6928 Grand Parkway
Wauwatosa, WI 53213

VIA EMAIL to govjudicialappointments@wisconsin.gov

October 2, 2015

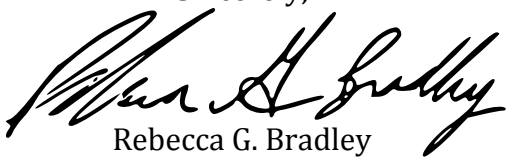
Governor Scott Walker
State of Wisconsin
Office of the Governor
115 East State Capitol
Madison, WI 53702

Re: Application for Judgeship
Supreme Court

Dear Governor Walker:

Attached please find my application for the Supreme Court judicial vacancy. Accompanying my application are my resume, a list of references, and two writing samples. I appreciate your consideration of my candidacy and the opportunity to serve the State of Wisconsin.

Sincerely,



Rebecca G. Bradley

REBECCA G. BRADLEY
6928 Grand Parkway
Wauwatosa, Wisconsin 53213
Mobile: [redacted]

JUDICIAL EXPERIENCE

Wisconsin Court of Appeals Judge, District I
Appointed by Governor Scott Walker (May 2015)

- Hear and decide appeals in all areas of the law, including criminal, civil, family, probate, and children's court.
- Wisconsin Juvenile Benchbook Committee Member
- Wisconsin Juvenile Jury Instructions Committee Member
- CAYSE Committee Member ("Comprehensive Approaches to Youth who have been Sexually Exploited")

Milwaukee County Circuit Court Judge
Appointed by Governor Scott Walker (November 2012)
Elected in contested election with 53% of the vote (April 2013)

- Presided over cases in Children's Court involving termination of parental rights, adoptions, juvenile delinquency, children in need of protection or services (CHIPS), guardianships and injunction proceedings.
- Milwaukee Trial Judges Association Member
- Wisconsin Trial Judges Association Member

PROFESSIONAL EXPERIENCE

Whyte Hirschboeck Dudek, S.C., Milwaukee, Wisconsin
Contract Partner, Commercial, Technology, and Intellectual Property Transactions and Litigation (2007 – 2012);
Associate Attorney, Commercial and Information Technology Litigation and Transactions (2000 – 2004)

- Reviewed, developed and negotiated global and multi-national contracts for software, health care technology, medical device, energy, and manufacturing industries.
- Represented clients in commercial disputes involving software and systems implementations, commercial contracts, computer crimes, fraud, trade secrets, employment, bankruptcy and business reorganizations.
- Counseled software, technology, and telecommunications start-up companies regarding launching new ventures.
- Advised clients regarding export compliance and regulations.
- Advised clients regarding software infringement audits.

RedPrairie Corporation, Waukesha, Wisconsin
Vice President—Legal Operations and Assistant Corporate Secretary (promoted from Associate General Counsel)
(2004 – 2007)

- Oversaw and managed global software sales and corporate contracting for international software corporation, including direct negotiations with CEO, CLO and CIO-level personnel of Fortune 500, multinational and international companies.
- Managed staff of three attorneys, legal compliance/senior contracts manager, and corporate paralegal.
- Integrated legal functions of multiple acquired companies.
- Advised executive management.
- Managed all litigation and provided risk assessments.

Hinshaw & Culbertson, Milwaukee, Wisconsin
Civil Litigation and Appellate Attorney (1996 - 2000)
Summer Associate (1995-1996)

- Represented physicians in medical malpractice actions and disciplinary proceedings before Medical Examining Board.
- Represented lawyers in legal malpractice actions.
- Defended businesses in product and premises liability actions.
- Defended clients in general liability, personal injury and wrongful death suits.
- Represented insurers in coverage disputes.

Melli, Walker, Pease & Ruhly, Madison, Wisconsin
Management-side Labor and Employment Law and Commercial Litigation, Summer Associate, 1994-1995. Offer received.

Honorable John L. Coffey, U.S. Court of Appeals for the Seventh Circuit, Extern, 1994

AWARDS

Named one of Milwaukee's Leading Lawyers in Business Law, Internet Law and Litigation by M Magazine (July 2012)
2010 recipient of Wisconsin Law Journal's Women in the Law Award
Named a Rising Star attorney by Milwaukee Magazine (2008 and 2010)

EDUCATION

University of Wisconsin-Madison
J.D. 1996
Honors: Dean's List
Scored in the 99th percentile on the LSAT

Marquette University, Milwaukee, Wisconsin
Honors B.S. 1993, Business Administration and Business Economics
Executive Certificate in Information Technology 2001

Honors: Economics Faculty Award for Outstanding Term Paper by Business Economics Major (welfare reform)
Dean's List, Business Scholar, Honors Program

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

115 EAST STATE CAPITOL
MADISON, WI

APPLICATION FOR JUDGESHIP

Instructions

Thank you for expressing an interest in serving Wisconsin. To apply for a judgeship, please submit the following: 1) a completed application, 2) a resume not exceeding two pages in length, 3) a cover letter, 4) a list of three to four references with contact information, and 5) two writing samples.

When filling out this application please use additional pages as necessary to provide full and complete answers to every question.

Letters of recommendation are encouraged, and may be sent via email to govjudicialappointments@wisconsin.gov, or via mail to Office of Governor Scott Walker, Attn: Chief Legal Counsel, 115 East State Capitol, Madison, WI 53702. Recommendation letters will be accepted and considered after the application deadline has passed. Please note SCR 66.06(5), which provides that an applicant "shall not knowingly personally solicit or accept endorsements from parties who have a case pending before the court to which election or appointment is sought." You may wish to also review the provisions of SCR Chapter 60 that apply to someone seeking a judgeship appointment.

To apply, please email your materials with the county or circuit you are applying for in the subject line to govjudicialappointments@wisconsin.gov. Please note that the last page must be printed, signed, scanned, and attached to the application. If you are unable to scan, you may fax the last page to the number below. All application materials (the application, cover letter, resume, reference list, and writing samples) must be attached to the email, preferably as PDFs. All components of the application must be received by 5:00 P.M. CST on the date applications are due.

Following submission of your application, you will receive an email confirming receipt of your application and explaining the next steps in the process. If you have any questions, you may email govjudicialappointments@wisconsin.gov. If you need to speak with someone immediately, please call (608) 266-1212 and ask to speak with Katie Ignatowski.

Upon request, this document can be made available in alternate formats to individuals with disabilities.

APPLICATION FOR APPOINTMENT TO THE COURT
(Please attach additional pages as needed to fully respond to questions)

DATE: October 2, 2015 **WISCONSIN BAR NO.:** 1021943

I. GENERAL:

1. Name: Rebecca G. Bradley Email: [redacted]

2. Date admitted to practice law in Wisconsin: June 18, 1996

3. Date admitted to practice law in other states: N/A

4. Current employer and title: State of Wisconsin, Wisconsin Court of Appeals Judge, District I

5. Work address: 330 E. Kilbourn Avenue, Suite 1020

   City: Milwaukee County: Milwaukee State: Wisconsin ZIP: 53202

   Telephone: 414-227-4683

6. Residential Address: 6928 Grand Parkway

   City: Wauwatosa County: Milwaukee State: Wisconsin ZIP: 53213

   Length of time at this residence: Nine years

   Home telephone: [redacted]

   Cell phone: [redacted]

7. List all previous residences for the past ten years

   1515 N. Van Buren St., Milwaukee, Wisconsin 53202

8. Place of birth: Milwaukee, Wisconsin

   Date of birth: [redacted] 1971 Age: 44

9. Are you a registered voter at your current address? Yes ☒ No ☐

10. Wisconsin driver's license number: [redacted]

11. Marital status: Engaged to be married

If married: Spouse's name: _____

Date of marriage: _____

Spouse's occupation: _____

If ever divorced, please provide all former spouses' names and current addresses, the dates and places of divorce, and the court and case numbers for the divorces.

Gordon J. Bradley, [redacted]
10/14/2004, Milwaukee County Case Number 2004FA002772

12. List any children (including stepchildren).

Name	*Age*	*Occupation*	*Residential address*

13. Answer yes or no to the following questions. Attach a separate page explaining any affirmative answers.

a) Yes ☐ No ☒ Do you currently have a physical or mental impairment that in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?

b) Yes ☐ No ☒ In the past ten years, have you unlawfully used controlled substances as defined by federal or state laws? Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs that were prescribed to you and taken under lawful supervision of a licensed health care professional.

c) Yes ☐ No ☒ Since leaving high school, have you, for other than academic reasons, ever been denied enrollment, disciplined, denied course credit, suspended, expelled, or requested to terminate your enrollment by any college, university, law school, or other educational institution?

d) Yes ☐ No ☒ Have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any contractual arrangement?

e) Yes ☐ No ☒ Have you ever been held in contempt or otherwise formally reprimanded or sanctioned by a tribunal before which you have appeared?

f) Yes ☐ No ☒ Are you delinquent in your mandatory continuing legal education?

g) Yes ☐ No ☒ Have you ever been a party to a lawsuit either as a plaintiff or as a defendant? If yes, please supply the jurisdiction and/or county, case number, nature of lawsuit, whether you were the plaintiff or defendant, and disposition of each lawsuit.

h) Yes ☐ No ☒ Has there ever been a formal complaint filed against you, a finding of probable cause, citation, or conviction issued against you, or are you presently under investigation by the Wisconsin Judicial Commission, the Supreme Court of Wisconsin, the Office of Lawyer Regulation, or any other state or federal equivalent, or any court, administrative agency, bar association, or other professional group, in any jurisdiction?

i) Yes ☐ No ☒ If you are a quasi-judicial officer, have you ever been disciplined or reprimanded by a sitting judge?

j) Yes ☒ No ☐ In the past five years, have you ever been cited for a municipal or traffic violation, excluding parking tickets?

k) Yes ☐ No ☒ Have you ever failed to timely file your federal or state income tax returns?

l) Yes ☐ No ☒ Have you ever paid a tax penalty?

m) Yes ☐ No ☒ Has a tax lien ever been filed against you?

n) Yes ☐ No ☒ Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you?

o) Yes ☐ No ☒ Have you ever owned more than ten percent of the issued and outstanding shares, or acted as an officer or director, of any corporation by which or against which a petition in bankruptcy has been filed?

II. EDUCATION:

14. List secondary schools, colleges, law schools, and any other professional schools attended.

School	*Dates Attended*	*Degree(s) Earned and GPA*
University of Wisconsin Law School	1993-1996	J.D., 85 GPA
Marquette University	1989-1993	Honors B.S., Business Administration and Business Economics, 3.468 GPA
Divine Savior Holy Angels	1985-1989	High School Diploma, 3.75 GPA

List and describe academic scholarships, awards, honor societies, and extracurricular involvement. Note any leadership positions.

University of Wisconsin Law School

- Dean's List
- Federalist Society
- Phi Alpha Delta

Marquette University

- Economics Faculty Award for Outstanding Term Paper by Business Economics Major (welfare reform) 1993
- Dean's List
- Business Scholar
- Honors Program
- Academic scholarship recipient
- Associated Students of Marquette University Senator
- Commuter Students Association Board Member

Divine Savior Holy Angels

- National Honor Society
- Model United Nations
- Future Business Leaders of America, President
- Forensics
- Cast of Fall musical and Spring play
- Homeroom President
- Concert Choir
- Student newspaper editor

III. MILITARY EXPERIENCE:

15. List all military service (including Reserves and National Guard).

Service	*Branch*	*Highest Rank*	*Dates*

Rank at time of discharge: Type of discharge:

List any awards or honors earned during your service. Also list any citations or charges pursued against you under the Uniform Code of Military Justice.

IV. PROFESSIONAL ADMISSIONS:

16. List all courts (including state bar admissions) and administrative bodies having special admission requirements to which you have ever been admitted to practice, giving the dates of admission, and, if applicable, state whether you have ever been suspended or have resigned.

Court or Administrative Body	*Date of Admission*
State of Wisconsin	June 18, 1996
U.S. District Court for the Eastern District of Wisconsin	June 18, 1996
U.S. District Court for the Western District of Wisconsin	June 18, 1996
Menomonee Tribal Court of Wisconsin	March 20, 2001
U.S. District Court for the Northern District of Illinois (General Bar and Trial Bar)	July 17, 2002
United States Court of Appeals for the Seventh Circuit	January 10, 2003

V. NON-LEGAL EMPLOYMENT:

17. List all previous full-time non-legal jobs or positions held in the past eight years.

Date	*Position*	*Employer*	*Address*

VI. LEGAL EMPLOYMENT:
(If you are a sitting judge, answer questions 18–23 with reference to before you became a judge.)

18. State the names, dates, and addresses of all legal employment, including law school and volunteer work.

Date	*Position*	*Employer*	*Address*
2000 – 2004 and 2007 – 2012	Attorney	Whyte Hirschboeck Dudek S.C.	555 E. Wells Street, Milwaukee, Wisconsin 53202
2004 – 2007	Vice President - Legal Operations and Assistant Corporate Secretary (promoted from Associate General Counsel)	RedPrairie Corporation	20700 Swenson Drive, Waukesha, Wisconsin 53186
1996 – 2000 1995	Attorney Summer Associate	Hinshaw & Culbertson	100 E. Wisconsin Avenue, Milwaukee, Wisconsin 53202
1994 – 1995	Law Clerk	Melli, Walker, Pease & Ruhly	10 E. Doty Street, Madison, Wisconsin 53701
1994	Extern	Honorable John L. Coffey, U.S. Court of Appeals for the Seventh Circuit	517 E. Wisconsin Avenue, Milwaukee, Wisconsin 53202
1993 – 1994	Volunteer Advocate	Unemployment Compensation Appeals Clinic	Madison, Wisconsin
1993 – 1994	Volunteer	Community Law Office	Madison, Wisconsin

19. Describe your legal experience as an advocate in criminal litigation, civil litigation, and administrative proceedings.

I began my career as a civil litigator and appellate attorney with Hinshaw & Culbertson LLP in 1996, primarily representing physicians and other medical

professionals in malpractice suits and in medical examining board proceedings, in addition to defending parties against various product, premises liability, personal injury and wrongful death claims. I also defended lawyers in malpractice actions and represented insurers in coverage disputes. I joined Whyte Hirschboeck Dudek S.C. in 2000 and continued my civil litigation practice, initially representing government officials and governmental entities in a variety of cases involving civil rights and liability claims, defending professionals in malpractice and negligence actions, and representing business entities in general commercial litigation. My practice began to focus on the technology sector in 2001 with my representation of software companies as well as software and technology licensees in lawsuits and arbitrations involving failed software systems implementations and in software licensing and other contractual litigation. I continued representing companies in a variety of industries in general commercial contract disputes. Between 2004 and 2007, I served as Vice President of Legal Operations for RedPrairie Corporation, where I managed the company's litigation but predominately performed transactional work. After resuming private practice with Whyte Hirschboeck Dudek S.C. in 2007, I represented parties in litigation and arbitrations involving software licensing, software and telecommunications systems implementations, information security and data breaches, domain name and website conversion, intellectual property infringement, state and federal computer crimes, trade secrets, employment law, financial services, federal Chapter 11 bankruptcy, and general commercial contracts.

20. What percentage of your legal career has been in:

Court		Area of Practice	
Federal appellate:	5%	Civil:	95%
Federal trial:	25%	Criminal:	0%
Federal other:	0%	Family:	5%
State appellate:	10%	Probate:	0%
State trial:	55%	Other:	0%
State administrative:	5%		
State other:	0%		
TOTAL	100 %		100 %

21. In your career, how many cases have you tried that resulted in a verdict or judgment?

Jury: 1 Non-jury: 1

Arbitration: 2 Administrative bodies: 1

Please note that the numbers above reflect cases I tried as first chair. I second-chaired numerous additional cases.

22. How many cases have you litigated on appeal? Please provide case names and case numbers. If you have litigated less than twenty cases, please describe the nature of each case, your involvement, and each case's disposition.

I litigated the following six cases on appeal:

Berginz-Graef v. Lamon, No. 96-2755 (Wis. Ct. App. June 23, 1998): I represented the Defendants-Respondents in this personal injury case in which the issues on appeal related to the trial court's exclusion of plaintiff's expert testimony as well as the court's other evidentiary rulings. In an unpublished decision, the Wisconsin Court of Appeals affirmed the judgment of the trial court. As an associate and in collaboration with the lead partner on the case, I had substantial responsibility for developing the arguments and preparing the brief on appeal.

Hull v. Medical Assc., No. 97-1246 (Wis. Ct. App. Dec. 29, 1998): I represented the Defendants-Co-Appellants-Cross Respondents in this medical malpractice action in which the issues on appeal included whether the plaintiffs' action was timely filed under the applicable statute of limitation, the continuum of negligent treatment doctrine, the defendants' constitutional and statutory right to a jury trial, various evidentiary rulings by the trial court, and whether the damages award was excessive. In an unpublished decision, the Wisconsin Court of Appeals determined that "the factual inaccuracies in the trial court's decision and its complete failure to consider the issue of contributory negligence requires a reversal of the judgment" and remanded the case for a new trial on the issue of liability and damages. As an associate and in collaboration with the lead partner on the case, I had substantial responsibility for developing the arguments and preparing the brief on appeal.

Grunewald v. West Allis Memorial Hospital, Inc., No. 97-1413 (Wis. Ct. App. June 24, 1997): I represented a physician and the Wisconsin Patients Compensation Fund in a medical malpractice action. I filed a petition for leave to appeal a non-final decision of the trial court, which was denied by the Wisconsin Court of Appeals.

Slaven v. Graeber, No. 98-0330 (Wis. Ct. App. June 22, 1999): I represented a mental health professional and her employer in a case alleging defamation based upon a report she made to government authorities pursuant to her statutory duty to report suspicions of child abuse. The trial court granted summary judgment dismissing the claim on the grounds of statutory immunity for required reporters of child abuse. The court concluded that the action was frivolous and imposed costs and attorney fees as a sanction against the plaintiff and his counsel. Plaintiff's counsel appealed. Finding that the real issue of frivolousness was not tried, the Wisconsin Court of Appeals reversed and remanded for an evidentiary hearing on that issue. As an associate and in collaboration with the lead partner on the case, I had substantial responsibility for developing the arguments and preparing the brief on appeal.

Larson v. State of Wisconsin Medical Examining Board, No. 99-0487 (Wis. Ct. App., November 10, 1999): I represented a physician in disciplinary proceedings before the State of Wisconsin Medical Examining Board, which concluded that the physician engaged in unprofessional conduct under the Wisconsin Administrative Code. The Medical Examining Board reprimanded the physician in accordance with its findings of fact and conclusions of law. The Wisconsin Court of Appeals affirmed the decision of the Medical Examining Board. As an associate and in collaboration with the lead partner on the case, I had substantial responsibility for developing the arguments and preparing the appellate briefing.

Hasbro Inc. v. Catalyst USA Inc., 367 F.3d 689 (7th Cir. 2004): I represented the Defendant-Appellee in an action to vacate an arbitration award on the ground that the arbitrators exceeded their power by issuing an untimely award. The district court, Judge Randa presiding, vacated the award on this basis. On appeal, the Seventh Circuit Court of Appeals vacated the district court's judgment and remanded for enforcement of the arbitral award, despite acknowledging the arbitration panel's "substandard performance." The court based its decision in part on the "harsh penalty" that would be imposed on the Plaintiff-Appellant, the party awarded damages, if the judgment were instead affirmed. As an associate and in collaboration with the lead partner on the case, I had substantial responsibility for developing the arguments and preparing the brief on appeal. I also argued the case before the Seventh Circuit Court of Appeals.

23. List and describe the two most significant cases in which you were involved; give the case number and citation to reported decisions, if any. Describe the nature of your participation in the case and the reason you believe it to be significant.

In re Grede Foundries, Inc., 651 F.3d 786 (7th Cir. 2011): I was part of a team of lawyers representing Grede Foundries in a Chapter 11 reorganization under the federal Bankruptcy Code that ultimately led to the sale of substantially all of the operating assets of the company and the preservation of over 1500 jobs in the State of Wisconsin. In addition to negotiating the debtor's obligations to utilities around the country, I successfully moved for a ruling that one utility violated the automatic stay by asserting a $1 million post-petition lien against the debtor, potentially jeopardizing the planned sale of the company. Judge Martin ruled in favor of the debtor on this issue, voiding the tax lien and largely adopting the principal arguments advanced in the motion. Judge Martin's ruling was affirmed by Judge Crabb on appeal. Judge Crabb's decision was affirmed by the Seventh Circuit Court of Appeals. A copy of the motion I wrote, in collaboration with two partners (the lead bankruptcy attorney and a tax attorney) is attached to this application. I played a substantial role in researching and developing the arguments and in drafting the motion, which construes the text of the applicable state and federal statutes, drawing on the intent of the drafters as expressed in the legislative history, and applying existing federal precedent.

Hasbro Inc. v. Catalyst USA Inc., 367 F.3d 689 (7th Cir. 2004): I co-chaired an arbitration that spanned five months, over a dispute requiring the interpretation of a

complex software license agreement. This case was significant in my practice given the complexities of the facts, the breadth of legal issues, the number of witnesses and the extent of discovery and testimony, all in the context of an administered arbitration proceeding that concluded two years after the demand for arbitration was filed. The vacation of the arbitration award, as explained in my response to question 22 above, was a result rarely achieved in federal court. The arguments I advanced on behalf of my client, both in briefing and in oral arguments to the appellate court, were based upon the application of the Federal Arbitration Act to a situation where the arbitrators exceeded their powers by failing to comply with the arbitration rules requiring an award to be issued within a specific and calculable timeframe. The appellate court's remand of the case for enforcement of the arbitral award focused on the harshness of the outcome for, and the perceived injustice to, one party rather than applying the text of the Federal Arbitration Act or the parties' arbitration agreement and for that reason was also significant to me as a demonstration of a judicial philosophy at odds with my own.

VII. PRIOR JUDICIAL EXPERIENCE:

24. Have you ever held judicial or quasi-judicial office? If so, state the court(s) involved and the dates of service.

Dates	*Name of Agency/Court*	*Position Held*
June 1, 2015 – Present	Wisconsin Court of Appeals, District I	Judge
December 6, 2012 – May 31, 2015	Milwaukee County Circuit Court, Branch 45	Judge

A. List the names, phone numbers, and addresses of two attorneys who appeared before you on matters of substance.

Atty. Scott P. Phillips
Law Office of Scott P. Phillips
633 W. Wisconsin Ave., Suite 605
Milwaukee, WI 53203-1925
Phone: (414) 273-6677

Atty. Paul Rifelj
State Public Defenders Office
10930 W. Potter Rd., Suite D
Wauwatosa, WI 53226-3450
Phone: (414) 266-1178

B. Describe the approximate number and nature of cases you have heard during your judicial or quasi-judicial tenure.

While serving as a Milwaukee County Circuit Court Judge I presided in children's court, where I heard cases involving children in need of protection or services ("CHIPS"), juvenile delinquency, guardianship, child abuse and harassment injunctions, juveniles in need of protection or services ("JIPS"), termination of parental rights ("TPR") and adoptions. I presided over approximately 700-800 cases annually.

As a Court of Appeals Judge, I review and decide approximately 18-25 cases each month, in all areas of the law including civil, criminal, family, children's court, and probate.

C. Describe the two most significant cases you have heard as a judicial officer. Identify the parties, describe the cases, and explain why you believe them to be significant. Provide the trial dates and names of attorneys involved, if possible.

As a judge assigned to a children's court rotation, nearly all of the cases I heard are statutorily confidential and every case was significant with respect to the impact on the children, families, victims and community members affected by the decisions I made. For example, I frequently made decisions involving where children would live, who would raise them, whether parents would be able to see their children, whether parents would retain or lose their parental rights, what parents needed to do in order to have their children returned to them, what mental health interventions children and parents would receive, what consequences juveniles would face as a result their delinquent acts, whether to retain juveniles charged with delinquent acts in secure custody and incarcerate them when adjudicated delinquent, and whether juveniles would be prosecuted for their alleged crimes in juvenile or adult court. Many of the cases were emotionally charged, presented complex evidentiary issues, and involved significant Constitutional rights and liberty interests.

SCR 60.04(1)(m) provides that "[a] judge may not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity." Accordingly, given the confidentiality protecting the children and families involved in juvenile court proceedings over which I presided, I am unable to describe particular cases I heard in children's court. Two of the most significant types of cases I heard as a circuit court judge involved termination of parental rights ("TPR") and petitions for waiver of juveniles into adult criminal court. In the first phase of a TPR action, a determination is made—via party admissions, jury trial or court trial—as to whether one or more grounds exist for terminating parental rights. In the second phase, the court alone determines whether to terminate parental rights, with the best interests of the child the

prevailing consideration. The court is statutorily obligated to consider six statutory factors during the dispositional phase of the proceedings, including the likelihood the child will be adopted, whether the child has substantial relationships with the parents or other biological family members, whether it would be harmful to sever those relationships, the duration of separation of the parents from the child, and whether the child will be able to enter a more stable and permanent family relationship if the biological parents' rights are terminated. That ultimate decision, like many others I have made as a judge, highlights the tremendous power possessed by trial court judges, who significantly and permanently impact the lives of individuals with cases before the courts.

In certain juvenile delinquency cases, the State of Wisconsin may file petitions seeking waiver of juvenile court jurisdiction, which if successful would result in juveniles as young as 14 facing charges in adult criminal court proceedings. I presided over multiple evidentiary waiver hearings, during which the parties present testimony and other evidence relevant to the five statutory factors required to be considered by the court, including the juvenile's personality and prior record, the type and seriousness of the offense, and the adequacy and suitability of services available in the juvenile system. The consequences of a decision on a petition for waiver are significant for both the juvenile and the public. In children's court, juveniles are not entitled to jury trials and the maximum consequence for an adjudication in many waiver-eligible cases is five years of supervision by the Department of Corrections under the Serious Juvenile Offender Program, with a statutory maximum incarceration of three years. In adult criminal court, juveniles have the right to a jury trial and face decades of possible imprisonment if convicted of the types of offenses for which waiver petitions are typically filed.

VIII. PREVIOUS PARTISAN OR NON-PARTISAN POLITICAL INVOLVEMENT:

25. Please list all instances in which you ran for elective office. For each instance, list the date of the election (include both primary and general election), the office that you sought, and the outcome of the election. Include your percentage of the vote.

After Governor Walker appointed me as a Milwaukee County Circuit Court Judge in November 2012 to fill a vacancy created by Judge Thomas Donegan's retirement, I won more than 59% of the vote over two opponents in the February 19, 2013 primary. I was elected to a full six-year term on April 2, 2013, winning over 53% of the vote.

I am currently a candidate for the Wisconsin Supreme Court. The election is April 5, 2016.

26. Have you ever held a position or played a role in a judicial, non-partisan, or partisan political campaign, committee, or organization? If so, please describe your involvement.

Other than my own campaigns, no.

27. Please list all judicial or non-partisan candidates that you have publically endorsed in the last six years.

I offered my endorsement of Justice David Prosser in his 2011 Wisconsin Supreme Court race. I also endorsed Judge Thomas McAdams, Judge Christopher Dee, and Judge Michelle Ackerman Havas in their campaigns to retain their seats as Milwaukee County Circuit Court Judges appointed by Governor Walker. I may have offered my endorsement to other judicial candidates in the past but I do not specifically recall.

IX. HONORS, PUBLICATIONS, AND PROFESSIONAL AND OTHER ACTIVITIES:

28. List any published books or articles, giving citations and dates.

• "Responding to data security breaches" Wisconsin Law Journal, April 2, 2012 (co-author)
• "Is Your Firewall the Maginot Line? Preventing, Detecting and Responding to Data Breaches" WHD Forethought, January 2012
• "Social Media: Liability Considerations for Businesses" WHD Forethought, January 2012
• Information Security and Privacy: A Practical Guide for Global Executives, Lawyers and Technologists, (2011) American Bar Association, Information Security Committee, Contributing Author and Editor
• "Reining in E-Discovery Costs," WHDonline, Fall 2010
• "Adapting Arbitration for Technology Disputes," Emerging Applications for ADR, Aspatore's Inside the Minds Series (2010)
• "Internet Law," The Wisconsin Business Advisor Series: Commercial and Consumer Transactions, Vol. 6. State Bar of Wisconsin CLE Books (2006; 2008 update) (co-author)
• "Improper Role for State Bar" Milwaukee Journal Sentinel, January 18, 2008
• "Pharmacists are guaranteed the right to exercise their religious beliefs" January 2006, MKE Magazine
• Information Security: A Legal, Business and Technical Handbook, (2004) American Bar Association, Information Security Committee, Contributor
• PKI Assessment Guidelines, American Bar Association Information Security Committee, 2003, Contributor
• "Commercial E-mail Programs Trigger Serious Spam Liability: How To Avoid It," whdonline.com, Spring 2003

• "Lessons Learned: Enforceability of 'Clickwrap' Agreements," whdonline.com, Winter 2003
• "The E-Records Challenge for Local Government," whdonline.com, Special Report, Fall 2002
• "Developing Information Security Policies," Business Law News, Summer 2002
• "PKI: The key to secure e-commerce?" whdonline.com, Spring 2001

29. List any honors, prizes, or awards you have received, giving dates.

• Named one of Milwaukee's Leading Lawyers in Business Law, Internet Law and Litigation by M Magazine (July 2012)
• 2010 recipient of Wisconsin Law Journal's Women in the Law Award
• Named a Rising Star attorney by Milwaukee Magazine (2008 and 2010)

30. List all bar associations and professional societies of which you are a member; give the titles and dates of any office that you may have held in such groups and committees to which you belong or have belonged.

State Bar of Wisconsin
Business Law and ADR Sections
• Business Law Section Immediate Past Chairman (2012)
• Business Law Section Chairman (2010 - 2012)
• Business Law Section Vice Chairman/Chairman-Elect (2008 – 2010)
• Business Law Section Secretary/Treasurer (2006 - 2008)
• Business Law Section Board Member (2003 – 2012)
• Technology Law Committee Chairman (2004 – 2012)
• Business Law Newsletter Editor (2006 – 2008)
• Business Dispute Arbitration/Mediation Program Co-Chairman (2003 - 2004)
• Testified on behalf of the Business Law Section before a Wisconsin State Senate committee, advocating for passage of the Uniform Electronic Transactions Act (UETA)

Federalist Society
• Board of Advisors, Milwaukee Lawyers Chapter (2012 – present)
• Board of Directors and Co-Chairman (2012)
• President (2007 – 2012)
• Vice-President (2005 – 2007)

Seventh Circuit Bar Association
• Alternative Dispute Resolution Committee, Wisconsin Chairman (2003)

St. Thomas More Lawyers Society of Wisconsin
• Board of Governors (2011 – present)
• Secretary (2011 – 2012)

31. Describe any additional involvement in professional or civic organizations, volunteer activities, service in a church or synagogue, or any other activities or hobbies that could be relevant or helpful to consideration of your application.

- Wisconsin Juvenile Benchbook Committee Member
- Wisconsin Juvenile Jury Instructions Committee Member
- CAYSE Committee Member ("Comprehensive Approaches to Youth who have been Sexually Exploited")
- Former Milwaukee Trial Judges Association Member
- Former Wisconsin Trial Judges Association Member
- Former American Arbitration Association Arbitrator (Customer Account, Expedited Case, and Non-Binding Arbitration Panels)
- United States Commission on Civil Rights
  - Wisconsin State Advisory Committee Member (2008 - present)
  - Wisconsin State Advisory Committee Chairman (2008 - 2010)
- Milwaukee Tennis & Education Foundation Board Member
- Wisconsin Forum Chairman and Board Member
- Milwaukee Forum, Alumni Member
- Western Racquet Club, member and past tennis team captain

32. Describe any significant pro bono legal work you have performed in the last five years.

When I was a practicing attorney, I volunteered for two pro bono guardianship clinics—Children's Hospital of Wisconsin, Inc. Guardianship Clinic and the Milwaukee County Guardianship Assistance Program. The clinics provide free legal services to families of developmentally disabled young adults who are near age 18, or have already reached age 18, and lack the mental capacity to make health care decisions for themselves. Once these disabled young people reach adulthood, their parents lose the legal authority to make health care decisions for them. I served as a volunteer attorney to seek appointment of the parent (or other family member) as the guardian of the person so that there is someone in place with legal authority to continue making decisions for that young adult.

33. Describe any courses on law that you have taught or lectures you have given at bar association conferences, law school forums, or continuing legal education programs.

- "Ethics Appellate Practice" Milwaukee Bar Association, September 30, 2015
- "The Role of Social Media in E-Discovery" Rossdale National Podcast, September 24, 2012
- "Anatomy of a Cyber Breach: The Legal Response" August 21, 2012
- "Electronic Contracting (or 'Oops, I Didn't Know that E-Mail Could Actually Create a Contract!')" State Bar of Wisconsin Real Estate & Business Law Institute, June 14, 2012 (co-presenter)

- "IT Contracting: Tips for Negotiating on the 'Front End' to Avoid Disputes on the 'Back End'" Association of Corporate Counsel, Wisconsin Chapter, March 29, 2012
- "E-Discovery & Social Media: Winning Techniques" Rossdale National Podcast, July 13, 2011
- "Emerging Legal Trends in E-Discovery" EMC/Capital Data Seminar, May 18, 2011
- "Negotiating Software Licensing Agreements: Risk Mitigation Provisions" Strafford Publications, Inc. National Webinar, May 10, 2011
- "Uses and Misuses of Social Media In Litigation" Association of Women Lawyers, February 15, 2011
- "Emerging Legal Trends in E-Discovery" EMC/Capital Data Seminar, Lincolnshire, IL, November 16, 2010
- "Law & Economics of Software Licensing: You Don't Own It" Marquette University, October 12, 2010
- "E-Discovery Cost Containment: Legal Strategies: Leveraging Economical Litigation Agreements, E-Mediation and Other Emerging Tools" Strafford Publications National Webinar, August 19, 2010
- "Facebook, Twitter, and the County Employee" Wisconsin County Mutual Insurance Corporation's 17th Annual Corporation Counsel/Defense Counsel Forum, September 18, 2009
- "The Ethical Use of Social Media (or…You Can't Tweet That!)" Whyte Hirschboeck Dudek S.C., August 19, 2009
- "Uses and Misuses of the Internet in Litigation" Whyte Hirschboeck Dudek S.C., May 20, 2009
- "Best Practices in Crisis Management" Wisconsin Association of Corporate Counsel, May 15, 2008
- "Critical Issues that Keep Corporate Counsel Awake at Night: Electronic Discovery" Corporate Practice Institute, December 4, 2007
- "An Army of One: Resource Suggestions to Help You Do Your Job More Efficiently-War Stories and Lessons Learned" Wisconsin Association of Corporate Counsel, September 20, 2007
- "Business and Legal Issues Related to Open Source Software Licensing" Milwaukee Bar Association, October 27, 2005 and Licensing Executives Society International, Milwaukee, WI, October 12, 2005
- "Preparing and Defending the CEO and your Executive Staff for their Business Litigation Depositions" ALFA International Client Seminar, Boca Raton, FL, March 10-12, 2005
- "Do's and Don'ts of Dealing with In-House Counsel" Milwaukee Bar Association, March 8, 2005
- "Corporate Information Security" Corporate Counsel Forum Series, Whyte Hirschboeck Dudek, May 18, 2004
- "Contracting Issues Under the Revised Uniform Arbitration Act" Wisconsin State Bar Annual Convention, May 7, 2003
- "Top 10 Legal Do's and Don'ts in Project Management," January 22, 2003
- "Unconscionable and Unenforceable Contract Terms," Whyte Hirschboeck Dudek

S.C., December 10, 2002
- "Legal Issues with System Insecurity," Marquette University Law School, October 10, 2002
- "Ethics in Contract Drafting," Whyte Hirschboeck Dudek S.C., September 16, 2003 and August 19, 2003
- "The Ethical Use of Electronic Evidence in Litigation," Whyte Hirschboeck Dudek S.C., September 13, 2000

34. Describe any other speeches or lectures you have given.

- During my current campaign for Supreme Court, I have given numerous speeches to community groups.
- "Children in Need of Protection or Services: Foster parents" Connecting Bridges, November 10, 2014
- "Wisconsin's Juvenile Justice System" South Milwaukee High School, May 21, 2014
- "Wisconsin's Juvenile Justice System: Safer Communities/Stronger Families" Rotary International District 6270 Conference, Oshkosh, WI, April 26, 2014
- In 2013, while campaigning to retain my seat as a Milwaukee County Circuit Court Judge, I gave numerous speeches to community groups and at public forums for candidates.
- "Social Media & The Law: Liability Considerations for Businesses" University of Wisconsin-Milwaukee Small Business Development Center, February 22, 2011
- "Identity Theft: How to Minimize Your Risk and Recover if You are a Victim" Medical College of Wisconsin, April 18, 2008
- "Information Security Liability" RSA Conference, San Francisco, CA, April 15, 2003

X. FINANCIAL INVOLVEMENT:

35. If you or your spouse are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and you or your spouse's intended involvement upon your appointment or election to judicial office.

N/A

36. Describe any business or profession other than the practice of law that you have been engaged in since being admitted to the Bar.

N/A

37. Describe any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind that you have received during the past five years.

N/A

XI. ADDITIONAL INFORMATION:

38. Explain in one page or less why you want to become a judge/justice.

After sixteen years as an attorney in private practice, in 2012 I felt called to public service as a judge by my strong belief that the people of the State of Wisconsin are best served by judges who understand their duty to state what the law is and not what it should be or what they want it to be. I offered my candidacy not because I wanted to "become someone" but because I want to do something—namely, apply the law as it exists and not as I might wish it to be—in order to preserve the rule of law and the proper balance of governmental powers. Sometimes the results of applying the law may be unpalatable or even repugnant to a judge; however, a judge's preferences regarding policies or outcomes should be irrelevant to and absent from the judge's rulings. A judicial candidate seeking to enshrine subjective policy judgments should seek a seat on the legislature rather than on the judicial bench. My deep respect for the rule of law and my recognition of the importance of an appropriate deference to the legislative branch in achieving the ideals of true justice drove me to pursue this different avenue in the law as a judge rather than an advocate.

39. In one page or less, name one of the best United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

One of the best United States Supreme Court decisions in the past thirty years is *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), in which the Court re-affirmed its First Amendment jurisprudence of protecting religious groups from unlawful viewpoint discrimination by state entities that invoke unwarranted Establishment Clause concerns to justify such discrimination. Under the authorization of New York law, Milford Central School adopted a policy permitting community access to its building for certain uses, including the "welfare of the community." The Good News Club, a private Christian organization, requested access to the school cafeteria for afterschool meetings of grade school children. Among the Club's activities were Bible lessons. Invoking the school's policy prohibition on the use of its facilities for "religious purposes," the school denied access to the Club.

In an opinion authored by Justice Thomas, the Court recognized that a State's prerogative to restrict speech in a limited public forum is limited: a State may not discriminate against speech on the basis of the viewpoint it espouses without violating the First Amendment. The Court relied on precedent that struck down, in one case, a school

district's exclusion of a private group presenting films with a religious perspective and, in a second case, a university's denial of funding for a school newspaper expressing a religious perspective.

The Court next rejected the school's argument that its exclusion of religious groups from school facilities was necessary to avoid running afoul of the Establishment Clause. The Court acknowledged the State's compelling interest in avoiding an Establishment Clause violation but found no such valid interest in this case. The Club's non-mandatory meetings occurred after school hours, were open to all students between the ages of six and twelve (with parental consent) and received no school sponsorship; therefore, opening the same access to a Christian group as that afforded any other group would exert no coercive pressure on the community to participate in the activities of the Club. Moreover, granting access to secular and religious organizations alike would respect the principle of State neutrality toward religion.

In declining to recognize the State's professed Establishment Clause interest, the Court suggested that the State's exclusion of a religious group from public facilities presents as much danger of signifying hostility toward a religion as such a group's presence may of indicating an endorsement of that viewpoint. Indeed, the Court understood the pernicious and chilling effects of viewpoint discrimination on individual thought and expression as a countervailing constitutional concern based upon the impingement on the free speech rights of members of religious groups. The Establishment Clause does not ban religious expression from the public square; rather, it commands neutrality toward religious viewpoints, which is achieved when a State applies its policies in an even-handed manner across organizations seeking access to its facilities, whether such organizations are secular or religious.

In upholding the First Amendment rights of religious organizations and in its recognition that the Establishment Clause does not require hostility toward religion in attempts by a State to avoid an advancement of religion, *Good News Club* qualifies as one of the best U.S. Supreme Court decisions in the last several decades.

40. In one page or less, name one of the worst United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Although several United States Supreme Court opinions may qualify for the title of "worst," *Kelo v. City of New London*, 545 U.S. 469 (2005) represents one of the most abusive attacks on a constitutional right in the last thirty years by expansively interpreting the power of eminent domain to permit the taking of property, not for a constitutionally-sanctioned "public use" but rather for "public benefit." The Fifth Amendment includes the following restriction on the government's eminent domain power: "…nor shall private property be taken for public use, without just compensation." The Supreme Court's takings clause jurisprudence traditionally applied the plain meaning of "public use" for purposes such as building roads; however, in *Berman v. Parker*, 348 U.S. 26 (1954), the Court expanded the ordinary meaning of "public use" to encompass "public purpose" in order to uphold governmental actions designed to remedy urban blight. That

decision conferred vast discretion on governmental entities to identify "blight" where it would not be found by an objective eye, in order to justify the condemnation of property to the benefit of would-be developers promising jobs and higher tax revenue. Over time and in state courts around the country "public purpose" morphed into "public benefit," at the expense of most often powerless property owners.

In 2005, the Supreme Court had the opportunity to examine the constraints on the government's exercise of its eminent domain power in the context of economic development rather than the elimination of true blight. With the usual promises of jobs and increased property tax revenue, the New London Development Corporation ("NLDC")—a private nonprofit organization—proposed a plan to enhance the land surrounding a new corporate site, which would require the condemnation of residential properties. The properties belonging to the owners who resisted the sale of their properties to the NLDC were to be replaced by private corporate offices or rather vaguely described "park support" and leased to a private developer. Despite the fact that property would be taken from several private parties and given to another private party, the Court nevertheless characterized the taking as public, relying on a mere promise of more tax revenue and more jobs, regardless of whether that promise would ever be fulfilled.

The *Kelo* decision poses a threat to every property owner in the United States by enabling private parties that are financially or politically more powerful to successfully petition often unaccountable governmental entities to take property on their behalf in the name of "public benefit." The fact that some good resulted from the outrage provoked by the decision—a majority of states subsequently enacted restrictions on eminent domain power—does not reverse the Supreme Court's trampling of the Fifth Amendment in that opinion.

41. In one page or less, describe your judicial philosophy.

My judicial philosophy is reflected in my response to the question of why I originally sought appointment as a judge; it is conservative, textualist, and restrained. In fulfilling the judicial duty to uphold the rule of law, judges should access objective sources of statutory and constitutional interpretation, such as the text and history of the law, and resist influences beyond those sources, leaving activism at the capitol and instead exercising judicial restraint. There are, of course, statutes that confer discretion on the court to apply certain factors to the facts of a case, but that discretion is not to be exercised arbitrarily. For example, judges are afforded some discretion in applying the "best interests of the child" standard in family law disputes over custody and physical placement, as well as in cases involving CHIPS and TPR over which I have presided. However, those judgment calls should be fully informed by prevailing precedent, narrowly but reasonably construed to effectuate the intent and policy judgments of the legislature rather than those of the judge personally.

Alexander Hamilton in The Federalist No. 78 characterized the judiciary as having "neither FORCE nor WILL, but merely judgment…" My judicial philosophy ensures that on the bench I exercise my legal judgment in an appropriately restrained manner,

devoid of political and social policy judgments. In over sixteen years of private legal practice, encompassing both civil litigation as well as the construction of complex commercial contracts, I honed my skills in the textual interpretation that underlies an appropriately restrained exercise of judgment. In serving as a trial court judge and as an appellate court judge for nearly three years, I faithfully exercise my duty to apply the law as it is written and not as I may wish it to be.

42. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.

I submitted my application to this judicial nominating commission on January 7, 2015, which resulted in my appointment to the Wisconsin Court of Appeals, District I, in May 2015.

I submitted my application to this judicial nominating commission on September 12, 2012, which resulted in my appointment to the Milwaukee County Circuit Court in November 2012.

43. Describe any other information you feel would be helpful to your application.

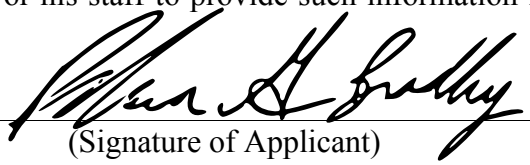
My ability to win a contested primary election in Milwaukee County against two opponents, as well as the general election against a challenger who spent approximately $250,000 in the race, establishes that I can be successful in retaining this seat on the Wisconsin Supreme Court, should I earn the Governor's appointment. In my first race, I was able to secure significant bipartisan support and maintain a highly visible presence in Milwaukee County through numerous public appearances and speeches. I was a tireless campaigner, meeting with public officials, business and community leaders, the media, and voters throughout Milwaukee County. I was honored to have a campaign team that created and coordinated print, radio, television and Internet messaging, consistent with my campaign themes, that resonated with voters. Since my election in April 2013, I maintained a significant presence in the County, continuing to attend community events and forums.

Prior to announcing my campaign for Supreme Court on September 17, 2015, I began to lay the groundwork for a successful statewide campaign by reaching out to community and business groups, law enforcement, first responders, judges, district attorneys, and voters across the state. At the time I announced my candidacy, I had secured bipartisan support and dozens of endorsements from sheriffs, judges and district attorneys. I have a campaign team in place. In the two weeks since I announced my candidacy I have been interviewed many times on radio in multiple media markets. My social media presence on Facebook, Twitter, LinkedIn and on my website, www.judgerebeccabradley.com, is well-established. I thoroughly understand the work required to launch and maintain a successful campaign to retain a judicial seat as an incumbent appointee. I have also earned a reputation on the bench as a hard working, fair and impartial judge with an excellent judicial temperament. I would be the first

Wisconsin Supreme Court Justice with both trial court and appellate court experience. It would be my honor and privilege to serve as a member of the judiciary on the Wisconsin Supreme Court.

WAIVER AND AUTHORIZATION:

I hereby authorize any person acting on behalf of the Governor or his staff to seek information related to my interest in appointment as judge. I further authorize any recipient of a request for information from the Governor or his staff to provide such information for consideration of my application.

October 2, 2015 
(Date) (Signature of Applicant)

NOTICE OF DISCLOSURE:

I acknowledge and understand that this application and supporting materials, when submitted to the Governor of Wisconsin, generally becomes public record. I therefore understand that this means my name, the fact that I have applied to be appointed as a judge, and my application materials could be released to the public.

October 2, 2015 
(Date) (Signature of Applicant)

Please note that under certain, limited circumstances, applications for appointed positions may be exempt from disclosure under the public records law. If you wish your application to remain confidential to the extent allowed by law, please send a request to that effect in writing along with your application.

Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed. But the Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

13.j. On June 18, 2012, I was cited for speeding in a 55 mph zone (Columbia County Case Number 2012TR004390).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

AFRIM DZELILI, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

vs.

Case No. 11-C-735

WILDERNESS HOTEL & RESORT, INC., and VACTIONLAND VENDORS, INC.,

Defendants.

DEFENDANT VACATIONLAND VENDORS, INC.'S BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION[1]

Defendant Wilderness Hotel & Resort, Inc. ("Wilderness") operates vacation resorts and water parks in Wisconsin and Tennessee. (Compl. ¶ 9.) Defendant Vacationland Vendors, Inc. ("Vacationland") operates vending machines and arcades in those locations. (Compl. ¶ 10.) In March 2011, a security breach occurred within Vacationland's arcade systems located in resorts operated by Wilderness in Tennessee and Wisconsin. (Compl. ¶¶ 11-12.) An unauthorized person wrongfully accessed certain parts of the point of sales systems used to process credit and debit card transactions at Wilderness' resorts. (Compl. ¶ 15.) Consumer credit card information was disclosed. (Compl. ¶ 14.)

The plaintiff filed this action on October 26, 2011, seeking class certification for claims alleging that his and others' financial information was "negligently, deliberately, and/or recklessly allowed to be stolen from Wilderness Hotel & Resort, Inc. and Vacationland Vendors, Inc." (Compl. ¶ 1.) Plaintiff asserts causes of action for violations of Wis. Stat. §§ 134.98 and § 100.18, as well as common law causes of action for negligence and breach of contract, against

[1] For purposes of this Motion only, Vacationland Vendors accepts the factual allegations in plaintiff's Complaint as true.

each defendant. Plaintiff seeks damages for "expenses for credit monitoring, anxiety, emotional distress, loss of privacy, and other economic and non-economic harm" that is not specified in the Complaint.

Plaintiff does not allege that he or any other potential class member actually suffered any compensable injury. This silent admission is fatal to all of plaintiff's claims. The Seventh Circuit Court of Appeals has held that in data breach cases, credit monitoring expenses are not compensable damages where the plaintiffs suffered only an exposure to a future potential harm. Here, plaintiff seeks damages for a future potential harm, which is not compensable damage under controlling precedent. Accordingly, plaintiff has failed to state a claim upon which relief can be granted and the Complaint should be dismissed in its entirety. Furthermore, plaintiff lacks Article III standing to maintain his action because he does not allege that he sustained an injury-in-fact; as a result, plaintiff has not pled facts sufficient to invoke the subject matter jurisdiction of this Court and plaintiff's claims should be dismissed on that ground as well.

MOTION TO DISMISS STANDARD

On a motion to dismiss made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for "failure to state a claim upon which relief can be granted," dismissal is proper where plaintiff does not set forth allegations to state a claim that is plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 552 (2007). It is not enough for a pleader to make "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009). A well-pled complaint

> demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'

Id. at 1949 (internal citations omitted). At minimum, a complaint must contain specific allegations that, if true, make plaintiff's claim for relief more than speculative. *Twombly*, 550 U.S. at 555. While a court is obliged to accept well-pleaded factual allegations as true, a plaintiff is not entitled to favorable inferences of allegations, which are merely conclusions of law asserted in the guise of factual allegations. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

"If a plaintiff lacks standing, a defendant may bring a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1)." *EMD Crop Bioscience Inc. v. Becker Underwood, Inc.*, 750 F. Supp. 2d 1004, 1011 (W.D. Wis. 2010). Article III limits a federal court's jurisdiction to actual cases or controversies. U.S. Const. art. III, § 2. As one element of this "bedrock requirement", plaintiffs "must establish that they have standing to sue." *Raines v. Byrd,* 521 U.S. 811, 818 (1997). The plaintiff bears the burden, at the pleading stage, to establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). While "general factual allegations of injury resulting from the defendant's conduct may suffice," *id*., the complaint must still "clearly and specifically set forth facts sufficient to satisfy" Article III. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In the absence of Article III standing, a federal court lacks subject matter jurisdiction to address a plaintiff's claims and they must be dismissed. *Freedom From Religion Foundation, Inc. v. Ayers*, 748 F. Supp. 2d 982, 990, (W.D. Wis. 2010).

ARGUMENT

Plaintiff asserts three causes of action: Count I asserts a claim for "Violations of § 134.98, Wis. Stat. and § 100.18, Wis. Stat.;" Count II asserts a claim for negligence; and Count III asserts a claim for breach of contract. None of these causes of action states a claim upon which relief can be granted and all of them should be dismissed. Furthermore, plaintiff's failure to plead an actual or imminent injury-in-fact deprives him of Article III standing,

rendering his claims inadequate to trigger the subject matter jurisdiction of this court and providing a second and independent basis on which to dismiss his claims.

I. PLAINTIFF'S ALLEGATIONS OF VIOLATIONS OF WIS. STAT. § 134.98 AND WIS. STAT. § 100.18 FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. A Cause Of Action For Violations Of Wis. Stat. § 134.98 Does Not Exist.

Section 134.98 generally sets forth notice requirements for business entities principally located in Wisconsin or which maintain or license personal information in Wisconsin, where personal information possessed by such a business is acquired by an unauthorized third party. In paragraph 30 of the Complaint, plaintiff states that "[t]his is a claim for violation of § 134.98, Wis. Stat." Notably, § 134.98 does not provide an independent, private right of action for individuals whose personal information was unlawfully obtained: "Failure to comply with this section is not negligence or a breach of any duty, but may be evidence of negligence or a breach of a legal duty." Wis. Stat. § 134.98(4). Had the Wisconsin legislature so intended, it would have expressly provided for an individual cause of action as other states' data breach statutes do. *See*, *e.g.*, Illinois Insurance Information and Privacy Protection Act (HPPA), 215 Ill. Comp. Stat. 5/1021; Wash. Rev. Code § 19.255.010(10)(a).

Although the Wisconsin appellate courts have not considered the issue, this conclusion is confirmed by the Seventh Circuit's analysis of a similar data breach statute, which, like Wisconsin's, does not provide for a private right of action: "Had the Indiana legislature intended that a cause of action should be available against a database owner for failing to protect adequately personal information, we believe that it would have made some more definite statement of that intent." *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 637 (7th Cir. 2007). In reaching this conclusion, the Seventh Circuit appropriately exercised judicial restraint, recognizing federal courts' "limited discretion . . . with respect to untested legal theories brought

under the rubric of state law" and cautioning that "when given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path (at least until the [state] Supreme Court tells us differently)." *Pisciotta*, 499 F.2d at 635-36 (internal citations omitted).

Since the Wisconsin Supreme Court has not interpreted § 134.98 to recognize a stand-alone private right of action in the event of its breach, this Court should decline to recognize the plaintiff's unprecedented claim under this statute in this case. As the Seventh Circuit recognized in *Pisciotta*, "[f]ederal courts are loathe to fiddle around with state law. Though district courts may try to determine how the state courts would rule on an unclear area of state law, district courts are encouraged to dismiss actions based on novel state law claims." *Id*. at 636 (*citing Insolia v. Philipo Morris Inc*., 216 F.3d 596, 607 (7th Cir. 2000)). Because plaintiff's cause of action for violations of § 134.98 lacks any legal basis in either the plain language of the statute itself or in appellate interpretations of that statute, it is appropriately dismissed for failure to state a claim upon which relief can be granted.

B. An Alleged Non-Disclosure Is Insufficient To State A Claim Under Wis. Stat. § 100.18.

Perhaps recognizing that an alleged breach of Wis. Stat. § 134.98 is alone insufficient to establish a claim, plaintiff next asserts that "Defendants' failure to properly give notice of the breach of the security of the computerized data system pursuant to § 134.98 constitutes an unfair or deceptive practice" under Wis. Stat. § 100.18, Wisconsin's Deceptive Trade Practices Act ("DTPA"). (Compl. ¶ 35.) Plaintiff's attempt to bootstrap a claim under § 134.98 into a § 100.18 violation fails because a mere failure to give notice, in the absence of an affirmative statement or representation, is insufficient to support a claim under § 100.18. Plaintiff also alleges that "Defendants' failure to maintain reasonable procedures designed to protect against unauthorized access while transferring and/or maintaining possession of the Personal Financial Information

constitutes an unfair or deceptive trade practice." (Compl. ¶ 34.) This allegation does not save plaintiff's § 100.18 claim either, because an alleged "failure to maintain reasonable procedures" likewise cannot support a claim under that statute. (Compl. ¶ 34.)

In order for a claim to succeed under § 100.18, a plaintiff must allege that the defendant, in its public advertisements or sales announcements, "made an 'advertisement, announcement, statement or representation . . . to the public,' which contains an 'assertion, representation or statement of fact' that is 'untrue, deceptive or misleading,' and that the plaintiff has sustained a pecuniary loss as a result. . . ." *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶ 39, 270 Wis. 2d 146, 677 N.W.2d 233. A nondisclosure, silence, or the omission to speak is insufficient to support a claim under § 100.18(1). *Id.*

> The DTPA does not purport to impose a duty to disclose, but, rather, prohibits only affirmative assertions, representations, or statements of fact that are false, deceptive, or misleading. To permit a nondisclosure to qualify as an actionable 'assertion, representation or statement of fact' under Wis. Stat. § 100.18(1) would expand the statute far beyond its terms.

Tietsworth, 270 Wis. 2d 146, ¶ 40.

In this case, plaintiff's allegation that "Defendants' failure to properly give notice"—a nondisclosure—constitutes a violation of § 100.18 is contrary to the Wisconsin Supreme Court's interpretation of that statute. Defendants' alleged "failure to maintain reasonable procedures" is certainly not an advertisement, announcement, statement or representation to the public which contains an assertion, representation or statement of fact and therefore cannot support a claim under § 100.18. (Compl. ¶ 34.) Finally, as explained below, plaintiff has not asserted that he or any members of the proposed class sustained any compensable damage. Without a "pecuniary loss," plaintiff cannot maintain a private right of action under § 100.18. *Tietsworth*, 270 Wis. 2d 146, ¶ 38. Accordingly, because plaintiff fails to plead any essential element of a cause of action

under Wis. Stat. § 100.18, plaintiff's cause of action under that statute is appropriately dismissed for failure to state a claim upon which relief can be granted.

II. PLAINTIFF'S CLAIMS FOR NEGLIGENCE AND BREACH OF CONTRACT FAIL AS A MATTER OF LAW BECAUSE PLAINTIFF FAILS TO ALLEGE COGNIZABLE DAMAGE.

In *Pisciotta*, 499 F.3d 629, the Seventh Circuit Court of Appeals determined that the cost of credit monitoring following the theft of personal financial information is not a compensable damage and affirmed the district court's dismissal of plaintiff's claims for negligence and breach of implied contract. Because compensable damage is an essential element of claims for negligence and breach of contract, plaintiff's negligence and breach of contract claims in this case fail as a matter of law.

Personal information of the plaintiffs in *Pisciotta*—including names, addresses, social security numbers, driver's license numbers, dates of birth, mothers' maiden names, and credit or other financial account numbers—was compromised when a computer hacker obtained access to this information. *See* 449 F.3d at 631-32. In this case, only credit card information was exposed. Here, plaintiff's causes of action arise under Wisconsin law, rather than Indiana's.[2] The law of each state is materially similar on all relevant points; hence, the analysis and ultimate conclusion of the Seventh Circuit in *Pisciotta* is fully applicable here.

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[2] Because plaintiff is a Wisconsin resident (Compl. ¶ 4) and asserts claims under Wisconsin law (Compl. at 6-7), Vacationland analyzes plaintiff's claims under Wisconsin law. *See also Davis v. G.N. Mortg. Corp.*, 396 F.3d 869, 876 (7th Cir. 2005) ("[I]n a case where subject matter jurisdiction in federal court is premised on diversity jurisdiction under 28 U.S.C. § 1332, [the court] appl[ies] the substantive law of the forum state."). Plaintiff does assert that the data breach occurred within arcade systems located in both Wisconsin and Tennessee. (Compl. ¶ 11.) The application of Tennessee law also supports the dismissal of plaintiff's claims because, as in Indiana and Wisconsin, in Tennessee a showing of damages is an essential element of a plaintiff's cause of action. *Ervin v. Nashville Peace & Justice Ctr.*, 673 F. Supp. 2d 592, 612 (M.D. Tenn. 2009). The existence of damages cannot be uncertain or based on conjecture or speculation. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) (discussing damages in tort law); *Cummins v. Brodie*, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983) (discussing damages for breach of contract). "Parties are not entitled to uncertain, contingent, or speculative damages." *Ervin*, 673 F. Supp. 2d at 612. "Damages will be considered uncertain or speculative when their existence is uncertain." *Id.*

The court in *Pisciotta* interpreted and applied Indiana's law on damages, citing an Indiana Supreme Court decision in a tort case suggesting that "compensable damage requires more than an exposure to a future potential harm." *Pisciotta*, 499 F.3d at 639. Wisconsin law is consistent with Indiana law. In Wisconsin, a claimant cannot maintain a tort action unless the claimant has suffered actual damage. *Tietsworth*, 270 Wis. 2d 146, ¶ 17 ("[W]e have generally held that a tort claim is not capable of present enforcement (and therefore does not accrue) unless the plaintiff has suffered actual damage"). Damages are an essential element of a contract action as well. *Black v. St. Bernadette Congregation of Appleton*, 121 Wis. 2d 560, 360 N.W.2d 550 (Ct. App.1984). Actual damage is harm that has already occurred or is reasonably certain to occur in the future. *Tietsworth*, 270 Wis. 2d 146, ¶ 17. Actual damage is not the mere possibility of future harm. *Id*. A claimant cannot recover speculative or conjectural damages. *Sopha v. Owens-Corning Fiberglas Corp*., 230 Wis. 2d 212, 227, 601 N.W.2d 627 (1999). Damages must be proven with reasonable certainty. *Maslow Cooperage Corp. v. Weeks Pickle Co*., 270 Wis. 179, 70 N.W.2d 577 (1955).

In this case, plaintiff alleges that he and other proposed class members suffered damages including expenses for credit monitoring, anxiety, emotional distress, loss of privacy and "other economic and non-economic harm." (Compl. ¶¶ 36, 48, & 53.) However, plaintiff fails to allege that he or any other proposed class member actually suffered a compensable loss. Instead, like the *Pisciotta* plaintiffs, plaintiff seeks a remedy that would monitor the possible occurrence of a future injury that he has not yet sustained, namely, the cost of credit monitoring. Although plaintiff carefully avoided characterizing his claim for damages as "potential" he nevertheless fails to allege a harm that has actually occurred, instead seeking damages for the threat of harm and for his alleged fears surrounding that perceived threat. This is confirmed under paragraph (f) of plaintiff's Prayer for Relief in the Complaint, where plaintiff requests an order "requiring

Defendants to pay for monitoring Plaintiff's and other Class members' financial accounts as well as to compensate Class members for all damages that result from the unauthorized release of their private information." (Compl. at 10.) Again, plaintiff seeks a remedy for monitoring a potential future injury (credit monitoring) and for damages that may result from the release of plaintiff's credit card information—not for damages that have actually resulted from the release of this information, of which plaintiff alleges none that have actually occurred. Under *Pisciotta*, these speculative damages are not compensable.

The *Pisciotta* court's holding on this point is consistent with other jurisdictions that have considered the issue. The *Pisciotta* court cited several court decisions, applying the laws of other jurisdictions, in summarizing the holding that has been consistently applied in each of them, although the type of information exposed may have differed: "Without more than allegations of increased risk of future identity theft, the plaintiffs have not suffered a harm that the law is prepared to remedy." *Pisciotta*, 499 F.3d at 639.

Despite this clear and controlling directive from the Seventh Circuit mandating the dismissal of claims for credit monitoring where personal information has been exposed, the plaintiff in this case may point to his generalized allegations of "emotional distress." In *Pisciotta*, the plaintiffs abandoned their emotional distress claims on appeal; therefore, they were not considered by the Seventh Circuit. The outcome should not be different, however. Under Wisconsin law, damages resulting from mental and emotional distress are not recoverable in a breach of contract action. *Uebelacker v. Paula Allen Holdings, Inc.*, 464 F. Supp. 2d 791 (W.D. Wis. 2006). While potentially recoverable in negligence actions, "recovery may be had for reasonably certain injurious consequences of the tortfeasor's negligent conduct, not for merely possible injurious consequences." *Brantner v. Jenson*, 121 Wis. 2d 658, 663-64, 360 N.W.2d 529 (1985). Anxiety about a fictitious or imagined or highly unlikely consequence is not a recoverable element in an action to recover damages for emotional distress. *Id.* In this case, plaintiff has not alleged that he or any members of the proposed class suffered any reasonably

certain injurious consequence as a result of the data breach; rather, plaintiff merely imagines that he and other class members potentially could be injured. This mere possibility of harm is, under *Pisciotta,* insufficient to support a negligence claim.

In this case, plaintiff seeks a remedy for damages that merely *could* result from the exposure of credit card data. The Seventh Circuit Court of Appeals, consistent with findings in other jurisdictions, has concluded that such allegations of potential future harm are too speculative to constitute compensable damages. This Court should reject the plaintiff's invitation to "adopt a 'substantive innovation' in state law . . . or 'to invent what would be a truly novel tort claim' on behalf of the state" absent any supportive authority from the Supreme Court of Wisconsin. *Pisciotta*, 499 F.3d at 640. An appropriately restrained interpretation of the applicable laws of the State of Wisconsin militates in favor of dismissing plaintiff's novel and unsupported claims in this case.

III. PLAINTIFF LACKS STANDING TO BRING SUIT BECAUSE HE HAS NOT PLED AN INJURY-IN-FACT.

Because plaintiff has not alleged an actual or imminent injury-in-fact, he has failed to plead facts sufficient to confer standing and plaintiff's claims therefore fail to trigger the subject matter jurisdiction of this Court under Article III. Constitutional standing requires an injury-in-fact, "which is an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical." *DH2, Inc. v. U.S. S.E.C.*, 422 F.3d 591, 596 (7th Cir. 2005). An injury-in-fact "must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is 'distinct and palpable,' as distinguished from merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore*, 495 U.S. at 155 (citations omitted). Asserting a "possible future injury" is insufficient to satisfy Article III. *Id.* at 158. Requiring an actual or imminent injury rather than a merely possible future injury is designed to ensure that "courts do not entertain suits based on speculative or hypothetical harms". *Public Interest Research Grp. of*

N.J., Inc. v. Magnesium Elektron, Inc., 123 F.3d 111, 122 (3rd Cir. 1997), *citing Lujan*, 504 U.S. at 564 n.2.

The majority of courts that have analyzed Article III standing in the context of a data breach have concluded that the risk of future harm presented by data security breaches is insufficient to confer Article III standing because there has been no actual or imminent injury. *See*, *e.g.*, *Randolph v. ING Life Ins. & Annuity Co.*, 486 F. Supp. 2d 1, 8 (D.D.C. 2007) ("Plaintiffs' allegation that they have incurred or will incur costs in an attempt to protect themselves against their alleged increased risk of identity theft fails to demonstrate an injury that is sufficiently 'concrete and particularized' and 'actual or imminent'" thereby depriving plaintiffs of standing); *Key v. DSW Inc.*, 454 F. Supp. 2d 684, 690 (S.D. Ohio 2006) (plaintiff's claims of increased risk of identity theft or other financial crimes are speculative and fail to allege any injury-in-fact that was either actual or imminent); *Hammond v. The Bank of New York Mellon Corp.*, No. 08 Civ. 6060 (RMB) (RLE), 2010 WL 2643307, at *7 (S.D. N.Y. June 25, 2010) (concluding that plaintiffs lack standing because their claims arising from loss of personal identification information are "future-oriented, hypothetical, and conjectural"); *Bell v. Acxiom Corp.*, No. 4:06CV00485-WRW, 2006 WL 2850042, at *2 (E.D. Ark. Oct. 3, 2006) (plaintiff does not have standing where she alleged an increased risk of identity theft and not any concrete damages).

In contrast to this prevailing legal trend, the Seventh Circuit in *Pisciotta* concluded that the injury-in-fact requirement may be satisfied by a threat of future harm or by an act that increases the risk of future harm; however, as the *Hammond* court noted in distinguishing the case, the *Pisciotta* court did not consider the Supreme Court's requirement that a threatened injury be "imminent" and "certainly impending" in order to confer standing. *Hammond*, 2010 WL 2643307, at *8. When applying this established standard as articulated by the Supreme

Court, plaintiff's claims in this case fail to meet Article III standing requirements and therefore fail to confer subject matter jurisdiction on this Court, as the majority of jurisdictions have concluded in the context of cases alleging data breaches. Accordingly, plaintiff's claims are appropriately dismissed based on this second and independent ground.

CONCLUSION

For all of the foregoing reasons, Vacationland Vendors, Inc. respectfully requests that the Complaint against it be dismissed in its entirety for failure to state a claim on which relief can be granted and for lack of subject matter jurisdiction.

Dated this 19th day of December, 2011.

s/ Rebecca Grassl Bradley
Rebecca Grassl Bradley
Jeffrey A. McIntyre
WHYTE HIRSCHBOECK DUDEK S.C.
555 East Wells Street, Suite 1900
Milwaukee, WI 53202-3819
(414) 271-2300 Phone
(414) 223-5000 Fax
rbradley@whdlaw.com
jmcintyre@whdlaw.com

Attorneys for Defendant, Vacationland Vendors, Inc.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In Re:	**Case No. 09-14337 (RDM)** **(Jointly administered)**
GREDE FOUNDRIES, INC., et al.[1]	**Chapter 11**
Debtors.	**Hon. Robert D. Martin**

DEBTORS' BRIEF IN SUPPORT OF ITS MOTION PURSUANT TO SECTIONS 105(a) AND 362 OF THE BANKRUPTCY CODE FOR AN ORDER ENFORCING THE AUTOMATIC STAY

INTRODUCTION

1. On November 5, 2009, Grede Foundries, Inc., et al., debtors and debtors-in-possession (the "Debtors"), filed with this Court a Motion (the "Motion"), and supporting papers, for the entry of an Order enforcing the automatic stay provisions of 11 U.S.C. § 362(a)(4) against Reedsburg Utility Commission ("Reedsburg") and holding Reedsburg in contempt for violating the automatic stay.

2. On November 11, 2009, Reedsburg filed its Objection to Debtor's Motion, and supporting papers, asking the Court to conclude that Reedsburg had not acted in violation of the automatic stay and that it therefore should not be found in contempt.

3. On November 12, 2009, a hearing was held on Debtor's Motion, the Honorable Thomas S. Utschig presiding. Judge Utschig concluded that Reedsburg had not acted in a way that "was contemptuous," but deferred deciding the issue of whether Reedsburg violated the automatic stay by affirmatively taking steps to create a lien subsequent to Debtor having filed a voluntary petition for relief ("Petition") under Chapter 11

[1] The Debtors in these jointly administered proceedings are Grede Foundries, Inc., Grede Transport, Inc., and Grede-Pryor, Inc.

of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). Judge Utschig *also* instructed Reedsburg that it was prohibited from taking any further action to create, file, perfect, or enforce any lien against Debtor's properties pending further order of the Court. *See* Excerpt from Transcript of Hearing Held on November 12, 2009, Affidavit of Katherine Stadler in Support of Reedsburg Utility Commission's Motion for Partial Summary Judgment Declaring that Reedsburg has Complied with 11 U.S.C. § 362, Exhibit A.

4. On December 7, 2009, Reedsburg filed with this Court a Motion for Partial Summary Judgment Declaring that Reedsburg has Complied with 11 U.S.C. § 362.

5. On December 9, 2009, Debtor filed its Response to Reedsburg's Objection to Debtor's Motion, and supporting papers. In its Response, and in consideration of Judge Utschig's finding, Debtor abandoned its claim that Reedsburg's actions were contemptuous; however, Debtor renewed its claim that Reedsburg nevertheless violated the automatic stay by affirmatively taking steps to create a lien subsequent to Debtor having filed its Petition.

6. On December 10, 2009, at a preliminary hearing on this matter, the Court instructed the parties to brief the matter, with Debtor's brief to be filed within five (5) days of the December 10th hearing and Reedsburg's brief to be filed within five (5) days thereafter.

UNDISPUTED FACTS

7. The facts pertinent to Debtor's Motion are undisputed.[2]

8. Prior to June 30, 2009, Debtor incurred charges for electrical, water and sewer services provided by Reedsburg in the amount of $1,312,314.09 ("Prepetition Utility Charges").

[2] At the outset of the December 10th hearing on this matter, Debtor's counsel, Joseph A. Pickart, identified several facts relevant to Debtor's Motion. In response to the Court's inquiry regarding Mr. Pickart's presentation of the facts, Reedsburg's counsel confirmed that the facts were not in dispute. Those facts, as well as other undisputed facts supported by the affidavits of *both* parties in this matter, provide the factual basis for Debtor's Motion.

9. As of June 30, 2009, Debtor had not made payment of the Prepetition Utility Charges. The charges remain unpaid.

10. As of June 30, 2009, there was no lien against Debtor for the Prepetition Utility Charges, nor had Reedsburg made any efforts to create a lien against Debtor.

11. On June 30, 2009 (the "Petition Date"), Debtor commenced its reorganization case by filing its Petition.

12. Subsequently, by notice dated October 15, 2009 (the "Lien Notice"), Reedsburg affirmatively notified Debtor that it would be placing the Prepetition Utility Charges on the property tax roll unless Debtor made full payment by October 30, 2009. Reedsburg's affirmative act of issuing the Lien Notice was a condition precedent to its creation of the lien under Wis. Stats. § 66.0809(3) against Debtor for the amount of the Prepetition Utility Charges.

13. Because Reedsburg affirmatively issued the Lien Notice, thereby satisfying the statutory prerequisite for creating a lien, and affirmatively caused the charges to be placed on the property tax roll, the Prepetition Utility Charges became a lien against Debtor's property on November 16, 2009.

14. The Debtor is seeking to sell substantially all of its remaining operating assets and has requested that the Court approve a sale to a winning bidder at a hearing scheduled for December 22, 2009.

15. Reedsburg's postpetition creation of the lien for the Prepetition Utility Charges will cloud title to the Debtor's largest operating plant, thus jeopardizing the sale and potentially affecting bidding for the Debtor's operating assets.

RELIEF REQUESTED

16. Reedsburg has taken actions, after the Petition Date, to assert, create and ultimately perfect liens against the properties of Debtor — liens that did not exist on the Petition Date. Reedsburg failed to seek relief from the automatic stay and, instead, attempts to justify its

actions by arguing for the application of certain exceptions to the operation of the automatic stay. Reedsburg's attempts in this regard fail because no exception to the automatic stay applies. Having failed to meet its burden of establishing the applicability of any exception, Reedsburg should be ordered to comply with the automatic stay and undo the effects of its improper actions. Furthermore, Reedsburg should be prohibited from taking any further action in the future to create a lien against Debtor for the Prepetition Utility Charges.

ARGUMENT

REEDSBURG'S ATTEMPTS TO CREATE AND PERFECT A LIEN UNDER WISCONSIN STATUTE § 66.0809 VIOLATE THE AUTOMATIC STAY BECAUSE NO EXCEPTIONS TO THE STAY'S OPERATION APPLY.

17. For the protection of both the debtor as well as its creditors, the automatic stay has broad effect and exceptions to it are specifically and narrowly drawn:

> The automatic stay is one of the most important effects of filing bankruptcy. The stay protects the debtor from the assertion of claims that were or could have been filed prior to the bankruptcy petition. There are exceptions to the stay, but the exceptions are to be narrowly construed in order to give the stay broad effect.

In re Harris, 310 B.R. 395, 397-98 (Bankr. E.D. Wis. 2004) (footnotes omitted), *citing* Robert E. Ginsberg & Robert D. Martin, *Ginsberg & Martin on Bankruptcy* § 3.02[A] (2000). "Statutory exceptions to the automatic stay are to be interpreted narrowly and in accordance with its underlying rationale." *Lincoln Sav. Bank, FSB v. Suffolk County Treasurer* (*In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540, 1547 (2nd Cir. 1989).

18. Reedsburg bears the burden of establishing the applicability of any exception to the automatic stay. *In re Reisen*, No. 03-01999, chapter 7, 2004 Bankr. LEXIS 390, at **8-9 (Bankr. N.D. Iowa March 4, 2004).

19. Reedsburg has previously represented to this Court that one or more exceptions under Bankruptcy Code § 362(b) provide support for its violation of the automatic stay.

However, as discussed below, Reedsburg is unable to satisfy its burden of establishing the applicability of *any* of the exceptions on which it relies.

A. Section 362(b)(3) Does Not Apply To Liens Under Wis. Stat. § 66.0809.

20. Reedsburg first claims that its post-Petition actions to collect pre-Petition utility charges are permissible under § 362(b)(3), which permits the perfection, or the maintenance or continuation of perfection, of an interest in property to the extent that the trustee's rights and powers are subject to such perfection under § 546(b). It is well-settled that § 546(b) works as an exception to the automatic stay (i) only if the lien was "in existence before the petition is filed and perfected thereafter" and (ii) only if "state law provides for retroactive perfection which supersedes the rights of an intervening bona fide purchaser." *United States Leather, Inc. v. City of Milwaukee (In re United States Leather, Inc.)*, 271 B.R. 306, 308 (Bankr. E.D. Wis. 2001). Reedsburg's asserted lien against Debtor for the Prepetition Utility Charges did not exist as of the Petition Date of June 30, 2009. Moreover, unpaid public utility charges in Wisconsin (as in this case) do not constitute an interest in property that would supersede the rights of an intervening bona fide purchaser because the relevant statutory sections do not provide for retroactive perfection. *Id.*

21. Any attempt by Reedsburg to avoid the application of *United States Leather* is without merit.

22. First, Reedsburg's reliance on the provisions of Wis. Stat. § 70.01 was considered – but rejected – by Judge McGarrity in *United States Leather*, 271 B.R. at 311-13. In that case, the City of Milwaukee argued that all taxes, assessments and charges against a property constitute "real estate taxes" for purposes of § 70.01. Judge McGarrity disagreed, drawing a distinction between real estate taxes and public utility charges on the tax bill:

> Wisconsin real estate taxes are undoubtedly entitled to retroactive perfection under § 70.01, Wis. Stats., and cannot be avoided, but the dispositive issue is whether water charges can be avoided.

…

> [t]he prepetition [utility] charges could not become a lien until November 16 of the year they were incurred…[t]he lien arises in the future after the charges are unpaid, notice is given, and the city comptroller places them on the tax rolls. … **§ 70.01, Wis. Stats. …treats real estate taxes differently** and affords them retroactive perfection to January 1 of the year levied. …**Once the charges are on the tax bill, the charges may, of course, be collected in the same manner as the real estate taxes,** because by that time the charges constitute a perfected lien…

Id. at 312-13 (emphasis supplied).

23. Second, Reedsburg's argument that the Wisconsin Legislature's amendment of § 66.069 (now § 66.0809) after the petition date in *United States Leather* warrants a different result has also been considered – but rejected – by this Court in *In re Delafuente,* No. 05-13151, 2005 Bankr. LEXIS 2657, at *6 (Bankr. W.D. Wis. Oct. 17, 2005). While Reedsburg may attempt to make much of the removal of "thereafter" and "thereupon" from the statute, this Court analyzed those very changes in the statutory language and concluded that "there is nothing to suggest that the changes in the language, which removed the words 'thereafter' and 'thereupon,' were intended to change the effect of the law." *Id*. This Court's finding in *In re Delafuente* is also supported by the legislative history underlying the statutory change. Specifically, the Prefatory Note to 1999 Wisconsin Act 150 indicates that the recodification of Chapter 66 was intended to be largely non-substantive and was designed, among other things, to "repeal … unnecessary or archaic and obsolete language" and the special committee charged with the recodification effort "was directed to refrain from recommending substantive changes…."[3] Had the Legislature intended to make a substantive change to provide for retroactive perfection, it could have done so expressly by mirroring the language in § 70.01.

24. Third, Reedsburg's attempts to analogize *In re Parr Meadows Racing Association*, 880 F.2d 1540 (real estate taxes) and *In re AR Accessories Group, Inc.,* 345 F.3d

[3] The Prefatory Note goes on to state that "[t]he special committee explicitly intends that, **unless expressly noted, this bill makes no substantive changes**…" (emphasis supplied).

454 (7th Cir. 2003) (wage lien) to the public utility charges at issue in this case also fail. *Parr Meadows* involved real property taxes under New York law, not the special charges for utility services under Wisconsin law. Wisconsin law clearly provides that retroactive perfection exists for real estate taxes under § 70.01 but no such retroactivity exists for unpaid utility charges that become special charges under § 66.0809. *United States Leather*, 271 B.R. at 312. *Parr Meadows* is simply irrelevant to the analysis of unpaid *utility charges* in this case. Reedsburg's analogy to *AR Accessories* likewise fails. *In re Globe Bldg. Materials, Inc.*, 463 F.3d 631, 634-35 (7th Cir. 2006) held that *AR Accessories* was limited to determining whether the *perfection* of a *wage lien* that was *created prepetition* violated the automatic stay. Accordingly, it is of no value in the Court's determination here, which involves the *post*petition creation of a lien.

B. Section 362(b)(18) Does Not Apply to Liens Under Wis. Stats § 66.0809 Because Unpaid Public Utility Charges Are Neither "Special Assessments" Nor "Special Taxes."

25. Reedsburg has also argued that its post-petition attempt to create and perfect a lien under Wis. Stat. § 66.0809 for Debtor's Prepetition Utility Charges is permissible under § 362(b)(18). This argument also comes up short of its intended mark.

26. Section 362(b)(18) exempts from the operation of the automatic stay "the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition." Assuming that the lien in question is statutory in nature, § 362(b)(18) applies *only if* Reedsburg can demonstrate that the lien arises out of an unpaid (i) ad valorem tax, (ii) special assessment or (iii) special tax. If the lien arises from an unpaid municipal charge that falls outside of the three enumerated categories, § 362(b)(18) does not apply and the automatic stay remains in full force and effect.

27. An "ad valorem tax" is a tax imposed by a governmental taxing jurisdiction based upon the value of a taxpayer's property. The purpose of all ad valorem tax systems is to raise

revenue to support government services provided to the general population of the taxation district. The tax revenues typically are used to offset the costs of municipal services including, but not limited to, snow plowing, public schooling and municipal landfill operations. Reedsburg does not contend that the lien here arises from an unpaid ad valorem tax on Debtor's real property.

28. A "special assessment" is an assessment made by a municipality based on the cost of an improvement. It is billed only to those properties benefiting from the work. Typical public improvement projects for which special assessments are levied include street construction and paving, curb and gutter installation, sidewalk construction, sanitary sewer installation, storm sewer installation, and water main and facility installation. *See* Jean Setterholm, *Special Assessment In Wisconsin* (2001). In its Objection, Reedsburg argues that the lien "is for a special tax" under Wisconsin law. (Objection at 6.) In its recent filing,[4] Reedsburg alleges that the lien "is for *either* a special tax or special assessment."[5] (Mot. Br. at 10 (emphasis added).) The charges at issue here are not from an unpaid "special assessment." To the contrary, the charges here arise from Reedsburg's provision of municipal utility *services* (as opposed to public improvements) and from Debtor's inability to pay for such services.

29. By process of elimination (*i.e.*, because we know that the lien does not arise from either an unpaid ad valorem property tax or an unpaid special assessment), § 362(b)(18) would apply as an exception to the automatic stay *only if* Reedsburg can demonstrate that the charges for Debtor's unpaid utility bills qualify as a "special tax" within the meaning of § 362(b)(18). No such demonstration is possible. Reedsburg points out that the term "special tax" neither is defined by § 362 nor referenced in that Bankruptcy Code Section's underlying legislative

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[4] Reedsburg Utility Commission's Motion for Partial Summary Judgment Declaring that Reedsburg has Complied with 11 U.S.C. § 362, filed December 7, 2009 (the "Motion Brief").

[5] As explained in greater detail below, the shift in Reedsburg's theory of the case can be explained by the fact that its City Clerk and Treasurer has now admitted that the utility charges at issue are "special charges" and, as such, are not "special taxes" after all.

history. It follows, Reedsburg argues, that whether its inclusion of the unpaid utility charges on Debtor's ad valorem property tax bill tax qualifies as a "special tax" under § 362(b)(18) should be determined by reference to Wisconsin state law. However, Reedsburg's analysis is flawed. Before turning to Wisconsin state law, we must look first to whether the Bankruptcy Code elsewhere provides guidance regarding the definition of the term "special tax" for bankruptcy purposes and then determine, with that guidance in mind, whether the unpaid utility charge here is a "special tax."

30. Turning to the first of these two threshold questions, under the provisions of Chapter 9 of the Bankruptcy Code, which pertains to municipal bankruptcies, § 902(3) defines a "special tax payer" as one who owns real property and who is liable for a special tax assessed against that property. In turn, a "special tax" is defined as a tax the proceeds of which are the sole source of payment of one or more of the municipality's obligations *relating to an improvement to the real property involved*. *Id*. Thus, the defining characteristic of a "special tax" under the Bankruptcy Code is that it arises from improvements to the real property at issue (i.e., similar to special assessments that benefit a particular property).[6] In this case, Debtor's unpaid utility charges, and the lien sought by Reedsburg, relate only to utility services provided by Reedsburg. They simply do not arise from real property improvements made to Debtor's property, as is required for the charge to be considered a "special tax" under the Bankruptcy Code's provisions.

31. An analysis of Wisconsin law supports the same conclusion. Section 74.01 (5) of the Wisconsin Statutes defines a "special tax" as "any amount entered in the tax roll which is *not* a general property tax, special assessment or special charge" (emphasis supplied). Section 74.01(4) defines a "special charge" as "an amount entered in the tax roll as a charge against real

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[6] See also, Carl M. Jenks, The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Summary of Tax Provisions, 79 Am. Bankr. L.J. 893, 896 n.19 (2005) ("The phrases 'special tax' and 'special assessment' both refer to charges that relate to specific projects that a jurisdiction undertakes to benefit a particular area and that are funded in whole or in part from taxes imposed on properties in the area receiving the benefit.")

property to compensate for all or part of the costs to a public body of providing services to the property."[7] A "special charge" can not be a "special tax" – *i.e.*, the two are mutually exclusive. Wis. Stat. § 74.01(5). In this case, Reedsburg concedes that the charges stem from Reedsburg's provision of utility *services* to Debtor. (Mikonowicz Decl. ¶ 3.)[8] And while that admission alone should suffice, the testimony of another key Reedsburg witness is even more compelling on the issue. Specifically, Reedsburg's City Clerk and Treasurer, the "person most familiar with the process by which unpaid utility bills are reported to the County for inclusion on the property tax bill," testified as follows:

> 8. Unpaid utility bills are placed on the property tax bill mailed by the County ***as a special charge***. The property tax, ***including any special charge***, is due on January 31 … After January 31, the County pays the City for any unpaid property taxes, ***including special charges***, and assumes responsibility for collecting the unpaid amounts from taxpayers.
>
> 9. Pursuant to Wis. Stats § 74.11(12), when the City receives payment on a property tax bill containing a ***special charge***, ***the special charges – including delinquent utility charges*** – are paid first. …

(Meister Aff. ¶ 8-9.)[9] Reedsburg cannot avoid the necessary effect of that admission — *i.e*, that the special charge for Debtor's unpaid utility charges do not qualify as a "special tax" under the Wisconsin Statutes or, conversely, under § 362(b)(18).[10] Accordingly, Reedsburg's claim that its post-petition lien under Wis. Stat. § 66.0809 is permissible under § 362(b)(18) must fail.

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[7] In addition to charges for utility service, "special charges" are imposed for services such as snow and ice removal, weed elimination, garbage and refuse disposal, recycling, tree care, and removal and disposition of dead animals.

[8] Declaration of David Mikonowicz in Support of Reedsburg Utility Commission's Motion for Summary Declaratory Judgment dated December 4, 2009 ("Mikonowicz Decl.), filed in support of Reedsburg Utility Commission's Motion for Partial Summary Judgment Declaring that Reedsburg has Complied with 11 U.S.C. § 362.

[9] Affidavit of Anna L. Meister in Support of Reedsburg Utility Commission's Motion for Summary Declaratory Judgment.

[10] An example of a "special tax" under Wisconsin law is the tax assessed under Wis. Stat's Chapter 76 against the special property of power companies, telephone companies and railroad. Chapter 76 taxation is in lieu of the ad

C. Section 362(b)(9) Does Not Operate As An Exception To The Automatic Stay Because The Charges At Issue Are Unpaid Utility Charges And Not Taxes Within The Meaning Of That Section.

32. Reedsburg has also previously argued that § 362(b)(9) operates as an exception to the stay. (Mot. Br. at 6-7.) Section 362(b)(9) provides, in relevant part, that the automatic stay is not violated in the context of:

> (A) an audit by a governmental unit to determine tax liability;
>
> (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency; … or
>
> (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment. ...

Reedsburg has been unable to cite any authority under § 362(b)(9) to support its claim that the nature of unpaid utility charges is the same as, or is equivalent to, the nature of unpaid property taxes, or unpaid franchise/income taxes or unpaid sales/use taxes. To the contrary, it is well established that "[s]tate law labels upon a tax are not controlling for the purposes of federal bankruptcy law. When a federal court seeks to determine whether a 'tax' is actually a tax for bankruptcy purposes, the court looks behind the tax's label and examines the operation of the provision." *In re LTV Steel Co.*, 264 B.R. at 455 (citations omitted). In this instance, Debtor's Prepetition Utility Charges are not truly a tax at all. They are simply charges for utility services provided by Reedsburg prior to Debtor having filed its petition which, because such charges were not paid, may be *collected* as if they were a tax.

33. Moreover, even if Debtor's Prepetition Utility Charges could be considered a "tax" for purposes of under § 362(b)(9), such charges arose to the level of a "tax" only after Reedsburg issued the October 15th Lien Notice, and only after Reedsburg affirmatively caused the charges to be placed on the tax roll. Because, by its terms, the exception under § 362(b)(9)

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valorem tax under Chapter 70. *See* Wis. Stats, § 70.112, entitled "Property exempted from taxation because of special tax."

applies only to taxes (as opposed to charges that may at some future point become a tax), that exception was not available at the time Reedsburg violated the automatic stay.

CONCLUSION

The automatic stay prohibits any action by Reedsburg to create, perfect or enforce any liens against Debtor's properties. Reedsburg bears the burden of establishing the applicability of any exception to the automatic stay. Reedsburg has not met its burden. Having failed to meet its burden of establishing the applicability of any exception, Reedsburg should be ordered to comply with the automatic stay and undo the effects of its improper actions. Furthermore, Reedsburg should be prohibited from taking any further action in the future to create a lien against Debtor for the unpaid pre-Petition utility charges.

Dated this 15th day of December, 2009.

GREDE FOUNDRIES, INC.,
GREDE TRANSPORT, INC.,
GREDE-PRYOR, INC.
Debtors and Debtors-in-Possession, by their counsel,
Whyte Hirschboeck Dudek S.C.

By: /s/ Daryl L. Diesing
Daryl L. Diesing
State Bar No. 1005793
Joseph A. Pickart
State Bar No. 1001477
Rebecca Grassl Bradley
State Bar No. 1021943

POST OFFICE ADDRESS:
555 East Wells Street, Suite 1900
Milwaukee, WI 53202
Telephone: (414) 273-2100
Facsimile: (414) 223-5000
Email: ddiesing@whdlaw.com
jpickart@whdlaw.com
rbradley@whdlaw.com

Rebecca G. Bradley
Application for Judgeship
References

1. **Michael J. Pfau.** Retired managing partner, Hinshaw & Culbertson LLP, (414) 333-3405.

2. **Daniel Kelly**. Attorney, Rogahn Kelly LLC, (262) 347-4550.

3. **Richard M. Esenberg**. President and General Counsel, Wisconsin Institute for Law & Liberty and Adjunct Professor of Law, Marquette University Law School, (414) 727-6367.

4. **Hon. Annette K. Ziegler**. Wisconsin Supreme Court Justice, (608) 266-1881.

Chambers of
Judge EUGENE A. GASIORKIEWICZ
Presiding Judge Racine County Circuit Court Branch II
717 Wisconsin Ave
Racine, Wisconsin 53403
Eugene.Gasiorkiewicz@wicourts.gov
Chambers: (262) 636-3304

Case Manager
Amy Vanderhoef
(262)636-3311

Court Reporter
Patricia Schaefer
(262) 636-3143

September 30, 2015

Office of Governor Scott Walker
Attn: Chief Legal Counsel
115 East Capitol
Madison, Wisconsin
53702
govjudicialappointments@wisconsin.gov

Dear Governor Walker,

As a circuit court judge, I am in a unique position to comment upon our state Supreme Court. The decisions rendered by our highest court affect every citizen in this state. It is extremely important that the citizens of Wisconsin have faith that this court, which comprises law and philosophy, is made up of the very best of legal minds available.

In this vein, I highly recommend the appointment of Judge Rebecca Bradley to fill the present vacancy. Her academic and work history credentials are impeccable and with Wisconsin roots. Her private practice experience has been of the highest caliber, and her decision making on the bench has been exemplary. In addition, due to her educational background, she would bring considerations of economic principles to our highest court that should be part of the rubric of the decision making process. The consideration of intended and unintended consequences of decision making is the hallmark of economic thought process.

I am of the opinion she would bring much needed reunification to a now divided court and assist in restoring the Wisconsin Supreme Court to one of the most respected courts in this country.

Very truly yours,

Hon. Eugene A. Gasiorkiewicz
Branch II, Racine