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Waukesha County
2018CV001687

BY THE COURT:

DATE SIGNED: September 10, 2019

Electronically signed by Michael J. Aprahamian
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

PAUL and MARY BRUNNER,

Plaintiffs/Third-Party Defendants, **Case No. 18CV1687**

v.
SHERRI BRUNNER, individually and as personal Representative of the Estate of Brian P. Brunner,

Defendant/Third-Party Plaintiff,
and

FLOORCARE USA, INC.,

Interested Party.

DECISION AND ORDER ON MOTIONS FOR DECLARATORY RELIEF, SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

¶1. This case involves disputed share interests in a closely-held corporation. The Court heard several dispositive motions on August 14, 2019, and took the matters under advisement to prepare a written decision.

¶2. On September 19, 2018, Floorcare USA, Inc. ("Company"), through its attorneys DeWitt LLP ("DeWitt"), filed a lawsuit against Sherri Brunner ("Sherri") seeking declaratory relief. The lawsuit named Paul Brunner ("Paul") as an "Involuntary Plaintiff." Thereafter, Sherri filed a motion to disqualify DeWitt from representing the Company and Paul in this lawsuit because of an alleged conflict of interest.

¶3. On April 3, 2019, this Court granted the motion to disqualify DeWitt and filed a decision and order precluding DeWitt from representing the Company in this lawsuit and from representing Paul on matters related to the Company and estate planning unless Sherri consents under SCR 20:1.9.

¶4. Pursuant to that decision and the Court's identification of the appropriate parties in interest, Paul, through new attorneys, filed a motion to amend the case caption—subsequently granted by the Court—making Paul and his wife, Mary, the Plaintiffs and Third-Party Defendants, Sherri the Defendant and Third-Party Plaintiff, individually and as personal representative of the Estate of Brian P. Brunner, and with the Company identified as an Interested Party. By Stipulation, an independent attorney, Robert William Snyder of Snyder & Ek, was retained to represent the Company.

SUMMARY JUDGMENT RECORD

¶5. The parties presented the following undisputed facts for purposes of the pending motions for declaratory relief and for summary judgment.

¶6. In or around 2002, Paul Brunner acquired full ownership of the Company.

¶7. In or around 2009, Paul Brunner's son, Brian Brunner, became a 25 percent owner of the Company, with Paul retaining a 75 percent interest. It is unclear from the submissions how Brian acquired his interest, *i.e.* by gift, purchase, or sweat equity.

¶8. On or about October 22, 2015, a document entitled "BPB BUYOUT OF PAB INTEREST IN FLOORCARE USA, INC." (hereinafter "Statement") was prepared outlining a transaction in which Paul wished to sell 60 percent of his ownership interest in the Company to Brian. The Statement provides in full:

- THE TOTAL WORTH OF FCUSA AS OF 10/01/2015 IS $1,400,000
  - Based on Mark Wiesman valuation 9/25/2015

- PAB'S PERCENTAGE OF FCUSA OWNERSHIP STANDS AT 75% or $1,050,000
- PAB WISHES TO SELL 60% OF HIS INTEREST TO BRIAN P. BRUNNER
- WHEN ADDED TO BPB'S CURRENT OWNERSHIP INTEREST OF 25%--BPB WILL OWN 85% OF FLOORCARE USA,INC.
- THIS WILL REFLECT A PURCHASE PRICE OF $630,000
- APPLYING A 35% DISCOUNT (FOR FAMILY ATTRIBUTION)---MAKES THE FINAL PURCHASE PRICE AT $410,000.
- PAB WILL CARRY THE FINANCING FOR THIS AMOUNT BASED ON THE FOLLOWING PAYMENT PLAN:
  - $410,000 AT 4% OVER 12 YEARS $3,600 PER MONTH
- PAB WILL RETAIN A 15% INTÈREST IN FCUSA AND WILL SUBORDINATE HIS INTEREST TO BPB IN THE EVENT THE COMPANY IS SOLD TO A 3RD PARTY IN THE FUTURE. THE ABOVE WILL BE TRANSPOSED TO A FORMAL CONTRACT OF SALE BY A LAW FIRM MUTUALLY AGREED TO BY THE PARTIES. THERE MAY BE PROVISIONS IN SAID CONTRACT FOR ACCELERATED PAYMENTS, LUMP SUM PAYMENT OR CASH OUT PROVISIONS IN CERTAIN CIRCUMSTANCES. PAB WILL CONTINUE IN AS AN ADMINISTRATIVE AND SALE CONSULTANT AT UIA AND WILL CONTINUE IN AN ADVISORY CAPACITY TO COMPANY MANAGEMENT. AN EMPLOYMENT CONTRACT WILL GOVERN THIS EMPLOYMENT. THIS AGREEMENT WILL BE RETROACTIVE TO 12/31/2014.

¶9. The Statement is not signed.

¶10. On or about November 25, 2015, the Company refinanced its loans with BMO Harris Bank (the "BMO"). In those dealings, Paul represented to BMO that he owned less than 20% of the Company. Based on this representation, Paul was removed as guarantor, and Brian took on the role as sole guarantor of the Company's loan from BMO.

¶11. On or about February 25, 2016, the shareholders and directors of the Company executed a Joint Unanimous Consent Resolution ("Consent Resolution"). The Consent Resolution was drafted by John Movroydis of DeWitt.

¶12. The Consent Resolution resolves on behalf of the shareholders and directors that: (1) the directors of the Company are Brian and Paul; (2) Brian is President and Secretary, and

Paul is Vice President and Treasurer; (3) the registered agent of the Company is changed from Paul to Brian; and (4) the shareholders as of January 1, 2016, are Brian (85 percent) and Paul (15 percent). With respect to share ownership, the Consent Resolution provides

> The Shareholders as of January 1, 2016, and thereafter until as may be changed in writing, holding all of the issued and outstanding shares of stock in the corporation are as set forth below herein and are confirmed, ratified and approved, and shall control any shareholding contrary or inconsistent with the following shareholding: [Brian 85%, Paul 15%].

¶13. The Consent Resolution also provides

> This is also to memorialize that Brian P. Brunner and Paul A. Brunner had agreed to and consummated the buyout of that portion of the shares of stock in the Corporation of Paul A. Brunner, consisting of Sixty Percent (60%) of his interest to Brian P. Brunner such that when added to Brian P. Brunner's current ownership interest at Twenty-five Percent (25%), Brian P. Brunner is the owner of Eighty-five Percent (85%) of the Corporation and Paul A. Brunner is the owner of Fifteen Percent (15%) of the Corporation. The terms of the buyout are as set forth on the attached Statement dated October 22, 2015, which the parties shall proceed to memorialize in a formal contract of sale as lawfully and mutually agreed to by the parties.

¶14. The referenced, attached "Statement" is the Statement quoted in full above.

¶15. The Consent Resolution also makes clear that the change in ownership is directly related to Paul's estate planning and corporate planning DeWitt prepared on behalf of him and his wife:

> Presently Paul A. Brunner and Mary F. Brunner are having their estate planning and corporate planning, including the Corporation developed by the law firm of DeWitt, Ross & Stevens, s.c., which the parties agree benefits the Corporation. The parties recognize that the work is interrelated and the Corporation agrees to pay, as invoiced, to pay the amount equal to one-third (1/3) of the total cost of this estate planning and corporate planning; one-third (1/3) is to be paid by Paul A. Brunner and Mary E. Brunner; and, one-third (l/3) is to be paid by Unisource Insurance Associates, LLC.[1]

[1] Unisource Insurance Associates, LLC or "UIA" is another company owned by Paul and Mary Brunner. As part of his estate and corporate planning, they sold interests in that company to their daughter.

¶16. The Consent Resolution is signed by Paul and Brian.

¶17. According to Attorney Movroydis, the sole purpose of the Consent Resolution was for IRS and/or Wisconsin Department of Revenue audit protection to the Company and to Paul and Mary as part of their estate and succession planning Paul and Mary were doing through DeWitt.

¶18. Although the Consent Resolution references memorializing the Statement in a formal contract of sale, and retaining "legal counsel to prepare a Buy-Sell Agreement between the Shareholders regarding certain events such as the death or disability of a Shareholder and the sale of a Shareholder's stock interest," apparently no formal contract of sale or Buy-Sell Agreement were prepared, and no such documents were presented to the Court.

¶19. The Company is an IRS Chapter "S" corporation, and pursuant to federal tax law, its income tax returns must reflect the actual ownership interests of the corporation's shareholders.

¶20. The Company's 2012, 2013, and 2014 federal income tax returns reported that the Company was owned 25 percent by Brian and 75 percent by Paul for each respective tax year.

¶21. In 2016, Paul contacted the Company's accountant, Mark Spindler, and told him "a deal had been worked out between Paul and Brian, and that for purposes of the 2015 tax returns, the ownership should be reported 85 percent Brian and 15 percent Paul effective January 1, 2015."

¶22. This 85/15 ownership structure was reflected in the Company's 2015 and 2016 reported federal income tax returns.

¶23. All distributions made by the Company to its shareholders for the period from January 1, 2015 until June 1, 2017, were paid 85 percent to Brian and 15 percent to Paul.

¶24. Paul's state and federal tax returns also reflected an 85/15 Company ownership structure in 2015 and 2016, whereby he reported owning 15 percent of the Company.

¶25. Paul testified that he and Brian rarely discussed completion of the documents referenced in the Consent Resolution and Statement because Brian was experiencing serious mental health issues and rarely showed up for work from approximately May 2016 until May 2017.

¶26. Brian did not pay, and Paul did not receive, any share purchase payments referenced in the Consent Resolution and Statement.

¶27. Paul never demanded any share purchase payments from Brian as contemplated in the Consent Resolution and Statement.

¶28. On April 6, 2017, Paul called Attorney Movroydis to inform him that Paul and Brian had agreed to cancel the Consent Resolution. This was based upon Brian's illness and Brian's failure to come to work at the Company for an extended period of time. Very little regarding the details of their agreement and Brian's mental health at the time of this discussion is contained in the summary judgment record.

¶29. On May 1, 2017, Attorney Movroydis dictated a Mutual Cancellation Agreement and draft cover letter to Paul.

¶30. On May 15, 2017, Brian died intestate. Sherri, Brian's wife, is the sole heir to, and personal representative of, Brian's estate, and succeeds to his shares in the Company.

¶31. The Mutual Cancellation Agreement was typed by Attorney Movroydis' secretary on May 19, 2017. The draft reflected that Paul would be 15 percent owner and Brian 85 percent owner of the Company. Attorney Movroydis made edits to the typed draft even after learning of Brian's death, but the draft was never sent to Paul or the Company. The edits changed, among

other things, the ownership from 85/15 in Paul's favor, and not 75/25—the share ownership predating the Consent Resolution.

¶32. Other than the Consent Resolution, Paul is not aware of any Company shareholder or Board of Director meetings or minutes from January 1, 2015 to the present.

¶33. After his passing, Brian's vacancy on the Company's Board of Directors has never been filled, leaving Paul the sole director.

¶34. The Company's Articles of Incorporation require two directors to constitute the Board.

¶35. The Company purchased and owned a life insurance policy on Brian's life. After Brian's death, the Company as beneficiary on the policy received a life insurance payment of $1,002,136 (the "Life Insurance Proceeds").

¶36. Acting as sole director, Paul used the Life Insurance proceeds to pay off the outstanding bank loans in the amount of $373,711, and other Company indebtedness in the amount of $151,277.

¶37. Following Brian's death in 2017, Paul contacted Company accountant Mark Spindler and informed him that "there was a transaction put together realigning the ownership interest to the 85/15" but Brian had not made payments and therefore Paul "wanted it reverted back to the 75 percent to Paul, 25 percent to Brian."

¶38. Mark Spindler advised Paul that IRS regulations require distributions to be made consistent with relative ownership percentages of Paul and Brian (Sherri) and that the distributions Paul caused the Company to make were inconsistent with IRS regulations.

¶39. Despite Mr. Spindler's advice, Paul said he understood the risk, accepted responsibility, and proceeded anyway against Mr. Spindler's advice.

¶40. Paul had the Company make distributions to himself out of the Life Insurance Proceeds and other funds and property of the Company. These distributions include:

Distribution Date	Distribution Amount
June 1, 2017	$6,000
June 1, 2017	$31,000
June 15, 2017	$35,000
June 23, 2017	$100,000
July 7, 2017	$150,000
August 22, 2017	$16,000
August 22, 2017	$3,500
December 19, 2017	$16,000
December 19, 2017	$3,500
December 31, 2017	$19, 563 (Payment for personal vehicle using company funds)
December 31, 2017	$15,000 (Trade in value of Company vehicle for personal vehicle)
February 2, 2018	$15,000
Total:	$410,563

¶41. Sherri received some monies from the Company after Brian's death. Sherri received $5,500 from the Company on June 1, 2017; $45,000 on July 7, 2017; $5,500 on August 22, 2017; and $5,500 on December 9, 2017.

¶42. After Brian's death, Paul has received 87% of the monies distributed by the Company, and Sherri has received 13% of the monies distributed.

¶43. Paul's average annual salary for the five-year period prior to Brian's death was $70,668. Following Brian's death in 2017, Paul raised his salary to $90,662. By January 1, 2018, Paul's salary increased to $130,000, not including a $7,500 year-end bonus he gave himself in December of 2018. To date, Paul has maintained an annual salary of $130,000.

¶44. Paul did not consult with or seek the approval from Sherri for any of the identified distributions or increases in his salary and compensation.

¶45. Paul concedes that the Company paid for legal fees that were individual and personal to him and should have been paid by him and not the Company.

¶46. The pending motions involve the motion for declaratory relief initially filed by the Company on January 2, 2019, and joined and supported by Paul on January 7, 2019. That motion seeks a declaration that Paul owns a 75 percent interest in the Company and that Sherri owns a 25 percent interest. In summary, the motion seeks a declaration that a transfer of shares from Paul to Brian in 2016 did not occur, that the Statement and Consent Resolution were merely an "agreement to agree," and thus unenforceable, and that, even if there were a valid agreement, there was a material breach warranting rescission and restoring Paul as a 75 percent shareholder and Brian as a 25 percent shareholder.

¶47. On May 10, 2019, Sherri filed a motion for summary judgement seeking a declaration that the Consent Resolution is enforceable and that, based on the express terms of Consent Resolution and the actions taken by Paul himself thereafter, the Consent Resolution reflects a valid and consummated bargain, and that Paul is equitably estopped from denying the validity of the Consent Resolution and transfer of shares it confirms.

¶48. In addition to her motion for summary judgment, Sherri also filed two motions for partial summary judgment on Count VII of her First Amended Counterclaim and Third Party Complaint—a derivative claim she filed on behalf of the Company. Sherri's first derivative claim on which she moved for partial summary judgment is that Paul misused corporate funds when he caused the Company to pay for his personal legal fees while he was acting as sole director and sole officer of the Company. Sherri seeks partial summary judgment in favor of the Company

that Paul is liable, leaving for trial the disputed issue of the amount he is obliged to pay the Company.

¶49. Sherri's second derivative claim forming a basis for her Count VII and on which she moved for partial summary judgment alleges that Paul made unauthorized distributions to himself and to Sherri and also that Paul unilaterally increased his own salary. Sherri contends that Wisconsin law and the Company's Articles of Incorporation require a properly-constituted board of directors to make distributions and increase officer salaries. The Company's Articles of Incorporation require two directors, and after Brian's death on May 15, 2017, Paul was the sole director when he made these distributions and increased his salary.

¶50. On July 26, 2019, Paul filed a reply brief in response to Sherri's motion for summary judgment restating his original arguments, but also raising for the first time the referenced agreement between Paul and Brian in April 2017 to cancel the transfer of shares in the Company, and how that supports his claim for declaratory relief. None of Paul's prior affidavits submitted in relation to the pending motions mentioned or relied upon this agreement to cancel the transfer of shares.

¶51. Paul did not move for summary judgment on Sherri's claim for promissory estoppel.

DISCUSSION

I. STANDARDS FOR SUMMARY JUDGMENT AND DECLARATORY RELIEF.

¶52. Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2). In making this determination, this Court must apply a

two-step test. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Under the first step, this Court asks if the plaintiff stated a claim for relief. *Id.* at 315. Under the second step, this Court applies the summary judgment statute and asks if any factual issues exist that preclude summary judgment. *Id.*

¶53. "Any doubts as to the existence of a genuine issue of material fact are resolved against the moving party." *L.L.N. v. Clauder,* 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). "A 'material fact' is a fact that is significant or essential to the issue or matter at hand." *State v. Allen,* 2004 WI 106, ¶ 22, 274 Wis. 2d 568, 682 N.W.2d 433 (citing *Black Law Dictionary* 611 (7th ed. 1999)).

¶54. In deciding whether there are any factual disputes, the Court is to consider whether more than one reasonable inference may be drawn from undisputed facts. When that is the case, the competing reasonable inferences may constitute a genuine issue of material fact. *H&R Block E. Enters., Inc. v. Swenson*, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421. At the summary judgment stage, the Court must not "decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts…." *Fortier v. Flambeau Plastics Co*., 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991).

¶55. The Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, authorizes courts to enter a judgment determining the validity of a contract regardless of whether there has been an alleged breach of the contract. The purpose of the statute "is to allow courts to anticipate and resolve identifiable, certain disputes between adverse parties." *Putnam v. Time Warner Cable of S.E. Wisconsin, Ltd. P'ship,* 2002 WI 108, ¶ 43, 255 Wis. 2d 447, 473-74, 649 N.W.2d 626.

¶56. The statute, as it relates to contracts, "is to allow for a determination of legal rights before an injury has occurred or been threatened." *Aslanukov v. Am. Express Travel*

Related Serve. Co., 426 F. Supp. 2d 888, 891 (W.D. Wis. 2006). The facts on which the court relies in rendering a judgment should not be contingent or uncertain, but not all facts need to be resolved as long as the facts are "sufficiently developed to allow a conclusive adjudication." *Putnam,* 2002 WI 108, ¶ 44.

¶57. The relief requested and authorized under Wis. Stat. § 806.04 is discretionary. As the statute makes clear, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Wis. Stat. § 806.04(6).

II. CROSS MOTIONS RELATING TO THE SHAREHOLDER OWNERSHIP IN THE COMPANY

¶58. Paul contends that the Statement and Consent Resolution reflect an unenforceable "agreement to agree." He cites to the fact that both documents contemplate the preparation of formal agreements containing certain material terms, such as payment terms, a promissory note, and a shareholder agreement incorporating buy-sell terms, but such formal agreements were never negotiated, prepared, and executed. Because the promissory note was identified as being for twelve years, Paul alleges that it was required to be memorialized in a written document signed by both parties under the Statute of Frauds, Wis. Stat. § 241.02(1)(a). In addition, the documents contemplate an employment agreement for Paul, but none exists,[2] and the Court cannot provide or supply terms out of whole cloth and draft on its own an employment agreement on which the parties themselves did not negotiate and agree. As such, Paul urges that there was no meeting of the minds on material terms relating to the stock transfer.

[2] It is undisputed, however, that Paul has worked for the Company uninterrupted from the time of the Statement and Consent Resolution to the present without a written employment agreement.

¶59. In the alternative, Paul argues that, even assuming that the Consent Resolution is an enforceable contract, Paul should be able to rescind because of Brian's material non-performance. Brian never made any payments to Paul for the shares, as contemplated by the Statement and Consent Resolution, and never provided Paul the contemplated employment agreement with the Company.

¶60. Finally, Paul contends that the agreement Paul recites as having been made by Paul and Brian in April 2017 is enforceable, even though not in writing, because the meeting between Brian and Paul constituted, as a matter of law, a shareholder and board of directors meeting modifying the Consent Resolution.

¶61. Sherri, on the other hand, contends that the Consent Resolution, signed by both Paul and Brian, makes clear that the transfer of shares was "consummated" and that, as a result, Brian owned 85 percent of the Company and Paul owned 15 percent, and that this share ownership can only be changed in writing. What is more, Paul, Brian, and the Company all acted in accordance with the fact that the transfer had already occurred, and ratified it through their conduct in the following years. Paul renounced his majority ownership in order to be removed as guarantor to the BMO loan, which Paul then assumed as majority owner, and the Company's tax returns and Paul's personal tax returns reflected the 85/15 Company ownership stated in the Consent Resolution.

¶62. Sherri contends further that Paul waived any indefiniteness and supposed lacking and required terms of which Paul now complains through the actions Paul took in furtherance of the agreement and his continued work for the Company despite the allegedly required written employment agreement. Sherri also notes that the employment agreement would be with the

Company, and not Brian, and is severable from, and not material to, the share transfer reflected in the Consent Resolution.

¶63. According to Sherri, the same actions highlighted in support of her argument that Paul waived any alleged deficiencies in the Consent Resolution also require that Paul be equitably estopped from denying the validity and enforceability of the Consent Resolution. Relatedly, she notes that rescission is an equitable remedy, and that equity does not favor rescinding the Consent Resolution under the circumstances here.

¶64. Finally, with respect to Paul's more recent argument that he and Brian agreed in April 2017 to cancel the share transfer, Sherri contends that Paul's recent affidavit disclosing that discussion is a sham because it is inconsistent with his prior affidavits. She also argues that, if anything, the fact that Paul and his attorney believed that they needed an agreement to cancel the Consent Resolution refutes Paul's current position that the Consent Resolution was an unenforceable agreement to agree. Sherri also filed admissions by Paul wherein he denied there being any minutes to Company shareholder or board meetings other than the Consent Resolution, and thus the agreement Paul recites cannot trump the Consent Resolution which itself states that any change in share ownership must be in writing.

¶65. A contract consists of an offer, acceptance, and consideration. *Rosecky v. Schissel*, 2013 WI 66, ¶ 57, 349 Wis. 2d 84, 833 N.W.2d 634. For an agreement to be enforceable, there must be "a meeting of the minds upon all essential terms." *Todorovich v. Kinnickinnic Mut. Loan & Bldg. Ass'n*, 238 Wis. 39, 42, 298 N.W. 226 (Wis. 1941). "Vagueness or indefiniteness as to an essential term of the agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and

obligations." *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (Wis. 1996).

¶66. Courts often glean the intent of the parties to be bound by an agreement, as well as the terms of the purported agreement, by looking at their actions and how they construed the agreement. *See Jorgenson v. Northern States Power C*o., 60 Wis. 2d 29, 35, 208 N.W.2d 323 (Wis. 1973); *Zweck v. DP Way Corp*., 70 Wis. 2d 426, 435, 234 N.W.2d 921 (Wis. 1975); *Kuehn v. Safeco Ins. Co. of Am.*, 140 Wis. 2d 620, 626, 412 N.W.2d 126 (Ct. App. 1987). Moreover, such conduct may, in some circumstances, constitute a waiver of any prerequisites or indefiniteness that might otherwise prevent enforcement of the agreement. *See Godfrey Co. v. Crawford*, 23 Wis. 2d 44, 50, 126 N.W. 495 (Wis. 1964); *Fun-N-Fish, Inc. v. Parker,* 10 Wis. 2d 385, 103 N.W.2d 1 (Wis. 1960).

¶67. Both parties cite and rely upon *Skycom Corp. v. Telstar Corp.,* 813 F.2d 810, 816 (7th Cir. 1987). In *Skycom*, the United States Court of Appeals for the Seventh Circuit held that the alleged agreement reached between the parties there was merely an "agreement to agree" because only one party intended the agreement to be a binding contract. The court also noted the following:

> Even if parties agree, point by point, on all the terms of a contract, if they understand that the execution of a formal document shall be a prerequisite to their being bound there is no contract until the document is executed. On the other hand, if it is agreed that a formal document will be prepared to memorialize a bargain the parties have already made, the bargain is enforceable even though the document has not been executed.

Id. at 816.

¶68. In this case, according to the language used in the Consent Resolution, the parties agreed that a formal document would be prepared to "memorialize" a bargain that the parties had already consummated. The parties' conduct thereafter is consistent with the position that an

agreement was made and ownership in the Company changed. The Consent Resolution uses the past tense in discussing the buyout and share transfer, and expresses definitively the share ownership in the present tense. If the Consent Resolution contemplated that the formal documentation of other matters were a prerequisite to the share transfer, one would suspect that the Consent Resolution would have used the future tense, to reflect something that has not yet happened or a state that does not yet exist, a conditional tense, to recite what could happen *if* certain conditions are satisfied, or the subjunctive tense, to express what is imagined, wished, or possible.

¶69. On the other hand, there is language in the Consent Resolution and Statement supporting Paul's position that execution of formal documents was a prerequisite to the formation of an enforceable agreement, and that necessary and material terms still needed to be negotiated, drafted, and executed before the alleged agreement would have the requisite definiteness and certainty to be enforceable.

¶70. Of course, as discussed above, to establish a contract, there must be a meeting of the minds. "There is no meeting of the mind where the parties do not intend to contract, and the question of intent is generally one to be determined by the trier of fact." *Household Utilities, Inc., v. Andrews Co.,* 71 Wis. 2d 17, 29, 236 N.W.2d 663 (Wis. 1976).

¶71. Based upon the language of the Consent Resolution, coupled with the actions taken by the parties thereafter, the Court concludes that it cannot grant the requested motions. It will leave to the finder of fact what the parties intended with the Consent Resolution and whether the Consent Resolution is sufficiently definite and certain, and relatedly, whether the April 2017 agreement between Paul and Brian is sufficiently definite and certain. The Court also concludes that whether Paul waived (1) any deficiencies in the definiteness of the agreement, (2) additional

documents contemplated in the Consent Resolution, and (3) Brian's performance of the agreement, are all questions of fact best left to the finder of fact, as argued by Paul's attorney at the hearing on the motion.

¶72. In addition, the issues regarding the timing of Paul's disclosure of the April 2017 agreement with Brian, and alleged inconsistencies between Paul's latest affidavit, on the one hand, and Paul's previously filed affidavits and admissions in written discovery, on the other, necessarily involve credibility determinations this Court cannot decide on summary judgment. Such determinations, including the weight to be given to differing inferences drawn from the facts presented here, are best left for the finder of fact.

¶73. In denying the respective motions on share ownership, the Court is also cognizant that matters of equity, including Sherri's argument that Paul should be equitably estopped from denying the validity and enforceability of the Consent Resolution, and Paul's request for rescission—an equitable remedy—are difficult to assess on the cold record. The Court is exercising its discretion to hear and assess all the evidence, including making its own credibility determinations, before deciding the equitable claims and defenses presented by the parties in this case.

¶74. One other point bears mentioning as support for the Court's decision to deny Paul's request for declaratory relief. The Court stated at oral argument that since the filing of Paul's motion, Sherri has filed a counterclaim alleging promissory estoppel. Dkt. No. 21, Count IV. Paul has not moved for summary judgment dismissing that claim. Accordingly, the Court noted that even if it were inclined to grant the declaration Paul seeks—that is, that the Consent Resolution is not enforceable—that decision would potentially not resolve the share ownership issue because Sherri's claim for promissory estoppel is still pending.

¶75. "Promissory estoppel is an alternative basis to breach of contract for seeking damages from the breakdown of a relation. If there is a promise of a kind likely to induce a costly change in position by the promisee in reliance on the promise being carried out, and it does induce such a change, he can enforce the promise even though there was no contract." *Cosgrove v. Bartolotta,* 150 F.3d 729, 732 (7th Cir. 1998).

¶76. As noted above, a request for declaratory relief under Wis. Stat. § 806.04 is discretionary. When the requested declaration would not terminate the uncertainty giving rise to the proceeding, the Court may refuse to enter the declaratory judgment. That is the case here. Even if the Court were inclined to agree with some or all of Paul's argument, the Court finds that it would not terminate the uncertainty giving rise to the proceeding because of the pending claim for promissory estoppel, as well as the equitable issues and defenses discussed above.

¶77. The Court therefore denies the motions for summary judgment and declaratory relief relating to the share ownership issue. That being said, the Court holds that, as a temporary matter pending final resolution of the various claims associated with the Company's share ownership, the ownership of the Company is 85 percent Brian and 15 percent Paul, as reflected in the Consent Resolution.

III. SHERRI'S MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON HER DERIVATIVE CLAIM.

A. Derivative Claim for Misuse of Corporate Funds to Pay Personal Legal Fees.

¶78. Sherri filed a counterclaim alleging derivatively on behalf of the Company that Paul breached his fiduciary duties and misused corporate funds when he caused the Company to pay for his personal legal fees while he was acting as sole director and sole officer of the Company. Dkt. No. 21, Count VII. Sherri moved for partial summary judgment in favor of the Company on this claim, seeking a finding on the undisputed facts that as a matter of law Paul

breached his fiduciary duties and is liable to the Company for legal fees he had the Company incur inappropriately, leaving for trial the disputed issue of the amount he is obliged to repay the Company.

¶79. In response to the motion, Paul conceded that, as a result of the Court's decision disqualifying DeWitt from representing the Company and Paul in this matter, the Company did pay for some of his personal legal fees. Paul agreed to reimburse the Company for these fees when an amount is determined.

¶80. Corporate officers and directors owe fiduciary duties to act in good faith and to deal fairly in the conduct of all corporate business. *Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.,* 206 Wis. 2d 435, 442, 557 N.W.2d 835, 838 (Ct. App. 1996). This duty extends to the corporation, itself, and to its shareholders. *Id.; Grognet v. Fox Valley Trucking Serv*., 45 Wis. 2d 235, 241, 172 N.W.2d 812, 816 (1969); *Jorgensen v. Water Works, I*nc., 218 Wis.2d 761, 776-77, 582 N.W.2d 98 (Ct. App. 1998). For a discussion of fiduciary duties, generally, *see Zastrow v. Journal Communications, Inc*., 2006 WI 72, ¶¶ 24-40, 718 N.W.2d 51, 291 Wis. 2d 426.

¶81. An officer's or director's unauthorized payments to himself or herself, or the payment of constructive dividends to some shareholders, but not others, or the payment of disproportionate dividends, generally, is a breach of fiduciary duty. The breaching officer or director is liable to the corporation when the injury is principally suffered by the corporation, or to the shareholders if the injury is primarily to the individual shareholders. *Jorgensen*, 218 Wis. 2d at 776-77.

¶82. Accordingly, the Court grants the motion for partial summary judgment on Count VII, and finds that Paul is liable to the Company for the payment of personal legal fees. Final judgment will await a trial or stipulation determining the amount of damages on the claim.

B. Derivative Claim for Unauthorized Distributions and Salary Increases.

¶83. Sherri's Count VII also alleges derivatively on behalf of the Company that Paul breached his fiduciary duties and made unauthorized distributions to himself and to Sherri and also that Paul unilaterally and inappropriately increased his salary and compensation. Sherri contends that Wisconsin law and the Company's Articles of Incorporation require a properly-constituted board of directors to order distributions and increase officer salaries. Sherri moved for partial summary judgment in favor of the Company on this claim, seeking a finding on the undisputed facts that as a matter of law Paul is liable to the Company to repay the distributions and salary increases.

¶84. Paul disputes the contention that he had no authority to make the distributions and salary increases. Paul concedes that the distributions paid by the Company to Paul exceeded his share ownership and were 87/13 percent in his favor, instead of 75/25 percent, as he contends the ownership should be. As a result, he concedes liability but argues that Sherri should receive additional distributions to reflect the appropriate 75/25 ownership interest. In response to Sherri's argument that he did not have authority under Wisconsin law to make *any* of the challenged distributions to himself and to Sherri, Paul argues that the transactions are not void, but voidable, and that any repayment by the parties should await a final decision on all of the pending disputed issues.

¶85. On the issue of Paul's salary, Paul does not dispute that he unilaterally increased his salary after Brian's death to $130,000 by 2018, where it currently remains. Paul contends,

however, that these increases were justified based upon his increased role and responsibilities in the Company after Brian's death, and that the salary increases are protected by the Business Judgment Rule.

¶86. Under Wisconsin law, a corporation must have a board of directors. Wis. Stat. § 180.0801(1). "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the discretion of, its board of directors, subject to any limitation set forth in the articles of incorporation." Wis. Stat. § 180.0801(2). The number of directors must be specified in the articles of incorporation. Wis. Stat. § 180.0803.

¶87. Here, the Company's Articles of Incorporation require two directors to constitute a board of directors. The Company's Articles of Incorporation do not limit the board's authority. Pursuant to Wis. Stat. § 180.0640(1) and Wis. Stat. § 180.032(11), distributions to shareholders and the fixing of director and officer compensation are the responsibility of a corporation's board of directors.

¶88. After Brian's death, his position on the Company's Board of Directors remained vacant and unfilled. As a result, Paul was the sole director of the Company and the Board of Directors was not appropriately constituted under Wisconsin law and the Company's Articles of Incorporation.

¶89. Accordingly, it follows that Paul's distributions to both himself and to Sherri were unauthorized because they were not awarded or approved by a properly constituted board of directors.

¶90. Paul contends that his decisions increasing his compensation after Brian's death are protected by the business judgement rule because his salary increases were the result of increased responsibilities he accepted after Brian's death. The Court disagrees.

¶91. The business judgment rule is "a judicially created doctrine that limits judicial review of corporate decision-making when corporate directors make business decisions on an informed basis, in good faith and in the honest belief that the action taken is in the best interests of the company." *Einhorn v. Culea*, 2000 WI 65, ¶19, 235 Wis. 2d 646, 612 N.W.2d 78. The rule "immunizes individual directors from liability and protects the board's action from undue scrutiny by the courts." *Data Key Partners v. Permira Advisers LLC,* 2014 WI 86, ¶ 32, 356 Wis. 2d 665, 849 N.W.2d 693. The rule is in place to limit court involvement in business decisions in which the court may not have much or any expertise. *Reget v. Paige,* 2001 WI App 73, ¶17, 242 Wis. 2d 278, 626 N.W.2d 302.

¶92. Procedurally, the business judgment rule creates an evidentiary presumption that the acts of the board of directors were done in good faith and in the honest belief that its decisions were in the best interest of the company. *Reget*, 2001 WI App 73, ¶¶ 17-18. Four elements generally define the business judgment rule presumption: (1) a business decision; (2) disinterestedness and independence; (3) due care; and (4) good faith. *See Roselink Investors, LLC v. Shenkman,* 386 F. Supp. 2d 209, 216 (S.D.N.Y. 2004); *Aronson v. Lewis*, 473 A.2d 805, 811-16 (Del. 1984).

¶93. Wisconsin courts have yet to incorporate the duty-of-care requirement adopted by Delaware and other jurisdictions, and "Wisconsin's statutes and cases have tended to give boards a stronger hand than their counterparts in Delaware and other states." Kenneth B. Davis, Jr., *The Business Judgment Rule*, 2015 WIS. L. REV. 475, 482-83.

¶94. According to the Wisconsin Supreme Court in *Data Key Partners*, 2014 WI 86, ¶ 32, Wisconsin codified the business judgment rule in Wis. Stat. § 180.0828. As discussed in an influential law review article by former Wisconsin Law School Dean Kenneth B. Davis, Jr.,

however, the Supreme Court may have unintentionally conflated the business judgment rule, on the one hand, with the statute that is intended to immunize and protect directors from personal liability, on the other. 2015 WIS. L. REV. at 484-85. That article makes clear that Wisconsin has not codified the duties and responsibilities of directors and by "not codifying either the duty of care or the [business judgment rule], jurisdictions like Wisconsin and Delaware have effectively uncoupled the concept of a director's standard of conduct from the standard for liability." *Id.* at 486.

¶95. A predicate to the sound application of the business judgment rule is an action taken by a disinterested board of directors, properly constituted. *Cf. Einhorn v. Culea*, 2000 WI 65, ¶ 31. Whether a director or board is disinterested under a business judgment rule analysis means "that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson*, 473 A.2d at 812. As Dean Davis noted in his article, if directors in a closely-held corporation set their own compensation, "they cannot expect the benefits of the [business judgment rule]" and bear the burden of proving the fairness of the compensation. 2015 WIS. L. REV. at 497.

¶96. Here, as noted above, the board was not properly constituted. The decisions, moreover, were not made by a disinterested board, but by Paul unilaterally, who benefitted directly from the salary increases. *Id.; see also Stoiber v. Miller Brewing Co.*, 257 Wis. 13, 19, 42 N.W.2d 144 (Wis. 1950) (recognizing "[t]he rule which forbids a director of a corporation from casting the vote essential to the adoption of a resolution fixing his own salary").

¶97. The Court grants Sherri's motion for partial summary judgment. The Court finds that Paul breached his fiduciary duties by paying distributions to himself and to Sherri and by

increasing his compensation without board approval. The Court orders that distributions paid to Paul and to Sherri, $410,563 and $61,500, respectively, be returned to the Company within 30 days of the date of this Order unless such amounts or some portion of them, are authorized by a properly constituted board of directors.

¶98. As to the compensation increases, the Court grants partial summary judgment, but it cannot determine from the record of undisputed facts the amount of Paul's salary and compensation prior to Brian's death. The increases are undisputed, but on the present record, the Court cannot determine the compensation Paul received prior to Brian's death—as opposed to a five-year average ($70,668) Paul received prior to the first raise in 2017. Moreover, Paul should have the opportunity to prove that his salary is fair to the Company. Accordingly, while the fact of the compensation increases is undisputed and constitute a breach of fiduciary duty, such damages, if any, will be determined at trial. The Court notes, however, that Paul's continuing acceptance of an unauthorized and unfair salary pending trial could constitute a continuing and intentional breach of his fiduciary duties.

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¶99. Accordingly, IT IS ORDERED that the motions for summary judgment and for declaratory relief filed by both Paul and Sherri relating to share ownership are DENIED. As a temporary order pending a final determination on share ownership, the share ownership is 85/15 as stated in the Consent Resolution.

¶100. Sherri's motion for partial summary judgment on her Count VII is GRANTED. The Court finds that Paul breached his fiduciary duties and is liable to repay to the Company funds it incurred in paying legal fees properly attributable to Paul. The damages will be determined at trial. The Court also finds that Paul breached his fiduciary duties by ordering

Company distributions to himself and to Sherri without board approval, and orders that distributions paid to Paul and to Sherri, $410,563 and $61,500, respectively, be returned to the Company within 30 days of the date of this Order unless such amounts or some portion of them are authorized by a properly constituted board of directors. The Court also finds that Paul breached his fiduciary duties by granting salary increases to himself without board approval. The damages, if any, will be determined at trial.

Dated this 10th day of September, 2019.

BY THE COURT:
/s/ Michael J. Aprahamian
Circuit Court Judge