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STATE OF MICHIGAN

IN THE SUPREME COURT

IVAN FRANK, JEFFREY DWOSKIN, PHILLIP D. JACOKES, ROY KRAUTHAMMER, BLAKE ATLER, MATT KOVALESKI, JAMES BRUNK, and **IJF HOLDINGS, LLC**,

Plaintiffs/Appellees,

v.

DANIEL GILBERT, JOSHUA LINKNER, BRIAN HERMELIN, GARY SHIFFMAN, DAVID KATZMAN, ARTHUR WEISS, JAY FARNER, CAMELOT-ePRIZE, LLC, BH ACQUISITIONS, LLC, CRACKERJACK, LLC f/k/a ePRIZE, LLC, and **CRACKERJACK HOLDINGS, LLC**, f/k/a ePRIZE HOLDINGS, LLC,

Defendants/Appellants.

MSC No. _____
COA No. 318751
L/C No. 13-133554
Hon. Colleen O'Brien

APPLICATION FOR LEAVE TO APPEAL

OR ORDER GRANTING PEREMPTORY REVERSAL

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(also available at 2015 WL 1540980, 2015 Mich App LEXIS 701)

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

In March 2009, Defendant/Appellant Crackerjack, LLC, f/k/a ePrize, LLC ("ePrize") restructured itself by amending its operating agreement and issuing new "Series C" and "Series B" membership units with over $100 million in payment priority above older units. In August 2012, ePrize sold substantially all of its assets and distributed the proceeds exactly as required by the amended operating agreement. The proceeds were insufficient to pay the older, lower-priority membership units, including most of the units held by the two plaintiffs who owned any units.

In 2013, Plaintiffs, a group of former ePrize employees,[1] filed this suit against ePrize and others, claiming that the March 2009 restructuring was a scheme to dilute their membership units by creating "super-preferred equity," *i.e.*, the Series C and B units. The circuit court dismissed their suit as untimely, holding that it was time-barred by a three-year statute of repose and that even if it were a statute of limitation, the claims were still time barred because they accrued in 2009, when the new membership units were created and given distribution priority. The court did not rule on ePrize's other challenges to the suit, including most plaintiffs' lack of standing and one plaintiff's release agreement and consent. Plaintiffs appealed.

The Court of Appeals reversed and remanded in a published opinion. *Frank v Linkner*, ___ Mich App ___, 2015 WL 1540980, 2015 Mich App LEXIS 701 (Tab A). The panel circumvented the "repose" holding of *Baks v Moroun*, 227 Mich App 472, 486 (1998), *ovrrld in pt on other grds by Estes v Idea Engineering*, 250 Mich App 270 (2002), by treating it as dicta, and then held that the three-year limitations period in MCL 450.4515(1)(e) (Tab C) did not begin

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[1] Plaintiffs/Appellees, when referred to collectively in this brief, will be called "Plaintiffs." The large subcategory of Plaintiffs who owned no units of ePrize (and hence lack standing) will be called the "Nonmember Plaintiffs." The lead Plaintiff, Ivan Frank—and his company, IJF Holdings, LLC—who consented to the 2009 restructuring, will be called "Frank."

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to run in 2009, as the circuit court had held, but in 2012, when a liquidation event occurred. ePrize sought reconsideration, which was denied.

The question of accrual—2009 or 2012—is an issue involving legal principles of major significance to the state's jurisprudence. MCR 7.302(B)(3).[2] The published holding that actions for minority oppression or fiduciary breach stemming from business recapitalizations do not accrue until there is a liquidation event is conceptually incorrect, contrary to Michigan precedent, and contrary to accrual principles nationally. Until this error is corrected, the owners and managers of Michigan businesses in need of new capital to survive or expand will unfairly face indeterminable years upon years of risk from minority investors. The legislature's goal of a finite and manageable period within which challenges to such business decisions must be asserted will be frustrated. This holding as to limited liability companies will surely be construed to apply to closely held corporations as well.

Although the issue is moot if this Court agrees with ePrize on the accrual issue, the Court of Appeals panel also evaded MCR 7.215(J)(1), which required it to follow the "repose" holding of *Baks*, and to express its disagreement as provided in MCR 7.215(J)(2). There is no doubt that the *Baks* panel intended its ruling, 227 Mich App at 481-484, to be a formal holding, supported by this Court's decision in *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961), and necessary to justify the panel's later treatment of fraudulent concealment claims, 227 Mich App at 486-490. The "repose" holding of *Baks* has been the law in Michigan since 1998 without unfairly depriving litigants of access to the justice system. Although questioned recently in an unpublished Sixth Circuit opinion, *Techner v Greenberg*, 553 Fed Appx 495 (CA 6, 2014) (Tab H), in the 17 years since *Baks* was decided the Michigan legislature has been content with

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[2] Effective September 1, 2015, new subchapter 7.300 rules go into effect. At that time, MCR 7.302(B)(3) will become MCR 7.305(B)(3).

the holding. If not mooted by the accrual issue, this Court should remand to the Court of Appeals with directions to follow *Baks* and invoke the conflict resolution procedure of MCR 7.215(J).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this application for leave to appeal under MCR 7.301(A)(2). After September 1, 2015, this provision will be found in MCR 7.303(B)(1).

STATEMENT OF QUESTIONS INVOLVED

I.

Should this Court peremptorily reverse or grant leave to appeal to review the published holding of the Court of Appeals that a cause of action for minority oppression does not accrue at the time the members recapitalize the company in a manner alleged to oppress the minority, but instead accrues many years after the alleged harmful acts when the company is liquidated and distributes assets?

ePrize says yes.

The trial court would say yes.

The Court of Appeals says no.

II.

If not mooted by the decision of the accrual issue, should this Court:

(i) peremptorily reverse the panel's holding that the *Baks* "repose" decision was dicta and remand with directions to follow *Baks* and invoke MCR 7.215(J)(2); or

(ii) decide itself, by granting leave or ruling peremptorily, whether MCL 450.4515(1)(e) is a statute of repose or limitation?

ePrize says yes.

The trial court would say yes.

The Court of Appeals says no.

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FACTS AND PROCEEDINGS

A. The Parties

Defendants/Appellees include:

- ePrize, a Michigan limited liability company that was in the business of conducting on-line promotions until it sold substantially all of its assets on August 20, 2012;
- Crackerjack Holdings, LLC f/k/a ePrize Holdings, LLC ("HoldCo"), a holding company and minority member of ePrize;
- Joshua Linkner, ePrize's founder, its former CEO, one of its managers, and the sole manager of HoldCo;
- Daniel Gilbert and Jay Farner, who are alleged to control Camelot-ePrize, LLC, a manager of ePrize, although they are not themselves managers or members of ePrize;
- BH Acquisitions, LLC, a member of ePrize; and
- Four other individuals who are or were managers of ePrize.

Plaintiffs/Appellees include:

- Ivan Frank, a minority member of ePrize, and a subscriber to the Series C units;
- IJF Holdings, LLC, Frank's company;
- Jeffrey Dwoskin, Phillip Jacokes, Roy Krauthammer, Blake Atler, Matt Kovaleski, and James Brunk, all of whom were members of HoldCo, but none of whom were ever members of ePrize, although they were formerly employed by ePrize.
- Blake Atler, who owned some nonvoting units of ePrize.

B. The 2007 Loans

It is undisputed that ePrize issued four rounds of subordinated debentures in 2007. These "subordinated debentures" were promissory notes evidencing ePrize's borrowings from its members, needed for various purposes. By late 2007 ePrize also needed money to get through what had become a severe economic downturn gripping Michigan and much of the country. ePrize underwent four rounds of borrowings from members in 2007, as follows:

- In January 2007, certain members of ePrize loaned it $7 million under Subordinated Secured Notes due January 31, 2009 (the "B1 Notes").

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- In July 2007, certain members of ePrize loaned it approximately $7.26 million under Promissory Notes due December 31, 2008 (the "B2 Notes").
- In October 2007, certain members of ePrize loaned it approximately $2.3 million under Promissory Notes due December 31, 2008 (the "B3 Notes").
- In December 2007, certain members of ePrize loaned it approximately $11.6 million under Senior Subordinated Secured Notes due July 31, 2009 (the "B4 Notes").

These undisputed facts are alleged by Plaintiffs themselves in their Second Amended Complaint (Pltfs COA Ex 1, SAC at ¶¶21-31). Although some of the B1 through B4 Notes bore conversion features, they were not converted to membership units until the March 1, 2009 recapitalization discussed below (ePrize COA Tab A, Linkner Aff at ¶9).[3]

C. The March 1, 2009 Recapitalization

In early 2009, ePrize almost closed its doors due to a series of financial blows resulting from the economic downturn. Many of ePrize's customers had radically cut or deferred their advertising budgets, the source of ePrize's revenue. ePrize was running out of cash to fund operations and payroll. Charter One Bank was threatening to call its loan. ePrize had also defaulted on the B1 through B3 Notes and had no means to pay them or the B4 Notes coming due in July 2009. Just the principal on the B1 through B4 Notes exceeded $28 million. ePrize was facing bankruptcy unless it could raise new cash, appease Charter One, and defer payment of the B Notes (ePrize COA Tab A at ¶10).

On March 1, 2009, ePrize—and over 250 jobs—were saved by means of a corporate restructuring. As part of this transaction: i) ePrize refinanced with Charter One through a $14.5

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[3] The Affidavit of Joshua Linkner dated July 15, 2013, was Exhibit A to ePrize's summary disposition motion and Tab A to its Court of Appeals brief of appellee. In this brief, ePrize refers to attached material as Tab __, and Court of Appeals exhibits as Pltfs COA Ex __ or ePrize COA Tab __. Plaintiffs' previous brief will be cited Pltfs COA Br __.

million loan backed by personal guarantees from Defendants Gilbert, Shiffman and Hermelin;[4] ii) ePrize issued new Series C units to raise up to $5 million of additional cash; and iii) the B Notes were converted to Series B units and subordinated to the new Series C units. To acquire Series C units, a member was required to provide the following consideration:

- Make his pro rata share of an up-front capital contribution of $3,000,000;
- Agree to fund his pro rata share of an additional capital contribution up to $2,000,000;
- Fund 35% of his pro-rata share of the $14.5 million bank debt by participating with Charter One on the loan;
- Enter into a contribution agreement subjecting him to pro-rata personal liability along with the guarantors for the $14.5 million bank debt; and
- Convert all Series B notes into Series B units subordinated to the Series C Units.

This restructuring was formally approved in the Fifth Amended and Restated Operating Agreement of ePrize (the "Fifth Operating Agreement" without exhibits is Pltfs COA Ex 7). Although 80% member approval was required for ratification, 99.95% of the ePrize voting members approved it. This included Frank.

In the Fifth Operating Agreement, the ePrize members approved the creation of the new Series C units and also approved the conversion of the B1 through B4 promissory notes into

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[4] The issues in this case do not turn on the parties' competing claims about whether the 2009 recapitalization was fair, but Plaintiffs' Court of Appeals brief featured wild and unfounded assertions about ePrize members reaping benefits "in excess of 1,500 percent" while Plaintiffs received nothing (*e.g.*, Pltfs COA Br at 3, citing Pltfs COA Ex 4 at ¶9). In fact, to give one example, and as Plaintiffs know from documents produced to them, Camelot-ePrize, LLC invested a total of $26,177,485 in ePrize and received only $25,121,049 from the August 2012 sale. Far from netting a return of 1500%, Camelot-ePrize thus far has *lost* over $1 million, a situation that could improve if the buyer's note is paid but that never will produce a profit on the scale alleged by Plaintiffs. Plaintiffs look only at what was paid for the Series C units, not the millions invested in prior years in units that received nothing. Plaintiffs likewise ignore the risk taken by Gilbert, Shiffman and Hermelin in guaranteeing a significant share of $14.5 million in bank debt at a time when ePrize's continued existence was hanging in the balance and could have gone either way. Defendants did not merely invest a few million in 2009 and walk away with huge profits in 2012.

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Series B1 through B4 units (Pltfs COA Ex 7, §§2.1-2.2). In addition, the ePrize members approved a hierarchy of payment priorities, often called a "waterfall," in §3.1. Under the §3.1 waterfall, the new Series C units were given the highest payment priority. After the Series C units were paid in full, the Series B4 units were given the next priority, followed by the Series B-3 units, and down the line until the common units were paid, last.

All participating ePrize members, including Frank, knew in 2009 that the Series C units would receive a $68.5 million preference, as explained next.

D. Frank participates in the 2009 Recapitalization

Frank worked at ePrize from 2001-2010 (Pltfs COA Br 14). In 2005 he signed a written employment agreement (ePrize COA Tab C) with ePrize as its Senior Vice President, Strategic Services. Under this agreement, Frank was entitled to a fixed base salary (*id.* at ¶3a) and a discretionary "transaction bonus" expressly conditioned upon him being an employee at the time the bonus was declared and paid (*id.* ¶3b). This provision is consistent with ePrize's longstanding policy of limiting bonuses to current employees (ePrize COA Tab A at ¶16).

In 2009, Frank was given the opportunity to buy as many Series C units as he wanted (*id.* ¶11). He chose to purchase 1,428 Series C units, to go with his 10 Senior Series A units, 10,000 Junior Series A units, and 768,000 non-voting common units of ePrize, as well as various voting and non-voting units of HoldCo (*id.* ¶4). His total cash investment for these units in 2009 was about $9,200. He received some units for no money as a result of his employment, paid $5,000 to buy some units from Keith Simmons, a former member, and purchased the Series C units for $4,200 as explained further below. Frank alleges that he assigned some units in ePrize and HoldCo to IJF, an entity he controls (Pltfs COA Ex 1, SAC ¶78), although ePrize was unaware of this.

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ePrize eased some of the investment criteria (described in the previous section) for Frank. He was not required to participate in the Charter One loan, nor was he required to personally guaranty his share of the $14.5 million bank debt (ePrize COA Tab A, Linkner Aff at ¶11). Instead, Frank loaned capital directly to ePrize, which repaid him in full, plus 10% interest (*id.*).

It is undisputed that Frank executed all subscription agreements required by ePrize to invest in Series C units (ePrize COA Tab D, Frank Subscription Agreements). These documents confirmed—in 2009—the essential elements of the restructuring, including the payment priority for the various classes of ePrize units, including the $68.25 million preference for Series C units, ahead of all other membership units (*id.* at A-1 & 2). Plaintiffs state as a "fact" that in 2009 "the economic impact [of the Series C units] could not have been, and was not, known to" them (Pltfs COA Br at 12), but Frank knew in 2009 that the Series C units would likely receive at least the first $68.25 million in any sale of ePrize or its assets.

Unlike Frank's subscription agreement, which he admits receiving and signing, Plaintiffs claim that Frank never received and did not sign the Fifth Operating Agreement (Pltfs COA Br at 15), but there is no genuine dispute about this. Plaintiffs rely on a signature page that happens not to be signed by Frank (Pltfs COA Ex 7 at 38), but the agreement was signed in several counterparts and ePrize showed the trial court Frank's signature page (ePrize COA Tab E), as Plaintiffs acknowledge. Nonetheless, Plaintiffs persisted below in denying that Frank ever saw the Fifth Operating Agreement, although he admittedly represented in writing on April 3, 2009 that he had been given a copy of the Agreement and that he had reviewed it carefully; that he was intimately familiar with the operations of ePrize, and that he and his representatives had had open access to all ePrize documents and records (ePrize COA Tab D, §6(a) at pages 8 and 14).

Moreover, contradicting Plaintiffs' assertion that Frank "was provided with no…material that would even remotely suggest" that his other units would be subordinated to the Series C

units (Pltfs COA Br at 15), Frank admittedly received—and signed—his subscription agreements, which explained the waterfall and how it subordinated the other units (ePrize COA Tab D at A-1, A-2).

Again, in the Fifth Operating Agreement, Frank and the other voting members of ePrize authorized the creation of the new Series C units and the conversion of the B1 through B4 Notes into Series B1 through B4 units (Pltfs COA Ex 7, §§2.1, 2.2). Exactly in conformity with the subscription documents, the §3.1 waterfall required distributions first to the Series C units until paid, second to the Series B4 units, third to the Series B3, and down the line until the common units were paid, last (*id.*, §3.1).

E. Frank voluntarily resigns and releases all claims

In the Fifth Operating Agreement, Frank and the other ePrize voting members agreed to limit the liability of the managers:

> (i) *Each Manager shall be liable solely to the Company and, derivatively, to its members for the Manager's gross negligence or willful misconduct.* The Manager's taking of any action or failure to take any action, or a Manager's errors in judgment, the effect of which may cause or result in loss or damage to the Company, if done pursuant to the provisions of the Michigan Act, the Articles of Incorporation and this Operating Agreement, shall be presumed not to constitute gross negligence or willful misconduct on the part of the manager. (*id.*, §4.2(b); emphasis added).

The parties also agreed to a "merger clause" stating that the Fifth Operating Agreement set forth the entire understanding of the parties with respect to its subject matter and superseded all prior agreements or understandings, which were declared null and void (*id.*, §9.8).

About 10 months after he ratified the Fifth Operating Agreement, on January 29, 2010, Frank voluntarily resigned from ePrize (ePrize COA Tab A, Linkner Aff at ¶6). In connection with his resignation, Frank entered into a "Separation Agreement and General Release" (ePrize COA Tab F, Release) with ePrize and all of its subsidiaries, affiliates, officers, directors, agents, partners, employees agents predecessors, successors and assigns. Under the Release, Frank was

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paid $111,000, and was entitled to receive certain defined commissions. He agreed that this was the entire amount due him under the ePrize company practices, policies or benefit plans (ePrize COA Tab F at ¶10). In return for the $111,000, Frank gave a complete release:

> Employee voluntarily, knowingly and willingly releases and hereby forever discharges the Company, and its officers, directors, partners, shareholders, affiliates, subsidiaries, employees and agents,...from any and all charges, complaints, claims,...causes of action and demands of any nature, known or unknown, associated with Employee's employment with the Company which Employee ever had, now has or hereafter may have...arising prior to the time the respective parties sign this Agreement, including but not limited to those: in tort...; in contract, whether express or implied,...; under any Company policy, procedure or benefit plan; and under any federal, state or local law.... (ePrize COA Tab F at ¶6)

F. The August 20, 2012 Sale

The March 1, 2009 recapitalization, which raised $4 million of the target $5 million, coupled with major cost cutting efforts, saved the company and over 250 jobs. Given this turnaround, in 2012 the managers of ePrize were able to market the company, which sold substantially all of its assets to a third party in August 2012 (the "Sale"). By then, none of the Plaintiffs still worked for ePrize. It is undisputed that the ePrize managers distributed the Sale proceeds *exactly* as required by the §3.1 waterfall in the Fifth Operating Agreement. The Sale proceeds were sufficient to pay the Series C, Series B4, and Series B3 units in full, and the Series B2 units in part. The Series B1 units and those below them on the §3.1 waterfall received no distribution (ePrize COA Tab A, Linkner Aff at ¶14).

The net Sale proceeds available for distribution, after payment of bank debt, employee bonuses, and other obligations, were $99,952,891, comprised of $91,294,591 in cash and a seller note valued at $8,658,300 (*id.*). A demonstrative exhibit in the trial court (Exhibit G) provided a simplified explanation of the §3.1 waterfall and how the $99,952,891 in proceeds were distributed. That exhibit looked like this:

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Summary of ePrize, LLC Distribution Waterfall

Unit Class	(A) Total Accrued Preference 1	(B) Available for Distribution
		99,952,891
Series C Preferred Units	67,124,121	67,124,121
Series B-4 Preferred Units	26,797,022	26,797,022
Series B-3 Preferred Units	3,646,547	3,646,547
Series B-2 Preferred Units	11,682,020	2,385,201
Series B-1 Preferred Units	11,384,433	0
Participating Preferred Units	0	0
Senior Series A Preferred Units	31,192,932	0
Junior Series A Preferred Units	50,485,685	0
Common Units	N/A	0
Totals	202,312,759	99,952,891

1. The Total Accrued Preference amounts listed are created and governed by the Fifth Amended and Restated Operating Agreement of Crackerjack, LLC f/k/a ePrize, LLC.

Column A ("Total Accrued Preference") sets forth the total preference attributable to each class of units as of the Sale date. The Series C preference wound up being only $67,124,121 because the final capital call on Series C units was never made. The three most senior classes of units (C, B4, and B3) received full distributions; the next class, Series B2, received only a partial distribution. Under the Fifth Operating Agreement, the managers had no discretion to make distributions in any other way.

As part of the Sale, ePrize paid a transaction bonus to certain *current* employees who had signed a transaction bonus agreement (conditioning the bonus on employment status at the time of sale). This amount was not a distribution on ownership units but incentive compensation for current employees, reportable on IRS form W-2. None of the Plaintiffs were entitled to this bonus, because none of them were employed by ePrize in August 2012.

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Frank owned 0.14523% of the Series C units (1,428.33 out of 983,503.60 outstanding, for which he paid $4,200). This entitled Frank to a total consideration from the Sale of $97,483.52, consisting of $89,039.13 in cash and the right to his pro-rata portion of the seller note, which has a fair market value of $8,444.39 (ePrize COA Tab A, Linkner Aff at ¶15). A copy of the payment check to Frank was provided to the trial court. Frank cashed that check and never returned this money.

G. Plaintiffs bring untimely claims

Plaintiffs filed this case on April 19, 2013, more than four years *after* the March 1, 2009 restructuring that resulted in the new Series C units and the conversion of the 2007 loans into Series B units. The complaint was amended twice, resulting in the Second Amended Complaint ("SAC," Pltfs COA Ex 1). Frank did not tender back to ePrize any portion of the money he received for his Series C units or the $111,000 he received when he left (and released) ePrize.

Plaintiffs' alleged in the SAC that the managers and others in control of ePrize conspired through the March 1, 2009 restructuring to create what they call "super-preferred equity," that is, the Series B and Series C units, with the intention of depriving other units of their value by giving the new units the highest payment priorities (*see* Pltfs COA Ex 1, SAC ¶¶ 15-49). Based on this common premise—that the ePrize managers improperly created and prioritized the "super-preferred" Series B and Series C units—Plaintiffs asserted a laundry list of claims against the Defendants, including statutory oppression (Count I), breach of fiduciary duty (Count II), conversion (Count III), breach of contract (Count IV), tortious interference (Count V), conspiracy (Count VI), aiding and abetting (Count VII), fraudulent omission (Count VIII), negligent misrepresentation (Count IX), accounting (Count X), unjust enrichment (Count XI), and piercing the corporate veil (directed at Camelot-ePrize, LLC, only). Despite this multiplicity of claims, summarized by the Court of Appeals (Tab A at 3-4), the Court accurately capsulized

the case in its opening sentence: "This is a limited liability company member oppression case" (*id.* at 1). As with their many claims, Plaintiffs sought every conceivable form of relief for oppression. Their prayer for relief contained 19 distinct requests, lettered "a" through "s," including these five:

c. all applicable remedies under MCL 450.4515
f. the "cancellation or alteration" of operating agreement provisions under .4515(1)(b)
g. the "direction, alteration, or prohibition of various acts" by ePrize under .4515(1)(c)
h. a buy-out at fair value, not factoring in ePrize's wrongful acts under .4515(1)(d)
i. damages under .4515(1)(e). (Tab B; also Pltfs COA Ex 1, SAC prayer for relief).

Without exception, all counts in the SAC are premised on allegations of allegedly wrongful acts, the last of which occurred on *March 1, 2009*:

- "In ***January 2007***, a seven million dollar convertible subordinated debenture was secretly offered to the Defendants and a select group of others."
- "In ***August 2007***, another convertible subordinated debenture was offered to the Defendants and the same select group of others."
- "In ***October of 2007***, another convertible subordinated debenture was offered to Defendants and the same select group of others."
- "In ***December 2007***, another convertible subordinated debenture was offered to Defendants and the same select group of others."
- "The final convertible subordinated debenture offering was the [***March 1, 2009***] Series C."
- "Defendants used these subordinated debentures to expropriate economic value in [ePrize] from the minority members to themselves …."

(Pltfs COA Ex 1, SAC at ¶¶21, 25, 28, 31, 37 & 38) (emphasis added).

H. The circuit court grants summary disposition and the Court of Appeals reverses as to the accrual and repose issues

ePrize filed three motions for summary disposition: first, that all claims were time-barred; second, that the Nonmember Plaintiffs lacked standing; and third, that Frank's claims were barred by release, acceptance of benefits, and consent to the 2009 Recapitalization. The circuit court ruled only on the first of these motions, agreeing with ePrize that the claims accrued in

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2009 and holding further that the three years within which suit could be brought was a period of repose.

Plaintiffs appealed. The Court of Appeals summarized the parties competing claims in its opinion (Tab A at 1, 4); summarized the facts given here (*id.* at 2-3); and quoted the trial court's holding (*id.* at 4). It then turned to the question whether the claims were time-barred (*id.* at 5).

First, it held that all of plaintiffs' claims, including its fiduciary duty and contract claims, were governed by the time periods in MCL 450.4515 (Tab C), *i.e.*, the period for member-oppression claims (Tab A at 6-7).

Next, it held that MCL 450.4515(1)(e)'s three-year period was a statute of limitation, not a statute of repose (*id.* at 7-10), contrary to *Baks v Moroun*. The Court noted that the statute used the word "accrual" and did not measure the period from the happening of an event like the time of occupancy or the date of a medical procedure (*id.* at 8-9). The Court acknowledged that shareholder oppression and member oppression claims should be interpreted consistently (*id.* at 9 n.6), but concluded that *Baks* (a shareholder oppression case) did not decide a legal issue when it "called the analogous provision's limitations period a statute of repose" (*id.* at 9-10).

Finally, the Court held that Plaintiffs' claims did not accrue until 2012:

> Here, it was impossible for plaintiffs to establish their claims for damages in 2009 because all that occurred in 2009, if anything, was an alleged breach of the duties set forth in MCL 450.4515(1). Plaintiffs did not suffer harm until 2012, when ePrize's sale occurred and the proceeds were distributed three years later. In other words, although defendants' alleged wrongdoing occurred in 2009, plaintiffs had no claim for damages to enforce in 2009 since they had incurred none. At best, their damages were speculative… (*id.* at 11).

The Court of Appeals declined to consider other issues raised by ePrize in the circuit court but not yet ruled upon (*id.* at 12). ePrize sought reconsideration, which was denied.

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SUMMARY OF ARGUMENT

This is a very important case for the thousands of business entities in Michigan that are subject to MCL 450.4515(1)(e) (limited liability companies) or MCL 450.1541a (closely held corporations). These are closely interrelated provisions that dictate when actions may be brought against those in control of these entities. The Court of Appeals has construed the word "accrual" in these statutes to mean that equitable actions for minority oppression and breach of fiduciary duty—in this case the subordination of existing member interests to those making new investments in the business—do not accrue when the "oppression" allegedly occurs. Rather, they accrue only when there is a liquidating event such as a sale of the business.

This holding runs contrary to Michigan's existing jurisprudence, under which a claim accrues as soon as there has been a wrong that causes some harm, not the point at which damages can be calculated to the penny. Indeed, in the present case the damages *could* be calculated to the penny at the time Plaintiffs' interests were subordinated, although the Court's holding would be incorrect even if that weren't so. Accrual is triggered by the fact of an identifiable loss, not the finality of money damages.

The very idea of "oppression" includes the idea of "harm." A usurpation of a company's business opportunity is oppressive to members and shareholders when it happens, not when the usurper begins to turn a profit from it. In the same way, if a subordination of minority interests is oppressive, it is oppressive when it happens, not when the new preferred equity finally derives some benefit from the change. No other test for the accrual of oppression claims is remotely workable.

The Court of Appeals holding is not based on any theory of notice, knowledge, or an alleged lack thereof. It is based solely on a misunderstanding of the accrual concept. This opinion is published and thus binding precedent in Michigan until this Court acts. *Michigan*

Lawyers Weekly, in an article published days after the opinion was issued (Vol 29, No 27, page 2, May 11, 2015), labeled it Michigan's first-ever published "dilution" opinion in the context of an oppression claim. In June, *Business Torts Reporter* described *Frank v Linkner* as deciding "a question of first impression (Vol 27, No 8, Bus Torts Rep 181 (CCH June 2015) (Tab D).

Even if the Court of Appeals had not erred on accrual, it was bound to follow the 1998 holding in *Baks v Moroun* that these are statutes of repose, not statutes of limitation. If it had done so, the claims would be time-barred unless the Court convened a special conflict-resolution panel under MCR 7.215(J). This rule is intended precisely to prevent any three-judge panel from publishing a decision that is seriously inconsistent with a prior decision published after November 1, 1990. The rule codifies a series of Administrative Orders from this Court. In this case the Court of Appeals avoided its duty by labeling a deliberate holding in *Baks* as "dicta."

ARGUMENT

I.

THE ACCRUAL ERROR IS OBVIOUS ENOUGH FOR A PEREMPTORY ORDER AND IMPORTANT ENOUGH FOR PLENARY REVIEW

Correcting the Court of Appeals' accrual error could be done in a short, peremptory order on the application papers, which would make it unnecessary to consider whether MCL 450.4515(1)(e) (Tab C) is a statute of limitation or repose. On the other hand, this published opinion is now binding precedent statewide as to when any LLC oppression claim of this kind (involving a change in the priority given to different classes of membership during a recapitalization and, later, a liquidation event). In the corporate setting, it very likely will be deemed precedential as to any shareholder oppression claim based on analogous events.

For several reasons, the claims in this case accrued in March 2009 and the Court's contrary published holding—if not corrected—will extend the potential liability of owners and

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investors for years beyond the intent expressed in the statute, with dramatic unintended consequences for businesses in Michigan.

A. The standard of review is de novo

ePrize and Plaintiffs (Pltfs COA Br at 17) agree that the standard of review is de novo. MCR 2.116(C)(7) requires summary disposition of all or part of a claim if "[t]he claim is barred because of…statute of limitations." A motion for summary disposition under MCR 2.116(C)(7) does not test the merits of a claim, but rather tests the necessity for a trial on the merits. ePrize also agrees with Plaintiffs that "[i]n the absence of disputed facts, the question whether a cause of action is barred by the statute of limitations is also a question of law." *Boyle v General Motors Corp*, 468 Mich 226, 229-230 (2003); *Moll v Abbott Laboratories*, 444 Mich 1, 26 (1993). Under MCR 2.116(G)(5), the affidavits, pleadings, depositions, admissions and documentary evidence filed in connection with the motion are to be considered.

Whether a claim is within the period of limitation is a question of law for the court to decide when no facts are in dispute. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 386 (2007). ePrize contends that all of Plaintiffs' claims are governed by MCL 450.4515 and 450.4404, which in both cases is three years or less. The Court of Appeals held that Plaintiffs' fiduciary duty claims did not differ materially from their member oppression claims and were all governed by MCL 450.4515 (Tab A at 6). The Court also noted that company managers owe their fiduciary duties to the company, not individual members (*id., citing The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43 (2005)).

B. Plaintiffs' claims accrued in March 2009, not August 2012

Whether the three-year period of MCL 450.4515(1)(e) (Tab C) is one of limitation or repose, all of Plaintiffs' claims are time-barred because either way the period began to run in

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2009 and expired in 2012, well before Plaintiffs filed this action in 2013.

1. Plaintiffs' oppression claims are all equitable, including their request for damages

Because this is an LLC member oppression case (Tab A at 1), Plaintiffs sought every possible remedy under MCL 450.4515, including the cancellation of the Series C units, the banning of distributions in accordance with the operating agreement's "waterfall," a buy-out at a fair price (as though there were no Series C units), and damages (Tab B; also Pltfs COA Ex 1, SAC prayers for relief c, f, g, h, i). These are all equitable causes of action, including buy-outs and damages. This Court recently so held in the context of the shareholder oppression statute, *Madugula v Taub*, 496 Mich 685 (2014), and the LLC oppression statute is precisely analogous, as the Court of Appeals recognized (Tab A at 9 n.6).

The Court of Appeals (and Plaintiffs) wrote as though the limitations period began sooner for their "equitable" claims than it did for their "damages" claim, but there is only one point of accrual for any of these claims. If adopting the 2009 distribution waterfall was wrongful, Plaintiffs did not need a liquidating sale event to seek its cancellation, enjoin a distribution, force a buy-out, or seek money damages for the lost value of their units.

As ePrize showed in the facts, these are all remedies that Plaintiffs seek (Tab B), and rightly so if there was any substance to the "oppression" allegations made. That avenue was open to them for three years following adoption of the new operating agreement, but that ship sailed before they sued. It is not possible now to separate "damages" from all the other remedies available to a circuit court in an oppression case and say "Well, the rest of the remedies may be time-barred now, but not damages—the clock only started on that one in 2012." The diminution in value allegedly damaged Plaintiffs and a buy-out is a damage remedy, just like any other. *Irish*

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v Natural Gas, 2006 WL 2000132, *3 (Mich App 2006) (Tab E) (buy-out is a damage remedy).[5] There is no difference here between an action for buy-out and an action for damages.

2. The wrong to Plaintiffs, if any, occurred when ePrize units were subordinated in 2009

The oppression alleged in this case was the adoption in 2009 of the Fifth Amended Operating Agreement's "waterfall" of distribution priorities, which guaranteed that holders of junior preferred and common ePrize units would never receive a pro rata share of any liquidation proceeds until the holders of Series C Units received the first $68.25 million, thus diminishing the proceeds by that extent, no matter what the total was. This alleged oppression—if proved—would have immediately damaged Plaintiffs, triggering accrual under the statute at issue here:

> (e) ...An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first. MCL 450.4515(1)(e) (Tab C).[6]

Damages are one of many remedies available if oppression has been proved. Plaintiffs' claims for all remedies were ripe in 2009, including their damages claim for the diminution in value of their ePrize units caused by the new Series C Units.

Plaintiffs' allegations of harm all relate to events occurring no later than 2009, four years before they filed this action (Pltfs COA Ex 1, SAC at ¶¶21-38, 47, 96-97, 111, 147, 156). Their claims accrued at "the time the wrong upon which the claim is based was done regardless of the

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5 Plaintiffs argued to the trial court that its proposed "buy out" remedy had a *different* limitations period than a claim seeking money damages, citing *Estes*. But the *Irish* case (Tab E) shows that the limitation period is the same. The Court in *Irish* noted that the language Plaintiffs rely on in *Estes* was mooted by the Legislature in 2001 when it enacted the three year/two year periods (*id.*). A claim under the oppression statutes seeking a buy-out as a remedy is a claim for damages subject to the three-year/two-year time limits. *Id.*

6 This provision is identical to its counterpart in the Michigan Business Corporation Act. The corporate "oppression" statute, MCL 450.1489(f), contains the same 3 year/2 year limitation periods. The Court of Appeals expressed no doubt that Michigan precedent interpreting MCL 450.1489(f) applies equally to MCL 450.1541a(4) (Tab A at 9 n.6).

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time when damage results." *Marilyn Froling Trust v BH Country Club*, 283 Mich App 264, 279 (2009). The alleged "wrong" was the adoption in 2009 of the new operating agreement, with its new preferred Series C units. If there was a "wrong," all the damage was immediate.

Any loss incurred by Plaintiffs was incurred in 2009. The Series B units created then merely converted the 2007 loans, which would have had to have been repaid first anyway, to membership units with priority over any units held by Plaintiffs. As for the Series C Units, whose holders invested new money in 2009 and personally guaranteed millions in bank debt, they received a $68.25 million priority over both the Series B units and the older junior preferred and common units. Immediately, putting the Series B units aside, this new priority reduced the value of Plaintiffs' units by their pre-2009 pro rata share of $68.25 million dollars. This was their alleged "damage." It was no more difficult to calculate in 2009 than it would have been after 2012. No matter how much the value of ePrize might increase later, Plaintiffs could make exactly the same claims in 2009 that they eventually made in 2013.

If Plaintiffs wished to "cancel or alter" the new operating agreement, their litigation clock started running in 2009. If they wanted to "prohibit" ePrize from making a priority distribution to Series C units, their clock started running in 2009. If they wanted a "buy out" at fair value, without the Series C priority, their clock started running in 2009. And if they wanted money damages for the diminution in value of their units, that clock started running in 2009 as well. Under any measure, 2012 has nothing to do with accrual here.

The Court of Appeals, like the circuit court, did not reach any knowledge-based issue, so its decision is not based on what Plaintiffs knew in 2009.[7] In any event, the only Plaintiffs with

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[7] In any event, Plaintiffs are precluded under *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389 (2007), from tolling the three-year period through application of the "common-law" discovery rule. *Trentadue* abolished the common-law practice of tolling accruals based on

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standing (Ivan Frank and Blake Atler) had full knowledge in 2009. The other Plaintiffs were not even members of ePrize, so their knowledge does not matter. The Court of Appeals opinion is premised *solely* on the flatly incorrect contention that "Plaintiffs did not suffer harm until 2012, when ePrize's sale occurred." This ignores the economic reality of the liquidation preference created in 2009. The effect was the same as though in 2009 the Series C investors had taken $68.25 million in ePrize equity right then and removed it from the company, permanently out of the reach of the holders of junior preferred and common members.

The Court of Appeals cites the general rule of MCL 600.5827 and *Moll v Abbott Laboratories*, 444 Mich 1, 12 (1993), that a claim accrues "at the time of the wrong upon which the claim is based was done *regardless of the time when damage results*" (Tab A at 11; emphasis added). The Court then cites an unhelpful general definition from *Black's Law Dictionary*, which in turn quotes a California treatise. The definition is not wrong, but is too general to advance the analysis in this case. Next the Court cites, with a "*cf*" signal, a civil rights action under 42 USC §1983 brought in Ohio by a death-row prisoner against the governor, *Cooey v Strickland*, 479 F3d 412 (CA 6 2007). The Court of Appeals' quote from *Cooey*—which supports ePrize, not Plaintiffs—needs context. The *Cooey* panel reversed a district judge for finding that a method-of-execution challenge was timely filed and ruled instead that it was time-barred.[8]

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allegations that a claimant could not have reasonably discovered the claim sooner. Discovery serves only to ***shorten*** the limitations period from three years to two. MCL 450.4515(1)(e).

8 Cooey claimed that Ohio's lethal injection protocol was cruel and unusual punishment. The Sixth Circuit applied Ohio's two-year tort statute of limitation, but federal law determines accrual. *Id.* 416. Cooey was sentenced to death in 1986. Ohio started using lethal injection in 1993 and in 2001 it became Ohio's sole method of execution. *Id.* Cooey exhausted his direct appeal options in 1993 and his federal habeas options in 2003, when the Supreme Court denied certiorari. *Id.* 417. Cooey filed suit in 2004. *Id.* 418. The trial court held that Cooey's clock began to tick "when his execution became imminent and he knew or had reason to know of the facts that gave rise to his specific method-of-execution challenge." *Id. 417.* The court defined "imminent" to mean when all avenues of sentence relief were exhausted. *Id.*

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The only other authority cited by the Court of Appeals as concerning accrual is not a statute of limitation case at all. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483 (1988), concerns several other issues, including the well-known principle that damages need not be proved to a higher degree of certainty than the nature of the case admits. *Id.* 511-512. There was nothing "speculative," however, about Plaintiffs' oppression cause of action in 2009. The new operating agreement was adopted—Frank voted for it—and those who invested new capital were given new rights that allegedly violated promises made to Plaintiffs that their rights would never be diluted or subordinated. No matter when or for how much ePrize ultimately was sold, Plaintiffs other than Frank always were going to get nothing until $68.5 million went to others.

The Court closed with two additional points. It pointed out that the new operating agreement might have been amended again or that ePrize might have become worthless (Tab A at 11-12). These are poor arguments. One might as well say that theft is not a chargeable felony until the thief spends the money, because until then the thief might give it back or the stolen item might become worthless. On reconsideration in the Court of Appeals, Plaintiffs responded to this analogy by claiming that "[t]heft is a chargeable felony when the thief *steals the money*" (italics by Plaintiffs). But that was the point of the analogy—ePrize allegedly "stole" over $100 million in equity in 2009 (the new Series C units and the conversion of Series B loans into senior Series B units). From Plaintiffs' perspective, that equity was gone in 2009, immediately and irretrievably. It was no more "gone" in 2012 than it was in 2009.

Moreover, ePrize could not amend its operating agreement to deprive the holders of Series C and B units of their promised priority over the holders of older units. The holders of

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The Sixth Circuit rejected the district court's analysis, including that court's holding that the execution had to be imminent. *Id.* 419-424. Ultimately, the panel majority held that the action would have accrued at the end of the state appeal process, without further delay for federal habeas, except that in this case the execution method was adopted later, although still more than two years before Cooey filed his action.

Series C units made a very risky investment in a company on the brink of disaster in 2009. They did so in part because ePrize promised them they would have priority if there was a distribution. They performed fully by investing all requested sums and their right to priority was vested. Similarly, the 2007 Series B Note holders agreed to forgo the repayments owed them in exchange for equity units with tiered priority, below Series C but ahead of all older units.

The application of limitation periods is a question of law where the facts are not in dispute. *Terrace Land v Seeligson*, 250 Mich App 452, 455 (2002). Here, the alleged breach (adoption of the §3.1 waterfall and its distribution preferences), the alleged harm (dilution of Plaintiffs' units), and the alleged "wrong" were all complete no later than April 3, 2009. All elements of a cause of action, if any, were present then. *Connelly v Paul Ruddy*, 388 Mich 146, 151 (1972). As of April 3, 2009, it was assured that Plaintiffs (other than Frank, who invested and was paid) would not see a penny of the first $100 million or so received in any future distribution. The economic impact on common and junior preferred units was immediate and immediately quantifiable. These claims—including whatever money damages Plaintiffs would ever have—all accrued in 2009.

Plaintiffs' "accrual" analysis is inconsistent with *Marilyn Froling Trust, supra. Froling* "completely and retroactively abrogated the common-law continuing wrongs doctrine in the jurisprudence of this state" (283 Mich App at 288). Plaintiffs cannot revive an untimely claim by treating the drop of the proverbial "other shoe"—the 2012 liquidation—as a fresh act of oppression. It was no such thing. To say that there was no oppression until 2012 is to say that there was no oppression in 2009, not because the operating agreement might have been amended yet again or because ePrize might have become worthless, but because there is never anything oppressive about a control group deciding that it is in the best interests of the company to give a distribution priority to new investors at the expense of the owners of older units. In fact, in this

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case, there was no oppression ever. The new investment was all that saved the company and was risky for the investors. But accepting Plaintiffs' claims as pleaded, there is no doubt *when* the alleged oppression—*and the alleged damage*—happened. It happened in 2009.

In 2009, Plaintiffs' claims were ripe for litigation. The value of the common and junior preferred ePrize units had been diminished by an easily calculated amount. If all those units were worth "*x*" dollars right before the creation of the Series C and B units, they were collectively worth *x* minus "*y*" dollars the next day. If that diminishment in value of the previously existing ePrize units was wrongful oppression, the holders of those units were damaged by their pro rata share of the diminishment. It's just arithmetic, no different in 2012 than in 2009. "[P]laintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run." *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 224 (1997).

> It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claims. *Kroll v Vanden Berg*, 336 Mich 306, 311 (1953).

As the ICLE treatise, *Guide to Michigan Statutes of Limitations (January 2015 Update)*, explains in §1.4, the *extent* of damages is immaterial. "It is…the fact of an identifiable and appreciable loss, and not the finality of monetary damages, that gives birth to the cause of action." *Luick v Rademacher*, 129 Mich App 803, 806 (1983), cited by *Gebhardt v O'Rourke*, 444 Mich 535, 545 (1994). No case anywhere supports the Court of Appeals' accrual analysis. *See Berrios v Miles, Inc*, 226 Mich App 470 (1997) (hemophiliac's cause of action accrues when he knows blood transfusion probably caused him to be HIV-positive, even if AIDS does not develop for seven more years, applying *Moll*'s "possible cause of action" standard).

Other jurisdictions agree. Consider the counterclaims in *Schnelling ex rel Bankruptcy Estate of Epic Resorts, LLC v Prudential Securities, Inc*, 2004 WL 1790175 (ED PA 2004) (Tab

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F), where counter-plaintiff alleged that it sold its portfolio of receivables in 2004 at a loss of $13 million after counter-defendants gave them false financial statements, which it knew in 2001 were false. *Id.* at *2. The Pennsylvania accrual rule tracks ours. The damage occurred in 2001 when counter-plaintiff knew it had been harmed, not in 2004 when it actually realized the loss.

> The damage to [counter-plaintiff] occurred when it became aware that the escrow accounts were not created in June 2001. At that point...[defendants] should have known that [counter-defendants'] allegedly tortious actions would negatively impact the value of its portfolio of receivables.... The fact that [counter-plaintiff] did not formally realize the $13 million loss until March 2004 does not delay the running of the limitations period. A contrary holding would "effectively enable similarly situated parties *to forestall the running of the statute of limitations indefinitely*." *Id.* (emphasis added).

As the district court explained further in a footnote, counter-plaintiff "suffered actual legal damage in the diminution in value of the time-share receivables due to [the] allegedly tortious conduct long before the receivables were sold in March 2004." *Id.* *2 n.3.

C. The accrual error is broadly important

Although Plaintiffs' claims are all frivolous—most of them did not own units of ePrize and lack standing; Frank approved and participated in the recapitalization and gave ePrize a release; there were no unfair profits (*see supra* at 5 n.4); actions taken in compliance with operating agreements cannot be oppression—the Court of Appeals' published accrual error is important far beyond the facts of this case and must be corrected because of the harm it will cause to business entities in Michigan and the confusion it will sow among bench and bar concerning the meaning of accrual. As to harm, the decision creates a powerful disincentive to new investment and introduces heightened uncertainty about a broad range of business decisions that might be claimed to be oppressive. As to the law, the Court of Appeals has eviscerated the concept of accrual in oppression and fiduciary duty cases by extending unpredictably and indefinitely the potential liability of company managers and control persons.

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The importance of *Frank v Linkner* has been quickly recognized. As noted earlier, it was discussed in *Michigan Lawyers Weekly* (Vol 29, No 27, page 2, May 11, 2015) and *Business Torts Reporter* (Vol 27, No 8, Bus Torts Rep 181, CCH June 2015) (Tab D).

The Court of Appeals' fatal error in this case relates not to which accrual rules apply, but to its conclusion that "Plaintiffs did not suffer harm until 2012" (Tab A at 11). That is incorrect. If there ever was any harm to them, actionable under the equitable theories they alleged, it happened in 2009. Plaintiffs stressed that they sought "damages," and the Court of Appeals seemed to agree that this was important (stating that damages in 2009 were "speculative"), but accrual here has nothing to do with remedy. Every remedy that was potentially available to Plaintiffs was available in 2009. The general accrual rule of MCL 600.5827 is perfectly adequate for this situation: "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

Plaintiffs also rely on MCL 600.5827. They argue, however, that the "wrong" is not done until the plaintiff is "harmed," as opposed to when the defendant "acted." Although there may be cases where time passes between the defendant's action and the harm to plaintiff, this simply is not such a case. The trial court correctly held that Plaintiffs' claims all accrued in 2009 ((Pltfs COA Ex 2, 10/9/2013 Tr at 22; bench opinion, quoted by the Court of Appeals, Tab A at 4). The Court of Appeals' accrual error, being more a matter of its ultimate conclusion than its reasoning, could be corrected by this Court in a paragraph on the application papers.

By focusing on the liquidating event, the Court of Appeals effectively has prevented the statute of limitations from even beginning to run until that event occurs, no matter how long the wait is. In this case, ePrize by happenstance was sold in 2012, but it might not have been sold for many more years. Under the Court's reasoning, Plaintiffs never could sue for the 2009 "oppression" until ePrize was sold, even though there was never any change in the diminution of

their equity and there was nothing "speculative" about that. From ePrize's viewpoint, the oppression claim would remain a ticking time bomb, just waiting to go off whenever there was a distribution of equity for any reason. If ePrize were not sold until 2212, the distant descendants of these Plaintiffs would have three more years to sue the descendants of these Defendants. If Michigan law sanctioned such unlimited exposure on investment-related claims, our businesses would have a hard time attracting new investors. And the very purpose of such statutes—to prevent stale claims—would be frustrated.

II.

IF NOT MOOTED BY THIS COURT'S ACCRUAL HOLDING, THE REPOSE HOLDING WAS ERROR IN THE COURT OF APPEALS BECAUSE OF MCR 7.215(J); THIS COURT SHOULD REMAND WITH DIRECTIONS TO FOLLOW *BAKS* AND INVOKE THE CONFLICT RESOLUTION PROCEDURE

If this Court agrees with ePrize that Plaintiffs' claims all accrued in 2009, it need not consider this second issue, although it may nonetheless wish to do so.

If Plaintiffs' claims are deemed to have accrued for statute-of-limitations purposes in 2012, the *Baks* holding would be outcome determinative in this case and the panel's error in concluding that *Baks* does not contain a "repose" holding would matter. Under MCR 7.215(J), the panel would have to follow *Baks*, state its disagreement, and await the vote of the entire Court of Appeals on whether to convene a conflict resolution panel.

But if Plaintiffs' claims accrued in 2009, as ePrize argues, a *Baks* holding is unnecessary because Plaintiffs' claims were all time-barred under MCL 450.4515(1) either way. If this Court rules peremptorily for a 2009 accrual, the Court of Appeals opinion becomes a nullity and the status remains *quo ante* for the *Baks* repose/limitations question. On the other hand, if this Court

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grants leave to appeal to address the accrual issue, it may also wish to decide on the merits whether MCL 450.4515(1)(e) is or is not a statute of repose.

A. The standard of review is de novo

Decisions regarding the meaning of a statute or a court rule are both legal questions, which this Court reviews de novo. Authorities appear in subsection A of the first argument. Whether MCL 450.4515(1)(e) sets forth a statute of repose or limitation is such a question. So is the interpretation of MCR 7.215 and the panel's decision regarding what was held in *Baks*.

B. *Baks* states a deliberate holding, essential to the outcome of that case

The Court of Appeals avoided MCR 7.215(J) by denying that *Baks* meant "repose" when it said "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 limitation period a statute of repose… (Tab A at 9; italics by the Court of Appeals).

This is not accurate. Later-to-be Chief Justice Taylor did not just "call" the statute one of "repose." Rather, he did so after an analysis of *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961). As in this case, minority oppression was not the only claim presented in *Baks*[9] and the appeal was not over when the majority ruled that there was no such

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9 In *Baks*, plaintiffs as minority shareholders asserted both statutory and common law claims against corporate officers and directors, including breach of contract, breach of fiduciary duty and shareholder oppression. *Baks*, 227 Mich App at 476. Defendants sought summary disposition under MCR 2.116(C)(7) on the basis that plaintiffs had not filed their complaint within the period required by the statute of repose in BCA §541a(4)—the substantively identical counterpart to LLCA §404(6). *Id.* at 484. When *Baks* was decided, there was no limitations period set forth in the oppression statute, MCL 450.1489.

The trial court granted summary disposition against the *Baks* plaintiffs, who appealed, arguing that the statute of repose in BCA §541a(4) did not extend to all of their statutory and common law claims. *Id.* Citing to and relying upon the Michigan Supreme Court's decision in *Detroit Foundries*, *supra*, this Court affirmed dismissal of ***all*** the plaintiffs' statutory and common law claims:

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cause of action in Michigan. The plaintiffs asserted that *all* their claims had been fraudulently concealed by their brother, Manuel "Matty" Moroun.

Section I of the *Baks* opinion discusses repose and *Detroit Gray Iron*, 227 Mich App at 481-484, and Section II extends that reasoning to plaintiffs' fraudulent concealment claims, *id.* 486-490. The majority held that a repose period cannot be extended by fraudulent concealment. This was a holding, not dicta. Moreover, as to the Court of Appeals' mention of the dissenting opinion in *Baks* (Tab A at 10), Judge Hoekstra had no occasion to consider the repose issue because he would have applied a *six*-year statute of limitation, making the issue irrelevant. *Id.* 500. Thus, the Court of Appeals erred in concluding that *Baks* did not intend to "lay down a legal rule governing future cases" (Tab A at 10) when it ruled that the provision in question was a statute of repose. It not only did so intend, but it needed to do so before it could dismiss the claims of fraudulent concealment in that case without addressing them substantively.

> [W]e agree with defendants that the trial court properly held that § 541a(4) establishes the period of limitation for ***all*** actions filed against corporation officers and directors alleging conduct that violates the standard found in § 541a or its common-law antecedents.
>
> ***
>
> [A]ny action for breach of fiduciary duty against a corporate officer or director, whether under § 489 or otherwise, is subject to the period of limitation set forth in § 541a(4) if the action alleges conduct that violates the standard of conduct for directors and officers found in § 541a(1).

Baks, 227 Mich App at 484-485. Under the rule established in *Detroit Foundries* and reaffirmed in *Baks*, the two-year statute of limitations and three-year statute of repose in MCL 450.4404(6) and 450.4515 govern ***all*** claims against limited liability company managers or members, based on alleged conduct that would constitute a breach the duties owed under MCL 450.4404(1) or 450.4515, no matter how the claims are labeled, characterized or described in the claimant's pleading. *Id.*

This part of *Baks* was undisturbed by *Estes*. Aside from the new cause of action for oppression by those in control of the company, every claim against the managers is governed by the same periods, no matter how labeled. When the legislature added the same period of limitations/repose for oppression actions in 2001, then every claim against a company's managers, without exception, was subject to the same three-year period.

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The *Baks* decision on this issue has been the law in Michigan for 17 years now. The legislature has not seen fit to amend either this statute or the analogous BCA statute. Other courts likewise have found this analysis persuasive. *See, e.g., Schafer & Weiner, PLLC v Estate of Schafer*, No. 2008-320,768-CZ (Oakland Probate Ct 2009) (Opinion of Pezzetti, J) (Tab G at 8) ("Plaintiffs' claims…are claims under MCL 450.1451a and MCL 450.4404, no matter how Plaintiffs attempt to characterize their individual counts.… As such, Plaintiffs' claims…are *all* subject to the statutes of repose set forth in MCL 450.1451a(4) and 450.4404(6)" (emphasis by the court)). Federal decisions like *Techner, supra,* disagree, but even they acknowledge that *Baks* holds that the three-year period is a statute of repose.

After the Court of Appeals ruled in the case at bar, Westlaw promptly added a "red flag" to its online version of *Baks* to note that it had been "overruled" by *Frank v Linkner*. (Lexis states that *Frank* "distinguishes" *Baks*.) In fact, only this Court or a conflict-resolution panel of the Court of Appeals can "overrule" a post-1990 published decision of the Court of Appeals.

C. The Court of Appeals was bound to follow *Baks* and invoke the conflict resolution procedures in MCR 7.215(J)

Under MCR 7.215(J)(1), a regular panel of the Court of Appeals "must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990" unless the rule has been changed by this Court or by a conflict panel of that Court. The correct procedure was for the Court of Appeals to follow *Baks* and explain why it believed the rule announced in *Baks* was wrong. MCR 7.215(J)(2). The quality of the *Baks* majority's reasoning is relevant only to the explanation of disagreement, not the panel's ruling.

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CONCLUSION AND RELIEF REQUESTED

For these reasons, ePrize respectfully requests that this Court either peremptorily reverse the Court of Appeals' decision and reinstate the circuit court's decision or that it grant leave to review the important questions presented here.

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