

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NATCOM BANCSHARES, INC.,

Plaintiff,

v.

BRENDA L. JOHNSON, MURRAY R. JOHNSON,  
DIANA T. JOHNSON, T.R.J., a minor,  
M.P.J., a minor, M.S.J., a minor, and T.P.J., a minor,

Defendants.  
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OPINION AND ORDER

12-cv-334-bbc

This is an action under Wis. Stat. § 180.1330 to determine the fair value of plaintiff NATCOM Bancshares, Inc.'s common stock. Defendants Brenda Johnson, Murray Johnson, Diana Johnson and minor defendants T.R.J., M.P.J., M.S.J. and T.P.J. are former shareholders who dissented from plaintiff's decision to convert from a Subchapter C corporation to a Subchapter S corporation under the Internal Revenue Code. Because defendants dissented, they were entitled to payment for the fair value of their shares under Wis. Stat. § 180.1325. Plaintiff paid defendants for their shares, but defendants disputed plaintiff's estimate of fair value of the shares.

Plaintiff brought this action in the Circuit Court for Douglas County, seeking a judicial determination of the fair value and accrued interest of its shares of common stock. Defendants removed the case to this court under 28 U.S.C. §§ 1441 and 1446. Jurisdiction

is present under 28 U.S.C. § 1332 because defendants' citizenship is completely diverse from plaintiff's citizenship and there is more than \$75,000 in controversy.

Now before the court is plaintiff's motion for partial summary judgment. Dkt. #23. Plaintiff seeks a dismissal of defendants' claims for (1) payment of interest on their former shares for the period from December 29, 2011 to January 20, 2012; and (2) fees and expenses under Wis. Stat. § 180.1331(2). Plaintiff has not moved for summary judgment on the issue of the fair value of its shares of common stock, and the parties agree that there are genuine disputes of material fact relating to that issue that must be resolved by the court after a trial, which is scheduled for April 1, 2013.

After reviewing the parties' arguments, I conclude that plaintiff's motion must be denied. Under Wis. Stat. § 180.1301(5), interest accrued on the value of defendants' shares from the date of plaintiff's Subchapter S conversion, not from the date of defendants' payment demand. Thus, plaintiff was required to pay defendants interest on their former shares for the period from December 29, 2011 to January 20, 2012. With respect to fees and expenses, I conclude that it would be premature to resolve the issue at this stage.

From the parties proposed findings of fact and the record, I find the following facts to be material and undisputed.

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Natcom Bancshares, Inc. is a Wisconsin banking corporation with its

principal place of business in Wisconsin. Defendants are former shareholders of plaintiff who collectively owned 14,002 shares of plaintiff's common stock before they dissented from plaintiff's conversion to a Subchapter S corporation. Defendants Diana Johnson and Murray Johnson are adult citizens of Illinois and T.R.J., M.P.J., M.S.J. and T.P.J. are minor citizens of Illinois. Defendant Brenda Johnson is an adult citizen of Minnesota. Defendants have demanded payments for the fair value of their former shares in an amount in excess of \$3,000,000, plus accrued interest.

#### B. Vining Sparks's Valuation

On August 5, 2011, plaintiff's board of directors announced to its shareholders that it was considering converting the bank from a Subchapter C corporation to a Subchapter S corporation under the Internal Revenue Code. The board of directors had been discussing a possible conversion for several months. Plaintiff's board of directors voted to select Vining Sparks IBG, L.P. to render its opinion about the fair value of plaintiff's outstanding stock, and plaintiff's advisors, Gerrish McCreary Smith, PC, retained Vining Sparks on plaintiff's behalf. Vining Sparks had performed some financial analysis services for plaintiff in the past related to bonds, but had never performed any valuation services for plaintiff. Thomas Mecredy of Vining Sparks oversaw plaintiff's appraisal. Mecredy had performed 15 or 20 appraisals for Gerrish McCreary Smith in the past five years, but had never worked with plaintiff.

In preparing for the appraisal, Mecredy sent a questionnaire to plaintiff, seeking

financial information about the bank's projected performance, security portfolio, asset liability and previous trades. Mecredy met with Joseph Konradt, plaintiff's president, and talked about the financial condition of plaintiff and the economic climate of the markets in which plaintiff operated. Plaintiff provided Mecredy performance projections, asset information and a record of recent private transactions in plaintiff's shares showing the dates on which shares were bought and sold and the prices paid.

Plaintiff did not tell Mecredy that it was operating under a formal agreement with the Office of the Comptroller of the Currency that required plaintiff to comply with recording and reporting requirements regarding certain loans. (The agreement was lifted in mid-December 2011.) Also, plaintiff did not tell Mecredy about its policy of telling shareholders only the "book value" of shares when they contacted the bank asking the price for which shares were selling. Before 2010, plaintiff had disclosed to shareholders recent known transaction prices, but plaintiff ceased that practice in January 2010 and began disclosing only the book value. Plaintiff also did not tell Mecredy that a board member, Todd Johnson, was the buyer in a June 16, 2011 transaction involving the purchase of 851 shares of stock from an individual for about \$154 a share below the current book value at the time.

Mecredy produced a report concluding that the value of plaintiff's common stock was \$750 a share as of June 30, 2011. He provided the report to plaintiff in August 2011. As the basis for his valuation, Mecredy used a weighted average of private transactions in plaintiff's shares. In using this private transaction approach, Mecredy assumed that the transactions were at arm's length, with a willing buyer and seller, without duress and with

the two parties having a reasonable amount of information regarding the market for shares. Because Mecredy used a weighted average of private transactions, large transactions such as the June 16, 2011 transaction involving Todd Johnson had a proportionally higher effect on the value of shares than smaller transactions.

After Mecredy provided his report to plaintiff, plaintiff's board of directors continued to discuss the Subchapter S Conversion. During the same time period, in fall 2011, bank president Konradt prepared a series of "strategic planning documents" to present to the board regarding potential growth scenarios for the bank to consider. According to Konradt, he did this as an "exercise" to "get the board focused on how big" it wanted the bank to be. Konradt Dep., dkt. #41, at 71-75. He considered the documents to be "what if" formulas, id. at 73, and "aspirations" for the bank, id. at 85, but did not consider them to be official financial projections. The official projections were prepared by plaintiff's controller and approved by Konradt. Id. at 71. Konradt's various scenarios caused "serious internal debates in management [about] whether [plaintiff] could get [the] numbers" he proposed, id. at 77, and about what qualified as "reasonable annual growth." Id. at 82. Plaintiff never provided Konradt's various growth scenarios to Mecredy.

### C. Subchapter S Conversion and Payment to Defendants

In October 2011, members of plaintiff's board of directors exchanged a series of emails discussing the Subchapter S conversion and defendants' opposition to the conversion. In an October 19, 2011 email, Konradt questioned whether the conversion was more

important than a possible acquisition. Dkt. #35-24. He questioned whether another board member's "argument that current bank stock valuations make[] this a compelling time to convert to a Sub S" should "trump all other issues." Id.

On November 4, 2011, plaintiff notified its shareholders that a special shareholders meeting would be held on December 1, 2011 to vote on the transaction necessary to convert plaintiff to a Subchapter S corporation. The meeting notice stated that shareholders would be entitled to assert dissenters' rights under Wisconsin law. Between November 21 and 29, 2011, defendants notified plaintiff that they dissented from the proposed transaction and intended to demand payment for their 14,002 shares of plaintiff's common stock if the proposed transaction was effectuated.

At the December 1, 2011 special meeting, a majority of plaintiff's common stockholders voted to approve the transaction. On December 9, 2011, plaintiff sent defendants written dissenters' notices under Wis. Stat. § 180.1322, specifying that their payment demands had to be delivered no later than January 20, 2012.

For the purposes of the Subchapter S conversion, the board set the fair value of plaintiff's stock at \$780 a share, \$30 more than Mecredy's fair value estimate as of June 30, 2011. On Konradt's recommendation, the board added the \$30 to Mecredy's estimate to reflect an increase in plaintiff's book value after June 30, 2011. The change was largely attributable to a one-time "write down of goodwill." Mecredy did not recommend that the board increase its fair value estimate and testified later that simply adding to the evaluation might "get [] the right result but it's not the right way to get there." Mecredy Dep., dkt.

#42, at 78.

By letter dated December 16, 2011, defendants told plaintiff that they had engaged an accredited financial appraisal firm, Southard Financial, to review Vining Sparks's valuation and that Southard had identified a number of problems with it. Plaintiff did not ask Mecredy about the issues identified by defendants before proceeding with the Subchapter S conversion.

Plaintiff completed the Subchapter S conversion on December 29, 2011. On January 20, 2012, defendants demanded payment of fair value in return for their 14,002 shares of plaintiff's common stock. On the same day, plaintiff paid defendants a total of \$10,921,560, or \$780 a share, in return for their 14,002 shares. On February 17, 2012, defendants notified plaintiff under Wis. Stat. § 180.1328 that they estimated the fair value of their former shares to be \$995 a share and demanded additional payments of \$215 a share, plus interest at an annual rate of 3.25% retroactive to December 29, 2011.

## OPINION

Under Wis. Stat. ch. 180, shareholders may dissent from certain corporate transactions and demand payment of the "fair value" of their shares. Wis. Stat. §§ 180.1302, 180.1323. If, as here, the dissenting shareholder disagrees with the amount of the corporation's payment, the dissenter may notify the corporation of the dissenter's estimate of the fair value of the shares and demand payment under Wis. Stat. § 180.1328. If that demand remains unsettled, the corporation must "bring a special proceeding" in the

circuit court within a specified time limit and petition the court “to determine the fair value of the shares and accrued interest.” Wis. Stat. § 180.1330(1). If the court finds that a corporation has underpaid, the dissenter is entitled to a judgment in the “amount . . . by which the court finds the fair value of his or her shares, plus interest, exceeds the amount paid by the corporation.” Wis. Stat. § 180.1330(5)(a).

In this case, plaintiff filed a petition under § 180.1330 for a judicial determination of the fair value of defendants’ former shares and accrued interest. In their response to plaintiff’s petition, defendants contend that the fair value of their shares was significantly greater than \$780 a share. They also contend that plaintiff failed to pay them all of the interest they were owed on their shares and that they are entitled to an award of all fees and expenses under Wis. Stat. § 180.1331. Plaintiff has moved for summary judgment on defendants’ claim for additional interest and fees.

#### A. Interest

Plaintiff completed the Subchapter S conversion on December 29, 2011. It paid defendants for their shares on January 20, 2012, the same day on which it received defendants’ demand for payment, and did not pay any interest to defendants. Defendants contend that they are entitled to payment of interest on their former shares for the time period from December 29, 2011 to January 20, 2012.

Plaintiff cites Wis. Stat. § 180.1325(1) in support of its position. That statutory provision states that

[A]s soon as the corporate action is effectuated or upon receipt of a payment demand, whichever is later, the corporation shall pay each shareholder or beneficial shareholder who has complied with s. 180.1323 the amount that the corporation estimates to be the fair value of his or her shares, plus accrued interest.

Wis. Stat. § 180.1325(1). Plaintiff contends that interest on amounts owed to dissenting shareholders begins to accrue from the later of the shareholder payment demand or the date on which the corporate action is effectuated. Thus, because defendants submitted their payment demand after the Subchapter S conversion was effectuated, interest began accruing on the date of the payment demand. Plaintiff argues that because it paid defendants on the same day as the payment demand, no interest had accrued.

Plaintiff's arguments are not persuasive. The statutory provision on which plaintiff relies does not relate to the accrual of interest. Rather, the provision establishes when a corporation must pay dissenting shareholders. The phrase "whichever is later" in § 180.1325(1) modifies when the corporation "shall pay," not when interest begins to accrue.

Moreover, the dissenters' rights statute contains a separate provision regarding the accrual of interest that conflicts with plaintiff's interpretation of § 1325(1). Under Wis. Stat. § 180.1301(5), interest as used in the dissenters' rights provisions is defined to mean

interest from the effectuation date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all of the circumstances.

Wis. Stat. § 180.1301(5). This provision makes it clear that interest begins accruing "from the effectuation date of the corporate action." Although plaintiff argues that this provision merely states that interest may be "available" to a dissenting shareholder on the effectuation

date, its interpretation conflicts with the plain language of the provision. The provision states that “‘interest’ *means* interest from the effectuation date [] until the date of payment”; it does not state what interest “*could*” or “*may*” mean and does not provide any alternative methods for calculating interest. The meaning of the provision is clear. Hoague v. Kraft Foods Global, Inc., 2012 WI App 130, ¶ 9, 344 Wis. 2d 749, 824 N.W.2d 892, 894 (“If . . . the meaning of the statute is plain, then we apply that plain meaning.”).

I disagree with plaintiff that the Wisconsin Court of Appeals adopted plaintiff’s interpretation of the interest provisions in HMO-W Inc. v. SSM Health Care System, 2003 WI App 137, 266 Wis. 2d 69, 667 N.W.2d 733. The court’s decision in that case contains what it states is a “brief summary of the applicable provisions of the dissenters’ rights statutes.” Id. at ¶ 6. In summarizing § 180.1325(1), the court stated that

the corporation must make a payment to the dissenting shareholder equal to “the amount that the corporation estimates to be the fair value of his or her shares, plus accrued interest,” calculated from the date the challenged “corporate action is effectuated” or from the date of “receipt of a payment demand,” whichever is later.

Id. Although this statement suggests that “accrued interest” is calculated from the later of the corporate action or the payment demand, the court did not resolve any issue regarding the accrual of interest in HMO-W. The parties in that case actually agreed that the definition of interest in § 180.1301(5) applied “to the time between the corporate action effectuation date and the date the circuit court makes a decision regarding the fair value of the shares.” Id. at ¶ 9. The question before the court concerned the *rate* of interest payable to a dissenting shareholder, not when interest began to accrue. The circuit court had

determined the fair value of shares owed to the dissenting shareholder, but the parties disagreed about the interest rate that should be applied from the date of the circuit court's decision to the corporation's payment. Id. ("We are asked to resolve whether the interest language in § 180.1301(5) or the 12% rate contained in Wis. Stat. § 814.04(4) applies to the time between the circuit court's decision regarding fair value and the date the corporation actually tenders payment."). Thus, the court's "brief summary" of § 180.1325 is not support for plaintiff's position.

Finally, plaintiff contends that defendants' interpretation would produce an unfair result, because it requires plaintiff to pay for defendants' delay in making a payment demand. However, plaintiff established the deadline by which defendants were required to submit their payment demand. Under the law, plaintiff was required to give defendants "no[] fewer than 30 days nor more than 60 days after the date on which the dissenters' notice [was] delivered," Wis. Stat. § 180.1332(d), on December 9, 2011. Plaintiff gave defendants 42 days, until January 20, 2012. Despite knowing the defendants had until January 20 to file their payment demands, plaintiff proceeded to effectuate the Subchapter S conversion on December 29. Plaintiff cannot now complain that defendants delayed in submitting their payment demands.

In sum, because the transaction was "effectuated" on December 29, 2011, plaintiff was required to pay defendants interest from that date until the date it paid defendants, on January 20, 2012. Therefore, I am denying plaintiff's motion for summary judgment on the interest issue and granting summary judgment to defendants on this issue.

## B. Fees and Expenses

Under Wis. Stat. § 180.1331(2), the parties “shall bear their own expenses” in a special appraisal proceeding, except the court may assess the “fees and expenses of counsel and experts . . . in amounts that the court finds to be equitable” against the corporation “if the court finds that the corporation did not substantially comply with ss. 180.1320 to 180.1328” or “if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously or not in good faith with respect to the rights provided by this chapter.” “The language of the statute makes clear that an award of fees is a matter of discretion for the court.” Albert Trostel & Sons Co. v. Notz, 07-C-0763, 2010 WL 3835117 (E.D. Wis. Sept. 28, 2010).

Plaintiff contends that it cannot be liable for any portion of defendants’ fees and expenses because it followed the procedural requirements of the dissenters’ rights statute and made a reasonable and honest attempt to determine the fair value of its stock. Defendants disagree, contending that plaintiff (1) failed to “substantially comply” with the requirement to pay defendants the fair value of their shares; (2) acted arbitrarily, vexatiously and in bad faith in making its estimate of fair value; and (3) failed to “substantially comply” with the accrued interest requirement of the dissenters’ rights statutes.

With respect to defendants’ first argument, it is possible that I will conclude that plaintiff’s estimate of fair value was too low and that plaintiff must pay more money to defendants for their former shares. However, I agree with plaintiff that defendants cannot recover fees solely because plaintiff’s estimate of fair value was too low. I have found no

Wisconsin cases that have considered this issue, but several cases in other jurisdictions that have considered nearly identical fee provisions in dissenters' rights statutes. For example, in Pro Finish USA, Ltd. v. Johnson, 63 P.3d 288, 298 (Ariz. Ct. App. 2003), the Court of Appeals for Arizona vacated the trial court's award of fees and expenses to dissenting shareholders that was based on the trial court's determination that fair value "materially exceeded" what the corporation had paid. Under Arizona law, as under Wisconsin law, a court can award fees to the shareholder if the corporation "did not substantially comply with the requirements of [Arizona's dissenters' rights statute]" or if it "acted arbitrarily, vexatiously or not in good faith with respect to the rights provided by [Arizona's chapter of the law of corporations]." Ariz. Rev. Stat. § 10-1331(B). The court of appeals held that because the trial court did not find that the corporation acted arbitrarily, vexatiously or in good faith or failed to comply with the statute, the trial court had "no statutory authority" to award fees. Pro Finish USA, 63 P.3d at 298. See also Brooks v. Brooks Furniture Manufacturers, Inc., 325 S.W.3d 904, 915 (Ky. Ct. App. 2010) (holding that nearly identical dissenters' rights statute in Kentucky "does not require the payment of fees and expenses merely because the fair value of the shares materially exceeds that which the corporation offered to pay"), overruled on other grounds by Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542 (Ky. 2011).

The relevant question for the fee shifting provision is whether plaintiff followed an objectively reasonable process and can offer an objectively reasonable explanation for its estimate of fair value. Sieg Co. v. Kelly, 568 N.W.2d 794, 805 (Iowa 1997) (applying

statute nearly identical to Wis. Stat. § 180.1331 and noting that, “the objective and subjective process by which a party arrives at its fair-value figure is more important than the accuracy of that party's valuation, as later determined by the trial court”); Security State Bank, Hartley, Iowa v. Ziegeldorf, 554 N.W.2d 884, 894 (Iowa 1996) (finding corporation acted arbitrarily where it offered no justification of its calculation of fair value or reasonable explanation of that calculation).

Defendants contend that there is ample evidence in the record to support a conclusion that plaintiff acted not only unreasonably, but “vexatiously” or in “bad faith” in reaching its estimate of fair value. In particular, they contend that plaintiff acted vexatiously and in bad faith by

- hiring a “non-independent” appraiser to assess the value of its stock;
- withholding Joseph Konrad’s favorable growth projections from Thomas Mecredy;
- withholding substantial information about share transactions;
- failing to tell Mecredy that the formal agreement with the Comptroller of Currency was hampering plaintiff’s business; and
- attempting to manipulate the value by waiting for a “low point” in the market to effectuate the Subchapter S conversion.

Defendants have little evidence to support these assertions and only a dubious argument that plaintiff acted in bad faith or vexatiously. For example, they have adduced no evidence that Mecredy was biased simply because he had performed work for plaintiff’s advisors in the past or because his employer, Vining Sparks, had performed financial work for plaintiff unrelated to the valuation of plaintiff’s stock. Additionally, defendants’

argument that plaintiff improperly withheld growth projections from Mecredy has no basis in fact. It is undisputed that the so-called “growth projections” were actually strategic planning documents that plaintiff’s former president prepared to encourage the board to think about growth possibilities. Konradt admitted that the documents were “aspirations” and that there was no consensus among the board that such growth was either achievable or desirable.

Nonetheless, I conclude that it would be premature at this stage to resolve the issue of fees and expenses. Defendants have adduced some evidence showing that plaintiff acted “arbitrarily” in setting its ultimate price of \$780 a share in December 2011. Instead of asking Mecredy to prepare a new appraisal before the conversion, plaintiff simply added \$30 to Mecredy’s earlier appraisal to account for an increase in plaintiff’s book value. Defendants also adduced evidence showing that plaintiff failed to investigate the potential problems with Mecredy’s appraisal that were identified by defendants’ expert before the conversion was finalized. Finally, defendants have shown that plaintiff did not comply with the interest payment requirements of the statute. Until I resolve the question of the fair rate of plaintiff’s stock, I cannot determine whether any of these factors warrant a fee award. Thus, I will reserve a final decision regarding fees and expenses until after trial.

#### ORDER

IT IS ORDERED that

1. Plaintiff NATCOM Bancshares, Inc.’s motion for summary judgment, dkt. #23,

is DENIED.

2. Summary judgment is GRANTED to defendants Brenda Johnson, Murray Johnson, Diana Johnson and minor defendants T.R.J., M.P.J., M.S.J. and T.P.J. on the issue of interest on their former shares. Plaintiffs were required to pay interest to defendants on their former shares for the period from December 29, 2011 to January 20, 2012.

Entered this 19th day of February, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge