**SUPREME COURT OF WISCONSIN**

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**District IV Appeal No. 2022AP1958**
**Circuit Court Case No. 2022CV43**

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**KARIN EICHHOFF, STEVEN SPEER AND RODERICK RUNYAN,**

**Plaintiffs-Appellants-Petitioners,**

**v.**

**NEW GLARUS BREWING COMPANY AND DEBORAH A. CAREY,**

**Defendants-Respondents.**

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**Petition for Review of a Decision Filed by the Wisconsin Court of Appeals, District IV, on February 22, 2024**

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# PETITION FOR REVIEW OF PLAINTIFFS-APPELLANTS-PETITIONERS

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# PETITION

Karin Eichhoff, Steven Speer and Roderick Runyan, Plaintiffs-Appellants-Petitioners, respectfully petition the Supreme Court of the State of Wisconsin, pursuant to Wis. Stat. § 808.10 and Wis. Stat. § 809.62, for review of the decision of the Court of Appeals, District IV, *Karin Eichhoff, Steven Speer and Roderick Runyan v. New Glarus Brewing Company and Deborah A. Carey,* Court of Appeals Case No. 22AP1958, filed on February 22, 2024, insofar as that decision affirms the judgment entered by the circuit court for Green County dismissing Plaintiffs-Appellants-Petitioners' claims for minority shareholder oppression and securities fraud.

## ISSUES PRESENTED FOR REVIEW

1. Is a shareholder oppression claim asserting a squeeze out involving multiple instances of oppressive conduct -- not all of which necessarily constitutes independently illegal conduct -- evaluated holistically as a direct shareholder claim as opposed to evaluating whether each individual act constitutes a direct claim, or a derivative claim?

   Answered by the Wisconsin Court of Appeals: No. Courts conduct the same analysis for oppression claims as they do for fiduciary duty claims: each individual act is independently analyzed to determine whether the act is illegal and whether it is a direct claim or a derivative claim.

2. May minority shareholders who funded the initial start-up of a business to be managed initially by the majority shareholder, later assert a valid claim for minority shareholder oppression when the controlling shareholder subsequently engages in a course of seeking to squeeze the minority shareholders out of the business and frustrates the minority shareholders' reasonable expectations?

   Answered by the Wisconsin Court of Appeals: No. Because the minority shareholders invested with the knowledge that the majority shareholder would be able to control the business, and they received a standard securities disclosure document stating that dividends could not be assured, the minority shareholders could not state a valid oppression claim despite the majority shareholder subsequently stockpiling uninvested cash, withholding financial information, and threatening the shareholders with adverse consequences if they didn't sign a more restrictive shareholder agreement.

3. Does a selling shareholder in a corporation state a valid claim for securities fraud alleging the corporation buying back its shares withheld material information that would impact a reasonable investor's decision to sell at the transaction price, if the seller and buyer agreed to the price and the stock purchase agreement did not say that the price represented fair market value?

   Answered by the Wisconsin Court of Appeals: No.

## RULE 809.62(1r) CRITERIA FOR REVIEW

This Court should review the Decision of the Court of Appeals, which affirmed dismissal of Plaintiffs-Appellants-Petitioners' claims for dissolution based on minority shareholder oppression, and for securities fraud. A decision by the Supreme Court will help to develop, clarify and harmonize the law, with respect to minority shareholder oppression claims. Wis. Stat. § 809.62(1r)(c). Notably, since the Court of Appeals established the standard for asserting a valid oppression claim in ***Jorgensen v. Water Works***, 218 Wis. 2d 761, 582 N.W.2d 98 (Ct. App. 1998), only one Supreme Court case has addressed minority oppression claims under that standard. *See* ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, 316 Wis. 2d 640, 764 N.W.2d 904. ***Notz*** was devoted to a unique set of facts: whether a shareholder had standing to sue after the corporation had been merged and the plaintiff was no longer a shareholder of the corporation. ***Id.*** at ¶¶29-37.

The Court of Appeals in ***Jorgensen*** defined minority oppression, but no decision by the Supreme Court explains to the bar how the minority oppression standard should be applied in practice to evaluate whether a shareholder may proceed on a claim, or what relief may be granted. Moreover, in the 25 years since the ***Jorgensen*** decision, Court of Appeals decisions addressing minority oppression claims continue to confuse whether it is a direct action that shareholders may individually pursue, or a derivative action similar to a breach of fiduciary duty claim. The current opinion of the Court of Appeals, along with other Court of Appeals opinions (virtually all being *per curiam* or unpublished), have conflicted with each other and with the standard set forth in ***Jorgensen***. Wis. Stat. § 809.62(1r)(d).

The issues presented here are also questions of law that have recurred repeatedly in the last 25 years based on the Court of Appeals' decisions, and they are likely to recur unless resolved by the Supreme Court. Wis. Stat. §

809.62(1r)(c)3. Both Wisconsin corporate law and limited liability company law include statutory claims for judicial dissolution based on shareholder oppression. The LLC laws were amended effective January 1, 2023, establishing oppression as an independent basis for the Court to grant judicial dissolution or other relief.

According to the Small Business Administration, there are 497,000 small businesses in Wisconsin, the substantial majority of which are subject to judicial dissolution statutes based on oppression. U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, *2023 Small Business Profile – Wisconsin*. https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-WI.pdf. Because of the dearth of published case law, with none from the Supreme Court other than the 2009 ***Notz*** case on standing, granting this Petition for Review would provide a valuable opportunity to establish, clarify and harmonize the law on minority oppression.

In addition, the absence of Wisconsin case law on securities fraud claims needs to be remedied to clarify decisions by the Court of Appeals that hold: (1) securities fraud claims cannot be pursued as long as the buyer and seller agree to the price and the party withholding information does not make any representation as to fair market value in the purchase agreement, and (2) there is no claim for securities fraud against a corporation repurchasing its own shares, and no duty to disclose relevant financial information to the selling shareholders, if the corporation is closely-held with no established price for those shares on an open market. Wis. Stat. § 809.62(1r)(c)3.

In this case, the Court of Appeals' decision cites no securities case law as authority, instead citing only to Wis. Stat. Ch. 551. The lack of published case law by this Court is problematic, and justice would be aided by this Court granting the Petition for Review.

## I. NATURE OF THE CASE

This appeal concerns whether the Plaintiffs-Appellants-Petitioners' Amended Complaint states a claim under Wis. Stat. § 180.1430 and Wis. Stat. § 551.501. The Defendants-Respondents moved to dismiss the Complaint[1] on various grounds, including failure to state a claim upon which relief may be granted. The circuit court granted the motion to dismiss the claim under § 180.1430 because the wherefore clause of the Complaint contained a parenthetical stating that the Shareholders were not asking the court to dissolve the Brewery, but were instead seeking alternative remedies. The circuit court further concluded that judicial dissolution was the only available remedy under § 180.1430. The Court of Appeals affirmed, based on completely different grounds than those set forth by the circuit court, as explained further below. The circuit court held that the securities fraud claim under § 551.501 failed to state a claim because the Brewery "set the market for Plaintiffs' shares in the transactions at issue based upon nothing more than a dollar figure known to both seller and purchaser" and therefore "no material misrepresentations or omissions could have been made." (R.54:7, APP-046). The Court of Appeals affirmed, holding there could be no securities fraud claim for failing to disclose material financial information to the Shareholders, because the purchase agreements did not promise that the price was the fair market value of shares.

## II. PROCEDURAL HISTORY

The original complaint was filed in August 2021 in the Dane County Circuit Court. (R.16). The Defendants moved to change venue, which the Dane County Circuit Court granted in part. (R.16). The claim under Wis.

[1] The operative complaint is an Amended Complaint; it will be referred to as the "Complaint." The Plaintiffs-Appellants-Petitioners will be referred to as the "Shareholders," the Defendants-Respondents as the "Defendants", New Glarus Brewing Company as "the Brewery," and Deborah Carey as "Carey."

Stat. § 180.1430 was dismissed and refiled in Green County Circuit Court on March 8, 2022. (R.16). The Shareholders filed an Amended Complaint on May 23, 2022, which added a securities fraud claim.

The Defendants filed Motions to Dismiss. The circuit court issued a written decision granting the Defendants' Motions to Dismiss on October 6, 2022, and the Shareholders timely appealed to the Court of Appeals.

The Court of Appeals affirmed the dismissal of the Complaint on different grounds in a decision dated February 22, 2024. (APP-001). The Plaintiffs now petition this Court for review.

## STATEMENT OF FACTS IN ADDITION TO FACTS OUTLINED IN COURT OF APPEALS' DECISION

Karin Eichhoff (through her husband, Dierk), Steven Speer, and Roderick Runyan were among the original investors in the Brewery, which started in 1993 as an idea among friends. (R.32, ¶¶1, 5, APP-053). Speer was also one of the initial officers of the company, serving as Vice President and Secretary. (R.32, ¶9, APP-054). Speer spent a summer working with Dan Carey and Deborah Carey on a detailed business plan. (R.32, ¶¶5-10, APP-053-055). Speer invested $25,000 in the Brewery, which he had recently inherited. (Id.). Speer convinced his friend Dierk Eichhoff to invest as well. (Id.). Runyan was also an initial investor, having previously invested in a successful brewpub. (Id.). The investors contributed significant start-up funds and effort to transform the Brewery from a concept into an operational business. (R.32, ¶¶6-8, APP-054).

The Shareholders invested in the Brewery with reasonable expectations: to be treated fairly and to have a chance to share in the Brewery's financial success. (R.32, ¶14, APP-055). One expectation was described in the Private Placement Memorandum ("PPM") that Carey signed and provided to the Shareholders to induce them to invest: "The Founder

[Carey] is dedicated to producing a quality beer, establishing a mutually beneficial relationship with the Corporation's customers, and ***operating a profitable business for the Corporation's investors***." (R.32, ¶124; APP-149, Sec. 6.A., emphasis added)

Another Shareholder expectation was Carey's promise in the PPM that any contracts between the Brewery and her "will not be undertaken unless they are approved by a majority of disinterested directors, are fair to the Corporation and comply with applicable laws and regulations." (R.32, Ex. D; APP-149, Sec. 5).

In spite of Carey's initial promises, she has since told the Shareholders that she has no intent to ever distribute any of the Shareholders' profits to the Shareholders (except for tax distributions). (R.32, ¶69, APP-067). Carey unilaterally changed the Corporate bylaws, without proper notice or shareholder vote, to state that the Brewery would be operated, in part, for the benefit of the community and excluding any mention of the shareholders. (R.32, ¶¶120-122, APP-074-075). Carey also personally entered into several contracts with the Brewery that she secretly approved without input from others. (R.32, ¶47, APP-062).

Defendants' oppressive conduct came to a head in 2021, when Defendants pushed the Shareholders to sign a new shareholder agreement that would have significantly restricted the Shareholders' rights. (R.32, ¶¶154-156, APP-081-082). Carey threatened the minority shareholders that if they did not adopt the new shareholder agreement (to which Carey and her family would never be bound), Carey would have no obligation to the minority shareholders, and Carey's shares would be sold to the highest third-party bidder to the exclusion of the minority shareholders. (R.32, ¶18, APP-056-057).

The purpose of the proposed shareholder agreement was to dilute the Shareholders' ownership interest, increase the value in Carey's shares and her daughter's shares, and to squeeze-out the Shareholders. (R.32, ¶165, APP-084-085). Carey subsequently confirmed at the annual shareholder meeting her feeling that "getting rid of people who have voting shares and a say in the company is great." (R.32, ¶¶146, 198, APP-079, APP-094).

## ARGUMENT

### INTRODUCTION

This case concerns the squeeze-out of minority shareholders by the controlling shareholder. The Shareholders filed suit pursuant to Wis. Stat. § 180.1430(2)(b), alleging that the controlling shareholder and sole director of the Brewery was acting and would continue to act in a manner that was oppressive, and the Shareholders sought relief under the statute (including dissolution and other equitable relief).

A squeeze out is "the use by some of the owners … in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners." F. Hodge O'Neal & Robert B. Thompson, OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, § 1.1 (2d ed. 2011).

The Brewery has withheld tens of millions of dollars of the Shareholders' money, keeping it uninvested in bank accounts.[2] Carey only authorizes distributions to the Shareholders sufficient to pay to the taxing authorities, with all the extra income being retained to sit idle in bank accounts or used for the benefit of Carey and her family. The only way the Shareholders can receive any financial benefit from their ownership is if they

[2] The Brewery is a subchapter S corporation. (R. 32, ¶195). The corporation itself, like LLCs, pays no income tax. The income of the business is "passed through" and the Shareholders pay income tax out of their own pocket on their pro rata share of the income regardless of whether the money is ever distributed to them by the company. *See* ***Metz v. Keener***, 215 Wis. 2d 626, 633 at n. 3, 573 N.W.2d 865.

agree to sell their shares to the Brewery at depressed prices set by Defendants.

In order to induce the Shareholders to sell their shares at depressed prices, Carey bullies the Shareholders – in other words, she tries to squeeze them out. Carey does this through a variety of measures alleged in the Complaint, including stating they will never receive any of the millions that the Brewery continues to stockpile. This squeeze out culminated in an attempt by Carey to induce the minority shareholders to enter into a new Shareholder Agreement that would introduce a price cap on minority shares but exempted Carey and her family. The effect is that if the entire business is sold, the cap would prevent the minority from participating pro-rata in the sale if it exceeded the artificially low cap and shift tens of millions in potential market value away from minority shares to Carey's unencumbered shares. Carey furthered the squeeze by threatening the Shareholders that if they did not sign, that Carey would make sure her shares were sold to an outside buyer and the Shareholders were excluded from any benefit from that sale.

The Court of Appeals expressly noted that there were "few published cases addressing minority shareholder oppression claims" in Wisconsin. (APP-010, ¶22). Nevertheless, the Court of Appeals affirmed dismissal of the oppression claim, holding that because the Shareholders' allegations did not squarely fit the fact pattern of previous published cases addressing oppression, the Shareholders failed to state a claim. The Court of Appeals further held that the series of oppressive acts alleged by the Shareholders, taken individually, would at most support derivative claims based on harm to the corporation and not a direct action by the Shareholders.

The lack of published case law, particularly by the Supreme Court, is problematic. This Court should resolve the confusion and lack of clarity on minority oppression by accepting review, and explaining how the broad standard should be applied in squeeze out scenarios.

Shareholder oppression occurs when "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent." Wis. Stat. 180.1430(2). The very language of the statute defines "oppressive conduct" as something different from illegal or fraudulent conduct. The plain language also permits claims when oppressive conduct involves acts threatened for the future.

***Jorgensen v. Water Works, Inc.*** first evaluated the statutory definition of oppression. 218 Wis. 2d 761, 782-85, 582 N.W.2d 98 (Ct. App. 1998). The ***Jorgensen*** Court held that oppressive conduct is "burdensome, harsh and wrongful conduct, a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." ***Id.*** at 783. Moreover, "this definition is intended to be broad and flexible, rather than narrow" and includes "consideration of the frustration of the reasonable expectations of shareholders." ***Id.*** at 783 n. 10.

The ***Jorgensen*** Court made clear that oppression claims should be broadly construed, but the circuit courts and Court of Appeals have struggled with these concepts due to a lack of further development and clarity of the law. The ***Jorgensen*** plaintiffs were originally directors of the corporation receiving monthly payments, one plaintiff was also in management, and they were later removed from their roles and ceased receiving payment as directors. Here, the Court of Appeals held that because the ***Jorgensen*** facts were dissimilar to the present case involving original investors in the Brewery, and that ***Jorgensen*** did not support a claim when the Shareholders had no prior role in managing the Brewery, were not directors or employees, and were never (in the Court of Appeals' opinion) denied distributions because the original PPM stated there was no guarantee dividends would ever be paid. (APP-011-013, ¶¶26, 29).

The Court of Appeals' opinion regarding the scope of a valid shareholder oppression claim is inconsistent with the "broad and flexible" definition of oppression established by ***Jorgensen***. Moreover, that inconsistency is evident in other conflicting Court of Appeals decisions.

Oppression claims fundamentally require a controlling shareholder/ director who exercises that control. Yet, according to the Court of Appeals, one cannot state an oppression claim if investors know from the beginning that a majority shareholder will have control. That is not the intended construction of the oppression statutes, is inapposite to ***Jorgensen***, and this Court should develop and clarify the law.

Granting review, and clarifying the law with respect to minority oppression, will remove the incentive for controlling shareholders to bully minority shareholders and provide more clearly defined practical applications in oppression cases. Clarity will encourage companies to honor investors' reasonable expectations, and will foster investment in business start-ups and the growth of businesses that would otherwise be curtailed in the absence of any protections against abuse by controlling shareholders.

The Court of Appeals also misconstrued the purpose of a PPM to exclude both a valid claim for oppression and securities fraud. A private placement is a limited offering of securities pursuant to Regulation D in Section 5 of the Securities Act of 1933. 15 U.S.C. § 77a. A public offering requires a broader scope of disclosures and documentation in order to sell shares of stock, whereas a PPM is a more limited disclosure document. This Court should accept review to clarify that both oppression and securities fraud claims can be maintained in spite of the securities requirements necessitating broad disclaimers in a PPM.

In the present case, the PPM promised that the Brewery would be operated for the profitability of the investors. However, it also stated that profits (dividends to investors) were not guaranteed. These two statements have to be read in context, meaning that although the corporation cannot guarantee profits, the goal is to operate the Brewery for the benefit of the investors. That was a reasonable expectation the Shareholders had. Similarly, it was reasonable for the Shareholders to expect that millions in excess cash would be distributed to them, rather than stockpiled for no business purpose particularly when shareholders are also told by Defendants that dividends would never be paid and that no one will buy the shares as a result. (R.32, ¶147, ¶195, APP-079, APP-094).

The Shareholders recognize this Court accepts review of roughly 50 cases per year, with 30 of those being civil cases. The Court cannot take every case. This case warrants review because it presents legal issues with a significant lack of developed case law, making it suitable for the Court to establish purely legal standards for future cases. Furthermore, despite the lack of published case law, minority shareholder oppression is not an infrequent issue. The number of unpublished decisions on oppression since ***Jorgensen***, and the almost 500,000 small businesses existing in Wisconsin that are subject to judicial dissolution claims based on oppression, make this case a situation that will be repeated. We respectfully request this Court to grant this Petition for Review.

## I. THE COURT SHOULD ACCEPT REVIEW BECAUSE THERE IS NO DEVELOPED CASE LAW ON SHAREHOLDER OPPRESSION, AND THIS APPEAL PRESENTS A CLASSIC SQUEEZE OUT OF MINORITY SHAREHOLDERS ALLEGING THE STOCKPILING OF UNINVESTED CASH, WITHHOLDING DISTRIBUTIONS AND FINANCIAL INFORMATION, AND BULLYING SHAREHOLDERS TO ADOPT A NEW SHAREHOLDER AGREEMENT THAT CAPS THE PRICE MINORITY SHAREHOLDERS COULD EVER RECEIVE FOR THEIR SHARES.

The oppressive conduct in the present case is more pervasive than that addressed by the ***Jorgensen*** Court. The series of oppressive acts by Defendants represent a classic squeeze out, where the party in control tries to force out the minority investors and give them no practical alternative but to surrender their investment for less than fair value. These oppressive acts include:

- Stockpiling $40 million in uninvested cash and telling the shareholders repeatedly that they will never receive any profits beyond distributions to cover taxes on Brewery income.
- Consistently withholding financial and other information from the minority shareholders.
- Carey exempting herself and her family from the existing shareholder agreement, despite promises in writing that all shareholders would be bound by the shareholder agreement.
- Pushing a new shareholder agreement for only the minority shareholders, that would impose significant caps on the price that shareholders could ever receive for their shares, shifting market value from minority shares to Carey's shares, and remove other protections including the commitment to pay minimal distributions to cover taxes on Brewery income.
- Using corporate resources to benefit Carey and her family, including loans, bonuses, payments for another business owned by

Carey, setting up a family foundation to assist her estate planning, and employing Carey's family.

- Bullying the minority shareholders and threatening that if they did not adopt the new shareholder agreement, Carey would make sure that her shares were sold to the highest outside bidder and that the minority shareholders be excluded from that sale.

(R.32, ¶¶18, 80-83, 147, 148, 172, APP-056, APP-069, APP-079, APP-086).

Defendants thwarted any reasonable expectations the Shareholders had to be treated fairly and receive profits as investors in the Brewery. (R.32; ¶16, APP-055). Carey promised the Shareholders in the PPM that the Brewery would be operated for the profitability of the investors, to induce the Shareholders to invest. Defendants' oppressive conduct is intended to squeeze out the Shareholders, leaving the Shareholders with no opportunity to realize their reasonable expectations. (R.32, ¶165, APP-084; ¶207, APP-097).

Although the frustrated expectations addressed by the ***Jorgensen*** Court were narrower, the course of conduct of the Shareholders is no less oppressive. The ***Jorgensen*** Court cites an article by Professor Robert B. Thompson, titled THE SHAREHOLDER'S CAUSE OF ACTION FOR OPPRESSION, DISCUSSING JUDICIAL DISSOLUTION CLAIMS BASED ON OPPRESSION. ***Jorgensen***, 218 Wis. 2d at n. 8. Professor Thompson is also author of the leading treatise on minority oppression, which identifies the following as examples of squeeze-out techniques -- the very same techniques alleged by the Shareholders: withholding of dividends/distributions; siphoning-off profits through leases and loans favorable to the majority shareholders; siphoning-off profits for the benefit of other business enterprises owned by the majority; the majority entering into self-dealing contractual relationships; employing the majority's family members and excluding minority shareholders or their family from employment; using corporate assets for personal use; withholding information, including in connection with buying or selling shares of corporation's stock; and diluting the minority shareholders' voting or ownership percentages. F. Hodge O'Neal & Robert B. Thompson, OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS, Vol. 1, Ch. 3.

The ***Jorgensen*** Court contemplated precisely this broad spectrum of conduct when it adopted the definition for minority oppression. Instead of following the broad and flexible rubric set out in ***Jorgensen***, Wisconsin trial and appellate courts have focused narrowly on the factual situations present in ***Jorgensen*** and the few other published cases, and largely limited oppression claims to substantially similar factual scenarios. This Court should grant review to develop and clarify the law with respect to minority oppression claims.

**A. Since the Court of Appeals defined shareholder oppression in *Jorgensen*, only one Supreme Court case (*Notz*) has mentioned oppression and that was on a narrow issue of a shareholder's standing to sue, there has been no published case law from the Court of Appeals since *Notz* and there remains a glaring need for clarity on the broad nature of oppression that may be actionable.**

The only Supreme Court case addressing minority oppression is ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, 316 Wis. 2d 640, 764 N.W.2d 904. Unfortunately, the ***Notz*** Court's holding with respect to oppression is on the narrow issue of standing to bring such a claim when a corporate merger has occurred and the original corporation is not the surviving corporation. The ***Notz*** Court did state that a judicial dissolution claim based on oppressive conduct is not a derivative action, and may be pursued directly. ***Id.*** at ¶34. Despite that comment, the Court of Appeals continues to analogize oppression claims to breach of fiduciary duty claims, and analyze whether an allegation of oppressive conduct constitute derivative claims, rather than direct claims available to shareholders. The Court of Appeals exemplified that confusion, holding that the Shareholders' allegations of oppression were injuries to the corporation and could not be pursued directly by the Shareholders. (APP-021, ¶50).

This same confusion is immediately evident in ***Reget v. Paige***, 2001 WI App 73, ¶¶25-26, 242 Wis. 2d 278, 626 N.W.2d 302, decided shortly after ***Jorgensen***. The ***Reget*** Court did not address a squeeze-out situation, but rather a narrow set of facts involving a shareholder who did not initially invest in the corporation but later acquired his shares from another investor and did not have his reasonable expectations frustrated. In the present case, on the other hand, the Shareholders were initial funders of the Brewery and allege a course of conduct that, when viewed as a whole, constitutes oppression, including withholding information and bullying the shareholders to sign a shareholder agreement that would forever cap only their sales price drastically. The Shareholders further allege that in lieu of distributions, Carey has essentially paid herself in other means that constitute distributions of profit to her. Even more significantly, Carey promised in the original PPM that the business would be operated for the profitability of the Shareholders, but later frustrated that expectation by stating that the Brewery will instead be operated for the benefit of others and that no distributions will ever be paid to the Shareholders beyond tax distributions. In spite of the broader allegations in the present case, the Court of Appeals nevertheless held that the claim was not a direct claim available to the Shareholders.

In the absence of case law from the Supreme Court, litigants and the lower courts are left with ***Jorgensen,*** where the Court of Appeals established the standard definition for minority oppression, and the application of ***Jorgensen*** to a narrow set of facts in ***Reget***, leading to an erroneous conclusion that plaintiffs' reasonable expectations were not frustrated as a matter of law. Notably, a Petition for Review in the ***Reget*** case was not granted by this Court, and as explained in this Petition, resulted in an ongoing series of confusing and conflicting decisions by the Courts of Appeal. ***Reget v. Paige***, 2001 WI 114, 246 Wis. 2d 171 (Petition for Review denied). This Court should accept review to provide clarity and develop this area of the law.

### B. The case law in Wisconsin on minority oppression, both published and unpublished, reveals conflicts among the Courts of Appeal, as well as inconsistencies in applying the standards set forth in *Jorgensen.*

Since ***Jorgensen***, the Court of Appeals has issued several decisions concerning minority oppression that have been confusing and conflicting, and many of those have been unpublished. The Court of Appeals in this case analyzed the Shareholders' claim as a series of independent acts and determined whether each of those acts alleged unlawful conduct and constituted a direct or derivative claim. The Court of Appeals held that no claim had been set forth alleging a squeeze-out, in spite of allegations collectively pointing to that conduct, including specific allegations using the words squeeze-out and frustration of a shareholder's reasonable expectations.

The current Court of Appeals decision conflicts with a case analyzing minority oppression both in the context of frustrating a shareholder's reasonable expectations on multiple levels, but also collectively as a squeeze-out tactic. ***Edler v. Edler***, No. 2006AP2937, unpublished slip op., 2007 WL 4530823 (Wis. Ct. App. Dec. 27, 2007) (per curiam)[3] The ***Edler*** Court

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[3] This unpublished case, as well as other unpublished cases cited below, are not cited as precedent or for their persuasive value. They are cited solely to demonstrate that there is a conflict between appellate court districts and decisions, and this Court should grant review to develop and clarify the law to resolve these conflicts. Citation for this limited purpose is permitted under Wis. Stats. §§ 809.62(1) and 809.23, because it is for the purposes of addressing the criteria for this Court considering a Petition for Review, and is not being used to convince the Court to accept the legal holding of any of the unpublished decisions

analyzed a series of alleged oppressive actions in a closely-held family corporation, including allegations that the plaintiff's exclusion from the corporation, exclusion from corporate bonuses, and other acts frustrated reasonable expectations that the business would provide certain benefits to each shareholder. ***Id.*** at ¶10. However, the ***Edler*** Court also stated that separate and distinct from termination of the plaintiff's employment, he had alleged squeeze-out tactics that constituted a valid minority oppression claim. ***Id.*** at ¶11. These squeeze-out tactics constituted minority oppression according to the ***Edler*** Court, even though each of the oppressive acts were independently legal and within the sole authority of the majority shareholder. The ***Edler*** Court's decision conflicts with the current Court of Appeals decision, which did not recognize a squeeze-out claim involving otherwise legal conduct but instead evaluated each allegation independently to determine whether it was unlawful conduct which independently constituted a direct claim for breach of fiduciary duty.

These unpublished cases also illustrate courts' conflicting standards for minority oppression claims. The ***Reget*** case, cited by the Court of Appeals in the present case, noted that the plaintiff shareholder was promised nothing and thus had no reasonable expectations to frustrate: he was not an original investor, had never invested any of his own money in the company, and was never an employee. ***Reget***, 242 Wis. 2d 278, ¶2.

On this point, ***Reget*** is in line with holdings that ***Jorgensen's*** oppression and frustration of the reasonable expectations of the shareholders "is not appropriate in every situation, such as when the shareholders have recently acquired shares in a pre-existing corporation." ***Id.*** A footnote in ***Jorgensen*** indicated that oppression claims have to be analyzed based on

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but to alert the Court of the fact of the conflict. ***State v. Higginbotham***, 162 Wis. 2d 978, 998, 471 N.W.2d 24 (1991).

their particular context. ***Jorgensen v. Water Works***, 218 Wis. 2d at 783, n. 10.

The problem is that the Court of Appeals in this case, as well as other appellate decisions, misconstrued the holdings in ***Jorgensen*** and ***Reget*** defining oppression too narrowly, holding that unless the plaintiff-shareholders were formerly employees or directors, or were denied dividends or distributions that were specifically made to other shareholders, that they could not maintain a claim for oppression. *See* APP-011-012, ¶¶25-26. The Shareholders in the present case *were* initial investors and *did* risk their money to fund the start-up of this corporation. Steve Speer was also an initial officer of the corporation. However, those are not the only allegations that support a finding that the Shareholders' reasonable expectations were frustrated.

The present case, and other unpublished cases, also conflict with cases from this Court and other Court of Appeals decisions with respect to the direct nature of minority oppression claims, versus the derivative claims that must be brought on behalf of the corporation. The ***Notz*** Court indicated that judicial dissolution claims on the grounds of minority oppression are direct and not derivative claims, but that lone statement has not clarified how the law is applied in practice. The current Court of Appeals is not alone in misconstruing the limited published case law to require that a shareholder must first establish that any underlying oppressive conduct supporting that claim constitutes an independent direct claim and not a derivative claim. Indeed, the Court of Appeals in this case cited as authority for its derivative claim holding a breach of fiduciary duty case that was completely unrelated to any claim for shareholder oppression. ***Ewer v. Lake Arrowhead Ass'n, Inc.***, 2012 WI App 64, ¶17, 342 Wis. 2d 194, 817 N.W.2d 465. (Analyzing whether a breach of fiduciary duty claim was direct or derivative.)

The holding in this case is also contrary to another unpublished Court of Appeals decision that specifically referred to minority oppression claims as direct claims. *See* ***Arrowhead Systems, Inc. v. Grant Thortnton, LLP***, No. 2019AP2268, unpublished slip op., 2020 WL 6065838, ¶80 (Wis. Ct. App. Oct. 15, 2020).[4] The parties in ***Arrowhead Systems*** argued by analogy that the ***Notz*** and ***Jorgensen*** holdings should be relied upon to support the shareholders' right to make a direct claim. The ***Arrowhead Systems*** Court noted that claims for judicial dissolution, such as in ***Notz*** and ***Jorgensen***, were by their very nature claims where "the injury to the plaintiff minority shareholder was an injury primarily to the minority shareholders as individuals…. That is, they were based on the proposition that individual minority shareholders must be allowed to challenge unfair treatment by directors who control the corporation." ***Arrowhead Systems,*** No. 2019AP2268, unpublished slip op., 2020 WL 6065838, ¶80 (Wis. Ct. App. Oct. 15, 2020).

As the ***Arrowhead Systems*** Court noted, a minority oppression claim is predicated on the proposition that minority shareholders can sue directly and challenge conduct by those in control. Those claims are not analyzed on the same direct/derivative basis as stand-alone breach of fiduciary duty claims. The ***Arrowhead Systems*** case was decided after ***Notz***, and had benefit of the ***Notz*** Court's directive that shareholder oppression claims are direct claims. However, other unpublished cases still continue to be in conflict. *See* ***Bessette v. Bessette***, No. 2016AP1215, unpublished slip op., 2017 WL 1494609 (Wis. Ct. App. Apr. 26, 2017) (per curiam).

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[4] Although the ***Arrowhead Systems*** case is unpublished, it is citable as persuasive authority under Wis. Stat. § 809.23(3)(b). All other unpublished decisions cited in this Petition except for ***Arrowhead Systems*** and ***Northern Air Services, Inc.*** are cited solely to address the criteria for granting review and not for any precedential or persuasive value.

The ***Bessette*** Court reviewed a trial court's dismissal of a minority oppression claim on a motion for summary judgment. Rather than analyzing the claim as a direct right of action, the ***Bessette*** Court engaged in an analysis of whether the claim constituted a derivative right of action. ***Id.*** at ¶24. The Court found that the injury was "not individual, specific, and direct as to [the plaintiff shareholder], but was to [the corporation]." ***Id.*** The ***Bessette*** Court further quoted from ¶22 of the ***Notz*** decision, where the Supreme Court said "a majority shareholder's self-dealing may result in injury that is primarily to the corporation." ***Id.*** However, that quote from ***Notz*** did not deal with the minority oppression claim, but rather the independent breach of fiduciary duty claim which is properly evaluated for a direct or derivative injury. Meanwhile, a subsequent section of the ***Notz*** decision states oppression claims are direct claims that may be pursued by the individual minority shareholders. The appellate courts are clearly confused between the two distinct claims, and the direct nature of claims based on oppression.

Another conflict among appellate court decisions relates to the Court of Appeals in the present case holding that the Plaintiffs could not allege a valid oppression claim based on a squeeze-out predicated on threatened future conduct. Carey pushed the minority shareholders to sign a new shareholder agreement that would further restrict their rights and cap the amount they could ever receive for selling their shares. The Court of Appeals held that Plaintiffs' allegations could not support an oppression claim because the shareholder agreement was never actually modified after Plaintiffs refused to sign. (APP-028, ¶66). This is a perplexing comment by the Court of Appeals because it suggests that a squeeze-out claim could only be maintained if the majority makes good on its threat and the shareholder is actually forced out. This makes little sense, because once shareholders are actually squeezed-out and no longer own shares, they lose standing to sue for minority oppression. ***Northern Air Services, Inc. v. Link***, No. 2008AP2897, unpublished slip op., 2012 WL 130531, ¶94 (Wis. Ct. App. Jan. 18, 2012). Rather, Carey's push for further oppressive conditions on the Shareholders through an amended shareholder agreement, and threats to the Shareholders if they do not sign the agreement, collectively constitute shareholder oppression.

The Court of Appeals' decision in the present case that Plaintiffs cannot sue based on prospective but unconsummated conduct is also in conflict with another unpublished Court of Appeals decision. *See* ***Lynch v. Carriage Ridge, LLC***, No. 02-0528, unpublished slip op., 2003 WL 21706305, ¶19 (Wis. Ct. App. Jul. 24, 2003) (per curiam).

The ***Lynch*** Court considered minority oppression of LLC members, and cited ***Jorgensen***. At issue was a capital call that Restaino and Bunbury threatened, in order to put pressure on the minority LLC members. The capital call suggested that minority member would be required to contribute additional money to the company in order to maintain their ownership. Restaino and Bunbury argued that their conduct could not constitute oppressive conduct as a matter of law, "because the capital call was never pursued, so the [minority members] suffered no direct harm as a result of the capital call." The ***Lynch*** Court rejected this defense: "In our view, a subterfuge by a managing member intended to influence a minority member to sell is obviously a violation of the rules of 'fair play.'" ***Id.*** at ¶19.

The statutes for minority oppression under both corporation and LLC law specifically contemplate oppression claims can be brought when the controlling parties "will act in a manner that is … oppressive." *See* Wis. Stat. § 180.1430(2)(b); *See also* Wis. Stat. § 183.0701(1)(d)3.b. The Court of Appeals districts in Wisconsin display confusion in their decisions about both the direct and derivative nature of oppression claims, as well as whether a valid claim for a squeeze-out can be predicated in part on prospective conduct. Confusion continues even after the Supreme Court stated in ***Notz*** that shareholder oppression claims are direct claims. This Court should grant review based on the significant conflicts among the appellate districts, and with prior decisions of this Court which are likely to recur unless resolved.

## II. The Court Should Accept This Petition for Review Because it is Likely to Recur Unless Resolved by This Court, As Evident Not Only By the Multiple Conflicting Appellate Decisions But Also The Fact That The Already Substantial Number of Small Businesses in Wisconsin are Increasing And Almost All Businesses Are Subject To Statutes Permitting Minority Oppression Claims.

The issues raised by this Petition are not only likely to recur, but recur on a regular basis unless resolved by this Court. The cases cited in Section I above, many of which are unpublished and uncitable as precedent, provide a glimpse of how prevalent these claims are. Not all cases get appealed, for various reasons.

The reason why oppression claims recur so frequently is connected to the opportunity for the claims to arise. According to the U.S. Small Business Administration ("SBA"), there were 457,769 small businesses in Wisconsin as of the end of 2023. U.S. Small Business Administration Office of Advocacy, *2023 Small Business Profile – Wisconsin*, https://advocacy.sba.gov/wp-content/uploads/2023/11/2023-Small-Business-Economic-Profile-WI.pdf. This makes up 99.4% of all Wisconsin businesses. Id. Although the SBA defines small businesses as fewer than 500 employees, over 442,000 of those small businesses had fewer than 20 employees. Id.

According to the Wisconsin Department of Financial Institutions, almost 500,000 active domestic corporations and LLCs exist in Wisconsin. Wisconsin Department of Financial Institutions Division of Corporate and Consumer Services, *Active Entity Counts as of the end of December 2023*, https://dfi.wi.gov/Documents/BusinessServices/

BusinessEntities/20231231EndMonthEntityCounts.pdf. Furthermore, over 5,000 new domestic corporations and limited liability companies are formed every month. WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS DIVISION OF CORPORATE AND CONSUMER SERVICES, *Compilation of Filings,* https://dfi.wi.gov/Documents/BusinessServices/BusinessEntities/20240229CompilationFilings.pdf. This means that a very high percentage of a half million active business entities in Wisconsin are small and closely-held domestic corporations and LLCs.

The issue of minority oppression is just as important for LLCs as it is for corporations. Wisconsin's limited liability company law, Wis. Stat. Chapter 183, was amended effective January 1, 2023. The law amended the dissolution statute, separating out oppression from illegal and fraudulent conduct as grounds for a court to judicially dissolve an LLC. Wisconsin Stat. § 183.0701(1)(d)3.b. Although there was a minority oppression statute in the prior LLC laws, the revised version more closely mirrors the minority oppression language for corporations.

Claims for minority oppression are recurring issues; are likely to continue to recur on a frequent basis due to the raw number of small/closely held corporations and LLCs in Wisconsin; and there are few opportunities for this Court to grant review and develop the law.

Because these issues are likely to recur, Petitioner respectfully requests the Court grant review.

## III. THE COURT SHOULD ACCEPT THIS PETITION FOR REVIEW TO DEVELOP THE LAW ON SECURITIES FRAUD DUE TO THE ABSENCE OF PUBLISHED CASE LAW, AND PARTICULARLY SECURITIES FRAUD CLAIMS BASED ON WITHHOLDING RELEVANT INFORMATION WHERE THERE IS A DUTY TO DISCLOSE.

The Court of Appeals in this case dismissed the securities fraud claims because the Court held there could be no misrepresentation because the

Brewery never told the Plaintiffs the price they were paying for their share represented fair market value.[5] (APP-029, ¶69). The Court of Appeals cited generally to the securities fraud statute, Wis. Stat. § 551.501(2), but cited no other law in support of their decision. The absence of case law in Wisconsin on securities fraud, and what constitutes a valid claim, is strong grounds for accepting review of this decision.

It is also evident that the concept of securities fraud and misrepresentations based on withholding information are confusing to the lower courts, and would benefit from this Court providing guidance.

The Shareholders agreed to sell some of their shares, because it had been made clear to them that they would never receive the benefit of their valuable securities beyond distributions calculated by the Brewery to slightly cover the Shareholders' tax obligations on Brewery income. They agreed to sell their voting shares (and not the non-voting shares) only because the Brewery made clear it would only purchase voting shares.

Before selling in January of 2019, the Shareholders requested Brewery financial statements, along with valuations that had been conducted by the Brewery for purposes of the ESOP. (R.32, ¶177(b)-(d), APP-087-088). Although Defendants disclosed what the most recent ESOP valuation figure was (for 2017), Defendants ignored requests for the ESOP Valuation report and supporting documents upon which the purchase price was based. (R.32, ¶177(e), APP-088). Defendants also failed to disclose other material facts, including that Carey had received an offer for a 10% ownership interest in the Brewery that was roughly 10 times the amount that

[5] Although the Shareholders' securities fraud claim is not linked solely to any affirmative representation regarding fair market value, it is also inaccurate to say that the Defendants did not represent that the price was based on fair market value. Defendants represented the price was based on the ESOP valuation. According to applicable law, an ESOP valuation must be based on fair market value. See 26 C.F.R. § 54.4975-11(d)(5). The Shareholders made this allegation in ¶177(m) of the Complaint.

the Defendants were stating the Shareholders' shares were worth. (R.32, ¶177(i), APP-089). Based on the limited and misleading information available to the Shareholders, they agreed to sell shares.[6]

A securities fraud claim is based on whether the alleged defrauder had a duty to disclose information that would have made the victims' investment decisions different, or would have made a difference in the investment decisions of a reasonable investor. A securities fraud claim does not fail because the victim agreed to a price, or because the alleged defrauder had the authority to set the price. Essentially, the circuit court and Court of Appeals rulings would mean that no securities fraud claim could ever be maintained based on a corporation withholding information, as long as the corporation did not make an affirmative misrepresentation. Such a rule would make the language in Wis. Stat. § 551.501(2) concerning fraud by omission superfluous:

> **551.501 General fraud.** It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly, to do any of the following:
> …
> **(2)** To make an untrue statement of a material fact ***or to omit to state a material fact necessary in order to make the statements made***, in light of the circumstances under which they were made, not misleading. (emphasis added).

Wisconsin law has a broad, two-pronged definition of what constitutes a material fact for purposes of securities fraud:

> A fact is a 'material fact' if it could be expected to influence a reasonable investor in making a decision whether to purchase an investment.
>
> A fact is also a 'material fact' if the maker of the representation knows that the investor regards the matter as important in making a decision to

[6] The Brewery redeemed 1,250 shares from Eichhoff and 625 shares from Speer, and Defendants directed that the ESOP purchase 40 shares from Runyan. (R.32, ¶¶145, 174, APP-079, APP-087).

> purchase an investment, even though a reasonable investor would not regard it as important.

Wis JI-Criminal-JI-2904; ***State v. Johnson***, 2002 WI App 224, ¶21, 257 Wis. 2d 736, 652 N.W.2d 642.[7]

The ***Johnson*** Court considered a conviction for a securities fraud violation after a bench trial, making clear that it is the fact finder who determines whether or not the omitted/misrepresented fact would have been important to a reasonable investor, or to the investor victimized by the alleged fraud. Whether a misrepresented or omitted fact would have impacted a reasonable investor or the Shareholders is a question that should not have been resolved as a matter of law.

By focusing on what the corporation *did* do with respect to its representations, and not what it *didn't* do – disclose the various information that would have impacted Plaintiffs' investment decisions – the Court of Appeals has missed the purpose of securities fraud by omission. Because there is no case law in Wisconsin, including any unpublished law, on the issue of securities fraud, this Court should grant review to develop and clarify the law.

## CONCLUSION

Plaintiffs-Appellants-Petitioners respectfully request this Court grant their Petition for Review of the Court of Appeals decision, based on the arguments herein.

[7] Although this is a criminal jury instruction, it is based on the exact same statute – § 551.501(2) – as the civil claim, and the only difference is the criminal charge requires a higher burden of proof.

Dated this 25th day of March, 2024.

**PALMERSHEIM DETTMANN, S.C.**

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this Petition for Review of Plaintiffs-Appellants-Petitioners conforms to the rules contained in § 809.62(4) for a petition produced with a proportional serif font. The length of this Petition is 7,884 words.

Dated this 25th day of March, 2024.

**PALMERSHEIM DETTMANN, S.C.**

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## ELECTRONIC COPY CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Petition as required by s. 809.62(4)(b).

Dated this 25th day of March, 2024.

**PALMERSHEIM DETTMANN, S.C.**

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