations or omissions could have been made." (R.54:7, APP-007).

II. Procedural History

The original complaint was filed in August 2021 in the Dane County Circuit Court. (R.16). The Defendants moved to change venue, which the Dane County Circuit Court granted in part. (R.16). The claim under Wis. Stat. § 180.1430 was dismissed and refiled in Green County Circuit Court on March 8, 2022. (R.16). The Shareholders filed an Amended Complaint on May 23, 2022, which added a securities fraud claim.

The Defendants filed Motions to Dismiss. The circuit court issued a written decision granting the Defendants' Motions to Dismiss on October 6, 2022, and the Shareholders timely appealed.

[1] The operative complaint is an Amended Complaint; it will be referred to as the "Complaint." The Plaintiffs-Appellants will be referred to as the "Shareholders," the Defendants-Respondents as the "Defendants", and Deborah Carey as "Carey."

STATEMENT OF FACTS

Appellants Karin Eichhoff (through her husband, Dierk), Steven Speer, and Roderick Runyan were among the original investors in the Brewery, which started in 1993 as an idea among friends. (R.32, ¶¶1, 5, APP-014). Dan Carey (the Brewmaster) was successfully developing beer recipes. (Id.). Speer thought the timing of the craft brewing market, combined with Dan's skills, could be grown into a successful business. (Id.).

Speer spent a summer working with Dan Carey and Deborah Carey on a detailed business plan. (R.32, ¶¶5-10, APP-014-016). Speer invested $25,000 in the Brewery, which he had recently inherited. (Id.). Speer convinced his friend Dierk Eichhoff to invest as well. (Id.). Runyan was also an initial investor, having previously invested in a successful brewpub. (Id.). The Investors contributed significant start-up funds and effort to transform the Brewery from a concept into an operational business. (R.32, ¶¶6-8, APP-015).

As the Brewery's successes have grown, so have Deborah Carey's efforts to increase her control. (R.32, ¶¶16-18, APP-016-017). Carey is the Brewery's President, CEO, sole director, and controlling shareholder. (R.32, ¶3, APP-014). Carey utilizes her position to run the Brewery however she sees fit and for her own benefit. (R.32, ¶18, APP-017-018).

The Shareholders invested in the Brewery with reasonable expectations: to be treated fairly and to have a chance to share in the Brewery's financial success. (R.32, ¶¶14-18, APP-016-017). Initially, these expectations were met. (Id.). This has become less and less true over the years, as Carey's iron grip over the Brewery has strengthened. (Id.).

As further detailed in the Argument below, the Shareholders allege they have been oppressed by Defendants, whose oppressive and fraudulent actions include:

- Carey secretly exempting herself from the Shareholder Agreement.
- Defendants refusing to distribute profits beyond the minimum to cover the shareholders' tax obligations, despite having $40 million in cash on

hand.

- Defendants working to depress the value of the minority shareholders' shares and ensure a lack of a market for the shares.
- Defendants pushing the Shareholders to sell their voting shares to the Brewery at values set by Defendants, without providing them full information regarding the value of the shares.

(R.32, ¶18, APP-017-018).

Defendants' oppressive conduct came to a head in 2021, when Defendants pushed the Shareholders to sign a new shareholder agreement that would have significantly restricted the Shareholders' rights. (R.32, ¶¶154-156, APP-042-043). Due to the increasingly oppressive conduct, the Shareholders filed suit against Defendants, pursuing claims for: (1) breach of fiduciary duty against Carey; (2) minority shareholder oppression under Wis. Stat. § 180.1430; and (3) securities fraud under Wis. Stat. § 551.501.[2] (R. 16; R.32, ¶¶158-208, APP-044-059). This appeal concerns the Green County Circuit Court's dismissal of the Shareholders' oppression and securities fraud claims. The circuit court erred by dismissing these claims with prejudice, and the Shareholders ask this Court to reverse the circuit court's decision.

[2] The breach of fiduciary duty claim is not part of this appeal.

STANDARD OF REVIEW

This is an appeal from the circuit court's order granting the Defendants' Motions to Dismiss for failure to state a claim. "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693. "Upon a motion to dismiss, [the Court] accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Id.*** "Whether a complaint adequately pleads a cause of action is a question of law [the Court] review[s] de novo." ***Vogel v. Liberty Mut. Ins. Co.***, 214 Wis. 2d 443, 447, 571 N.W.2d 704 (Ct. App. 1997).

ARGUMENT

I. THE SHAREHOLDERS' COMPLAINT STATED A CLAIM FOR SHAREHOLDER OPPRESSION AND THE CIRCUIT COURT ERRED BY DISMISSING THE COMPLAINT BASED ON A PARENTHETICAL IN THE WHEREFORE CLAUSE, WHICH FORMS NO PART OF THE COMPLAINT.

The circuit court dismissed the Shareholders' claim for relief pursuant to Wis. Stat. § 180.1430(2)(b) based on a parenthetical contained in the Complaint's "wherefore" clause, also known as the prayer for relief. In so doing, the circuit court ignored black letter law that the wherefore clause does not negate the validity of a claim, or the court's authority to order appropriate relief – including dissolution of the Brewery. The portion of the Complaint upon which the circuit court based its decision stated:

> WHEREFORE, Plaintiffs seek judgment against Defendants as follows:
>
> > A. The remedies under Wis. Stat. §§ 180.1430(2)(b) and 180.1432 and the Court's equitable powers, including, but not limited to, a judicial order requiring that Defendants acquire Plaintiffs' shares at fair value (To be clear, Plaintiffs are not seeking relief that the court order a complete dissolution of the Brewery, nor the winding up of the Brewery's affairs, but rather order equitable relief that will protect and make whole the Plaintiffs and other minority shareholders).

(R. 32:49-50, APP-058-059). The circuit court concluded that the only form of relief

available under § 180.1430 is dissolution, and that the Shareholders failed to state a claim by indicating their preference that the Brewery not be dissolved. (R. 54:9, APP-009). The court implicitly determined it had no power to grant dissolution even if the Shareholders were to establish entitlement to relief on their § 180.1430 claim, simply because they expressed that they preferred alternative remedies in the prayer for relief.

The crux of the circuit court's reasoning was as follows:

- Wisconsin Stat. § 180.1430 "provides that in certain circumstances (such as the 'oppressive conduct' alleged in this case) the 'circuit court … may dissolve a corporation in a proceeding …."
- "Wis. Stat. § 180.1431 then provides the 'procedure for judicial dissolution[.]'"
- Applying the "'common, ordinary, and accepted meaning'" of the language in Wis. Stat. §§ 180.1430 and 180.1431, a plaintiff pursuing a claim under these statutes may only seek dissolution.
- Because the Complaint's wherefore clause requested an alternative form of relief other than an order requiring a complete dissolution of the Brewery, the Shareholders failed to state a claim under § 180.1430(2)(b). (R.54:8-9, APP-008-009).

Section II of this Brief will address the circuit court's error in concluding that the only relief available under § 180.1430 is judicial dissolution. This Section will address the circuit court's error in: (1) dismissing the Complaint based on relief requested in the wherefore clause; (2) conflating the cause of action with the remedy; and (3) concluding that the Complaint failed to state a claim under § 180.1430.

A. The "Wherefore" Clause of a Complaint Cannot Be Considered In Determining Whether a Cause of Action Has Been Stated.

The circuit court ignored 208 paragraphs of allegations supporting the Shareholders' claim, and concluded the claim failed because the wherefore clause stated the Shareholders' preference that the court grant less drastic equitable relief.

In essence, the circuit court applied a rule of magic words: even though the Complaint contained detailed allegations and identified that the claim was being filed under § 180.1430, the Shareholders failed to use the magic words of "judicial dissolution" properly and, therefore, dismissal was warranted. This is antithetical to Wisconsin's pleading standards. *See* ***Farr v. Alternative Living Servs., Inc.***, 2002 WI App 88, ¶11, 253 Wis. 2d 790, 643 N.W.2d 841 ("[A] pleading need only notify the opposing party of the pleader's position in the case – no 'magic words' are required.").

The circuit court further erred by focusing on the *wherefore* clause. The wherefore clause of a complaint is not determinative of whether a cause of action has been stated. As the Wisconsin Supreme Court held: "We cannot consider the 'wherefore' clause of the complaint to determine whether a cause of action is stated. It forms no part of the complaint." ***Mayer v. Mayer***, 26 Wis. 2d 671, 678, 133 N.W.2d 322 (1965) (citations omitted) (emphasis added).

The wherefore clause, also called the "ad damnum" clause, "is no substantive part of a complaint and the fact that the plaintiff 'asks for more relief than that which his pleaded facts entitle him to have is not reached by demurrer.'" ***D'Angelo v. Cornell Paperboard Products Co.***, 19 Wis. 2d 390, 398, 120 N.W.2d 70 (1962) (citations omitted). "'[T]he ad damnum clause is not a substantive part of the complaint' and 'is nothing more than an asking price.'" ***Baumann v. Elliott***, 2005 WI App 186, ¶15, 286 Wis. 2d 667, 704 N.W.2d 361 (citations omitted).

The wherefore clause simply contained the Shareholders' preferred form of relief – a judicial order requiring that the Defendants acquire the Shareholders' shares at fair value – rather than an order dissolving the Brewery. This was nothing more than the Shareholders' "asking price." ***Id***. It was not a substantive part of the Complaint. The substance was contained in the preceding 208 paragraphs, which contained detailed allegations notifying the other parties of the Shareholders' claims. The circuit court's reliance on the wherefore clause was erroneous.

The "asking price" is even less relevant in this case because a court sitting in equity has the power to "apply an equitable remedy as necessary to meet the needs

of the … case." ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). Regardless of the relief requested in the Complaint, the circuit court was empowered to fashion the remedy it deemed appropriate. Indeed, the circuit court could still ultimately have ordered the Brewery dissolved regardless of the Shareholders' demand for relief. Instead, the circuit court determined without explanation that not only was dissolution the only relief available, but that it was somehow powerless to grant that relief. The circuit court erred by concluding the Complaint failed to state a claim under § 180.1430 based on the content of the wherefore clause, which "forms no part of the complaint." ***Mayer***, 26 Wis. 2d at 678.

B. The Circuit Court Conflated the Cause of Action With the Remedy.

The circuit court also erred by conflating the cause of action alleged with the remedy requested. "'A cause of action is distinguished from a remedy which is the means or method whereby the cause of action is effectuated.'" ***Tikalsky v. Friedman,*** 2019 WI 56, ¶15, 386 Wis.2d 757, 928 N.W.2d 502 (citations omitted). "[A] cause of action owes its existence to a set of operative facts." ***Wussow v. Commercial Mechanisms, Inc.***, 97 Wis. 2d 136, 145-46, 293 N.W.2d 897. "[T]he remedy or relief sought should not be confused with the concept of a cause of action." ***Id.*** "[I]t is the operative facts … that determine the unit to be denominated as the cause of action, not the remedy or type of damage sought." ***Id.*** at 146. A cause of action "is concerned with 'whether the claim is enforceable at all,'" which is a different question from the "remedy … afforded." ***Id.*** (citations omitted).

Here, the cause of action is for minority shareholder oppression pursuant to § 180.1430(2)(b). The showing of oppressive conduct is the mechanism by which the court acquires jurisdiction under the governing statute to consider a remedy. *See* ***Baker v. Commercial Body Builders, Inc.,*** 264 Or. 614, 631, 507 P.2d 387 (1973) (a showing of oppressive conduct "may be sufficient *to confer jurisdiction* upon the court under [the dissolution statute]" although the court does not have to exercise that power) (emphasis added). Oppression is the claim the Shareholders must prove to show entitlement to relief. This cause of action is amply set out in the 208 paragraphs

of the Complaint. The circuit court glossed over all of those facts and based its dismissal on the Shareholders' *request* for an alternative remedy.

Moreover, the circuit court's decision also ignored its independent ability to order dissolution regardless of the parties' requested relief if they are successful on the merits. If the case were to proceed to a determination on the merits and the Shareholders proved oppression, the court could order judicial dissolution under § 180.1430(2)(b) regardless of what either party demanded. Instead, the circuit court implicitly ruled, incorrectly, that a plaintiff's requested remedy strips the court of its own authority to order specific relief provided by statute.

The circuit court's task was to determine whether "the alleged facts comprise one or more causes of action." ***Tikalsky***, 386 Wis. 2d 757, ¶16. The Complaint sets out a detailed set of facts that comprise a cause of action under § 180.1430 and the circuit court's decision should be reversed.

C. The Complaint Stated a Claim Under Wis. Stat. § 180.1430.

To determine whether the Complaint states a claim upon which relief may be granted, the Court must look to the factual allegations in the complaint. ***Data Key***, 356 Wis. 2d 665, ¶18. The complaint must contain "[a] short and plain statement of the claim, identifying the transaction or occurrence … out of which the claim arises and showing the pleader is entitled to relief." Wis. Stat. § 802.02(1)(a).

Claims for minority shareholder oppression must be alleged under § 180.1430, "Grounds for judicial dissolution," which states in pertinent part:

> The circuit court for the county where the corporation's principal office … is or was last located may dissolve a corporation in a proceeding …
>
> > (2) By a shareholder if any of the following is established:
> > …
> > (b) that 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.

The Wisconsin Supreme Court has discussed judicial dissolution and shareholder oppression interchangeably. *See* ***Northern Air Services, Inc. v. Link***, 2011 WI 75, ¶¶88-90, 336 Wis. 2d 1, 804 N.W.2d 458 (discussing a claim under § 180.1430 and

explaining that "[t]he purpose of a shareholder oppression claim is to provide a method of recourse to minority shareholders who are subject to 'burdensome, harsh and wrongful conduct at the hands of the majority shareholder.'").

The Complaint articulated in great detail a claim under § 180.1430(2). It repeatedly identified the operative statute and the nature of the Shareholders' claim, including in the following portions:

- Paragraph 1 – "The Plaintiffs … pursue this action for shareholder oppression under Wis. Stat. § 180.1430(2)(b)."
- Paragraph 4 – "Wisconsin law, based on Section 180.1430(2)(b), protects minority shareholders from burdensome, harsh and wrongful conduct by directors and controlling shareholders, and from oppressive actions …. The Plaintiffs seek that protection in this case."
- Page 44 – "Claim Two: Relief Pursuant to Wis. Stat. § 180.1430(2) For Minority Shareholder Oppression."

(R.32, APP-014, APP-053). The Complaint invoked the applicable dissolution statute by repeatedly stating that the action was being brought under § 180.1430(2).

The circuit court's conclusion that the Shareholders failed to state a claim under § 180.1430(2) by informing the court and the other parties of their preference that the court not order the dissolution of the Brewery does not square with the text of the Complaint. The Complaint repeatedly invokes § 180.1430(2) and states in plain terms that the Shareholders are seeking protection from burdensome, harsh, and oppressive conduct. "'[A] pleading must give the defending party fair notice of … the … claim [and] the grounds upon which it rests …." ***Clark v. League of Wisconsin Municipalities Mut. Ins. Co.***, 2021 WI App 21, ¶28 n. 10, 397 Wis. 2d 220, 959 N.W.2d 648 (citations omitted). The Complaint satisfied this requirement.

The Complaint is extremely detailed, mapping out exactly how the Shareholders allege they have been oppressed. A summary of the key allegations regarding Defendants' oppressive conduct is as follows:

- ***Carey Exempts Herself and Her Family from the Shareholder Agreement.***
  - Carey secretly exempted herself from the Shareholder Agreement that binds all other shareholders, thus ensuring that she was not bound by the stock transfer restrictions in the Shareholder Agreement.
  - The Shareholder Agreement states that the "Corporation agrees to require all future shareholders … to execute this Agreement." Despite this language Carey transferred shares of her stock to her daughter and her daughter's trust, and secretly exempted her family from being bound by the Shareholder Agreement. (R.32, ¶¶55-65, 82, APP-025-030).
- ***Carey Fails to Inform Shareholders of Corporate Business and Ignores Conflicts of Interest.***
  - Carey controls the Brewery with an iron fist and makes virtually all corporate decisions without informing the shareholders in advance. Carey unilaterally created an Employee Stock Ownership Program ("ESOP") only informing the Shareholders of its creation after the fact at an investor meeting.
  - Carey originally named herself as the ESOP trustee – a significant conflict of interest. The ESOP is also not bound by the Shareholders' Shareholder Agreement, which Carey did not disclose until June of 2021. (R.32, ¶92, APP-032)
  - Carey routinely ignores conflicts of interest, including loaning herself money from the Brewery and negotiating contracts between her other companies and the Brewery. (R.32, ¶¶18, 67, 80-98, 105, APP-0014, APP-030-033).
- ***Carey Reinvented the Purpose of the Brewery and Now Operates the Brewery to That Effect.***
  - Carey unilaterally changed the purpose of the Brewery from operating "a profitable business for the Corporation's investors" to remaining locally owned and independent and operating for the benefit of the community.

- Carey pushed through a change to the Bylaws to reflect her reinvented mission.
- Amendments to bylaws require a majority vote and advance notice of a special meeting. These requirements were not followed; instead, the Shareholders were told there was no point in allowing a vote because Carey has voting control. The signed Bylaw Amendment states that it was passed by a "unanimous vote" of the shareholders, but no vote ever took place. (R.32, ¶¶120-128, APP-035-037).

- ***Carey Causes the Brewery to Retain Substantial Profits While Offering Fictitious Reasons for Doing So.***
  - Defendants have repeatedly stated that they will not permit distributions of profits to the Shareholders beyond what is required to cover Shareholders' pass-through income tax obligations.
  - The Brewery has retained earnings of approximately $100 million, $40 million in cash and cash equivalents, and virtually no debt.
  - Defendants have proffered false reasons for their refusal to pay distributions above the minimum required for tax purposes.
  - Defendants are stockpiling cash because it is the personal preference of Carey, with no plans for investment or other prudent corporate purposes.
  - The Brewery has repeatedly told the Shareholders that no one would ever be interested in buying their stock because no one would want to invest in a company that will never distribute actual profits. (R.32, ¶¶69-79, 181-200, APP-028-030, APP-053-058).
- ***Carey and the Brewery Actively Attempt to Reduce the Value of the Shareholders' Shares While Enriching Carey.***
  - If the Shareholders wish to have the Brewery redeem any of their shares, the Brewery bases the redemption price on the ESOP valuations.
  - The ESOP valuations are artificially low, resulting in a decreased value of the Shareholders' shares, while substantially increasing the value of

Carey's shares, because Carey's shares are entirely unrestricted.

- Additionally, Defendants will only agree to redeem the Shareholders' voting shares, thereby increasing Carey's voting control. The Brewery has openly stated that "getting rid of people who have voting shares and a say in the company is great."
- Carey and the Brewery either fail to provide complete and accurate information to the valuation firm that provides the ESOP valuations or have improperly influenced the valuations.
- Carey has stated that she has received outside offers for 10% of her Brewery shares for $100 million, yet the most recent ESOP valuation concludes the entire Brewery is valued at between $92.8-$113 million.
- Carey has also stated publicly that the value of the Brewery is probably closer to $200 million. (R.32, ¶¶49-53, 127, 140-146, APP-023-024, 037-040).

- ***Carey and the Brewery Attempted to Impose a New, Oppressive Shareholder Agreement And Lied About Its Effects.***

  - Defendants pushed the minority shareholders to execute a new, oppressive shareholder agreement, falsely stating that it would give the shareholders "additional … rights and benefits."
  - In reality, the new shareholder agreement would have imposed more restrictions on the Shareholders and lowered the value of their stock while dramatically increasing the value of Carey's controlling stock.
  - A comparison of the Shareholder Agreement and the new shareholder agreement is as follows:

Original Shareholder Agreement	**Amended Shareholder Agreement**
The Brewery has a right of first refusal and can purchase the shares at the same price offered by the third party.	The Brewery no longer needs to match the price offered in a proposed third-party sale. Instead, the Brewery can simply take the shares at an artificially low fixed price it controls even when the third-party offer is substantially higher.
The Brewery must exercise its right of first refusal as to either all or none of the selling shareholder's shares.	The Brewery may exercise its new unilateral option right to purchase some, but not all, of a shareholder's shares, thereby permitting the Brewery to redeem only voting shares to further consolidate Carey's voting control.
The Brewery must use its best efforts to make distributions to cover the shareholders' tax obligations.	This language is removed entirely, meaning the Brewery has no obligation to make distributions to cover the shareholders' tax obligations.
The shareholders have the unrestricted right to donate their shares to charity or anyone else as long as doing so does not violate S-corporation ownership rules.	Shareholders may only donate their shares to Carey's Family Foundation.

(R.32, ¶¶150-172, APP-041-048). The shares held by Carey, her daughter and the ESOP would remain unrestricted, and not subject to the new shareholder agreement. (Id.). The Shareholders attempted to negotiate for less oppressive terms, but this failed. (Id.). This litigation was commenced shortly thereafter. The combined effect of Carey's machinations would result in a substantial shift in value from the minority shares to Carey's shares. This is because Carey could now acquire shares at far below fair market value, while retaining the ability to sell her unrestricted shares for actual fair market value which is substantially more than the fixed ESOP price received by the minority shareholders.

The detailed factual allegations in the Complaint satisfy the standards for stating a claim under Wis. Stat. § 180.1430(2)(b). Even after ***Data Key***, Wisconsin still subscribes to notice pleading rules. *See* ***CED Properties, LLC v. City of Oshkosh***, 2014 WI 10, ¶20 325 Wis. 2d 613, 843 N.W.2d 382 (citations omitted).

Wisconsin's "'functional approach to pleading reflects a determination that the resolution of legal disputes should be made on the merits of the case rather than on the technical niceties of pleading.'" ***Id.***, ¶21 (citations omitted). Accordingly, courts "'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" ***Id.***, ¶22 (citations omitted).

The circuit court erred by dismissing the Shareholders' claim under Wis. Stat. § 180.1430 at the pleading stage. The Complaint presents a detailed factual recitation of a classic and egregious case of minority shareholder oppression. The circuit court entirely ignored Wisconsin's rules of pleading, including the requirement that "[a]ll pleadings should be construed as to do substantial justice." Wis. Stat. § 802.02(6). Furthermore, the circuit court's dismissal of the Shareholders' claims with prejudice – and without any opportunity to replead and simply remove the parenthetical – is antithetical to the just adjudication of disputes. The circuit court's decision dismissing the Shareholders' claim under § 180.1430 should be reversed and the claim should be remanded for determination on the merits.

II. THE CIRCUIT COURT ERRED WHEN IT CONCLUDED THAT IT DID NOT HAVE AUTHORITY TO FASHION ALTERNATIVE REMEDIES IN DISSOLUTION CASES.

The circuit court's error with regard to its immediate dismissal *with prejudice* of the Shareholders' claim for minority shareholder oppression pursuant to Wis. Stat. §180.1430(2)(b) is two-fold. First, as argued above, the circuit court erred in dismissing the Complaint based solely on the remedy requested. Even if this Court were to determine that a buy-out of the minority shareholders' shares at fair value is *not* an available remedy, it cannot follow that the Shareholders' request for this relief should subject their oppression claim to dismissal *with prejudice*.

Second, the circuit court erred when it decided without analysis that the oppression statute "does not provide for the form of relief Plaintiffs' seek." (R.32:9, APP-009). Both the great weight of the relevant case law throughout the country and

the legal scholarship that have examined the question of remedies in oppression cases have largely concluded that courts sitting in equity have substantial powers to fashion remedies appropriate to the case. Moreover, no Wisconsin court has ever seriously considered the possibility that courts cannot order alternative relief in oppression cases. Indeed, in every case where the issue of equitable remedies has been addressed, Wisconsin courts have routinely alluded to the availability of a judicially-ordered buy-out as a suitable alternative to the "drastic" remedy of dissolution.

Even if this Court holds that dismissal was improper under Argument I. above, the Shareholders request the Court to provide guidance on the scope of remedies available under §180.1430(2)(b), because otherwise this case will likely be back before this Court in the future on this same issue. This Court should reverse the dismissal of the Complaint and conclude that on remand, the trial judge has at their disposal the full powers of equity to fashion an appropriate remedy.

A. Dissolution is an Equitable Proceeding and Courts Sitting in Equity Have Broad Powers to Fashion Remedies.

Judicial dissolution actions are proceedings in equity. ***Gull v. Van Epps,*** 185 Wis. 2d 609, 622, 517 N.W.2d 531 (Ct. App. 1994). "A trial court has the power to apply an equitable remedy as necessary to meet the needs of a particular case." ***Mulder***, 120 Wis. 2d at 115-16.

> [E]quity…'has never placed any limits to the remedies which it can grant, either with respect to their substance, their form, or their extent; but has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case.'

Id. (citations omitted). The ***Mulder*** Court specifically condoned courts fashioning creative remedies: "If the customary forms of relief do not fit the case, or a form of relief more equitable to the parties than those ordinarily applied can be devised, no reason is perceived why it may not be granted." ***Id.***

The flexibility and expansiveness of available remedies in equity cases is deeply embedded in the purpose and history of equity courts as they have developed over hundreds of years. "Equity favor[s] the things society itself has always …

favored – some sort of fair dealing amongst all people, and relief from mistake, oppression and fraud." Dan B. Dobbs, DOBBS LAW OF REMEDIES § 2.2, at 71 (2d ed. 1993). Courts throughout the country have recognized that disputes among shareholders in closely held corporations are of a particular nature which "demand the unusual and extraordinary remedies available only in a court of equity." ***Maddox v. Norman***, 206 Mont. 1, 14, 669 P.2d 230 (1983). There is no reason why courts of equity adjudicating such complex problems should be permitted only two draconian choices: corporate death or dismissal of meritorious claims.

1. *The weight of cases throughout the nation and the scholarship on remedies for oppression claims supports the Court's broad equitable powers to fashion alternative relief.*

Numerous treatises discuss minority shareholder oppression and the remedies available to make plaintiffs whole. The most well-known is *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members*, which provides substantial detail on judicially-approved remedies for oppression. "If a court finds that the … grounds for shareholder relief have been met, courts may apply a variety of remedies. The traditional remedy of dissolution … has given way in many states, both in statutes and judicial opinions, to remedies based on buyout." 2 F. Hodge O'Neal & Robert B. Thompson, O'NEAL & THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 7:17 (2d ed. 2011) (hereinafter "O'Neal"). While the authors indicate that some states have adopted statutes outlining a variety of remedies, in many other states "courts order buyouts under their general equitable powers." *Id.*

Due to the "traditional view of dissolution as harsh or extreme or as corporate death," there has been a movement away from dissolution as the sole remedy. *Id.* One co-author of *O'Neal*, writes: "The most common remedy for oppression … is a buyout of the oppressed investor's stockholdings." Douglas K. Moll, SHAREHOLDER OPPRESSION AND "FAIR VALUE": OF DISCOUNTS, DATES AND DASTARDLY DEEDS IN THE CLOSE CORPORATION 54 Duke L.J. 293, 308-09 (2004)*; see also* O'Neal § 1.02 at 231 (noting that buyouts "are the most common remedy for dissension within a

close corporation."). In related writings, Thompson notes that "[c]ourts increasingly have ordered buyouts of a shareholder's interest by the corporation or the other shareholders even in the absence of specific statutory authorization." Robert B. Thompson, THE SHAREHOLDER'S CAUSE OF ACTION FOR OPPRESSION, 48 Bus. Law. 699, 720-21 (1993).

As explained below, the analysis to date in Wisconsin cases tracks the line of cases flowing from a seminal Oregon case, ***Baker v. Commercial Body Builders, Inc.,*** 264 Or. 614, 507 P.2d 387 (1973). In ***Baker,*** the Oregon Supreme Court interpreted a dissolution statute substantially similar to Wis. Stat. § 180.1430. ***Baker*** found that "while a showing of 'oppressive' conduct may be sufficient to confer jurisdiction upon the court under [Oregon's dissolution statute], such a showing does not require the court to exercise the power conferred upon it by that statute to require either the dissolution of a corporation or any other alternative equitable remedy." ***Id.***, 631. ***Baker*** further held that "courts are not limited to the remedy of dissolution, but may, as an alternative, consider other appropriate equitable relief," including "the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of minority stockholders[.]" ***Id.***, 633.

Other jurisdictions have stressed *why* the availability of alternative remedies is so gravely important. In examining a statute substantially similar to § 180.1430, the South Dakota Supreme Court held that "[i]t makes little sense to leave trial courts with two draconian options of helplessly dismissing outright a proven cause of action or ordering dissolution of a [successful] corporation." ***Landstrom v. Shaver***, 1997 S.D. 25, 561 N.W.2d 1, 9 (1997). Wisconsin courts should not be so limited, either. There is no rational reason why courts sitting in equity on a claim for shareholder oppression should be faced only with a Hobson's choice – either dismissing outright the Shareholders' claims or dismantling via dissolution a successful craft brewery.

A federal court interpreting Pennsylvania's corporation law artfully described the remedy problem this way: "We find ourselves struck by the unavailability or inadequacy of identifiable legal remedies to aid minority shareholders in redressing

abuses by majority shareholders equipped with unfettered power over the management of the close corporation. We bind ourselves to a careful balance of equities in fashioning appropriate relief under the present circumstances." ***Orchard v. Covelli***, 590 F. Supp. 1548, 1550 (W.D. Penn. 1984). The ***Orchard*** Court found that the majority shareholders had breached their duty to the plaintiff shareholder, but determined that the "extraordinary measure of dissolution [was not] appropriate or necessary. Dissolution would not be beneficial as a practical matter nor in the best interest of the shareholders." ***Id.*** at 1560. Instead, the court ordered a fair value buyout. ***Id.*** While the court acknowledged the defendants' argument that the applicable statute did not provide for that remedy, the court did not view the statute as a bar to its equitable powers, noting that the statutes contemplate fair value buyouts in other scenarios, including in dissenter's rights actions. ***Id.*** The Court "grant[ed] similar relief … that is not proscribed by the statutory framework" as a means of confronting the "need of finding an adequate method of paying a shareholder for the taking of his property." ***Id.***

The ***Baker***, ***Landstrom***, and ***Orchard*** cases involved substantially similar statutory language as § 180.1430; in each case, the court provided a reasoned articulation for why the applicable statute did not, as a matter of law, prevent courts of equity from fashioning alternative remedies. Numerous cases cite ***Baker*** and its progeny with favor or arrive independently at the same conclusion. Given the significance of this issue regarding available remedies, the Shareholders provide the following summary:

- Missouri: In ***Fix v. Fix Material Company, Inc.***, the Missouri Court of Appeals aligned itself with ***Baker*** in interpreting a substantially similar statute identifying only dissolution as the remedy for oppression, holding: "The court is not limited to the remedy of dissolution but may consider other appropriate alternative equitable relief." 538 S.W.2d 351, 357 n.3 (Mo. App. 1976).

- New York: In ***Gimpel v. Bolstein***, a New York court specifically found that although the conduct at issue did not rise to the level of oppression which could justify dissolution of the corporation, that did not mean the court was "without jurisdiction to fashion a remedy here." 125

Misc.2d 45, 54, 477 N.Y.S.2d 1014 (Sup. Ct. 1984). Similar to Wisconsin's statute, the New York oppression statute "makes explicit mention of only one remedy, that being liquidation[.]" ***Id.*** However, "the court is also charged to consider whether that is the only means available to protect the rights of the petitioning shareholder. Clearly, this gives the court discretion, in the proper case, to fashion an appropriate remedy." (Citations omitted). *See also*, ***Muller v. Silverstein***, 92 A.D.2d 455, 458 (1983).

- Maryland: In ***Edenbaum v. Schwarcz-Osztreicherne***, 165 Md. App. 233, 260, 885 A.2d 365 (2005). The court noted that the power to dissolve a corporation is "a discretionary one, to be exercised with great circumspection[.]" ***Id.*** Citing to ***Baker***, the court found: "While Corps. & Ass'ns § 3-413 only mentions dissolution as a remedy for oppressive conduct, we join other courts today 'which have interpreted their similar statutory counterparts to allow alternative equitable remedies not specifically cited in the statute.'" ***Id.*** (citations omitted).

- New Mexico: In ***McCauley v. McCauley & Son, Inc.,*** 104 N.M. 523, 527, 724 P.2d 232 (N.M. App. 1986), the court interpreted a substantially similar statute, and held: "We initially approve the trial court's recognition of remedies not specifically stated in the oppressive conduct statute." ***Id.***

- Alaska: In ***Alaska Plastics, Inc., v. Coppock***, the Alaska Supreme Court held that a court could order a corporation to purchase the shares of a complaining shareholder under the governing oppression statute, which was similar to Wisconsin's. 621 P.2d 270, 274 (1980). "Liquidation is an extreme remedy…. Absent compelling circumstances, courts often are reluctant to order involuntary dissolution. As a result, courts have recognized alternative remedies based upon their inherent equitable powers." ***Id.*** (internal citations omitted).

- Iowa: In ***Sauer v. Moffitt***, the Iowa Court of Appeals interpreted a statute similar to Wisconsin's. 363 N.W.2d 269, 274 (Iowa Ct. App. 1984). Citing to ***Baker***, the ***Sauer*** Court held: "The district court has the power to liquidate a corporation under section 496A.94(1). We agree with the Oregon court and find that Iowa Code § 496A.94(1) allows the district court to fashion other equitable relief." ***Id.*** at 275.

- Montana: In ***Maddox v. Norman,*** the Montana Supreme Court refused to liquidate and dissolve a corporation despite a shareholder's petition to do so, instead ordering a buyout of the shareholder's shares. 206

Mont. 1, 9, 669 P.2d 230 (1983). The court held that the statute was permissive and did not *mandate* dissolution. ***Id.*** at 10. The ***Maddox*** Court recognized its position as a court of equity: "Dissolution actions must be resolved on a case-by-case basis, balancing the underlying equities and eschewing rigid, predetermined rules …" ***Id.*** at 12. "[I]n the corporate dissolution context, courts of equity are not bound by cast-iron rules." The court also noted that cases from other jurisdictions (including those outlined in this brief) "do not seriously question whether courts have such power [to order a stock purchase,] only whether its exercise is appropriate in the particular case." ***Id.*** at 16.

- Alabama: In ***Belcher v. Birmingham Trust National Bank***, the court determined that while the evidence before it justified dissolution of the corporation, the balance of the equities did not. 348 F. Supp. 61, 152 (S.D. Ala. 1968). Even though there was no authority on point, the ***Belcher*** Court opined that, since there was "no prospect of harmony" between the shareholders, the case's special master could devise a valuation formula such that "those in the minority can tender their shares of stock to the Corporation … in exchange for properties of the Corporation." ***Id***. The court concluded that "the absence of precedents … presents no obstacle to the exercise of the jurisdiction of a court of equity." ***Id.***

- West Virginia: In ***Masinter v. WEBCO Co.,*** the West Virginia Supreme Court of Appeals remanded a case for further factual development on an oppression claim, citing ***Baker*** and noting ten possible remedies short of dissolution. 164 W.Va. 241, 254, 262 S.E. 2d 433 (1980).

- Indiana: In ***G&N Aircraft, Inc., v. Boehm***, the Indiana Supreme Court affirmed a lower court's ruling of a forced buyout. 743 N.E.2d 227, 243 (Ind. 2001). Because the court was sitting in equity, the court could fashion an appropriate remedy in cases involving close corporations *including* "dissolution or sale of shares" despite the lack of statutory authority for either remedy. ***Id.*** at 244.

This Court should contrast the breadth of these well-reasoned cases with the limited national authority supporting Defendants' position. Defendants relied on two cases in the circuit court which found that statutory language specifying only

dissolution placed a limit on the court's equitable powers.[3] In ***Giannotti v. Hamway***, the Virginia Supreme Court determined that "the remedy specified by the legislature, while discretionary, is 'exclusive,' and does not permit the trial court to fashion other, apparently equitable remedies." 239 Va. 14, 28, 387 S.E.2d 725 (1990). The ***Giannotti*** Court never provided the kind of reasoned analysis present in the cases cited by the Shareholders, nor did it grapple with the perplexing problems created by allowing only a harsh binary choice.

Defendants also cited to a Texas Supreme Court case, ***Ritchie v. Rupe***, in which the court held that the lower court did not have the authority to order a forced buyout in an oppression case. 443 S.W.3d 856, 872 (Tex. 2014). While the ***Ritchie*** Court did include more analysis than the ***Giannotti*** Court, ***Ritchie's*** holding is inapplicable. Unlike Wisconsin courts, the ***Ritchie*** Court crafted a much higher bar for a plaintiff in an oppression case, specifically requiring a showing that those in control:

> abuse their authority over the corporation with the intent to harm the interests of one or more shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation.

Id. at 871.

As the Shareholders argued, Wisconsin law does not impose such substantial burdens on oppressed minority shareholders. Instead, in Wisconsin, oppression is defined as:

> Burdensome, harsh and wrongful conduct; lacking in probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of probity and fair dealing and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

Jorgensen v. Water Works, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998).

[3] Defendants also cited to a Minnesota case, ***Sundberg v. Lampert Lumber Co.,*** 390 N.W.2d 352, 356 (Minn. Ct. App. 1986). However, the legislature later abrogated this decision by passing an amendment to ensure that courts do indeed have the power to order suitable equitable relief in oppression cases. *See* ***Berreman v. West Pub. Co.,*** 615 N.W.2d 362, 368 (Minn. Ct. App. 2000).

"This definition is intended to be broad and flexible," and includes "consideration of the frustration of the reasonable expectations of shareholders." ***Id.*** at 783 n.10. No Wisconsin court has held that oppressive conduct can only be found when those in control not only have a specific intent to harm constituting a serious risk to the company and creating exigent circumstances for the corporation. In other words, it is unnecessary as a matter of policy for Texas courts to have less drastic remedies available because oppression claimants must already establish such a serious risk of harm that an entitlement to relief necessarily justifies the harshest possible remedy.

To that end, courts throughout the country (as cited above), routinely order the consideration of alternative remedies precisely *because* the conduct at issue, while perhaps oppressive or otherwise a breach of duty to the minority shareholder, is not so egregious that it merits imposition of the drastic remedy of dissolution. *See e.g.* ***Orchard,*** 590 F. Supp. at 1559; ***Gimpel,*** 125 Misc.2d at 55.

The governing standards for oppression cases in Wisconsin specifically recognize a wide breadth of conduct which can give rise to an oppression claim. ***Jorgensen****,* 218 Wis. 2d at 783. Nothing in Wisconsin jurisprudence even approaches the hard line Texas courts have taken, and that authority should be disregarded. Instead, this Court should follow the well-reasoned and substantial body of law holding that the dissolution statute is simply an articulation of a court's ultimate discretionary authority to authorize dissolution upon a finding of oppression, and not a limitation on its equitable powers to order lesser, alternative relief.

2. *Wisconsin courts have implicitly approved and accepted a forced buy out for fair value as an alternative remedy in oppression cases.*

Although no published Wisconsin decisions have directly addressed the question of available remedies in oppression cases, several published decisions have implicitly approved a forced buy-out. In fact, the Shareholders could not find a single Wisconsin case in which any Wisconsin court questioned the propriety and availability of these well-accepted alternative remedies. For example, in ***Northern Air Services Inc., v. Link***, a leading Wisconsin case addressing oppressive conduct,

the Court specifically noted that Jay Link "seeks, under the dissolution statute, the difference between the fair value of his shares in Link Snacks – which he argues is a widely accepted damages remedy in judicial dissolution cases – and the fair market value of his shares in Link Snacks, which Jay is owed under the terms of the Buy-Sell Agreement." 2011 WI 75, ¶93. The Court continued to note that Link's "theory of damages for his oppression claim under Wis. Stat. § 180.1430(2)(b) is *well articulated*." ***Id.***, ¶94 (emphasis added). The Court ultimately declined to order the requested remedy because it held (under the complex facts of the case) that "the judicial dissolution statute simply is not the proper vehicle in which to bring [the] claim." However, the opinion makes plain that the Wisconsin Supreme Court has implicitly – if not overtly – aligned itself with the national body of law holding that courts are empowered to consider remedies other than dissolution in oppression cases.

In fact, the Court of Appeals in ***Northern Air*** stated on remand:

> One remedy for oppression of a minority shareholder is dissolution, in which case Jay could have remained a stockholder entitled to a *pro rata* portion of the company's net assets. But dissolution, as Jay recognized before the circuit court, is one of many potential remedies for oppression. *See* ***Dickman v. Vollmer,*** 2007 WI App 141, ¶27, 303 Wis. 2d 241, 736 N.W.2d 202 ("Dissolution does not automatically result even upon proper proof. Dissolution is discretionary.") The circuit court could have required Jack and Troy to turn over complete ownership in the company to Jay, or fashioned some other equitable remedy.

Northern Air Services, Inc. v. Link, No. 2008AP2897, 2012 WL 130531, ¶24 (Wis. Ct. App. Jan. 18, 2012) (unpublished opinion) (emphasis added).

The ***Northern Air*** line of cases is not the only time that the Wisconsin courts have addressed the various remedies available in oppression cases. In ***Notz v. Everett Smith Group, Ltd.,*** Notz brought claims for dissolution under § 180.1430(2)(b) and for dissenter's rights under § 180.1833, after the offending shareholders had effectuated a cash-out merger of the corporation. 2009 WI 30, ¶10, 316 Wis. 2d 640, 764 N.W. 2d 904. Notz requested a judicially ordered buy-out as one form of relief. The Supreme Court held that Notz's dissolution claim could proceed following the merger based on statutory language allowing the claim to proceed "as if the merger

did not occur." ***Id.***, ¶5. Playing this holding out to its conclusion, if Notz proved his claim under § 180.1430(2)(b), dissolution could not be ordered as a remedy because the corporation against which dissolution was sought had been merged into another corporation. As Justice Roggensack observed in her concurring opinion, this meant Notz's remedy would be having "the fair value of [his] shares … paid to him." ***Id.***, ¶43. The inability to order dissolution as a remedy did not bar Notz's § 180.1430 claim from proceeding.

Notz and ***Northern Air*** make it readily apparent that Wisconsin courts have never questioned the propriety of alternative remedies in dissolution cases. Courts of equity have broad authority to fashion relief in minority shareholder oppression cases, and this Court should reverse the holding of the circuit court to the contrary.

3. *Principles of statutory interpretation support the availability of alternative equitable remedies in oppression cases.*

Defendants argued that principles of statutory interpretation necessarily imply limits on courts of equity when applied to statutes stating identifiable remedies. As argued above, courts interpreting similar dissolution statutes have given little weight to this line of argument. Moreover, the Wisconsin Supreme Court has declined to recognize such limits when it has analyzed statutorily defined remedies in equitable proceedings. *See, e.g.,* ***Prince Corp. v. Vandenberg****,* 2016 WI 49, ¶48, 269 Wis. 2d 387, 882 N.W.2d 371. ***Prince*** involved a partition action, which "is governed primarily by statute, [but] is also equitable in nature." ***Id.*** Under the strict terms of the applicable statute, partition actions can result in two statutorily defined remedies: judgment of partition pursuant to § 842.14, or a judicial sale pursuant to § 842.17.

However, the circuit court in ***Prince*** refused to order either statutory remedy. ***Id.***, ¶¶50-51. After considering and disposing of the two available statutory remedies, the circuit court "specifically noted and considered its ability to fashion some other remedy such as partitioning the real estate *and* ordering a private sale to [defendant] 'free and clear of all liens and encumbrances.'" ***Id.***, ¶52 (emphasis added).

The Supreme Court in ***Prince*** approved of the circuit court's consideration of

various remedies not specifically allowed by statute, citing with favor a Court of Appeals decision which held: "Partition is an equitable proceeding; a court of equity seeks to do justice between the parties, and the trial court is not restricted to the statutory remedies … but it is within the discretion of the trial court to order any remedy … that is equitable." ***Schmit v. Klumpyan,*** 2003 WI App 107, ¶¶22, 26, 264 Wis. 2d 414, 663 N.W.2d 331 (internal citations omitted); *see also* ***Heyse v. Heyse,*** 47 Wis. 2d 27, 37, 176 N.W.2d 316 (1970). The Wisconsin Supreme Court has made clear that when actions in equity are codified into statutes with specific statutory remedies, a court sitting in equity can consider remedies other than those provided in the statutes. ***Id.***, ¶52.

Defendants' arguments in the circuit court ignored these tenets. Relying on ***GMAC Mortgage Corporation v. Gisvold,*** Defendants argued that a court's equity powers cannot be exercised in conflict with a "statutory mandate." 215 Wis. 2d. 459, 476, 572 N.W.2d 466 (1998). However, the holding in ***GMAC*** reveals that the tenets of statutory interpretation in the equity context actually *support* the Shareholders' position that courts of equity are not bound by statutory remedies.

As ***GMAC*** made clear, while a court's equity powers are not 'unfettered,' "a circuit court's equitable authority may not be limited absent a 'clear and valid' legislative command." ***Id.*** (internal citations omitted); *see also* ***Porter v. Warner Co.,*** 328 U.S. 395, 398 (1946) ("The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."). Here, there is no "statutory mandate" at play, nor a "clear and valid legislative command" which could otherwise serve to curtail the court's equitable authority to order alternative remedies.

Defendants argued to the circuit court that the right at issue was the "right to require the Brewery or Carey to purchase [the Shareholders'] shares." (R.50:5). This misstates the fundamental rights at issue in this case and improperly conflates "right"

with "remedy." In asking the circuit court to consider ordering an equitable buy-out of their shares, the Shareholders were not arguing that they had a "legally protected" right to obtain such a buy-out. Rather, the Shareholders assert that as minority shareholders in a closely-held corporation, they have a legally protected right to remain free from "burdensome, harsh and wrongful conduct" and from "a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." ***Jorgensen,*** 218 Wis. 2d at 783. An equity court is empowered to protect the Shareholders' legal rights by crafting any remedy appropriate to fit the needs of the case. *See* ***Mulder***, 120 Wis. 2d at 115.

A court of equity can order the remedy the Shareholders seek without "ignor[ing] a statutory mandate." ***GMAC***, 215 Wis. 2d. at 476. Nothing in the applicable statutes governing oppression can be (or has been) construed as a statutory mandate constraining the court's equitable powers. The language of § 180.1430 is fundamentally permissive when it states that a court "may" dissolve a corporation in a proceeding where oppression is established. Moreover, there are no words of "positive prohibition" – no affirmative requirement that dissolution be ordered or that dissolution be the only remedy flowing from a finding of oppressive conduct. *See, e.g.,* ***State v. Industrial Comm'n***, 233 Wis. 461, 289 N.W. 769, 771 (1940) (lack of words of "positive prohibition" relevant to determination that statutory time period was directory and not intended as a limitation).

Moreover, the very next statutory provision, § 180.1431(1), specifically contemplates the possibility that other relief can be had in the context of judicial dissolution proceedings: "It is not necessary to make shareholders parties to a proceeding to dissolve a corporation *unless relief is sought against them individually*." (Emphasis added). Here, individual relief is indeed sought against Carey. The Complaint specifically seeks an order requiring Carey to buy the Shareholders' shares at fair value, among other remedies. That relief is something other than dissolution of the corporation, and a court sitting in equity is empowered to order whatever relief will accomplish substantial justice between the parties.

The circuit court read too much into the *absence* of statutory language expressing affirmative approval of alternative remedies, which can hardly be construed as the type of "clear and valid legislative command" that operates to substantially curtail the proper authority of equity courts. ***Porter***, 328 U.S. at 398. This Court should reverse the circuit court and find that the trial judge may fashion remedies other than dissolution under its equitable powers.

III. THE SHAREHOLDERS STATED A CLAIM FOR SECURITIES FRAUD UNDER WIS. STAT. § 551.501(2) BASED ON BOTH AFFIRMATIVE MISREPRESENTATIONS AND OMISSIONS, INCLUDING GROSSLY INACCURATE ESOP VALUATIONS, AND OMITTING THAT DEB CAREY HAD RECEIVED AN OFFER FOR 10% OF THE BREWERY STOCK FOR ROUGHLY TEN TIMES THE PRICE OFFERED TO THE SHAREHOLDERS, AND THIS COURT SHOULD REVERSE THE CIRCUIT COURT'S DISMISSAL OF THE CLAIM.

The Shareholders agreed to sell some of their shares, because it had been made clear to them that they would never receive the benefit of their valuable securities beyond distributions calculated by the Brewery to slightly cover the Shareholders' tax obligations on Brewery income. They agreed to sell their voting shares (and not the non-voting shares) only because the Brewery made clear it would only purchase voting shares.

Before selling in January of 2019, the Shareholders requested Brewery financial statements, along with valuations that had been conducted by the Brewery for purposes of the ESOP. (R.32, ¶177(b)-(d), APP-048-049). Although Defendants disclosed what the most recent ESOP valuation figure was (for 2017), Defendants ignored requests for the ESOP Valuation report and supporting documents upon which the purchase price was based. (R.32, ¶177(e), APP-049). Defendants also failed to disclose other material facts, including that Carey had received an offer for a 10% ownership interest in the Brewery that was roughly 10 times the amount that the Defendants were stating the shares were worth. (R.32, ¶177(i), APP-050). Based on the limited and misleading information available to the Shareholders, they agreed

to sell shares.[4]

Defendants directed that while the Brewery would redeem Speer and Eichhoff's shares, that Runyan's shares would be sold to the ESOP. Starting in approximately June of 2021, the Shareholders became aware of the omitted facts outlined in the Complaint. They finally received copies of the ESOP valuations for some of the preceding years, along with certain financial statements. (R.32, ¶177(l), APP-051). The Shareholders also discovered in a conversation with Defendants that there was a third-party offer to purchase a 10% ownership interest in the Brewery for $100 million, even though Defendants had represented to the Shareholders that the value of a minority ownership interest would equate to a 10% interest being worth only $9.3-11.3 million. (R.32, ¶140, APP-039).Defendants also made statements at the June 2021 shareholder meeting suggesting that Carey's shares were worth between $300-700 million, and she was concerned about her heirs paying $40-80 million in estate taxes. (R.32, ¶169, APP-047).[5]

The Shareholders' securities fraud claim alleged numerous misrepresentations and omissions, including those outlined above. (R.32, ¶177(a)-(m), APP-048-052). The circuit court granted the Defendants' Motions to Dismiss, ruling as a matter of law that the ESOP valuations and fair market value were irrelevant, and that no fraud claim could be asserted based on any other misrepresentations or omissions because the Brewery was the party who set the market for the shares and both the Brewery and the Shareholders agreed on the price paid. (R.54:7, APP-007).

The circuit court also relied on selected documents outside of the Complaint (and not referenced therein) that were included with Defendants' brief, without affidavit, in support of their Motion to Dismiss. It was improper to consider these extraneous documents, particularly when other documents contemporaneous with the stock sale (including emails from Defendants that would reveal representations that

[4] The Brewery redeemed 1,250 shares from Eichhoff and 625 shares from Speer, and Defendants directed that the ESOP purchase 40 shares from Runyan. (R.32, ¶¶145, 174, APP-040, 048).

[5] Carey's ownership interest is roughly 38% of all shares, and 50.5% of voting shares. (R.32, ¶35, APP-021).

the price was a fair market value price) would have countered arguments made by Defendants regarding the materiality of the misrepresentations and omissions. The circuit court improperly weighed select evidence to determine materiality which is improper at the Motion to Dismiss stage.

The Shareholders' claim for securities fraud is predicated on Wis. Stat. § 551.501(2), which reads as follows:

> **551.501 General fraud.** It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following:
> …
> **(2)** To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

A securities fraud claim is based on whether the alleged defrauder had a duty to disclose information that would have made the victims' investment decisions different, or would have made a difference in the investment decisions of a reasonable investor. A securities fraud claim does not fail because the victim agreed to a price, or because the alleged defrauder had the authority to set the price. Essentially, the circuit court's ruling would mean that no securities fraud claim could ever be maintained – and certainly not a claim based on omission – because a consummated sale always occurs when a price has been agreed upon between a buyer and a seller.

This claim can be asserted against any person who makes a material misstatement or omission in connection with a sale of securities, and the Complaint alleges that Defendants made such misrepresentations and omissions. The claim applies equally to the sale of Runyan's shares, because Defendants made the misrepresentations and omissions in connection with the sale, and the Defendants themselves directed that the ultimate purchase be consummated by the ESOP. (R.32, ¶145, APP-040). Furthermore, Wisconsin Stat. § 551.509(7) imposes joint and several liability on persons who directly or indirectly control another person liable; Carey controls the Brewery, and Defendants together control the ESOP.

Wisconsin's securities fraud statutes are very similar to federal securities fraud

statutes, and the state courts may rely on the guidance of the federal courts when interpreting the statutes. *See* ***Cuene v. Hilliard***, 2008 WI App 85, 18 n.4, 312 Wis. 2d 506, 754 N.W.2d 509. The scope of the securities fraud claim is broader than a deliberate or honest omission, particularly when asserted against a fiduciary who is an insider in the corporation. *See* ***Kohler v. Kohler***, 319 F.2d 634, 637 (7th Cir. 1963).

The Shareholders alleged that: they did not know the undisclosed information; they were induced to sell shares based on misleading and incomplete material facts that the Defendants knew; they relied on those statements and omissions; and that would have been important to the Shareholders and other reasonable investors in making their investment decisions because the Shareholders would not have sold at the lower value if they had known the facts. (R.32, ¶¶178-180, APP-052). That is sufficient to state a cause of action, and the circuit court erroneously dismissed the claim at the motion to dismiss stage. The Shareholders also allege they did not discover the misrepresentations and omissions until roughly June of 2021, meaning the claim was timely filed. (R.32, ¶177(i), (j), and (l), APP-050-051); Wis. Stat. § 551.509(10)(b).

The circuit court also focused its decision on the very narrow issue of the ESOP valuation and fair market value. This is perplexing because the Shareholders alleged several misrepresentations and omissions, including one misrepresentation/omission that the ESOP valuation itself would have shown information to a reasonable investor that would have impacted the investor's decision. For example, the Shareholders alleged that the Defendants withheld corporate financial statements and projections made to the valuation firm, when there is a duty to disclose:

> It is unlawful for an insider, such as a majority stockholder, to purchase the stock of minority stockholders without disclosing material facts affecting the value of the stock, known to the majority stockholder by virtue of his inside position but not known to the selling minority stockholders, which information would have affected the judgment of the sellers. The duty of disclosure stems from the necessity of preventing a corporate insider from utilizing his position to take unfair advantage of the uninformed minority stockholders.

Kohler, 319 F.2d at 638.[6]

Wisconsin law has a broad, two-pronged definition of what constitutes a material fact for purposes of securities fraud:

> A fact is a 'material fact' if it could be expected to influence a reasonable investor in making a decision whether to purchase an investment.
>
> A fact is also a 'material fact' if the maker of the representation knows that the investor regards the matter as important in making a decision to purchase an investment, even though a reasonable investor would not regard it as important.

Wis JI-Criminal-JI-2904; ***State v. Johnson***, 2002 WI APP 224, ¶21, 257 Wis. 2d 736, 652 N.W.2d 642.[7]

The ***Johnson*** Court considered a conviction for a securities fraud violation after a bench trial, making clear that it is the fact finder who determines whether or not the omitted/misrepresented fact would have been important to a reasonable investor, or to the investor victimized by the alleged fraud. Whether a misrepresented or omitted fact would have impacted a reasonable investor or the Shareholders is a question that should not have been resolved as a matter of law at the pleadings stage, and circuit court's dismissal was in error:

> Determining whether an omitted fact made a statement materially misleading "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." … Therefore, "a materiality determination is rarely appropriate at the summary judgment stage, let alone on a motion to dismiss."

Friedman v. Rayovac Corp., 295 F.Supp.2d 957, 987 (W.D. Wis. 2003) (citations omitted).

Contrary to the circuit court's ruling, the Shareholders' claim is not based solely on withholding the ESOP valuation, or that the Shareholders were told they were selling at fair market value. Although there were allegations relating to fair

[6] The Defendants also had a duty to provide annual financial statements to the Shareholders pursuant to Wis. Stat. § 180.1620.

[7] Although this is a criminal jury instruction, it is based on the exact same statute – § 551.501(2) – as the civil claim, and the only difference is the criminal charge requires a higher burden of proof.

market value, that was in part because of the Shareholders' knowledge that under ERISA, an ESOP valuation was required to be made based on fair market value. (R.32, ¶177(m), APP-052). Therefore, when the Shareholders saw the ESOP valuation reports and realized they did not accurately represent the fair market value, that fact would have impacted their decision on the price for their shares.

It is also inappropriate to dismiss a securities fraud claim that is based on omitting valuation information and opinions held exclusively by the Defendants. Opinions themselves can be considered material facts for purposes of a properly alleged securities fraud claim if the opinions are open to objective verification. ***Friedman***, 295 F.Supp.2d at 990-91 ("A statement is not mere 'puffery' when it provides specific facts that may be relied on …. Thus, if defendants gave opinions made with no belief of their truth, they are not immune to a lawsuit."); *See also* ***Jersild v. Aker,*** 766 F.Supp. 713, 718-19 (E.D. Wis. 1991) ("Representation of the purchase price of the stock occurred under circumstances that suggest[ed] it be treated not as an opinion of the value of the stock but rather as a representation of fact.")

Regardless of whether there was any representation that the sale price was connected to fair market value, the issue in this case is whether material information was withheld that would have made a difference to the Shareholders or other reasonable investors making investment decisions. The circuit court erred by stating that there could be no viable claim for securities fraud because the Brewery was authorized to set the price for the shares and that the Shareholders agreed to that price. This Court should reverse.

CONCLUSION

The Shareholders ask this Court to reverse the circuit court's order granting the Defendants' Motions to Dismiss, and to remand the case to the circuit court for further proceedings.

Dated this 20th day of February, 2023.

PALMERSHEIM DETTMANN, S.C.

Electronically signed by Kevin J. Palmersheim
Kevin J. Palmersheim
Wisconsin State Bar #1013229
Cathleen A. Dettmann
Wisconsin State Bar #1048315
Erin E. Rome
Wisconsin State Bar #1083092
Attorneys for Plaintiffs-Appellants
1424 N. High Point Road, Ste. 202
P.O. Box 628005
Middleton, WI 53562-8005
(608) 836-6400

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Plaintiffs-Appellants conforms to the rules contained in § 809.19(8)(b), (bm) & (c) for a brief. The length of this brief is 10,763 words.

Dated this 20th day of February, 2023.

PALMERSHEIM DETTMANN, S.C.

Electronically signed by Kevin J. Palmersheim
Kevin J. Palmersheim
Wisconsin State Bar #1013229
Cathleen A. Dettmann
Wisconsin State Bar #1048315
Erin E. Rome
Wisconsin State Bar #1083092
Attorneys for Plaintiffs-Appellants
1424 N. High Point Road, Ste. 202
P.O. Box 628005
Middleton, WI 53562-8005
(608) 836-6400