

FILED  
02-10-2023  
Clerk of Circuit Court  
Manitowoc County, WI  
2023CV000056

STATE OF WISCONSIN : CIRCUIT COURT : MANITOWOC COUNTY

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ANDREW J. BEHNKE,  
209 S. 2nd Avenue Street  
Nazianz, WI 54232

Case No.

TAM ACQUISITIONS LLC, a Wisconsin Limited  
Liability Corporation,  
2060 N. Humboldt Boulevard, Suite 225  
Milwaukee, WI 53212, and

Class Code: 30303, 30701

COOL INVESTMENT LLC, an Arizona Limited  
Liability Corporation,  
4241 N. Winfield Scott Plaza  
Scottsdale, AZ 85251

Plaintiffs,

vs.

MANITOWOC ASSOCIATES, LLC, an Illinois  
Limited Liability Company,  
14 N. Peoria Street, Unit 3F,  
Chicago, Illinois 60607

SASSY NAILS & SPA MANITOWOC LLC, a  
Wisconsin Limited Liability Company,  
3313 Calumet Avenue  
Manitowoc, WI 54220

SALLY BEAUTY SUPPLY LLC, a Delaware  
Limited Liability Company,  
3001 Colorado Boulevard  
Denton, TX 76210

H&R BLOCK, INC., a Missouri Corporation,  
One H&R Block Way,  
Kansas City, MO 64105

SECURITY FINANCE CORPORATION, a  
Wisconsin Corporation,  
181 Security Place,  
Spartanburg, SC 29307

MAURICES INCORPORATED, a Delaware  
Corporation,  
425 W Superior Street,  
Duluth, MN 55802

GET IT NOW, LLC, a Delaware Limited Liability Corporation,  
5501 Headquarters Drive  
Plano, TX 75024

REGIS CORPORATION (COST CUTTERS), a Minnesota Corporation,  
3701 Wayzata Boulevard, Suite 500,  
Minneapolis, MN 55416

DOLLAR TREE STORES, INC., a Virginia Corporation,  
500 Volvo Parkway,  
Chesapeake, VA 23320

T&M ZHANG MANITOWOC LLC, a Wisconsin Limited Liability Corporation,  
733 Northwood Court,  
Manitowoc, WI 54220

ING REAL ESTATE, LLC, a Wisconsin Limited Liability Corporation,  
402 Maple Leaf Court,  
Manitowoc, WI 54220

RABBIT PROPERTIES, LLC, a Wisconsin Limited Liability Corporation,  
827 N. 14<sup>th</sup> Street,  
Sheboygan, WI 53081

MANITOWOC ASSOCIATES LIMITED PARTNERSHIP, an Illinois Limited Partnership,  
Spatz Centers,  
330 Melvin Drive  
Northbrook, IL 60062, and

RHINO HOLDINGS MANITOWOC, LLC, a Delaware Limited Liability Company,  
2200 Paseo Verde Parkway, Suite 260,  
Henderson, Nevada 89052

Defendants.

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**COMPLAINT**

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Plaintiffs Andrew J. Behnke, TAM Acquisitions, LLC, and Cool Investment LLC by their attorneys John D. Finerty, Jr. and Ena M. Kovacevic of Michael Best & Friedrich LLP, as their complaint against the Defendants, allege as follows:

### **INTRODUCTION**

This litigation seeks a Declaratory Judgment that a deed restriction, or “Restrictive Covenant,” in an Amended and Restated Operating Agreement executed by prior owners of Plaintiffs’ commercial properties, and that requires an adjoining parcel owner’s consent to develop Plaintiffs’ parcels, is unenforceable. The Amended Operating Agreement was recorded against Plaintiffs’ properties in July of 1979. Both Plaintiffs Behnke and Cool Investment however purchased their properties more than 40 years after the Amended Operating Agreement was recorded, so the Restrictive Covenant contained therein has expired under Wis. Stat. § 893.33(6).

As background, this case involves the former Shopko shopping mall property located at the crossroads of state Highway 42 and 35th Street in the City of Manitowoc (the “Shopping Center”). The agreements at issue in this case are a series of Operating Agreements, first signed in 1978, by and between The Manitowoc Partnership, Shopko Stores, Inc., and Gerald Stangel. After partitioning of the site, numerous sales of the various parcels located within the Shopping Center, and two amendments to the initial Operating Agreement that governed the Shopping Center, there are multiple successors in interest to the original owners; the current dispute however is between Behnke, TAM Acquisitions and Cool Investment, LLC, on one side, and Manitowoc Associates, LLC, which owns a property adjacent to Cool Investment’s, on the other side.

Plaintiff Andrew J. Behnke (“Behnke”) purchased his parcel in 2021. Behnke is in the process of selling his parcel, known as Lot 1, to TAM Acquisitions, LLC (“TAM”), which wants to build a Pizza Hut drive through restaurant on the parcel; Manitowoc Associates, LLC

(“Manitowoc Associates”), a parcel owner subject to the same Amended Operating Agreement, refuses to consent. Behnke and Manitowoc Associates have been unable to negotiate a resolution. If the Restrictive Covenant is ruled unenforceable however, the sale may be closed and the Pizza Hut development completed. In the alternative, and only if the Amended Operating Agreement is ruled enforceable, Behnke alleges a breach of the Amended Operating Agreement by Manitowoc Associates for unreasonably withholding its consent.

Cool Investment purchased the parcel it owns in September of 2019, also more than 40 years after the Amended Operating Agreement was recorded, so the Restrictive Covenant contained therein has likewise expired under Wis. Stat. § 893.33(6). It thus seeks the same Declaratory Judgment as Behnke. Further, all Plaintiffs seek damages for Manitowoc Associates’ breach of a separate contract, entitled the Second Amended Operating Agreement, because Manitowoc Associates has failed to maintain the parking lot these property owners share.

### **PARTIES**

1. Andrew J. Behnke is an adult individual with his primary residence located at 209 S. 2nd Avenue Street, Nazianz, Wisconsin.

2. TAM Acquisitions LLC is a real estate investment company duly registered to conduct business as a Wisconsin limited liability company with its principal place of business located at 2060 N. Humboldt Boulevard, Suite 225, Milwaukee, WI 53212.

3. Cool Investment LLC is an Arizona limited liability company that invests in real estate, with its principal place of business located at 4241 N. Winfield South Plaza, Suite 201, Scottsdale, AZ 85251.

4. Manitowoc Associates, LLC is an Illinois limited liability company whose address is 14 N. Peoria Street, Unit 3F, Chicago, IL 60607.

5. The following Defendants are lessees within the Shopping Center that are believed to be tenants of Manitowoc Associates; William Spatz, manager for Manitowoc Associates, alleged these tenants would be adversely impacted by the development of Lot 1; they are thus mandatory parties to this case pursuant to Wis. Stats. § 841.03:

- a. Sassy Nails & Spa Manitowoc LLC is a Wisconsin limited liability company with its principal place of business located at 3313 Calumet Ave, Manitowoc, WI 54220.
- b. Sally Beauty Supply, LLC is a Delaware limited liability company with its principal place of business located at 3001 Colorado Boulevard, Denton, TX 76210.
- c. H&R Block, Inc. is a Missouri corporation with its principal place of business located at One H&R Block Way, Kansas City, MO 64105.
- d. Security Finance Corporation of Wisconsin is a Wisconsin domestic business with its principal place of business located at 181 Security Place, Spartanburg, SC 29307.
- e. Maurices Incorporated is a Delaware corporation with its principal place of business located at 425 W Superior Street, Duluth, MN 55802.
- f. Get it Now, LLC is a Delaware limited liability company with its principal place of business located at 5501 Headquarters Drive, Plano, TX 75024.
- g. Regis Corporation (Cost Cutters) is a Minnesota corporation with its principal place of business located at 3701 Wayzata Blvd., Suite 500, Minneapolis, MN 55416.
- h. Dollar Tree Stores, Inc. is a Virginia corporation with its principal place of business located at 500 Volvo Parkway, Chesapeake, VA 23320.

6. The following Defendants own parcels within the Shopping Center and are parties or successors in interest to parties that signed one or more of the Operating Agreements; they are permissive parties to this case under Wis. Stat. § 841.03:

- a. T&M Zhang Manitowoc LLC is a Wisconsin limited liability company with its principal place of business located at 733 Northwood Court, Manitowoc, WI.
- b. Ing Real Estate, LLC is a Wisconsin limited liability company with its principal place of business located at 402 Maple Leaf Court, Manitowoc, WI 54220.
- c. Rabbit Properties, LLC is a Wisconsin limited liability company with its principal place of business located at 827 N. 14<sup>th</sup> Street, Sheboygan, WI 53081.
- d. Manitowoc Associates Limited Partnership is an Illinois limited partnership with its principal office located at Spatz Centers, 330 Melvin Dr. Northbrook, IL 60062.
- e. Rhino Holdings Manitowoc, LLC is a Delaware limited liability company with its principal place of business located at 2200 Paseo Verde Parkway, Suite 260, Henderson, NV 89052.

#### **JURIDICTION AND VENUE**

7. This court has general jurisdiction pursuant to Wis. Stat. § 753.03 and personal jurisdiction over Manitowoc Associates, LLC under Wis. Stats. § 801.05(1)(3) and (5) as it conducts substantial business in the State of Wisconsin and Manitowoc County in particular; further, the *res* of this case is the Shopping Center located within Manitowoc County.

8. Venue is proper in Manitowoc County pursuant to Wis. Stat. § 801.50(2)(c) or (d); further, the *res* of this case is the Shopping Center located within Manitowoc County.

#### **GENERAL ALLEGATIONS**

9. Plaintiff Andrew J. Behnke (“Behnke”) in 2021 purchased and now owns a parcel of real property (“Lot 1”) located at 3415 Calumet Avenue, Manitowoc, Wisconsin, within the Shopping Center that is the subject of this case.

10. Behnke intends to sell Lot 1 to TAM Acquisitions LLC (“TAM”) to build a Pizza Hut restaurant; the restaurant however will be non-traditional in that it will offer drive through, delivery and carry-out service only; this is known in the industry as a “DelCo” restaurant format. This format requires less parking than a traditional restaurant.

11. A prior owner of Lot 1 entered into an Operating Agreement, and later, an Amended and Restated Operating Agreement (the “Amended Operating Agreement”), among other agreements, with other property owners; the Amended Operating Agreement, at issue here, was recorded against Lot 1 on July 27, 1979; Behnke did not sign the Amended Operating Agreement nor did he affirmatively agree to its terms. A true and correct copy of the Amended Operating Agreement is attached as Exhibit A.

12. Plaintiff Cool Investment LLC (“Cool Investment”) is the fee simple owner of a parcel of real property known as Lot 2 in the Shopping Center (“Lot 2”) on Calumet Avenue in Manitowoc that is also the subject of this case; it purchased Lot 2 on September 12, 2019, and then duly recorded a Deed in the Office of the Register of Deeds for Manitowoc County on September 17, 2019.

13. A prior owner of Lot 2 also entered into the Amended Operating Agreement with other property owners; the Amended Operating Agreement was also recorded against Lot 2 on July 27, 1979; Cool Investment, like Behnke, did not sign the Amended Operating Agreement nor did it affirmatively agree to its terms.

14. Article VIII of the Amended Operating Agreement contains the following Restrictive Covenant:

Neither Developer nor Shopko shall hereafter construct any additional buildings or structures on their respective portions of the Shopping Center Property without the prior written approval of the other party, which ***approval shall not be unreasonably***

*withheld*; provided, however, that no buildings or structures shall be constructed which will reduce the available number of parking spaces available on the Shopping Center Property below the minimum number required by (a) any lease relating to the Shopping Center Property or (b) any law, ordinance or regulation relating to the Shopping Center Property. In any event, as long as Shopko occupies its portion of the property, neither Stangel nor the Developer will permit any portion of the Super Valu Property or Developer Property to be used as a home improvement center or pharmacy without first obtaining the prior approval of Shopko. In the event any portion of the Super Valu Property or Developer Property is wrongfully used as a home improvement center or pharmacy, Stangel or Developer, as the case may be, shall use its best efforts to enjoin any continued operation. If such party fails to act diligently, then Shopko shall be authorized to do so.

(Ex. A., p. 10 (emphasis added)).

15. Further, a Second Amendment to the Operating Agreement created obligations under its Article IV, that requires Manitowoc Associates to “agree to cause the Parking Area of the Shopping Center Property on each of their properties to be maintained, repaired and replaced (sometimes collectively herein referred to as [*sic*] “maintenance”) separately by each of the individual respective parties.” A true and correct copy of the Second Amended Operating Agreement is attached as Exhibit B (the “Second Amended Agreement”).

16. The maintenance required under the Second Amended Agreement includes, in relevant part, “maintenance, repair and replacement of the surface and subsurface of the Parking Area to maintain its level, smooth and evenly covered[,]” “striping, painting, and repainting as may be required to maintain the Parking Area and equipment installed thereon in a first class condition[,]” and “repairing holes and cracks in all parts of the Parking Area[.]” (Ex. B., p. 3)

17. The parking lot at the Shopping Center is currently in a state of disrepair because Manitowoc Associates failed to maintain the lot; it is riddled with potholes and the striping has severely faded; the estimated cost to repair is between \$350,000 and \$425,000.

18. In March 2022, pursuant to Article VIII of the Amended Operating Agreement,

TAM emailed William Spatz (“Spatz”), who is the managing member of Manitowoc Associates, to notify him of TAM’s intent to purchase Lot 1 from Behnke and requested Manitowoc Associates consent to allow TAM to construct a Pizza Hut restaurant on Lot 1; TAM then fully disclosed to Spatz the format of the restaurant, parking requirements and building specifications. A true and correct copy of TAM’s email dated March 25, 2022, is attached as Exhibit C.

19. On March 26, 2022, Spatz responded as follows:

OUR POSITION - WE WOULD OBJECT TO THE BUILDING ON THE OUTLOTS BECAUSE NEW BUILDINGS AND LANDSCAPING WOULD CAUSE SIGNIFICANT DAMAGE TO THE VISIBILITY OF OUR CENTER ESPECIALLY IN LIGHT OF VERY RESTRICTIVE SIGN CODES. THEREFORE IT WOULD SIGNIFICANTLY REDUCE THE VALUE OF OUR CENTER. IT ALSO MIGHT VIOLATE CURRENT LEASES.

A true and correct copy of Spatz’s email dated March 26, 2022 is attached as Exhibit D. Through this and other emails, Spatz made clear that he would not consent to building on Lot 1 or Lot 2.

20. TAM informed Spatz that the location of the Pizza Hut out lot and building would have zero impact on the visibility of his multi-tenant building.

21. The correspondence between TAM and Spatz ended in April 2022 and did not resume until August of the same year.

22. In August 2022, TAM emailed Spatz to try to reopen discussions regarding Manitowoc Associates’ approval for TAM to build the Pizza Hut. A true and correct copy of TAM’s email to Spatz dated August 29, 2022 is attached as Exhibit E.

23. Spatz responded that the development of the Pizza Hut would diminish the value and leasing potential of his parcel and demanded that TAM make an offer to compensate him for his purported loss.

24. TAM offered Spatz \$50,000 but Spatz demanded \$200,000.

25. Ultimately, TAM refused to capitulate to Spatz's demand and Spatz informed TAM: "*If you think you can win in court, proceed to file your case.*" A true and correct copy of Spatz's email dated September 8, 2022 is attached as Exhibit F; Spatz wrote a similar email to Cool Investment around the same time that stated: "*We will never approve a 9,000 sf building on an outlot so either buying our center or going to court are your only options.*"

26. Without conceding that consent was required, Behnke and TAM again requested Manitowoc Associates' consent to construction of the Pizza Hut restaurant.

27. On November 16, 2022, Behnke and TAM sent to Spatz a formal consent letter and again informed him of Behnke's intent to sell Lot 1 of the Shopping Center to TAM and attached a proposed Site Plan for the Pizza Hut restaurant. A true and correct copy of the letter dated November 16, 2022, from Behnke and TAM is attached as Exhibit G; Spatz, thus, had all relevant information he needed to evaluate the reasonableness of consent.

28. The Site Plan demonstrated that the development complied with the Agreements: (1) the Site Plan depicted a building with 1,014 square feet of space; (2) it called for 22 parking stalls, which far exceeded the minimum number of stalls required by the Agreements; and, (3) the building height at its highest point will be 18 feet, including the tower element and the pylon sign, so it would not interfere with the visibility of any improvements on Manitowoc Associates parcel.

29. The consent letter requested Spatz's signature, evincing Manitowoc Associates' consent, by December 16, 2022.

30. On January 21, 2023, Spatz declined to provide his consent, and stated as follows:

THIS IS TO REITERATE THAT I DON'T AGREE TO YOUR PROPOSED DEVELOPMENT AS REQUESTED FOR MANY REASONS INCLUDING THE FACT THAT THE BUILDING OF THE OUTLOT LEAVES THE RHINO PARCEL SIGNIFICANTLY DEFICIENT IN THE NUMBER OF PARKING

SPACES REQUIRED UNDER OUR REA FOR THEIR EXISTING BUILDING SIZE.

A true and correct copy of Spatz's email dated January 21, 2023, is attached as Exhibit H. The proposed Site Plan however accounts for parking and complies with the Agreements; signage issues could have been addressed with additional street located signage for Manitowoc Associates. Nevertheless, Spatz refused to consent to the Site Plan, damaging Behnke by interfering with the sale of Lot 1 and TAM's development.

31. Lots 1 and 2 owned by the Plaintiffs are compliant and have sufficient on-parcel parking; the remaining six lots, including the lot owned by Manitowoc Associates, are non-compliant. Specifically, the lot owned by Manitowoc Associates is under-parked by 62 stalls.

32. On January 9, 2023, Cool Investment sent Manitowoc Associates a notice of default and demanded that it repair the Parking Area, as defined by the Agreements, and comply with the parking stall requirement for the lot it owns and as the manager of the Shopping Center, inform the other lots owners of their noncompliance and demand immediate rectification. A true and correct copy of the notice of default letter is attached as Exhibit I.

33. As of the date of this Complaint, Manitowoc Associates has failed to respond, and the parking capacity and lot maintenance issues remain unresolved. Judicial relief is now needed.

**FIRST CLAIM FOR RELIEF**  
**Declaratory Judgment Under Wis. Stats. § 841.01(1) and (2)**

34. Plaintiffs reallege and incorporate by reference all prior allegations.

35. Article VIII of the Amended Operating Agreement is a "covenant" within the meaning of Wis. Stat. § 893.33(6) to which a 40 year limitations period applies.

36. Behnke is a "Purchaser" within the meaning of Wis. Stat. § 893.33(1) as a result of his purchase of Lot 1 in 2021, so he may invoke the limitation period of Ch. 893.33.

37. Cool Investment is a “Purchaser” within the meaning of Wis. Stat. § 893.33(1) as a result of its purchase of Lot 2 on September 12, 2019, so it may also invoke Ch. 893.33.

38. Wis. Stat. § 893.33(6) provides Plaintiffs a defense to enforcement of “covenants” that were recorded more than 40 years ago; the statute provides as follows:

Actions to enforce easements, or covenants restricting the use of real estate, set forth in any recorded instrument shall not be barred by this section for a period of 40 years after the date of recording such instrument, and the timely recording of an instrument expressly referring to the easements or covenants or of notices pursuant to this section shall extend such time for 40-year periods from the recording.

39. The Amended Operating Agreement was recorded against Lot 1 and Lot 2 on July 27, 1979; it was not re-recorded thereafter nor was any document “expressly referring” to the Restrictive Covenant in the Amended Operating Agreement recorded after 1979.

40. More than 40 years have passed since the Amended Operating Agreement was recorded; the Restrictive Covenant in Article VIII of the Amended Operating Agreement has therefore expired and may not be enforced.

41. Further, there has been a change in circumstances since 1979 that would make enforcement of the Restrictive Covenant in Article VIII inequitable today; Shopko Stores is out of business after the Covid-19 pandemic; Super Valu and Super 3 stores closed in the late 1980s; most of the original Shopko property has thus remained dormant for years.

42. Further yet, the Restrictive Covenant purports to limit Plaintiffs’ ability to build on their property only with the consent of Manitowoc Associates, despite the Plaintiffs never having signed the Amended Operating Agreement, nor did the Plaintiffs otherwise agree to be bound by the Restrictive Covenant; not all iterations of or Amendments to the original Operating Agreement were signed by all parcel owners; Plaintiffs alleges under the circumstances of this case that the Restrictive Covenant is unreasonable, inequitable, and should not be enforced.

43. Given the above allegations, the interests of the Parties are adverse.

44. A judicial declaration is necessary and appropriate at this time under the circumstances for the Court to determine the parties' rights and obligations.

45. A judicial determination will terminate the controversy between the parties.

46. An actual and justiciable controversy therefore exists between the parties as to whether the expired Restrictive Covenant entered into by prior owners and recorded against the Plaintiffs' property – but never signed by the current owners – is enforceable against the Plaintiffs; the Court may thus declare the interests of the Parties pursuant to Wis. Stats. § 841.10 (1) and (2).

**SECOND CLAIM FOR RELIEF**  
**Breach of the Second Amended Operating Agreement**

47. Plaintiffs reallege and incorporate by reference all prior allegations.

48. Although the Restrictive Covenant in Article VIII of the Amended Operating Agreement has expired and is unenforceable, the Second Amended Operating Agreement remains a binding and enforceable contract between the Parties because it has not expired.

49. Manitowoc Associates however breached Article IV of the Second Amended Operating Agreement by failing to maintain the parking lot on the premises in a condition that meets the standards required by the Agreements.

50. Further, as manager of the Shopping Center, Manitowoc Associates failed to enforce the parking capacity requirements against the other lot owners who are not in compliance.

51. Plaintiffs have suffered damages in an amount to be determined at trial due to Defendant's breach, including but not limited to the cost to repair and maintain the parking lot.

**ALTERNATIVE CLAIM FOR RELIEF**  
**Breach of the Amended Operating Agreements**

52. Plaintiffs reallege and incorporate by reference all prior allegations.

53. If and only if the Court declares the Amended Operating Agreement is enforceable, the Plaintiffs allege in the alternative that the Amended Operating Agreement is a binding and enforceable contract between the parties.

54. Plaintiff Behnke fulfilled his obligation under the Amended Operating Agreement by notifying Manitowoc Associates of his intent to sell Lot 1 to TAM and TAM's intent to build a Pizza Hut restaurant on Lot 1; TAM provided Manitowoc Associates with all relevant information, and any and all information requested, to evaluate the Lot 1 development.

55. Manitowoc Associates however breached Article VIII of the Amended Operating Agreement when its manager, Spatz, "unreasonably withheld" consent to allow TAM to construct the Pizza Hut restaurant.

56. Plaintiffs has suffered damages in an amount to be determined at trial due to Defendant's breach.

### **RELIEF REQUESTED**

Therefore, based on the above allegations, Plaintiffs request the following relief:

- A. Declaratory Judgment pursuant to Wis. Stat. § 841.10 that the Restrictive Covenant in the Amended Operating Agreement is unenforceable;
- B. Judgment in Plaintiffs' favor on the Second Cause of Action in the Complaint;
- C. A Permanent Injunction precluding enforcement, recording or publishing the Restrictive Covenant;
- D. If and only if the Court declares the Amended Operating Agreement is enforceable, the Plaintiff Behnke requests in the alternative a Judgment for damages;
- E. Pre-judgment interest;
- F. Post-judgment interest on any and all amounts awarded pursuant to statute;

- G. An award of attorneys' fees, litigation costs and expenses; and
- H. Any and all further relief the court deems appropriate.

Dated this 10th day of February, 2023.

MICHAEL BEST & FRIEDRICH LLP

By: Electronically signed by John D. Finerty, Jr.

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