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WISCONSIN COURT OF APPEALS
DISTRICT IV

Appeal No. 2022AP001958

KARIN EICHHOFF, STEVEN SPEER, AND RODERICK
RUNYAN,

Plaintiffs-Appellants,

vs.

NEW GLARUS BREWING COMPANY AND DEBORAH A.
CAREY,

Defendants-Respondents.

Appeal from the Circuit Court for Green County
The Honorable Faun Marie Phillipson, Presiding
Circuit Court Case No. 2022CV00043

BRIEF OF DEFENDANT-RESPONDENT
NEW GLARUS BREWING COMPANY

GODFREY & KAHN, S.C.
Anthony S. Baish, Bar No. 1031577
David R. Konkel, State Bar No. 1097244
833 East Michigan Street, Suite 1800
Milwaukee, WI 53202-5615
Phone: 414-273-3500
Fax: 414-273-5198

Attorneys for New Glarus Brewing Company

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STATEMENT OF ISSUES FOR REVIEW

The issues on appeal arise out of the efforts by Plaintiffs-Appellants Karin Eichhoff, Steven Speer, and Roderick Runyan (the “Dissident Minority Shareholders”) to rewrite the terms of their investments in Defendant-Respondent New Glarus Brewing Company (the “Brewery”). The Dissident Minority Shareholders’ Statement of the Issues attempts to reimagine the circuit court’s decision and order dismissing the Amended Complaint. Distilled to their essence, the two issues on appeal are as follows:

1. Did the Dissident Minority Shareholders’ Amended Complaint state a claim under Section 180.1430? (This issue is addressed in Section I, below.) The circuit court answered: no.
2. Did the Dissident Minority Shareholders’ Amended Complaint state a claim for securities fraud under Section 551.501? (This issue is addressed in Section II, below.) The trial court answered: no.

STATEMENTS ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent New Glarus Brewing Company requests oral argument and recommends that the Court's opinion be published because it will assist the Court in cutting through the Appellants' shifting positions and policy-laden arguments.

COUNTERSTATEMENT OF THE CASE

I. Nature of the Case

Thirty years ago, the Dissident Minority Shareholders made the fortuitous decision to invest in a startup craft brewery in a small town in Wisconsin—New Glarus Brewing Company. During those 30 years, the Dissident Minority Shareholders were never employees at the Brewery. They never held management positions. They were never paid a salary. They never served as directors. They played no role in day-to-day operations. That is, the Dissident Minority Shareholders are and always have been passive minority investors.

Rather, the Brewery has had only one President and Director—Deb Carey. She is and always has been the majority owner of the Brewery's voting stock. Carey, along with her husband as its only Brewmaster and a team of dedicated employees (many of whom are now employee-owners through an employee stock ownership plan), together with 22 additional minority investors, built the Brewery into one of the largest craft breweries in the country. As passive minority owners, the Dissident Minority Shareholders received annual dividends for many years and ultimately realized a 20,000% return on their investments in January 2019.

In August 2021, the Dissident Minority Shareholders started a series of legal battles—first in Dane County and then in Green County—contending that Carey and the Brewery are engaged in a scheme of oppression and securities fraud. After its attempt to litigate its original complaint and amended complaint against the Brewery in Dane County failed for improper venue, the Dissident

Minority Shareholders filed a new action in Green County, followed by yet another Amended Complaint (their third in total). After extensive briefing and oral arguments, the Green County Circuit Court dismissed the Dissident Minority Shareholders' Amended Complaint with prejudice in a written decision.

Judge Phillipson, well familiar with securities fraud and complicated claims from private practice, cut through the Dissident Minority Shareholders' lengthy Amended Complaint. She correctly concluded that the Dissident Minority Shareholders' deliberate and repeated abandonment of the only relief contemplated under Section 180.1430 was fatal to their oppression claim, having considered the non-precedential authority and policy-based arguments presented by the Dissident Minority Shareholders. She similarly cut through the Dissident Minority Shareholders' claim of securities fraud by concluding that the price offered and paid for the shares in 2018 was not and could not be a misrepresentation as a matter of law.

II. Procedural History

The Dissident Minority Shareholders original complaint was filed in August 2021 in the Dane County Circuit Court. (R.16.) The Brewery and Carey moved to dismiss and to change venue. (R.16.) The Dissident Minority Shareholders filed an amended complaint, dropping the claim for securities fraud. (R.16.) The Brewery and Carey again moved to dismiss. The motion for change of venue was granted in part with an order severing the Dissident Minority Shareholders' claim under Section 180.1430 and dismissing it without prejudice.

(R.16.) The Dissident Minority Shareholders' claim against Carey for breach of fiduciary duty remains pending in Dane County.

The Dissident Minority Shareholders refiled in Green County Circuit Court on March 8, 2022. (R.16.) Carey and the Brewery filed motions to dismiss on March 18, 2022. (R.19, 21.) The Dissident Minority Shareholders filed an Amended Complaint on May 23, 2022, adding back the securities fraud claim. (R.32; APP-013-160.) Carey and the Brewery filed Motions to Dismiss. (R.46, 48.) The circuit court heard oral arguments on August 23, 2022 (R.52; APP-161-233), and issued a written decision granting the Defendants' Motions to Dismiss on October 6, 2022. (R.54.) The Dissident Minority Shareholders timely appealed.

STATEMENT OF FACTS

The Brewery is an “extremely successful” Wisconsin-based and employee-owned company. (R.32 (“Am. Compl.”) ¶¶ 2, 15, 27, 39; APP-014, 016, 020, 022.) The Brewery “reinvested profits into the business, grew the business, practiced sound corporate governance, and increased shareholder value.” (*Id.* at ¶ 15; APP-016.) The results have been spectacular. The Dissident Minority Shareholders made their initial investments at just \$10 per share—all subject to a 1993 Private Placement Memorandum, Subscription Agreements, Shareholder Agreements, Articles of Incorporation, and Bylaws. (*Id.* at ¶¶ 9, 18, 41, 42; APP-015, 017-018, 022.)¹ The Dissident Minority Shareholders long ago fulfilled their hope that the “investment was a sound one, with the potential for big returns.” (Am. Compl. at ¶ 13; APP-016.)

The Brewery’s success is the result of years of hard work by Carey. Since founding the Brewery, Carey has held control over a majority of the voting shares of stock. (*Id.* at ¶¶ 3, 23, 27, 31; APP-014, 019-020.) Today, Carey owns the majority (50.48%, or 18,500 shares) of Class A voting shares. (*Id.* at ¶ 35; APP-021.) Carey has always been the Brewery’s sole director. (R.47 at Ex. 1; Am. Compl. ¶ 3; APP-014.)

¹ The Court can consider these documents, some of which were attached to the Amended Complaint, as well as Exhibits 1 to 6 attached to the Brewery’s Brief in Support of Its Motion to Dismiss (R.47) under the incorporation-by-reference doctrine. *Soderlund v. Zibolski*, 2016 WI App 6, ¶¶ 36–39, 366 Wis. 2d 579, 874 N.W.2d 561; *see also 188 LLC v. Trinity Indus., Inc.*, 300 F.3d 730, 735 (7th Cir. 2002) (“[t]he purpose of the [doctrine] is to prevent parties from surviving a motion to dismiss by artful pleading or by failing to attach relevant documents”).

The Dissident Minority Shareholders' shareholder oppression claim focused overwhelmingly on two issues: (1) the Sugar River Distillery and (2) Only in Wisconsin Giving, Inc. (Am. Compl. ¶¶ 18, 66-68, 70, 99-119, 129-38, 168, 192, 205; APP-017-018, 027-028, 033-035, 037-039, 045, 054, 058.) The Dissident Minority Shareholders allege that the Brewery founded the Sugar River Distillery in 2016 with the intent to own it entirely. (*Id.* at ¶¶ 18, 66, 99-102; APP-017-018, 033.) As a result, the Brewery incurred costs in developing plans, acquiring assets, and registering for federal trademarks. (*Id.* at ¶¶ 66-67, 100-01; APP-027, 033.) The Brewery informed its shareholders at an annual meeting about the distillery plans. (*Id.* at ¶ 103; APP-033.) Unfortunately, the Wisconsin Department of Revenue informed the Brewery that it could not legally own the distillery. (*Id.* at ¶¶ 104-06; APP-033; R.47 at Ex. 2.) The Brewery informed its shareholders of this development. (Am. Compl. at ¶ 106; APP-033.) The Brewery subsequently protected the investors from a loss by selling its interest in the Sugar River Distillery to a new corporation, owned by Carey and her husband. (*Id.* at ¶ 67; APP-027.)

Next, the Dissident Minority Shareholders complain Only in Wisconsin Giving, a non-stock non-profit corporation, was established "to ultimately be the marketing arm of the Brewery" (*id.* at ¶ 131; APP-038), and that it is intended to facilitate Carey's plan "to operate the Brewery for the good of all of the public, and not for the benefit of the minority shareholders." (*Id.* at ¶ 205; APP-058.) Yet nowhere does the Amended Complaint allege how the Dissident Minority

Shareholders have been injured or even could be injured by the Brewery's long-established history of charitable donations.

Finally, the Dissident Minority Shareholders allege they were defrauded when they chose to sell only a portion of their voting shares, profiting millions, in January 2019 for \$2,071 per share. (*Id.* at ¶ 173-83; R.47 at Exs. 3, 4, 5.) In a three-and-a-half-page paragraph that comprises the entirety of the purported fraud, the Dissident Minority Shareholders allege that they requested “detailed financial reports and ESOP valuations” prior to the sale in 2019, as well as requesting other documents going back as far as 2015. (*Id.* at ¶¶ 177a to d; APP-048-049.) The Dissident Minority Shareholders allege that the Brewery and Carey failed to disclose these documents in order to conceal a higher “fair market value” of the shares. (*Id.* at ¶¶ 177e to g; APP-049.) The Dissident Minority Shareholders readily admit in the Amended Complaint that they knew they entered into the January 2019 transactions without the most recent third-party accredited independent valuation opinion undertaken for the ESOP. (*Id.* at ¶ 178; APP-052.) In fact, the Amended Complaint refers to the communications (*id.* at ¶ 177b; APP-048-049), but does not attach them, demonstrating that Steve Speer had already decided to sell his shares for the offered price in July 2018 without the full ESOP valuation report. (R.47 at Ex. 6.) Unsurprisingly, the fully integrated Stock Purchase Agreements executed by the Dissident Minority Shareholders memorialize the representations and warranties made to them, and they do not include any representation of fact as to the value of their stock. (R. 47 at Exs. 3, 4,

5.) Further, the Stock Purchase Agreement executed by Rod Runyan demonstrates that the Brewery was not the buyer of his stock at all. (R.47 at Ex. 5.)

ARGUMENT

The Dissident Minority Shareholders hit the jackpot when they invested in the Brewery in 1993. Their modest investments returned millions in dividends, and their stock sales generated a 20,000% return. Nevertheless, their original Complaint expressly sought to dissolve the Brewery. In subsequent complaints, the Dissident Minority Shareholders abandoned such a remedy, no doubt because the Brewery is an unmitigated success. Their new approach is no less drastic, however. They ask the Court to dramatically reorganize an employee-owned company at the heart of the New Glarus community or to order a buyout at a judicially determined price. In short, by proclaiming they are “oppressed,” the Dissident Minority Shareholders want to hit the reset button on the foundational documents of the Brewery and to impose new terms on every other shareholder. Despite pressing for such extraordinary self-serving remedies, the Dissident Minority Shareholders did not plead facts supporting their claims of oppression—made plain by the fact that pages of the Amended Complaint are dedicated to events that never happened.

Moreover, the Amended Complaint fails to allege that the Dissident Minority Shareholders suffered any direct injury at all from the alleged “oppression.” Despite demonstrating the liquidity of their stock by selling it an incredible profit, the Dissident Minority Shareholders claim in their brief that they

have been “squeezed out” of their “illiquid investment.” But the Dissident Minority Shareholders cannot conjure a squeeze out into existence. They have benefited tremendously along with and on exactly the same terms as every other Brewery shareholder. They remain, like they always have been, passive minority investors. They have not lost employment, salary, or leadership positions at the Brewery. They do not allege that they have been deprived distributions made to other shareholders. To the contrary, they specifically allege that they, like every other shareholder, receive distributions more than adequate to cover their tax liabilities. In short, the Brewery’s commitment to distributions and the Dissident Minority Shareholders lack of involvement in the Brewery remains unchanged from its founding, such that they can have no other reasonable expectation from their passive minority interests.

Similarly, the Dissident Minority Shareholders cannot conjure remedies for alleged oppression not provided for by the Wisconsin Legislature. For this reason, the Brewery joins in full the arguments made by Carey in her separate brief.

The Dissident Minority Shareholders’ securities fraud claims are no less flawed. As found by Judge Phillipson, the Brewery was under no obligation to purchase shares at all and, moreover, never made any representation as to the “value” of those shares. Beyond this fundamental failure, the claims are untimely and are not alleged with particularity. Further, as to Runyan, Carey and the Brewery never purchased his stock at all and no cognizable claim for liability against them has been alleged.

Because the Dissident Minority Shareholders do not allege any particular facts necessary to proceed on a claim for fraud or identify any oppressive conduct that has caused them direct injury, the decision to dismiss the Amended Complaint with prejudice should be affirmed.

I. THE DISSIDENT MINORITY SHAREHOLDERS' CLAIM FOR MINORITY SHAREHOLDER OPPRESSION FAILS AS A MATTER OF LAW BECAUSE PLAINTIFFS DO NOT ALLEGE FACTS DEMONSTRATING OPPRESSIVE CONDUCT.

Wisconsin law provides for involuntary judicial dissolution of a close corporation by its shareholders if 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.” Wis. Stat. § 180.1430(2)(b). The Dissident Minority Shareholders invoke this statute while rejecting the sole remedy of dissolution it provides. (Am. Compl. ¶¶ 184–208, pp. 49–50; APP-053-059.) Lost in the Dissident Minority Shareholders’ brief is an irrefutable legal reality: no published, precedential Wisconsin decision has endorsed the view that courts have unfettered discretion to fashion a different remedy for shareholder oppression. It is not this Court’s role to rewrite the plain language of statutes passed by the Wisconsin legislature. Given the stunningly broad implications of the position advocated by the Dissident Minority Shareholders, the Brewery joins in full the arguments presented in Carey’s separate brief.

While this Court should affirm Judge Phillipson’s carefully considered decision honoring the plain language of Section 180.1430, it can also affirm based on the other arguments presented by the Brewery and Carey below.

Wisconsin courts define oppression as “burdensome, harsh and wrongful conduct; a lack of 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 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, Inc.*, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998) (citation omitted). Further, in some circumstances, “consideration of the frustration of the reasonable expectations of shareholders” may be appropriate. *Id.* at 783 n.10. The “wrongful conduct” test is to be applied in conjunction with the business judgment rule. *Reget v. Paige*, 2001 WI App 73, ¶¶ 17–18 and 26, 242 Wis. 2d 278, 626 N.W.2d 302 (evaluating claims for breach of fiduciary duty and whether the corporation engaged in wrongful conduct “in light of Wisconsin’s adherence to the business judgment rule”). “Decisions of the board made in good faith cannot satisfy” the wrongful conduct test. *Id.* at ¶ 26.

The Wisconsin Supreme Court has explained that “[a]n allegation of oppression is not a claim for relief, but rather, is a legal standard to be fulfilled before a circuit court may order liquidation of a corporation based on the acts of those who control it.” *N. Air Servs., Inc. v. Link*, 2011 WI 75, ¶ 75 n.32, 336 Wis. 2d 1, 804 N.W.2d 458 (citation omitted). The legal standard for oppression has

two components. *See Reget*, 2001 WI App 73, ¶ 25. The first component is the test for oppressive conduct. *Id.* at ¶¶ 23, 25. The second component is a direct injury. *Id.*

A claim of shareholder oppression “requires that the complaining shareholder prove that those in control of the corporation willfully and wrongfully inflicted a direct injury upon him that benefited the stockholders who were not injured.” *Reget*, 2001 WI App 73, ¶ 25. Wisconsin subscribes to the general rule that a cause of action that belongs to the corporation cannot be maintained as a direct action by an individual shareholder. *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, 316 Wis. 2d 640, 764 N.W.2d 904. This is true even where the injury to the corporation also impacts the shareholders, provided the primary injury is to the corporation. *Id.* Only where the injury is primarily to the shareholder rather than to the corporation, may a shareholder maintain a direct action and receive an individual recovery. *Jorgensen*, 218 Wis. 2d at 772-777.

“The fundamental inquiry in determining whether a claim must be brought as a derivative claim under Wis. Stat. § 180.0740(2) is: ‘Whose right is sought to be enforced by the ... cause of action?’” *Ewer v. Lake Arrowhead Ass’n*, 2012 WI App 64, ¶ 17, 342 Wis. 2d 194, 817 N.W.2d 465 (quoting *Rose v. Schantz*, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972)). The claim is derivative even if the direct injury to the corporation causes “a subsequent impact on the stockholders’ shares.” *Id.* “If the only direct injury is to the corporation, then the right to bring the action belongs solely to the corporation.” *Id.*

A. The Dissident Minority Shareholders' Amended Complaint relies on legal conclusions, rather than allegations of fact, to state a claim for minority shareholder oppression.

In their brief, the Dissident Minority Shareholders repeatedly claim to be the victims of a “squeeze out.” Yet the Amended Complaint lacks factual allegations supporting that claim. Common squeeze-out techniques “include the refusal to declare dividends, the termination of a minority shareholder’s employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder.” Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293, 301 (2004). The Dissident Minority Shareholders do not allege that they suffered any loss of employment or salary. They do not allege that they were removed from the board of directors. They do not allege that dividends have been withheld. They do not allege that other shareholders have received increased compensation in lieu of dividends. Nothing in the Amended Complaint suggests the Dissident Minority Shareholders are today treated differently than they were a year ago, 3 years ago, 10 years ago. They are passive investors who attend an annual shareholder meeting, vote on matters put before them, receive quarterly dividend payments based on a uniform calculation designed to at least cover tax liabilities, and enjoyed the liquidity of enormous profits when their stock was repurchased.

The Dissident Minority Shareholders cannot rely on legal conclusions to transform unremarkable conduct into oppression, or to ignore the clear propriety of each and every specific act comprising the alleged oppression.

B. None of the acts alleged in the Amended Complaint—whether viewed individually or collectively—demonstrate that the Plaintiffs are oppressed minority shareholders that have suffered a direct injury.

Ignoring the Dissident Minority Shareholders' legal conclusions as required at this stage, *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693, the Amended Complaint alleges a grab bag of challenged conduct that comprises the supposed oppression: (1) the payment of allegedly inadequate dividends, (2) the purchase of shares back from investors, (3) the refusal to sell the entire business, (4) a request for an amended Shareholder Agreement, (5) Carey's and her husband's purchase of the Sugar River Distillery, (6) the establishment of Only In Wisconsin Giving, Inc, and (7) the employment and compensation of members of the Carey family.

Dividends

Prominent in the Dissident Minority Shareholders' cries of oppression is their complaint that the Brewery should pay them greater dividends. (Am. Compl. ¶¶ 74–79, 84, 124, 127, 188, 195; APP-028-031, 036-037, 054-055.) In particular, they allege that the Brewery has substantial cash and retained earnings that it has “refused” to pay to shareholders (*id.* at ¶ 188; APP-054), though they concede the

Brewery has, in the past, used its retained earnings and cash reserves to improve and expand. (*E.g., id.* at ¶¶ 67, 119; APP-027, 035.)

The Brewery's only obligation with respect to dividends is to "use its best effort to make distributions" sufficient to meet shareholders' tax obligations. (Am. Compl., Ex. C at ¶ 9; APP-073-074.) The Dissident Minority Shareholders concede the Brewery has met that obligation and then some. (Am. Compl. ¶¶ 74–75; APP-028-029.) Their disappointment that they have not gotten more money from the Brewery is not oppressive as a matter of law:

In regard to the second allegation, that no dividends have been paid to the shareholders, we note that until the profits of a corporation are declared as a dividend, the shareholders have no right or title in them and such profits belong exclusively to the corporation. Rather than being used to pay dividends, corporate profits may be added to the assets of the corporation to use for other corporate purposes.

Reget, 2001 WI App 73, ¶ 15 (internal citations omitted).

Purchase of Shares

Although they seek an order compelling Carey or the Brewery to buy their shares at an hopefully inflated judicially determined price, the Dissident Minority Shareholders contradict themselves by simultaneously complaining that the Brewery and Carey "have been trying to buy back voting shares to consolidate control" of the Brewery under Carey, and that they use "harsh, burdensome and oppressive tactics to acquire only the minority shareholders' voting shares," because they supposedly believe that "getting rid of people who have voting

shares and a say in the company is great.” (Am. Compl. ¶¶ 193-194, 198; APP-054-055.)

The Dissident Minority Shareholders do not allege the Brewery has an obligation to buy their shares at all, much less that the Brewery must acquire shares at a specific price. Nor do shareholders have an obligation to sell them. If the Dissident Minority Shareholders did not want to sell their voting shares, if they did not want Carey to “consolidate control” over the Brewery, if they objected to her alleged view that it is “great” to buy out others who have voting shares, they could simply have declined to sell their shares. Instead, they freely chose to sell (at an astronomical profit). That voluntary exchange is far removed from a violation of the “standards of fair dealing” and “fair play” that is the stuff of shareholder oppression. *Jorgensen*, 218 Wis. 2d at 783.

Refusal to Sell the Brewery

The Dissident Minority Shareholders complain that the Brewery and Carey “have no intention of selling the Brewery in a manner that would result in value to the Plaintiffs,” while Carey “and her heirs also maintain the ability to sell the entire Brewery or only their shares[.]” (Am. Compl. ¶¶ 197, 204; APP-055, 058.) Moreover, if Carey is successful in her plot to buy up minority shares “at below market value,” then she will reap even greater profits when she sells the Brewery or her shares. (*Id.* at ¶ 204; APP-058.)

Loosely translated, these allegations amount to a complaint that the Dissident Minority Shareholders are minority shareholders, when they would

really like to be majority shareholders who could force a sale of the Brewery to their exclusive benefit. They would have this Court cast aside the deal they struck when they invested in the Brewery in 1993 and under which they have profited handsomely for nearly thirty years, and hand control of the Brewery over to them.² It is true that Carey owns a controlling interest in the Brewery—just as she has done since its inception, and just as Plaintiffs were told would be the case when they decided to invest. (Am. Compl., Ex. D at §§ 4.A, 6.A; APP-093-095, 110.) And while it is patently false that Carey can unilaterally decide to sell “the entire Brewery” (because she cannot compel other shareholders to sell their shares), unless and until she sells or forfeits her controlling interest, she—not the Dissident Minority Shareholders—*does* get to decide *not* to sell it. That is basic corporate law, not oppression.

In any event, the Dissident Minority Shareholders do not allege the Brewery is about to be sold or even that there are plans for a sale. Until such events come to pass, the Dissident Minority Shareholders’ worries over what *might* happen to the Brewery or to their shares are entirely speculative. As such, they are not actionable. *See Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 226–27, 601 N.W.2d 627 (1999) (explaining a plaintiff may only recover for “reasonably certain injurious consequences of the [alleged wrongdoing], not

² Indeed, the Dissident Minority Shareholders are explicit in their bid to seize control of the Brewery. (See Am. Compl. at 50; APP-059, wherein they ask the Court to reclassify all non-voting shares as voting shares.)

for merely possible injurious consequences”); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 537–38 (1st Cir. 1995) (affirming dismissal of shareholder claims that depended on future board action or events “that may never come to pass,” “may not occur in the form forecasted,” “depend[ed] on a lengthy chain of speculation as to what the future has in store,” and a “long string of contingencies”).

As for Carey’s right to sell her shares, the Dissident Minority Shareholders are correct that she may do so. They may do so, too—and have.

The Amended Shareholder Agreement (That Never Was)

The Dissident Minority Shareholders devote a great deal of ink to “proposed oppressive changes” to the Brewery’s shareholder agreement. (Am. Compl. ¶ 200; APP-056-057; *see also id.* ¶¶ 149–72; APP-041-048.) The amended agreement allegedly was introduced in advance of a June 2021 shareholder meeting. (*Id.* at ¶¶ 150–51; APP-041.) The Dissident Minority Shareholders objected to the proposed amended agreement, causing the Brewery to propose additional revised versions that the Dissident Minority Shareholders also found unacceptable. (*Id.* at ¶¶ 158–62; APP-044-045.)

None of these amendments, nor any others, was ever adopted. (*Id.* at ¶ 163; APP-045 (“Even without a proposed Amended Shareholder Agreement in effect . . .”).) And there *will never be* an amended shareholder agreement without the consent of the Dissident Minority Shareholders and every other shareholder. As the Dissident Minority Shareholders allege, “An amendment to the Shareholder

Agreement requires a unanimous vote of the shareholders.” (*Id.* at ¶ 152; APP-041.) They are correct. (Am. Compl., Ex. C at ¶ 12.D; APP-075.)

The Dissident Minority Shareholders have not been and cannot ever be oppressed by a proposed amendment to the shareholder agreement, over which they have unfettered veto power.

The Distillery

A claim of shareholder oppression “requires that the complaining shareholder prove that those in control of the corporation willfully and wrongfully inflicted a direct injury upon him that benefited the stockholders who were not injured.” *Reget*, 2001 WI App 73, ¶ 25. Mere dissatisfaction with corporate decision-making is not sufficient to claim oppression. *See Jorgensen*, 218 Wis. 2d at 783 (summarizing oppression standard). “Decisions of the board made in good faith” do not satisfy the oppression standard and are protected by the business judgment rule. *Reget*, 2001 WI App 73, ¶¶ 17–18 and 26.

None of the Dissident Minority Shareholders’ allegations about the Sugar River Distillery can establish injury to them or oppressive conduct. The Brewery purchased equipment and acquired intangible assets for the Sugar River Distillery. (Am. Compl. ¶¶ 99–119; APP-033-035.) Unfortunately, the Wisconsin Department of Revenue concluded that the Brewery could not own a distillery under Wisconsin’s alcohol and beverage laws and regulations. (R.47 at Ex. 2.) While unfortunate that the distillery project was blocked by regulators, the Brewery was able to salvage its investment by reselling the equipment to a new

entity owned by Carey and her husband. (Am. Compl. ¶ 46; APP-023.) Further, the distillery entered into leases with the Brewery for space and employees that provide a new, if modest, stream of income. (*Id.* at ¶ 47; APP-023.)

These actions benefitted the Brewery and all shareholders, including the Dissident Minority Shareholders. Even ignoring that benefit and assuming injury instead, the injury was to the Brewery alone. It was the Brewery's "profits" and assets that were allegedly used by Carey. (*Id.* at ¶¶ 98–99, 106–07; APP-032-033.) And it is the Brewery that allegedly has not been repaid or reimbursed. (*Id.* at ¶¶ 103, 108, 113–14, 116; APP-033-035.) There simply are no allegations to support the idea that the Dissident Minority Shareholders suffered a direct injury. Without direct injury, there is no actionable oppression. *See Reget*, 2001 WI App 73, ¶ 25.

Only in Wisconsin Giving

While the Dissident Minority Shareholders loudly complain about the Only in Wisconsin Giving's existence and connection to the Brewery, the Amended Complaint is silent on how the Brewery's long history of charitable donations has injured anyone. Even assuming the Brewery intends to donate to the foundation for some improper purpose (which is not alleged), that at most would amount to a claim for waste or self-dealing that directly injures the Brewery. (Am. Compl. ¶¶ 18, 68, 70, 129-38, 168, 205; APP-017-018, 027-028, 037-039, 046, 058); *Krier v. Vilione*, 2009 WI 45, ¶ 31, 317 Wis. 2d 288, 766 N.W.2d 517 ("When money is being misappropriated or stolen from a corporation, the damage is to the corporation, and as a result, the appropriate action is a derivative action and not a

direct action.”). That would be a derivative injury, not a direct one to the Dissident Minority Shareholders. *Borne v. Gonstead Advanced Techs., Inc.*, 2003 WI App 135, ¶¶ 14–16, 266 Wis. 2d 253, 667 N.W.2d 709 (affirming dismissal of claim as derivative because a corporation’s loss of assets is an injury to the corporation, not a shareholder).

The Amended Complaint makes a passing attempt to articulate injury when it alleges that the Brewery’s donations “*may* be reported for tax purposes as donations made by the individual shareholders,” such that they might have to itemize their tax deductions. (Am. Compl. ¶ 139 (emphasis added); APP-039.) “Depending on the shareholders’ tax situation,” this “*could* . . . complicate the shareholders’ personal tax situations.” (*Id.* (emphasis added).) To be clear, the Dissident Minority Shareholders do not allege that *they* have had to itemize their tax deductions or have suffered such “complications,” or even that they are likely to be among the “shareholders” this “could” happen to in the future. Even accepting the dubious proposition that more complex tax returns could ever support a claim for shareholder oppression, the Dissident Minority Shareholders’ musings about hypothetical *future* tax implications—for someone who might or might not be them—cannot. *See Sopha*, 230 Wis. 2d at 226–27; *Ernst & Young*, 45 F.3d at 537–38.

Absence of alleged injury aside, the claim for oppression is further doomed by the admission in the Amended Complaint that one of the foundation’s purposes is to serve as a “marketing arm” of the Brewery, *i.e.*, for its benefit. (Am. Compl.

¶ 131; APP-038.) Corporate donations to charitable causes for purely philanthropic reasons are expressly authorized by Wisconsin statute and fall squarely under the business judgment rule. Wis. Stat. §§ 180.0302(13), 180.0828. The same decisions undertaken to advance the Brewery's interests through marketing—by raising general awareness of the Brewery, by fostering goodwill in the community, etc.—enjoy the same protections. Wis. Stat. § 108.0302(15).

The Carey Family

Finally, the Dissident Minority Shareholders' effort to impugn the Carey family members' salaries, benefits, and bonuses without a shred of alleged factual support fails as a matter of law. (Am. Compl. ¶¶ 80–83; APP-030). The Brewery would not exist were it not for the enormous efforts of the Careys. In any event, the Carey family's employment and compensation cannot cause a direct injury to the Dissident Minority Shareholders as a matter of law. *See Reget*, 2001 WI App 73, ¶ 18 (rejecting challenge to excessive compensation as an improper direct action based on a derivative injury). Even if the Dissident Minority Shareholders could be directly injured by the Carey family members' salaries, the Amended Complaint does not allege a single fact suggesting that any of them are overpaid or somehow unqualified for their positions. (Am. Compl. ¶¶ 80–83; APP-030.) There are no such allegations because the Dissident Minority Shareholders know they have benefitted handsomely from the work of the Careys and all the Brewery's employees.

C. Precedential and non-precedential case law demonstrate that the Dissident Minority Shareholders are not oppressed shareholders being squeezed out of a business because they are not subject to disparate treatment in contravention of their reasonable expectations.

Lacking allegations to support a cognizable oppression claim, the Dissident Minority Shareholders declare they are victims of a “squeeze out.” (App. Br. at 39.) They are not. *Jorgensen*, 218 Wis. 2d 761, the leading case in oppression, illustrates what a genuine “squeeze out” looks like.

In *Jorgensen*, a husband and wife were founding members of a corporation, along with four other shareholders. 218 Wis. 2d at 781. All shareholders were members of the board of directors and received the same weekly payments. *Id.* After the husband complained about the activity of other directors, he and his wife were removed from the board. *Id.* Further, the other shareholders terminated payments to the husband and wife but continued to make weekly payments to themselves. *Id.*

None of that has occurred here. The Dissident Minority Shareholders are just three of twenty-five shareholders. They were never directors; Carey has always been the only director of the Brewery. They have never been stripped of any management authority or duties, because they never had any. The Brewery has not terminated payments of dividends to them. Rather, it continues to pay all shareholders dividends on the same terms, sufficient to at least cover their respective tax liabilities. Far from departing from the Dissident Minority Shareholders’ reasonable expectations, the Brewery’s calculation of distributions

remains consistent with its historical practices and its commitments at its founding.

It is the Dissident Minority Shareholders who demand a departure from their reasonable expectations, because they no longer want to honor the foundational documents that have governed their investments from the outset and that specify—in black and white—the Brewery’s commitments on distributions, the Brewery’s corporate governance structure, and Carey’s ownership of a majority of the voting shares.

The Dissident Minority Shareholders’ claims fare no better under the non-Wisconsin authority they cited in the Circuit Court:

- In *Res v. Rodd Electrotpe Co. of New England, Inc.*, the plaintiffs complained the corporation would not purchase their shares on the same terms offered to another shareholder. 328 N.E.2d 505, 510-11 (Mass. 1975). Here, Plaintiffs do not complain that the Brewery would not purchase their shares, but rather that it did so on the same terms it offered to every shareholder. (Am. Comp. ¶¶ 140–142; APP-039-040.)
- In *Fox v. 7L Bar Ranch Co.*, the plaintiff complained that “[s]ince its inception the [corporation] has not declared any dividends” and that he “never received dividends or remuneration of any kind from the [corporation], nor have any of the other stockholders.” 645 P.2d 929, 931 (Mont 1982). Here, the Plaintiffs admit to having received dividends. (Am. Compl. ¶¶ 74–77, 171, 188, 195–96; APP-028-029, 047, 054-055.)
- In *McMullin v. Beran*, which notably applied the business judgment rule under Delaware law, the plaintiffs challenged the sale of the “entire corporation to a third party at the behest of the majority shareholder,” claiming that the board of directors failed to conduct a critical assessment of the offer and then to make an independent determination about whether it maximized value for all shareholders. 765 A.2d 910, 918–20 (Del. 2000). Here, the Plaintiffs speculate about the possibility of a sale at some unknown time to some unknown buyer that Carey “refuses” to consider. (Am. Compl. ¶¶ 18, 96; APP-017-018, 032.)

- In his Duke University Law Journal article, Professor Moll explains that “[c]ommon freeze-out techniques include the refusal to declare dividends, the termination of a minority shareholder’s employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder.” Douglas K. Moll, *Shareholder Oppression and “Fair Value”: Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L. J. 293, 301 (2004). None of that is alleged here. The Brewery has declared dividends, none of the Plaintiffs was ever a paid employee or in a “position of management” at the Brewery, and there is no allegation that Carey is overpaid.

Indeed, the most analogous case to the Dissident Minority Shareholders’ supposed oppression is *Reget*. 2001 WI App 73, 242 Wis. 2d 278, 626 N.W.2d 302. Like *Reget*, the Dissident Minority Shareholders complain that the Brewery has not purchased their shares at a price that they (now) deem acceptable. Like *Reget*, the Dissident Minority Shareholders complain about their dividends, even though they are treated exactly the same as every other shareholder, including Carey. And like *Reget*, the Dissident Minority Shareholders feign concern about the compensation and benefits afforded to Carey, her husband, and her daughter. Yet nowhere in the Amended Complaint do the Dissident Minority Shareholders allege facts supporting a conclusion that the Carey family is unqualified or overpaid. Just as in *Reget*, there is no oppression here as a matter of law. *Id.* at ¶¶ 25–26.

I. THE DISSIDENT MINORITY SHAREHOLDERS UNPARTICULARIZED AND UNTIMELY CLAIMS FOR SECURITIES FRAUD DO NOT PLEAD ANY MISREPRESENTATIONS OF FACT BY THE BREWERY OR CAREY.

A. The Dissident Minority Shareholders' claims were properly dismissed because the Brewery's offering price was not a representation of the value of the shares.

To state a claim under Section 551.501(2), the Dissident Minority Shareholders must show that the Brewery made an “untrue statement of a material fact” or that it omitted “a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.” At oral argument and again in its written decision, the Circuit Court cut through the noise in the Dissident Minority Shareholders' 208-paragraph complaint and recognized that the Brewery made no actionable statements at all in connection with its purchase of Speer's and Eichhoff's shares. (Am. Compl. ¶ 177; APP-048-052; R.54 Decision and Order; APP-001-009.) The Brewery was under no obligation to purchase the shares in the first place, or to do so at “fair market value” or any other particular value. Even now, as they attempt to manufacture a fraud claim on appeal, the Dissident Minority Shareholders cannot identify any false statement or omission of fact by the Brewery.

The Amended Complaint does not allege that the Brewery made any representation about the value of shares, because no such representation ever occurred. The offered price itself, which yielded an outstanding return of 20,000% to the Dissident Minority Shareholders, does not constitute such a representation

as a matter of law. “[I]t is well-settled in Wisconsin law that a representation of purchase price, absent proof of artifice or trick, will be treated as an opinion of the value rather than as a representation of fact.” *Jersild v. Aker*, 766 F. Supp. 713, 718 (E.D. Wis. 1991) (citing *Kraft v. Wodill*, 17 Wis. 2d 425, 431, 117 N.W.2d 261 (1962); *Morgan v. Hodge*, 145 Wis. 143, 148, 129 N.W. 1083 (1911)); *see also BioConvergence, LLC v. Menefee*, 103 N.E.3d 1141, 1150 (Ind. Ct. App. 2018) (“Because statements of value are regarded as mere expressions of opinion, Plaintiff cannot state a claim for actionable fraud based upon Defendants’ representation regarding the units’ valuation.”); *Loula v. Snap-On Tools Corp.*, 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Ct. App. 1993) (“Statements of value, in general, as well as predictions as to profits to be made from the thing sold, fall into the same class of statements not to be relied on” as representations of fact).

None of the authority cited in the Dissident Minority Shareholders’ opening brief alters what is actually alleged—and not alleged—in the Amended Complaint. First, *Kohler v. Kohler*, 319 F.2d 634 (7th Cir. 1963), a 60-year-old case applying outdated federal law,³ has never been cited by a Wisconsin court for any purpose. Yet the Dissident Minority Shareholders claim that *Kohler* imposes a new burden, not argued below, on the Brewery to disclose additional information – “corporate financial statements and projections” (App. Br. at 39) – to a shareholder selling shares.

³ *See Sec. & Exch. Comm’n v. Jakubowski*, 150 F.3d 675 (7th Cir. 1998) (recognizing *Kohler*’s abrogation).

Regardless, the plaintiff in *Kohler* lost, because the Court specifically and repeatedly rejected proclamations of fraud predicated on “after-the-fact” complaining about accounting methods and omitted information that might have led to a higher valuation of the stock:

[R]ather, it appears to us from the facts found by the trial court and from the record as an ‘after-the-fact’ conclusion by plaintiff that the accounting treatment of the pension costs either should have been different than it was or that it should have been explained or clarified to him—something defendants may not be held to have anticipated under the circumstances.

319 F.2d at 640. Further, like the plaintiff in *Kohler*, the Dissident Minority Shareholders here were well acquainted with the Brewery’s finances, having been shareholders since its founding and received reviewed annual financial statements for many years. *Id.* at 642. Nothing in the Amended Complaint can change the fact that the Brewery, just like the defendant in *Kohler*, merely offered a price based on a valuation done by an accredited independent third party known to the Dissident Minority Shareholders.

In their insistence that the Brewery was obliged to disclose “prior offers and valuations of the Brewery” (App. Br. at 36-41), the Dissident Minority Shareholders’ position is inconsistent with existing Wisconsin law. *Ollerman v. O’Rourke Co.*, a case involving the sale of residential real estate and the non-disclosure of a well on the property, recognized a duty to disclose “facts which are known to the vendor, which are material to the transaction, and which are not readily discernible to the purchaser.” 94 Wis. 2d 17, 42, 288 N.W.2d 95 (1980).

But as *Ollerman* itself acknowledged and the Wisconsin Supreme Court has emphasized since, this was a “narrow holding” that was “premised on certain policy considerations present in non-commercial real estate transactions.” *Id.* at 41; *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 14, 270 Wis. 2d 146, 677 N.W.2d 233. *Ollerman* and *Tietsworth* counsel that there is no such duty outside that narrow context.

Next, the Dissident Minority Shareholders cite a stray passage from another federal decision to impose a new duty on the Brewery. Rather than support the Dissident Minority Shareholders’ claims, *Friedman v. Rayovac Corporation* refutes them. 295 F. Supp. 2d 957 (W.D. Wis. 2003). In *Friedman*, the court held that a duty to disclose arises when information will correct a representation that was made. *Id.* at 988. Here, the Amended Complaint never alleges that Brewery made any representation to the Dissident Minority Shareholders regarding share value, the Brewery’s sales or growth, or any other matter that would require a supposedly corrective disclosure. Indeed, *Friedman* emphasized that it is not enough that “a reasonable investor would want to know an omitted fact.” *Id.*

At bottom, as Judge Phillipson concluded, the allegations of the Amended Complaint, even accepted as true, establish nothing more than that the Brewery (or in Runyon’s case, the ESOP) offered to buy shares at a certain price and that Dissident Minority Shareholders accepted, reaping an enormous profit. That is not securities fraud.

Beyond affirming that an offering price is not actionable fraud, this Court can affirm on the basis of other arguments considered, but not expressly relied upon, by the Circuit Court.

B. The Dissident Minority Shareholders' claims are untimely because they were aware months before the January 2019 sale that the ESOP valuation opinion was the basis for the offered purchase price.

In 2019, the Dissident Minority Shareholders profited approximately \$4,000,000 in selling their stock at \$2,071 per share. (Am. Compl. ¶ 174; APP-048; R.47 at Exs. 3, 4, 5.) The sales allegedly violated the Wisconsin Securities Act primarily because the Dissident Minority Shareholders did not receive complete copies of ESOP valuations that they claim to have requested at various times from 2013 to 2019. (Am. Compl. ¶ 177; APP-048-052.) “A person may not obtain relief [for a securities fraud violation] unless the action is instituted within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation.” Wis. Stat. § 551.509(10)(b). That is, the 5-year bar starts running when a violation occurs, but the time limit for bringing an action is shortened to 2 years when the investor “discover[s] ... facts constituting the violation.” That discovery occurs when “the defrauded party possesses sufficient knowledge to make a reasonable person aware of the need for diligent investigation.” *Gygi v. Guest*, 117 Wis. 2d 464, 466-67, 344 N.W.2d 214 (Ct. App. 1984) (interpreting statutory predecessor to Section 551.509(10) with identical language triggering limitations period). While the Dissident Minority Shareholders

contended in the Circuit Court that *Gygi* should be ignored because it addressed a prior version of the statute, they provided no support for the argument that the identical words mean something different now than they did when *Gygi* was decided in 1984. Nor did they identify case law holding or suggesting that *Gygi* has been abrogated or overruled. In fact, the opposite is true:

As soon as the defrauded party has “sufficient knowledge to make a reasonable person aware of the need for diligent investigation,” the clock begins to run. *Stockman v. LaCroix*, 790 F.2d 584, 588 (7th Cir. 1986) (quoting *Gygi v. Guest*, 117 Wis. 2d 464, 344 N.W.2d 214, 215 (App.1984)).

KDC Foods, Inc. v. Gray, Plant, Mooty, Mooty & Bennett, P.A., 763 F.3d 743, 750 (7th Cir. 2014); *see also Haney v. Bridge to Life, Ltd.*, No. 18 CV 5417, 2019 WL 1098921, at *4 (N.D. Ill. Mar. 8, 2019) (concluding that under federal law, Wisconsin law, and Wyoming law “[t]he two-year limitations periods run ‘(1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, “the facts constituting the violation”—whichever comes first”).

In short, the Dissident Minority Shareholders pleaded themselves out of court. Each of them allegedly requested ESOP valuations at different points prior to January 2019 in order to evaluate or analyze their potential sales. (Am. Compl. at ¶¶ 177b to d; APP-048-049.) The Brewery allegedly never provided the ESOP valuations. (*Id.* at ¶ 177e; APP-049.) Nevertheless, each of the Dissident Minority Shareholders decided to sell some of their voting shares for the offered price. (*Id.* at ¶ 179; APP-052; R.47 at Exs. 3, 4, 5.) That is, the Dissident Minority Shareholders allege that they knew—before they consummated the sale of their

shares—that they needed, had requested, and never received the complete “ESOP valuations reports” and other “detailed financial information.” (Am. Compl. at ¶ 178; APP-052.) Speer in particular acknowledged in writing that he did not have the ESOP valuation reports almost six months prior to January 2019, explaining that he had already decided to sell 625 shares but was “still interested in the full valuation report from Capital Valuation Group if you can share that.” (R. 47 at Ex. 6.)

By their own allegations, then, the Dissident Minority Shareholders therefore had “sufficient knowledge to make a reasonable person aware of the need for diligent investigation” by July 2018 and possibly as early as the summer of 2015. (Am. Compl. ¶ 177; APP-048-052.) At the very latest, they possessed such knowledge when they sold their shares in January 2019. Whatever the precise starting point, their securities fraud claims brought in May 2022 are untimely.

C. The Amended Complaint does not allege the who, what, where, when, and how required to state a plausible claim for securities fraud.

Despite clocking in at 208 paragraphs, the Amended Complaint lacks particularity. It does not identify any employee or representative of the Brewery that made a misrepresentation or failed to disclose a material fact to any of them. The Amended Complaint repeatedly refers to “Defendants” collectively without identifying an individual at the Brewery at all. (Am. Compl. ¶¶ 18, 159, 176–77, 179, 182–83; APP-017-018, 044, 048-053.) That is impermissible. *Friends of*

Kenwood v. Green, 2000 WI App 217, ¶ 18, 239 Wis. 2d 78, 619 N.W.2d 271 (citing *Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777–78 (7th Cir. 1994)). Beyond the missing “who,” there are no allegations as to the specific content of the alleged misrepresentations, where and when they were made, or how they were transmitted to the Dissident Minority Shareholders. (E.g., Am. Compl. ¶¶ 18, 159, 176–77, 179, 182–83; APP-017-018, 044, 048-053.) It is not sufficient for the Dissident Minority Shareholders to allege that the “Defendants” made representations to someone about the value of the Brewery’s stock at some point prior to the sale. *Cattau v. Nat’l Ins. Servs. of Wis., Inc.*, 2018 WI App 45, ¶ 44, 383 Wis. 2d 600, 918 N.W.2d 127 (holding that “generic allegations” that failed to specify the individuals, time, content, or medium did not state a claim for misrepresentation).

The Dissident Minority Shareholders’ only attempt to provide particularity in paragraph 177 of the Amended Complaint. But none of its subparagraphs identify a misrepresented fact at all. (See Am. Compl. ¶ 177; APP-048-052.) Paragraph 177 primarily recites a partial history of requests—months and in some cases years before the January 2019 sale—for accredited, independent third-party ESOP valuation opinions and the failure to provide those opinions. (*Id.* at ¶¶ 177a to g; APP-048-049.) Even if the valuation opinions could be considered “facts” (and they cannot be), they cannot have been material to the decision to sell shares, because the Dissident Minority Shareholders made that decision with full awareness that they did not receive the valuation opinions.

The balance of Paragraph 177's subparagraphs allege that in June 2021 Carey mentioned her potential estate tax liability in the future, that in August 2021 she disclosed her opinion of the then-current value of the Brewery, and vaguely that she described "offers and interest" in the Brewery at some unknown time that were considered in the valuation opinion. The Dissident Minority Shareholders assert in each of these instances that these opinions about the value of Carey's majority interest or of the Brewery as a whole, made after or at unknown times before January 2019, suggest that the Brewery's shares were worth more than what it paid for a portion of their minority interests in January 2019. How this confusing mishmash of statements constitutes securities fraud is unclear.

In any event, the Brewery had no obligation to disclose unsolicited offers or attempts to obtain a higher price for the Brewery or a controlling interest in it. *Dixon v. Ladish Co.*, 785 F. Supp. 2d 746, 752 (E.D. Wis. 2011), *aff'd sub nom. Dixon v. ATI Ladish LLC*, 667 F.3d 891 (7th Cir. 2012) (citing Wisconsin circuit court decisions for the rule that Wis. Stat. § 180.0828 precludes strict application of *Revlon* rule to Wisconsin corporations). In addition, there is no allegation that the Brewery even received, much less considered, any of these alleged offers in anticipation of a merger or sale. *Cf. Michaels v. Michaels*, 767 F.2d 1185, 1192 (7th Cir. 1985) (majority shareholders omitted material fact when purchasing shares from minority shareholder by failing to disclose active efforts to sell company that resulted in actual sale of company for greater value than value at which they purchased minority's shares); *Jordan v. Duff & Phelps, Inc.*, 815 F.2d

429, 434 (7th Cir. 1987) (holding that close corporation which is actively negotiating a merger must disclose that fact to shareholders prior to purchasing their shares). And no allegations suggest Carey or the Brewery were even exploring such a sale. To the contrary, Carey's *unwillingness* to consider an "outside sale" of the Brewery is one of the Dissident Minority Shareholders' biggest complaints. (Am. Compl. ¶¶ 17, 18, 96; APP-016-018, 032.)

D. Rod Runyan's claim fails because the Brewery did not purchase any stock from him in January 2019.

Although the Dissident Minority Shareholders allege that the Brewery "purchased/redeemed" 40 voting shares from Rod Runyan in January 2019, they now acknowledge that Runyan did not sell his shares to the Brewery. (Am. Compl. ¶ 174; APP-048; App. Br. at 37.) The Brewery's only role in the transaction was to approve the sale from Runyan to the ESOP as required by the shareholder agreement. (Am. Compl. at ¶ 145; APP-040.) Because the Brewery was not the purchaser of Runyan's shares, it cannot be liable for any alleged fraud. *See* Wis. Stat. § 551.509(3) ("A person is liable to the seller if the person buys a security in violation of s. 551.501..."). Nor does the Amended Complaint contain any alleged facts that the Brewery or Carey are jointly and severally liable for supposed fraud by the ESOP. *See* Wis. Stat. § 551.509(7).

Undaunted, the Dissident Minority Shareholders contend that the Brewery and Carey are liable as "a person that directly or indirectly controls a person liable" under the Wisconsin Securities Act. If Carey and the Brewery are subjects

of a so-called “control person” theory under Section 551.509(7)(a) as to Runyan, their alleged liability depends entirely on the existence of a primary violation in the first instance. *See* Wis. Stat. § 551.509(7)(a) (imposing joint and several liability for “a person liable under subs (2) to (6)”); *Puskala v. Koss Corp.*, 799 F. Supp. 2d 941, 956 (E.D. Wis. 2011) (applying control person liability under Section 15 of the Securities Act of 1933). For the reasons discussed above, there is no primary violation, so there can be no control person liability.

Beyond that, Runyan must allege facts showing that the Brewery and Carey “actually exercised general control over the operations of the wrongdoer” and that they “had the power or ability—even if not exercised—to control the specific transaction or activity that is alleged to give rise to liability.” *Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 911–12 (7th Cir. 1994).⁴ He fails to do so. The Amended Complaint alleges that Carey controls the Brewery (Am. Compl. ¶¶ 18, 27, 31, 48, 137, 143–44, 148, 163, 164, 177–78, 186; APP-017-018, 020, 023, 038, 040-041, 045, 048-053), but it never mentions control of the ESOP beyond a single sentence alleging that “[t]he Brewery, at Carey’s direction, unilaterally determines when and whether voting shares it purchases from shareholders will be assigned to the ESOP or retained as treasury stock.” (*Id.* at ¶ 145; APP-040.) But nowhere does Runyon allege any facts, let alone

⁴ Because Wisconsin courts have not elucidated a test for control person liability under Section 551.509(7), this Court can look to federal court authority—which is voluminous—for the proper test. *Carney v. Mantuano*, 204 Wis. 2d 527, 534, 554 N.W.2d 854 (Ct. App. 1996).

particularized facts, that the Brewery or Carey “actually exercised control” over the ESOP at any point. Nor does the Amended Complaint allege that Runyan, in particular, seeks to hold the Brewery and Carey liable as control persons. (*See* Am. Compl. ¶¶ 173–183; APP-048-053.)

Similarly, the Amended Complaint does not allege that the Brewery or Carey “had the power or ability—even if not exercised—to control the specific transaction or activity that is alleged to give rise to liability.” *Donohue*, 30 F.3d at 911–12. Again, the only allegation is that the “Brewery, at Carey’s direction, unilaterally determines” when stock is purchased by the Brewery or the ESOP. (Am. Compl. ¶ 145; APP-040.) This conclusory allegation lacks any specificity as to the ability of the Brewery or Carey to control the ESOP’s purchase price or terms. As a result, it cannot support a plausible claim that the Brewery or Carey had the power or ability to control the specific disclosures and transaction upon which Runyan’s primary claim is based. *Starr v. !Hey, Inc.*, No. 01 C 6087, 2003 WL 21212596, at *4 (N.D. Ill. May 23, 2003) (dismissing control person claim against shareholders because no facts were plead regarding power or ability to control transaction). Runyan’s unpled control person claim must be dismissed as a result.

Finally, the ESOP is not a defendant here. Runyan’s apparent demand to hold the ESOP liable *in absentia* is inconsistent with due process in Wisconsin. *Mid-Plains Tel., Inc. v. Pub. Serv. Comm’n*, 56 Wis. 2d 780, 785–86, 202 N.W.2d 907 (1973) (“Generally, the fundamental or essential requirement of procedural

due process of law is notice and hearing, that is opportunity to be heard either before a court or the administrative agencies.”).

CONCLUSION

For the reasons stated above and in Carey’s separate brief, the Court of Appeals should affirm the trial court’s judgment in favor of Carey and the Brewery on the Dissident Minority Shareholders’ Amended Complaint.

Dated this 5th day of April, 2023.

GODFREY & KAHN, S.C.

By: Electronically signed by Anthony S. Baish

Anthony S. Baish

State Bar No. 1031577

David R. Konkel

State Bar No. 1097244

*Attorneys for Defendant-Respondent New Glarus
Brewing Company*

P.O. ADDRESS:

833 East Michigan Street, Suite 1800

Milwaukee, WI 53202-5615

Phone: 414-273-3500

Fax: 414-273-5198

tbaish@gklaw.com

dkonkel@gklaw.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in §§ 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font.

The length of this Brief is 9,297 words.

Dated this 5th day of April, 2023.

By: *Electronically signed by Anthony S. Baish*
Anthony S. Baish, State Bar No. 1031577

CERTIFICATE OF SERVICE

I certify that I electronically filed the brief of Defendant-Respondent New Glarus Brewing Company on this 5th day of April, 2023, which eFiling system will serve a copy of same upon counsel of record.

Dated this 5th day of April, 2023.

By: *Electronically signed by Anthony S. Baish*
Anthony S. Baish, State Bar No. 1031577

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