

STATE OF MICHIGAN  
IN THE SUPREME COURT

IVAN FRANK, an individual, JEFFREY DWOSKIN, an individual, PHILLIP D. JACOKES, an individual, ROY KRAUTHAMER, an individual, BLAKE ATLER, an individual, MATT KOVALESKI, an individual, JAMES BRUNK, an individual, IJF HOLDINGS, L.L.C., a limited liability company,

COA Case No. 318751  
LC Case No. 13-133554-CB  
Hon. Colleen O'Brien

Plaintiffs-Appellees,

v.

DANIEL GILBERT, an individual, JOSHUA LINKNER, an individual, BRIAN HERMELIN, an individual, GARY SHIFFMAN, an individual, DAVID KATZMAN, an individual, ARTHUR WEISS, an individual, JAY FARNER, an individual, CAMELOT-ePRIZE, L.L.C, a limited liability company, BH ACQUISITIONS, L.L.C, a limited liability company, CRACKERJACK, L.L.C. f/k/a/ ePRIZE, L.L.C., a limited liability company, CRACKERJACK HOLDINGS, L.L.C., f/k/a ePRIZE HOLDINGS, L.L.C., a limited liability company, jointly and severally,

Defendants-Appellants.

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**PLAINTIFFS-APPELLEE'S RESPONSE IN OPPOSITION TO  
DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL**

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<b><u>Exhibit</u></b>	<b><u>Document Name</u></b>	<b><u>Document Date</u></b>
Exhibit 1	Second Amended Complaint	June 19, 2013
Exhibit 2	Affidavit of Thomas Frazee	September 17, 2013
Exhibit 3	Sworn Affidavit of Ivan Frank	September 15, 2013
Exhibit 4	Deposition of Joshua Linkner	September 6, 2013
Exhibit 5	Fifth Amended and Restated Operating Agreement March 1, 2009	March 1, 2009
Exhibit 6	Sworn Affidavit of Phillip Jacokes	September 16, 2013
Exhibit 7	Sworn Affidavit of Jeffrey Dwoskin	September 16, 2013
Exhibit 8	Sworn Affidavit of Roy Krauthamer	September 18, 2013
Exhibit 9	Sworn Affidavit of James Brunk	September 11, 2013
Exhibit 10	Sworn Affidavit of Blake Atler	September 18, 2013
Exhibit 11	Sworn Affidavit of Matthew Kovaleski	September 13, 2013
Exhibit 12	ePrize LLC Ownership Breakdown	Post-2005
Exhibit 13	Minutes of a Meeting of the Board of Managers of ePrize, LLC Held May 1, 2006	May 1, 2006
Exhibit 14	Consideration (cash and note fmv) distributed To each member, on each unit	Undated
Exhibit 15	Grid showing Series C capital contribution	Undated
Exhibit 16	Member Signature Page to Fifth Amended And Restate Opening Agreement	April 3, 2009
Exhibit 17	Subscription Documents ePrize, LLC	March 2009
Exhibit 18	Separation Agreement and General Release	January 29, 2010
Exhibit 19	Defendants' Motion for Reconsideration to the Court of Appeals	April 27, 2015

Exhibit 20	<i>Frank v Linkner</i> , __Mich App __ 2015 WL 1540980	April 7, 2015
Exhibit 21	<i>Frank v Linkner</i> , Docket No. 318751 (Mich App)	May 22, 2015

**STATEMENT OF QUESTIONS INVOLVED**

**I.**

Should this Court deny leave to appeal and deny preemptory reversal where the Court of Appeals, in a comprehensive, published opinion, upheld on reconsideration, fully analyzed and properly held that, under the facts of this case, Plaintiffs' claim for member oppression under MCL 450.4515 accrued when Plaintiffs sustained definable and ascertainable harm at the time Defendants liquidated the company and wrongfully distributed its assets?

Plaintiffs say yes.

The Court of Appeals says yes.

ePrize says no.

**II.**

Should this Court deny leave to appeal and deny preemptory reversal where the Court of Appeals, in a comprehensive, published opinion, upheld on reconsideration, properly held that the "repose" language in *Baks* was merely dicta because: 1) the language was not essential to the outcome of the case, and 2) the *Baks* Court never applied the judicial mind to analyze the relevant language?

Plaintiffs say yes.

The Court of Appeals says yes.

ePrize says no.

## FACTUAL BACKGROUND

### **I. Background of the ePrize Businesses**

#### **A. ePrize, LLC**

ePrize, LLC was founded in 1999 by Defendant Joshua Linkner (“Linkner”), who was its principal owner, and, until 2010, its CEO. (Ex. 4, pp. 21-24, 169). The company specialized in online sweepstakes and interactive promotions. Over the years, ePrize, LLC grew into a valuable corporate asset, due in large part to the hard work and commitment of the Plaintiffs, all of whom were employees of the company. (Exs. 3, 6-11). During their employment, the Plaintiffs acquired ownership units in ePrize, LLC, as it was “standard practice” to issue stock to employees in all levels of the company in the early days of the business, and thus they became minority members. (Ex. 4, pg. 74). After the sale of ePrize in August 2012, the name of the company was changed to Crackerjack, LLC.

#### **B. ePrize Holdings, LLC**

In 2005, Defendant Linkner and a new investor in the business, Defendant Camelot-ePrize, LLC – owned by Defendants Gilbert and Katzman – made the decision to force the employee-owners (i.e., Plaintiffs) out of ePrize, LLC and into a newly formed company called ePrize Holdings, LLC, because, as Linkner testified, it was, for some unarticulated reason, “preferential to have fewer shareholder[s]” in the company. (Ex. 4, *Linkner Dep.*, pg. 85). In turn, the only asset owned by ePrize Holdings was its ownership of units in ePrize, LLC. (*Id.*, pg. 170). As explained more fully below, the Defendants caused the units of ePrize Holdings in ePrize, LLC to become subordinated to the units in ePrize, LLC which were subsequently issued by the Defendants to themselves through a series of unaudited, undisclosed, and self-interested transactions. (*See generally* Ex. 1, pp. 2-8). These self-interested transactions were negotiated

without the benefit of a valuation to ensure that ePrize, and its members, received a fair deal. (Ex. 4, *Linkner Dep*, pp. 150, 152-155; Ex. 4, *Affidavit of Thomas Frazee*, ¶¶ 11, 16).

Notwithstanding Defendants' contention in the Trial Court that Plaintiffs' ownership was effectively transferred to ePrize Holdings, the record established that this transfer may not have actually happened and is highly questionable. Specifically, Plaintiffs obtained a document in discovery stating that each Plaintiff remained on the books as owning units in ePrize, LLC after 2005, when their ownership was *allegedly* transferred to ePrize Holdings, LLC. (Ex. 12, *ePrize LLC Ownership Breakdown*).<sup>1</sup> Defendant Linkner testified that this document did in fact appear to list the ownership in ePrize, LLC, and, thus, it would have included all of the Plaintiffs, yet he then backtracked on this admission. (Ex. 4, *Linkner Dep*, pp. 132-133).

## **II. Overview of the Parties**

### **A. The Plaintiffs-Appellees – Employees and Minority Members**

The Plaintiffs are all former employees of ePrize, LLC and minority members of ePrize, LLC and/or ePrize Holdings, LLC. (Exs. 3, 6-11). While there is a question of fact as to whether the original ownership of the Plaintiffs in ePrize LLC was effectively transferred to ePrize Holdings, there is no dispute that they do in fact own minority interests in one or the other of the ePrize companies. (*Id.*) Each of the Plaintiffs submitted an Affidavit into the record below in connection with their personal knowledge of the facts of this case and a description of their membership interests. (*Id.*) In those un rebutted Affidavits, they describe the promises and agreements that Defendant Linkner made to and with them in connection with their ownership interests – specifically, that their interests would remain immune from dilution and subordination, and that they would receive *pro rata* distributive shares upon any sale of the

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<sup>1</sup> It is not in dispute that this document was created *after* the formation of ePrize Holdings, LLC, as shown by the fact that Gilbert did not invest in ePrize until 2005, and he is listed as the largest owner of the company. (Ex. 4, pg. 80-81).

company – which ultimately did not happen. (*Id.*) Each of the Plaintiffs further attested that material information was withheld from them with respect to the breach of these agreements, the dilutive events, and the sale which ultimately rendered their ownership interests worthless and damaged them. (*Id.*)

**B. The Defendants-Appellants – Managers and Members In Control of ePrize**

The Defendants – Gilbert, Camelot e-Prize, Linkner, Hermelin, Shiffman, Katzman, Weiss, Farner, and BH Acquisitions – have all been Managers of ePrize, LLC, and have effectively been in control of the company at all relevant times.<sup>2</sup> (Ex. 1, ¶¶ 56-86). Defendant Linkner was the sole manager of ePrize Holdings, LLC and was in control of that company. (*Id.*, ¶ 58). As set forth in the Second Amended Complaint, these Defendants controlled the ePrize business, directed and controlled the dilution and subordination schemes as well as the 2012 liquidation, and have liability on Plaintiffs' count for member oppression. (Ex. 1).

**III. The Dilution and Subordination Scheme; and Self-Dealing by the ePrize Managers**

Between 2007 and 2009, the ePrize managers carried out a series of undisclosed and unaudited self-interested transactions which would, in August 2012, culminate in damages to the Plaintiffs. (Ex. 1, ¶¶ 3-49). This scheme is described in detail in the un-rebutted expert Affidavit of Thomas Frazee, which in large part substantiates the facts alleged in the Second Amended Complaint and established that there were substantial questions of fact to be litigated. (Ex. 2).

More specifically, in 2007, the Company borrowed approximately \$17 million pursuant to the creation of three separate debt issuances with convertible debt features. (Ex. 2, ¶ 5a). The majority of the money was borrowed from the interested ePrize Managers and their affiliates –

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<sup>2</sup> Defendants dispute that Defendant Gilbert was ever a manager of ePrize; however, Meeting Minutes from May 1, 2006 state that he was indeed a manager of the company. (Ex. 13). Again, this raises a question of fact as to the fiduciary obligations of Mr. Gilbert, which Defendants go to great (indeed, misleading) lengths to disavow.

the Defendants in this case. (*Id.*) The interest rate on the notes correlating to these loans was at 10% per annum, and the notes were due at the end of 2008. (*Id.*)

In 2008, as the notes were coming due, ePrize, LLC borrowed \$11.6 million from an affiliated (and undisclosed) limited liability company called “ePrize Priority,” which was owned by certain of the defendant-managers of ePrize, LLC and their affiliates. (*Id.*, ¶ 5b). This time, the undisclosed interest rate was a far more aggressive 20% per annum, compounded quarterly. The notes on this transaction were to be due on July 31, 2009. (*Id.*) In addition to the interest rate, ePrize Priority received 3 million “priority” – as the name of the company implies – equity units in ePrize, LLC. (*Id.*) Ultimately, in 2009, all of the 2007 and 2008 debt would be converted by Defendants into various “Series B” Units, which would have a liquidation preference over the already existing Units in the company, including those which were owned by the Plaintiffs and ePrize Holdings. (*Id.*, ¶ 8).

In March 2009, the company issued a final series of Units – “Series C.” (*Id.*, ¶¶ 5c, 6). These Units carried with them a liquidation preference that allegedly entitled the holders to receive the first \$69.3 million of the equity proceeds received in a sale of the company. (*Id.*, ¶ 6a). Mr. Frazee describes the complex nature of these preferential units and their attributes in his Affidavit. (*Id.*, ¶¶ 6a-b). The Series C Units were offered and sold to various investors – primarily the defendant-managers – for slightly less than \$4 million. (*Id.*, ¶ 7a).

At the time when these massive preferences were being created at the direction of the Defendants, the economic impact could not have been, and was not, known to the Plaintiffs, and the harm that would result from them could not be discerned in any manner. (Ex. 2, ¶ 5). With the exception of Plaintiff Ivan Frank, whose standing within the company is discussed more fully below, none of the Plaintiffs had been given the opportunity to purchase any of these preferred units, and the implementation of this subordination and dilution scheme was **not disclosed**.

despite the fact that they held ownership interests in the ePrize business. (Exs 3, 6-11). Moreover, even with respect to Mr. Frank, material information was withheld regarding the consequences of these transactions. (Ex. 3, ¶¶ 33-38).

**IV. Plaintiffs Incurred Harm and Their Claims Accrued When the Company Was Sold In August 2012 and Defendants Distributed Over \$40 Million On a Single Series of Units to Themselves at Astronomical Rates of Return**

By August 2012, all of the Plaintiffs had ceased to be employed by ePrize, but they still retained their ownership units in the companies. (Exs. 3, 6-11). Unbeknownst to them, however, the Defendants were in the process of negotiating the sale and liquidation of the company assets. Ultimately, the Defendants agreed to sell the company to a third party for \$140 million, and, on August 20, 2012, the papers were signed and the deal was closed. (Ex. 1, ¶¶ 5-7). Thereafter, with ePrize flush with cash, the Defendants distributed the proceeds mainly to themselves. It was not until distributions were actually made that the returns on investment which the Defendants had put in place for themselves were reaped. These distributions, rates of return, and disparities in distribution between majority and minority ownership are abusive (with all but one Plaintiff receiving zero) and give rise to this cause of action. (Ex. 1, ¶¶ 38-42).

Plaintiffs' forensic expert concludes that the \$4 million that the Series C investors paid for their Units resulted in a total payout of \$67 million, which represents at least a *1,500 percent rate of return* over a 3.5 year period. (Ex. 2, ¶ 9). In addition, the evidence further shows that the specific rates of return for the individual Defendants are at a lottery-like *1,723 percent*:<sup>3</sup>

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<sup>3</sup> The data in this chart is from documents produced by the Defendants. (See Ex. 14, *Consideration distributed to each member, on each unit*; Ex. 15, *Listing of total capital contributed on Series C.*)

Defendant-member	Series C Investment	Distribution from August 2012 Sale	Rate of Return
J. Linkner	\$563,138	\$9,701,298	1,723%
G. Shiffman	490,163	8,444,145	1,723
A. Weiss	27,231	469,119	1,723
Camelot-ePrize	731,535	12,602,317	1,723
B. Hermelin	338,748	5,835,683	1,723
D. Katzman	260,885	4,494,331	1,723
<b>Totals<sup>4</sup></b>	<b>\$2,411,700</b>	<b>\$41,546,893</b>	<b>1,723%</b>

Plaintiffs only learned of these rates of return upon receiving documents from Defendants pursuant to statutory demands to inspect corporate books and records, under MCL 450.4503, in 2013. Plaintiffs' claim for member oppression under MCL 450.4515 did not accrue, and Plaintiffs did not sustain definable and ascertainable harm, until the company was sold, and these rates of return and distributions were made. (Ex. 1, ¶¶ 5, 10, 12; see generally Ex. 2).

#### V. Plaintiff Ivan Frank's Position in the ePrize Business and His Ownership Interests

Plaintiff Frank was an employee in top management of ePrize from 2001 to 2010. (Ex. 3, ¶¶ 1-3). During his tenure with the company, he came to own approximately 1% of the business, holding voting and non-voting units in both ePrize, LLC and ePrize Holdings, LLC. (*Id.*, ¶¶ 4-9). Mr. Frank acquired this mix of shares over time and had several discussions with Defendant Linkner regarding his ownership interest in the business. In these discussions, as with the other Plaintiffs, Defendant Linkner repeatedly promised and agreed that Mr. Frank's overall ownership in the ePrize business **would never be diluted** by future investments and that he would receive a *pro rata* share of any sale of the company, based on his entire ownership interest. (*Id.*, ¶¶ 11-22). These promises and agreements induced Mr. Frank to continue working hard for the business – 70 to 80 hours per week – and accept lower compensation. (*Id.*, ¶¶ 10, 26-29).

<sup>4</sup> The totals in this table are based on the Series C offering alone.

**A. Mr. Frank's Acquisition of Series C Units**

In 2009, Defendant Linkner offered, and indeed “encouraged,” Mr. Frank to purchase the new class of “Series C” Units. (Ex. 3, ¶ 34). At the time when the offer was made to Mr. Frank, he was already the owner of Units in ePrize Holdings, LLC, which he continues to own to this day. (*Id.*, ¶ 5). During the time period when the Series C Units, and other preferred Units, were being offered, Mr. Linkner again repeatedly made statements that Mr. Frank’s other Units would never be diluted, and never be subordinated to new investors. (*Id.*, ¶ 43).

Ultimately, in April 2009, Mr. Frank, who already owned 950,000 Units of the business in other classes, purchased the Series C Units. (Ex. 3, ¶ 34). In connection with the offering and purchase, Mr. Frank was provided with no financial data, valuations, or other material that would even remotely suggest that his other Units would be so subordinated that they would one day be rendered worthless upon a liquidation event, contrary to Mr. Linkner’s agreements. (*Id.*, ¶ 26). Furthermore, even though Mr. Frank was a voting member of ePrize, LLC, he never even received a copy of the Fifth Operating Agreement. (*Id.*, ¶ 38). The record reflects that Mr. Frank did not sign the Fifth Operating Agreement. (Ex. 5, pg. 38). As part of the Series C subscription documentation, Mr. Frank did sign a document entitled “Member Signature Page to Fifth Amended and Restated Operating Agreement.” (Ex. 16). However, the actual Fifth Operating Agreement was not attached to the Subscription Agreement as “Exhibit B,” as is represented in the document he signed. (Ex. 17). Therefore, while Mr. Frank may have been duped into signing a “continuation page” for the Fifth Operating Agreement, there is no evidence that there was a meeting of the minds in that regard.

**B. Mr. Frank Ceases His Employment With ePrize**

In 2010, Mr. Frank left his employment at ePrize. (Ex. 3, ¶ 44). When he left, ePrize and Mr. Frank signed a document entitled “Separation Agreement and General Release.” (Ex. 18).

The terms of this document do not address in any way Mr. Frank's ownership interest in the ePrize businesses, and related solely to the terms of his termination of employment and severance. (*Id.*) As part of his separation from the company, and in exchange for this severance pay, the Agreement contains a general *employment* release. (*Id.*, § 6). The severance had nothing to do with his ownership interest, and it was based on "a compromised amount of the past due bonuses owed to [Mr. Frank]." (Ex. 3, ¶ 44).

The release language in the Separation Agreement is also temporally limited to claims "arising *prior to* the time the respective parties sign this Agreement," which was in March 2010. (Ex. 18, § 6) (emphasis added). Thus, the plain language of the release precludes its application here where the claims arose in August 2012 when ePrize was sold.<sup>5</sup> The release does not in any way affect Mr. Frank's ownership interest in the company in any manner, and was related solely to claims that would have arisen out of the employment relationship. (Ex. 3, ¶¶ 45-48).

**C. The Sale of the Business and Wrongful Distribution**

As with all of the other Plaintiffs, in 2012, after the fact, ePrize notified Mr. Frank that the company had been sold to a third party. (*Id.*, ¶ 50; Exs. 6-11). Prior to that time, Mr. Frank had not received any notice that the company was being sold or that his ownership and distributive rights would thereby be affected. (Ex. 3, ¶ 50). At that time, while he received a distribution based on the Series C Units, Mr. Frank received nothing on his other 950,000 Units, which, after the sale, were rendered entirely worthless. (*Id.*, ¶ 55). Mr. Frank did not execute any documents, nor was he involved in any way, with respect to the sale of the company in 2012. Mr. Frank and the other Plaintiffs challenge this sale, wrongful distribution, and dilution down to zero. (Ex. 1, *Second Amended Complaint*).

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<sup>5</sup> See *Abraham v Jackson*, 189 Mich App 367, 370 (1991) (A cause of action "arises" when the Plaintiff's claim "accrues.").

## SUMMARY OF THE ARGUMENT

The Court of Appeals' published opinion in this matter comprehensively and correctly addressed the issues at hand, as dictated by the allegations in this case, the language of the relevant statutes, and the import of the controlling case law. (Ex. 20). Thereafter, Defendants filed a motion for reconsideration (Ex. 19) making the same arguments they make in their application now – and which the Court of Appeals correctly denied. (Ex. 21).

**First, Plaintiffs' claims did not accrue until August 2012.** Pursuant to MCL 600.5827<sup>6</sup> and this Court's precedent,<sup>7</sup> a claim does not accrue for statute of limitations purposes until a plaintiff actually incurs definable and ascertainable harm. In this case, the Plaintiffs did not suffer definable and ascertainable harm or incur any damage at all until the Defendants liquidated the ePrize companies and sold them for \$140 million to a third party, then collected for themselves over \$40 million in corporate distributions at an exorbitant and entirely unfair rate of return, while the Plaintiffs received nothing on their subordinated membership interest. Not until the ePrize companies and Plaintiffs' interests were devalued, in August 2012, did Plaintiffs incur actionable injury to sustain their claim for member oppression under MCL 450.4515(2), which is based on a "continuing course of conduct" or a "series of actions" that substantially interfered with the Plaintiffs' interests as members. Before 2012, Plaintiffs' membership units had value, the business was alive and well, and a claim by them based on a continuing course of oppressive conduct, entitling them to a statutory buy-out and damages, would have been entirely speculative. Accordingly, the accrual date for purposes of the statute of limitations can only be August 2012 and there is no period of limitations that can conceivably bar the claims. At the very least, there was a question of fact as to the accrual date. Even if Plaintiffs' claims accrued

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<sup>6</sup> This controlling statute was disregarded by the Trial Court.

<sup>7</sup> See, e.g., *Moll v Abbott Laboratories*, 444 Mich 1, 11 (1993).

in 2009, which they did not, Defendants' fraudulent concealment would operate to toll the limitations period under MCL 450.4515(1)(e).

Meanwhile, even if some component of equitable relief ancillary to Plaintiffs' member oppression claim theoretically could have accrued in 2009, which it did not, but which Defendants somewhat incoherently allege it did, any request for equitable relief by Plaintiffs under MCL 450.4515(1)(a)-(d), including a buy-out, carries a *six-year* statute of limitations.

**Second, the Court of Appeals correctly held that the "Repose" language in Baks is not applicable to this case.** The Court of Appeals was not bound by the *Baks* decision because *Baks* is inapplicable dicta. *Baks* merely denoted the limitations period in an analogous statute as one of repose, which then was overruled in *Estes*. "[T]he central issue of that case [*Baks*] . . . [was] whether MCL 450.1489 created an independent cause of action for shareholder oppression claims. The relevant time period – imported from a different section of the BCA – had nothing to do with this determination" (Ex. 20, *Frank v Linkner*, 2015 WL 1540980, pp. 9-10). As this Court held in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 436-37 (2008), "A statement that is dictum does not constitute binding precedent under MCR 7.215(J)." This Court further explained, "Obiter dictum is defined as . . . a judicial opinion in a matter related but not essential to the case." *Id* (internal citations omitted). The Court of Appeals was not bound by the "repose" dictum in the *Baks* decision.

## **ARGUMENT**

### **I. The Court of Appeals Correctly Held that Plaintiffs' Member Oppression Claim Accrued in August 2012**<sup>8</sup>

Plaintiffs' claims did not accrue until August 2012, when Defendants liquidated the ePrize companies, pocketed \$63 million, and dispossessed Plaintiffs of the value of their

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<sup>8</sup> Further, Plaintiffs fully agree with the Court of Appeals' finding that MCL 450.4515(1)(e) is a statute of limitations, and not one of repose.

membership interests. This is when the “harm” occurred, this is when the Plaintiffs first sustained damage, and this is when Defendants’ “continuing course of conduct” caused “substantial interference” with Plaintiffs’ membership interests. Plaintiffs’ cause of action did not exist until this occurred. Under the facts of this case, Defendants’ mere implementation of the Fifth Operating Agreement in 2009, alone, did not trigger the statute of limitations on Plaintiffs’ member oppression claim. Rather, it was the tremendously damaging liquidation and distribution event that accrued the action for member oppression in this case.

Defendants, meanwhile, rely on alarmist pleas attempting to avoid the import of the law as applied to the facts in this case. Defendants suggest that the Court of Appeals’ decision results in some kind of “per se” rule that the potential liability of companies in this situation will linger indefinitely until liquidation of the company. First, fundamentally, Defendants are mischaracterizing the nature of the Court of Appeals’ ruling. In any variety of contexts, a potential wrongdoer or tortfeasor might take a particular action precedent to committing a tort, for example, but the tort action does not start accruing until the tortfeasor has actually inflicted the harm and damages. Certainly, the statute of limitations on a given tort, for example, should not be drastically accelerated based on some precedent act, in order to avoid the potential tort action lingering indefinitely – but that is what Defendants’ theory suggests.

Second, neither Plaintiffs’ position nor the Court of Appeals’ decision in this case has suggested that a liquidation event is required to trigger accrual of a member oppression claim in all potential dilution cases. Rather, under the specific facts before this Court, and the nuances of the continuing course of conduct giving rise to the member oppression claim here, the liquidation and egregious distribution in 2012 is the action that triggered accrual of Plaintiffs’ member oppression claim. The shareholder and member oppression statutes are designed to provide “unique” relief for shareholders or members of closely held companies, who are owed the

strictest of fiduciary duties by those in control of the corporation. *Estes v Idea Engineering & Fabrications, Inc*, 250 Mich App 270, 280-281 (2002). Indeed, the statute is to be “liberally construed . . . to give special recognition to the legitimate needs of close corporations.” MCL 450.1103(c). Further, this Court has held that “the Legislature provided the circuit court wide discretion” in deciding an oppression case. *Madugula v Taub*, 496 Mich 685, 702 (2014). These legal principles reflect the unique nuances of individual oppression cases, and demonstrate the weakness of Defendants’ alarmist suggestions about the impact of the Court of Appeals’ decision in this case. The Court of Appeals did what it was supposed to do: apply the law to the facts. Under the specific facts of this case, Plaintiffs’ oppression claim in this case accrued upon the occurrences in 2012. That certainly is not to say it will be the same in another case. (Further, the highly fact-intensive nature of oppression cases like this is another reason why peremptory reversal would be inappropriate here.)

Notably, it is the Defendants who suggest a dangerous precedent. Under Defendants’ theory, controlling shareholders would be free to adopt a secret agreement diluting the non-controlling shareholders’ shares upon a future sale, and as long as the future sale is outside of the limitations period, the controlling shareholders would entirely avoid liability while the non-controlling shareholders would be prevented from ever bringing an action to enforce their rights. This is not only inconsistent with MCL 450.4515, it is bad policy and creates a disincentive in original investors and employees involved in helping to build a company from the ground up.

**A. Under Michigan Statute and this Court’s Precedent, a Claim Does Not Accrue Until the “Harm” Is Suffered by the Plaintiff**

The Court of Appeals correctly held that MCL 450.4515(1)(e) is a statute of limitations. Further, as the Court of Appeals correctly and completely explained in its published opinion, pursuant to MCL 600.5827 and this Court’s precedent, a claim does not “accrue” for statute of

limitation purposes until a plaintiff suffers distinct harm. (Ex. 20, pp. 8-9). The statute governing accrual, MCL 600.5827, states that “the claim accrues at the time the wrong upon which the claim is based was done,” and this Court has made clear that “the wrong” in MCL 600.5827 refers to “the date on which the defendant’s breach harmed the plaintiff, as opposed to the date on which the defendant breached his duty.” *Moll v Abbott Laboratories*, 444 Mich 1, 11-12 (1993). This Court has repeatedly emphasized this point: “The wrong is done when the plaintiff is harmed rather than when the defendant acted.”<sup>9</sup> Here, Defendants’ breach did not “harm” the Plaintiffs until 2012 when the company was liquidated.<sup>10</sup>

This Court has also held that a claim does not “accrue” until every element, “including damage,” is present. *Connelly*, 388 Mich at 151. See, also, e.g., *Stephens*, 449 Mich at 539 (same). In *Connelly*, the Court held that the statute of limitations began to run when the plaintiff actually got hurt, not when the company committed the negligent act. Defendants misapply *Connelly*, claiming that all elements of Plaintiffs’ member oppression claim, including the “harm,” were present in 2009 when Defendants adopted the Fifth Operating Agreement.<sup>11</sup> This is like arguing that the plaintiff in *Connelly* was fully harmed by being in the company’s

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<sup>9</sup> *Stephens v Dixon*, 449 Mich 531, 534–535 (1995). See also, e.g., *Connelly v Paul Ruddy's Equipment*, 388 Mich 146, 150-151 (1972) (same); *Boyle v Gen Motors Corp*, 468 Mich 226, 231 (2003) (same).

<sup>10</sup> Defendants’ argument that no case supports the Court of Appeals’ accrual analysis is simply false. See, e.g., *Moll*, *supra*, and *Connelly*, *infra*. There are even cases applying this accrual rule under MCL 450.4515(e). See, e.g., *Techner v Greenberg*, 553 F App’x 495, 505 (6th Cir 2014) (in a section 4515 case: “claims accrue in Michigan not when a defendant perpetrates a wrong, not when a plaintiff learns or should have learned of the harm done, but rather only when the plaintiff actually suffered damages as a result of the defendant’s actions,” which was “upon the failure to receive proper distributions”); *In re Richard Michael Wilcox*, 310 BR 689 (ED Bkr Mich 2004) (in a section 4515 case: “a cause of action for breach of duty is triggered at . . . the time that the wrong causes injury”).

<sup>11</sup> Indeed, there are substantial questions of fact as to whether the Fifth Operating Agreement was even in effect. The evidence points to it having not been fully executed, and, even if it were, it was breached by the Defendants’ self-dealing and oppressive profiteering, which violated the Fifth Operating Agreement, section 4.3 (requiring that “[e]ach manager shall discharge his, her or its duties in good faith” and “with the care that an ordinarily prudent person in a like position would exercise under similar circumstances”) and section 4.5 (prohibiting Defendants from being on both sides of a transaction with the company without the approval of disinterested managers and the members).

negligent environment, which had the potential to cause her damage but which did not damage her until she suffered physical injury. Plaintiffs' claims in the instant case were purely speculative until they suffered actual injury upon the 2012 liquidation and egregious distribution.

Notably, Defendants analogize the facts of this case to a person being charged with theft for stealing money. Defendants argue that theft is a chargeable felony regardless of when in the future the thief "spends the money." This misses the point. Theft is a chargeable felony when the thief *actually steals the money*. Here, the Defendants "stole the money" in 2012 when they pocketed \$63 million upon sale of the company.

Defendants also misconstrue *Cooley v Strickland*, 479 F.3d 412 (6th Cir 2007), which clearly supports Plaintiffs. *Cooley* confirms the "traditional rule of accrual," quoting the U.S. Supreme Court, which is that "the statute of limitations commences to run . . . when the wrongful act or omission results in damages[.]" *Id* at 19. That traditional rule would have controlled in *Cooley*, but it was a death penalty case, and, thus, "[s]etting an accrual date at the point when the actual harm is inflicted, ie., at the point of execution, is problematic in this context[.]" *Id* at 418.

Further, Defendants disregard *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483 (1988), as not directly discussing statutes of limitation, but the Court of Appeals cited *Bonelli* for the important point that a party cannot bring a claim based on purely speculative damages. This is directly relevant to the statute of limitations "accrual" analysis here: a plaintiff cannot bring a cause of action as long as his damages are purely speculative, and as long as there is no cause of action for a plaintiff to bring, there can be no "accrual" for statute of limitations purposes.

**B. An "Oppression" Claim under MCL 450.4515 Involves a "Continuing Course of Conduct" or "Series of Actions"**

In misconstruing and ignoring the actual language of the member oppression statute, Defendants also fail to recognize the unique and specific components of an enforceable claim

under MCL 450.4515. Under the statute, the plaintiff members must establish liability on the part of the defendant managers or members in order to be entitled to any relief at all under MCL 450.4515(1): “If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate[.]” (Emphasis added). See also, e.g., *Madugula v Taub*, 496 Mich 685, 702 (2014) (“Under [the shareholder oppression statutory analogue], once a shareholder establishes ‘grounds for relief’—i.e., that oppression occurred—“the circuit court may make an order or grant relief as it considers appropriate,” including an award of money damages.”) (emphasis added).

The grounds for relief under the statute include “willfully unfair and oppressive conduct” by the defendant managers or members, MCL 450.4515(1), and “‘willfully unfair and oppressive conduct’ means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member.” MCL 450.4515(2) (emphasis added). This, of course, is the well-understood and fundamental nature of an oppression claim. See, e.g., *Moscow & Ankers, Oppression of Minority Shareholders*, Mich BJ, Oct 1998, at 1088, 1093, 1095 (A “continuing wrong is the object of the section,” “abuse of minority shareholders typically will be part of continuing actions,” and the statute “is directed mainly at continuing wrongs.”), citing *Gidwitz v Lanzit Corrugated Box Co*, 20 Ill 2d 208, 221 (1960) (“The cumulative effects of these many acts and incidents, and their indicated continuing nature, combine to constitute . . . oppression[.]”); Schulman, *Moscow & Lesser, Michigan Corporation Law & Practice* at 133 (“Some continuing or substantial injustice inconsistent with the parties’ prior relationship and not authorized by agreement should be present.”). In the present case, the “continuing course of conduct” and “series of actions” that substantially interfered with the Plaintiffs’ interests did not even come into existence until 2012.

Although the Defendants’ initial act of implementing the Fifth Operating Agreement in

2009 is relevant to this case as it shows the Defendants' oppressive intent from the beginning, it was not until the Defendants sold the company and unfairly distributed the proceeds in 2012 that their conduct became a "continuing course of conduct" and "series of actions" that "substantially interfered" with Plaintiffs' interests as members. It was not until that pivotal action occurred that Plaintiffs could establish "willfully unfair and oppressive conduct," as that term is defined, under MCL 450.4515. Plaintiffs then exercised their statutory right to sue based on that continuing course of conduct/series of actions and seek relief based specifically thereon. And this cause of action certainly did not start accruing, for statute of limitations purposes, before it existed.

Defendants, however, ignore the basis of the "oppression" cause of action. They focus on the statute's non-exhaustive list of remedies, suggesting that some might have addressed Defendants' wrongdoing back in 2009. Aside from the fact that Defendants fraudulently concealed their wrongdoing in 2009 from Plaintiffs, which would toll the accrual of Plaintiffs' claim until 2012 even if it accrued in 2009 (see MCL 600.5855), the potential remedies that theoretically could have addressed Defendants' wrongdoing at a given time are irrelevant until and unless Plaintiffs have a cause of action under MCL 450.4515, and that was not until 2012.

Defendants' argument is also contrary to the plain language of the statute. MCL 450.4515 does not require that a member commence suit upon there being an inkling of an unfair act by a defendant member/manager that a remedy might address. Yet that is what Defendants' argument presupposes. MCL 450.4515 provides that a member may commence suit after there has been a "continuing course of conduct" or "series of actions" that "substantially interferes" with his member rights. "In construing a statute, a court should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, without meaning or effect." *Altman v Meridian Twp*, 439 Mich 623, 635 (1992). If Defendants' position were accepted and a claim under MCL 450.4515 necessarily started accruing the

moment there was a single unfair act that a remedy might address, the statutory right to bring suit based on a “continuing course of conduct/series of actions” that causes “substantial interference” would be rendered meaningless and confused.

Meanwhile, the fact that Plaintiffs generally listed in their complaint some of the interim relief provided under MCL 450.4515(1) simply reflects the fact that this is an oppression action in which the trial court has broad discretion to fashion relief as it considers appropriate.<sup>12</sup>

Lastly, Defendants’ reliance on *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264 (2009) and its abrogation of the *common law* “continuing wrongs” doctrine has no relevance here. MCL 450.4515 provides an independent, statutory cause of action for a continuing wrong (i.e., a “continuing course of conduct” or “series of actions”).

**C. The “Harm” and “Substantial Interference” Did Not Occur Until 2012**

Even if the distribution structure implemented in 2009 had not been fraudulently concealed from Plaintiffs, which it was, the harm to Plaintiffs did not occur until the 2012 event. As explained by Plaintiffs’ expert in his un rebutted Affidavit: “The dollar amount and proportion [of proceeds] (both which ultimately were zero at the 2012 transaction date) could only be determined in 2012, the date on which the triggering event (e.g., liquidation) and proceeds are actually received by the Company.” (Ex 2, ¶ 12).

Further, it was only clear that Defendants would dilute Plaintiffs when the disbursement actually occurred, especially given the promises and actions of Defendants assuring Plaintiffs they would not be diluted upon an actual sale and distribution of the company. For example, as explained in the affidavit of Plaintiff Adler, who was the company’s controller, the Defendants,

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<sup>12</sup> As explained by this Court: “Despite Madugula’s request for specific relief, the court was free under the language of the statute to grant relief as it considered appropriate, or none at all, even if he were to establish his claim of oppression.” *Madugula v Taub*, 496 Mich 685, 711-712 (2014) (A claim under § 489 “allows the court to shape the remedy regardless of what a claimant seeks.”).

including Linker, not only unequivocally promised there would be no dilution or subordination, but even had Plaintiff Adler “perform[] numerous calculations to correct the dilution caused by the convertible debt offerings in conjunction with possible sale scenarios of ePrize.” (Ex. 10, ¶¶ 11-24). Likewise, there existed millions of dollars in sale proceeds over which Defendant Linker ultimately had discretionary authority, which could have been distributed to the Plaintiffs to negate the dilutive effects of the Fifth Operating Agreement, but which were instead paid to others as “management bonuses.” (Ex. 4, *Linkner Dep*, pp. 137-138). So, the unlawful dilution and breach of contract did not occur until 2012. Finally, as the Court of Appeals recognized in its published opinion, a variety of other intervening actions or circumstances could have prevented the actual harm from accruing, including, for example, the operating agreement could have changed again.

The cases cited by Defendants do not support their position. In *Solowy v Oakwood Hosp Corp*, 454 Mich 214 (1997), as of the accrual date, the plaintiff’s physical injury was clear-cut and the critical facts regarding her previous doctor’s omissions were clearly known. This supports accrual as of the 2012 sale and distribution in the instant case. In *Luick v Rademacher*, 129 Mich App 803 (1983), the plaintiff incurred clear appreciable harm in dealing with the effects of his attorney’s malpractice, as opposed to the instant case, in which no harm or effects were incurred by the Plaintiffs until the 2012 sale and distribution. In *Berrios v Miles, Inc*, 227 Mich App 470 (1997), the plaintiff being infected with HIV from a blood transfusion was a clear-cut injury, a far cry from adoption of the Fifth Operating Agreement in the instant case.

**D. The Statute of Limitations Is Six Years for Plaintiffs’ Buy-Out Claim**

While Defendants attempt to bar Plaintiffs’ damages claim under MCL 450.4515(1)(e) by arguing that it accrued in 2009, despite there being no damages until 2012, Defendants ignore the fact that, even assuming arguendo that accrual occurred in 2009, Plaintiffs’ claims for equitable

relief under MCL 450.4515(1)(a)-(d), including a buy-out of shares at fair value, carry a six-year statute of limitations. First, by its express terms, MCL 450.4515(1)(e) only applies to “[a]n action seeking an award of damages” under subsection (e). Second, in *Estes v IDEA Engineering & Fabricating, Inc*, 250 Mich App 270, 285 (2002), the Court of Appeals decided this issue: “we hold that § 489 creates a separate and independent statutory cause of action and that the six year period of limitation contained in the residual statute applies.” The Court noted that the shortened limitations period for a damages claim *only* applies to the *damages* remedy. *Id* at 284 n 9 (“As a result of the 2001 Amendments, section 489 contains an express limitations period for damages claims under a cause of action *under that section.*”) (emphasis added). Third, according to this Court, a buy-out claim under subsection (d) of the oppression statute is equitable relief and is not damages. See *Madugula*, 496 Mich at 713 (“Although the final result of a forced buyout under § 489(1)(e) is a payment of money, the relief . . . has long been considered equitable in nature.”).

Meanwhile, even if Plaintiffs’ request for damages under MCL 450.4515(1)(e) were somehow subsumed legally into Plaintiffs’ request for a buy-out under MCL 450.4515(1)(d) for statute of limitation purposes, as Defendants incoherently suggest (which would, thereby, and inexplicably, render the “accrual” language and separate statute of limitations for “damages” nugatory), Plaintiffs’ request for damages would then benefit from the six-year residual statute of limitations that is applicable to equitable relief under the oppression statute anyway.

**E. Defendants’ Fraudulent Concealment Would Toll the Statute of Limitations**

Even if Plaintiffs’ claims accrued in 2009, which they did not, Defendants’ fraudulent concealment would operate to toll the limitations period under MCL 450.4515(1)(e). MCL 600.5855 provides an independent basis for tolling “[i]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable

for the claim from the knowledge of the person entitled to sue on the claim.” The Court of Appeals held, and Defendants did not dispute, that MCL 450.4515(1)(e) is an “accrual” statute, and thus fraudulent concealment under MCL 600.5855 may operate to prevent “accrual” from happening until the cause of action was known to Plaintiffs, which was not until 2012, when Plaintiffs learned they were diluted. See *Sills v Oakland Gen Hosp*, 220 Mich App 303, 308-310 (1996); *Techner v Greenberg*, 553 F App’x 495, 507 (6th Cir 2014) (Because MCL 450.4515(1)(e) is “properly . . . classified as [a] true statute[] of limitations, equitable principles may be applied to extend the period during which Techner’s claims for breach of fiduciary duty could be filed.”).

Meanwhile, “unlike the requirement for the general application of Michigan’s fraudulent-concealment statute, the statute’s relevance in breach-of-fiduciary duty cases is not constrained by the necessity of establishing an affirmative act by the defendant[.]” *Techner*, 553 F App’x at 507. There is instead “an affirmative duty to disclose where the parties are in a fiduciary relationship.” *Id.*, citing *Lumber Village, Inc v Siegler*, 135 Mich App 685, 695 (1984). With regard to the Defendant-fiduciaries, “his silence when he ought to speak, or his failure to disclose what he ought to disclose, is as much a fraud as an actual affirmative false representation.” *Barrett v Breault*, 275 Mich 482 (1936). As in *Techner*, the defendant “was required to disclose . . . that proper distributions were not being made,” and “because the defendant concealed the improper actions of the limited liability company’s managers,” MCL 600.5855 allows plaintiff “two years from the . . . uncovering of the defendant’s malfeasance to file suit.” *Supra* at 507.

Defendants’ reliance on *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007), and its abrogation of the *common law* discovery rule is perplexing. The basis for the holding in *Trentadue* was that a comprehensive *statutory* scheme was already in place (including MCL 600.5855, which the Court noted “provides for essentially unlimited tolling based on discovery

when a claim is fraudulently concealed”), to govern tolling for civil cases. *Id.* at 388-393. Defendants refute an issue (the common law discovery rule) that Plaintiffs nowhere advance.

## II. The Court of Appeals Correctly Held that *Baks* Is Inapplicable

Defendants misstate the Court of Appeals’ holding with regard to *Baks v Moroun*, 227 Mich App 472 (1998), and, without basis, ask this Court to order the Court of Appeals to “follow” *Baks* and/or explain why it believes “the rule” to be wrong. But, as the Court of Appeals correctly held, *Baks* simply does not apply in this case: “the *Baks* majority simply denoting the limitations period in an analogous statute as one of repose is incapable of definitively settling that issue.” (Ex. 20, p. 10). Given Defendants’ mischaracterization of the Court of Appeals’ holding on this issue, which clearly described that *Baks* simply did not lay down a rule of law on this issue, it bears quoting the Court of Appeals’ opinion in this regard:

In the face of § 4515(1)(e)’s plain language, defendants maintain that § 4515(1)(e) is a statute of repose. They stake their argument wholly on *Baks v. Moroun*, 227 Mich.App 472; 576 NW2d 413 (1998), overruled in part on other grounds by *Estes v. Idea Eng'g & Fabricating, Inc.*, 250 Mich.App 270; 649 NW2d 84 (2002), which described an analogous provision in the business corporation act (“BCA”), MCL 450.1101 et seq., as a statute of repose. *Baks*, 227 Mich.App at 486 (describing MCL 450.1541a(4) (pertaining to a corporate officer's discharge of fiduciary duties) as a statute of repose).

***Baks* did not analyze whether the plain language of the BCA’s analogous provision was a statute of repose or limitation, however. That issue was simply not before the Court.** Instead, the *Baks* majority simply called the analogous provision’s limitations period a statute of repose **before proceeding to resolve the central issue of that case, i.e., whether MCL 450.1489 created an independent cause of action for shareholder oppression claims.** *Baks*, 227 Mich.App at 476. **The relevant time period**—imported from a different section of the BCA—**had nothing to do with this determination. It is for this reason that neither *Estes* (which overturned *Baks*’ central holding) nor the *Baks* dissent (which *Estes* adopted) even addressed whether the time period was one of repose or limitation.** They simply refer to the time period as a statute of limitation. *Estes*, 250 Mich.App at 272, 281; *Baks*, 227 Mich.App at 500 (HOEKSTRA, J., dissenting). Again, the *Baks* majority offered nothing more, describing the relevant limiting language as a statute of repose only in conclusory fashion.

(Ex. 20, *Frank v Linkner*, 2015 WL 1540980, pp. 9-10) (emphasis added).

The Court of Appeals then went on to correctly describe the long established standard for whether a court has laid down a legal rule governing future cases, which *Baks* simply did not:

This is fatal to defendants' reliance on *Baks*, for it is well established that **to decide a question of law, a court must specifically intend to lay down a legal rule governing future cases.** *Foreman v. Foreman*, 266 Mich.App 132, 140; 701 NW2d 167 (2005), quoting *Detroit v. Mich. Pub Utilities Comm*, 288 Mich. 267, 301; 286 NW 368 (1939). **To do this, the court must thoroughly consider the issue and directly intend to resolve it.** *Foreman*, 286 Mich.App at 140; *Detroit*, 288 Mich. at 301.

(Ex. 20, *Frank v Linkner*, 2015 WL 1540980, pp. 9-10) (emphasis added). The Court of Appeals went on to describe this Court's precedence in this regard, including the rule that, "to constitute resolution of a question of law, it . . . must involve, among other things, 'fullness of the discussion' of the issue." (*Id*), quoting *McNally v Bd of Canvassers of Wayne Co*, 316 Mich 551, 557-558 (1947). But, as the Court of Appeals correctly held: "the *Baks* majority did not do this. Rather, it just described the relevant limiting language in conclusory fashion. This is a far cry from declaring a rule of law, let alone a turning of the judicial mind to the subject." (*Id*). "[T]he *Baks* majority simply denoting the limitations period in an analogous statute as one of repose is incapable of definitively settling that issue. *Baks* does not aid defendants." (*Id*).

The rule of law purportedly laid down in *Baks* was that MCL 450.1489 does not create an independent statutory cause of action – an incorrect ruling that was soundly overruled by *Estes v IDEA Engineering & Fabricating, Inc*, 250 Mich App 270 (2002). Everything else in *Baks* was a passing comment or dicta. As this Court held in *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 436-37 (2008): "Obiter dictum is defined as . . . a judicial opinion in a matter related but not essential to the case," and a "statement that is dictum does not constitute binding precedent under MCR 7.215(J)." The Court of Appeals in this case was not bound by the "repose" dictum in the *Baks* decision.

Even if, theoretically, *Baks* laid down a rule of law on this issue, which it absolutely did not, Defendants' argument fails on even further grounds. The Court of Appeals in *Estes* – in which a special panel was convened in a proceeding under MCR 7.215(J)(2) – overruled *Baks* to whatever extent Defendants purport to rely on *Baks* now. This is reflected in the language of *Estes* itself, which “adopt[ed]” Judge Hoekstra’s dissent in *Baks* “as [its] own.” 250 Mich App at 279. Judge Hoekstra’s dissent, meanwhile, plainly called the statutory period one of limitations, not repose: “I disagree with the majority’s conclusion in section I, which is that the *statute of limitations* applicable to a cause of action brought by shareholders of a closely held corporation is the same *statute of limitations* applicable to . . . action[s] brought by shareholders of a publicly held corporation.” *Baks*, 227 Mich App at 500 (Hoekstra, J., Dissenting) (emphasis added). This means that Judge Hoekstra and the *Estes* majority: (1) regarded any alleged “repose” finding by the *Baks* majority to be so inconsequential to the *Baks* majority’s opinion that it did not even warrant a literal reference, and/or (2) regarded the *Baks* majority as being plainly overruled to whatever extent it made any alleged “repose” finding.

#### **CONCLUSION AND RELIEF REQUESTED**

For all of the foregoing reasons, and for all of those set forth in the published Opinion of the Court of Appeals, Plaintiffs request that this Court deny Defendants’ application for leave to appeal or peremptory reversal, and allow this case to proceed in the Trial Court.

Respectfully submitted,

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