No. 22-

IN THE

Supreme Court of the United States

LARRY J. WINGET AND
THE LARRY J. WINGET LIVING TRUST,

Petitioners,

v.

ALTER DOMUS, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to annul a revocable, will-substitute trust and replace it with an irrevocable trust.

2. Whether a revocable, will-substitute trust is a separate legal person capable of participating in a fraudulent transfer.

3. Whether the Sixth Circuit's unfettered discretion to refuse to publish a decision violates Article III of the Constitution.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

There are no parties to the proceedings other than those listed in the caption. Petitioners are Larry Winget and The Larry J. Winget Living Trust. Respondent is Alter Domus, LLC. The Trust is not a corporate entity and therefore has no parent corporation or stock.

Because Petitioners are not a corporation, Supreme Court Rule 29.6 does not require a corporate-disclosure statement.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Sixth Circuit, No. 21-1568, *Alter Domus, LLC v. Larry Winget, et al*, judgment entered July 1, 2022.

U.S. Court of Appeals for the Sixth Circuit, Consolidated Case Nos. 14-1158, 14-1172, 14-1276, *JPMorgan Chase Bank, N.A. v. Larry Winget, et al*, judgment entered February 20, 2015.

U.S. Court of Appeals for the Sixth Circuit, No. 18-1143, *JPMorgan Chase Bank, N.A. v. Larry Winget, et al*, judgment entered April 10, 2019.

U.S. Court of Appeals for the Sixth Circuit, No. 18-2089, *JPMorgan Chase Bank, N.A. v. Larry Winget, et al*, judgment entered November 7, 2019.

U.S. Court of Appeals for the Sixth Circuit, No. 19-2194, *JPMorgan Chase Bank, N.A. v. Larry Winget, et al*, judgment entered April 22, 2020.

U.S. District Court for the Eastern District of Michigan, No. 2:08-cv-13845-DML-MJH, *Alter Domus, LLC v. Larry J. Winget, et al*, final judgment entered July 28, 2015.

Probate Court for the County of Oakland, State of Michigan, No. 2022-409, 601-TV, *In the Matter of Larry J. Winget Living Trust under Trust Agreement dated December 23, 1987, as amended*, pending.

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The opinion of the Sixth Circuit Court of Appeals No. 21-1568 is unpublished and is reprinted in the Appendix ("App.") at App.3a–46a. The opinion of the United States District Court for the Eastern District of Michigan is not reported and is reprinted at App.92a–124a.

JURISDICTION

The district court had diversity jurisdiction under 28 U.S.C. 1332, and the court of appeals had jurisdiction under 28 U.S.C. 1291. The court of appeals filed its opinion on July 1, 2022, and it denied, on August 17, 2022, petitioners' timely filed petition for rehearing and rehearing en banc. App.218a–219a. On November 8, 2022, this Court granted petitioners' motion to extend the deadline for filing this petition by thirty days. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 1, of the United States Constitution provides, in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

M.C.L. 700.1302 provides:

> The [probate] court has exclusive legal and equitable jurisdiction of all of the following…

> (b) A proceeding that concerns...the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following...(*v*) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.

26 U.S.C. 676 provides:

> **(a) General rule.**--The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both.

INTRODUCTION

This petition seeks review of a 2-1 Sixth Circuit decision that confiscates the petitioner's property to satisfy a $1 billion judgment that is *not* enforceable against him. The panel majority upended basic trust law, contradicted two uniform acts and the federal tax code, created a 5-1 circuit split, and *sua sponte* nullified the petitioner's revocable, will-substitute trust— all in the interest of bringing a long-running case to a close, regardless of the consequences. The holding is so startling that dissenting Judge Batchelder warned of the "damage to trust law" if the majority's decision is not overturned.

App.45a. Echoing this concern, the national estate and trust bar and academia have issued their own warnings about this decision. Certiorari is warranted for several reasons.

First, the Sixth Circuit panel majority annulled the petitioner's revocable, will-substitute trust (which the dissent equated to a "self-storage unit"), replacing it with an irrevocable trust, retroactive to 2003. App.33a (Batchelder, J., dissenting). In doing so, the panel majority stripped the petitioner and his named beneficiaries of estate property intended for them (held in the "self-storage unit") and gave it to someone else. That ruling exceeded the federal court's jurisdiction under *Marshall* v. *Marshall*, 547 U.S. 293 (2006), which reserves to state probate courts alone the annulment of wills and will substitutes and the administration of estate property. The ruling was also made *sua sponte*, as both parties and the district court agreed the will substitute was always *revocable* and subject to the petitioner's control.

Second, the panel majority held that a revocable, will-substitute trust—ubiquitous nationally as an estate-planning tool—is a distinct legal person from its settlor and so can have its own creditors and make itself irrevocable by its own act without the settlor's consent. That holding conflicts with this Court's decision in *Americold Realty Tr.* v. *Conagra Foods, Inc.*, 577 U.S. 378 (2016), which held the exact opposite: that a trust is *not* a distinct legal person but a fiduciary relationship. The holding also rewrites the Uniform Trust Code ("UTC") adopted in 36 states, upends compliance and enforcement of the Internal Revenue Code's income and gift-tax provisions, and ensures federal tax litigation by settlors and beneficiaries over how to

apply these new and "creative proclamations about the law of revocable trusts." App.45a (Batchelder, J., dissenting).

Third, the Sixth Circuit panel majority held that because a revocable, will-substitute trust is a distinct legal entity, a settlor who revokes it commits a fraudulent transfer as to the so-called creditors of that will substitute, even though under the UTC, the settlor had the unconditional right to demand his property back, and the trustee is required to comply. This decision creates a mature circuit split with the First, Fifth, Ninth, Tenth and DC Circuits, each of which have held it is *not* a fraudulent transfer when a trustee relinquishes property it does not own.

Finally, denying petitioner's motion to publish violated Article III and independently warrants review. After admitting the dissent may be right about the law, the panel majority nonetheless issued its opinion for the sake of finality and refused to publish it. App.218–19a. But not publishing a decision to cabin the harm that would be caused by its broader application lays bare the constitutional infirmity of the Circuit's publication practices.

For all these reasons, certiorari is warranted.

STATEMENT

A. Winget creates a will-substitute estate-planning trust.

Larry Winget and his wife Alicia have been married over 60 years. They have over 40 children, grandchildren,

and great-grandchildren. In 1987, Winget created the "Larry J. Winget Living Trust." Like millions of others, Winget put this will substitute in place to keep ownership of his property during his life and transfer it on death to his heirs outside of probate. The instrument creating it named Winget settlor, sole lifetime beneficiary and trustee. It also confirmed his right to revoke the will substitute at any time and for any reason. 12/23/87 Living Trust, § 3.1.

As such, until his death, Winget could change the property under the trust or remove it entirely, all while retaining the right to designate or change the beneficiaries of any property placed there. The revocable will substitute functioned as a "self-storage unit" for settlor Winget.[1]

B. Winget's $50 million guaranty.

In 1999, JPMorgan Chase, acting as agent for a group of hedge funds (collectively, the "Agent"), loaned $450 million to Venture Holdings Company, LLC, owned by Winget.[2] In 2002, after a Venture-related company was forced into a German bankruptcy, the parties executed an 820-page forbearance agreement that gave the Agent $750 million in additional security for its loan. The Agent also asked Winget for an unlimited personal guaranty. He refused, but agreed to a non-recourse guaranty tied to a stock pledge of two companies held in his revocable will-substitute trust—worth $150 million—that the Agent would release if he paid it $50 million.

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1. The term "settlor" and "grantor" are interchangeable under the law of trusts and estates.

2. The administrative agent is now Alter Domus, LLC.

The day before the closing, the Agent asked Winget if he used an estate-planning trust. Winget said yes.[3] So, at the last minute, the trustee of Winget's revocable, will-substitute trust was added as signatory to Winget's guaranty and pledge.

C. The Agent exploits a scrivener's error in the guaranty.

In 2005, a bankruptcy court ordered the sale of Venture's collateral based on its 2003 default. The Agent credit-bid a fraction of the $750 million pledged just three years earlier, leaving a $400 million deficiency. When the Agent's attempt to operate the Venture companies spectacularly failed, Winget bought back most of his old assets, grew his enterprise anew, and placed these *newly* formed companies in his revocable, will-substitute trust, believing he could revoke it at any time.

Then, in 2008, seizing on a scrivener's error that occurred during the last-minute addition of the trustee to the guaranty, the Agent claimed that while Winget's personal guaranty was limited to $50 million, his revocable, will-substitute trust made a *separate and distinct* unlimited guaranty. After an 11-day trial, the district court found that: (1) Winget's will substitute was merely his alter ego as settlor; and (2) the guaranty should be reformed to reflect the parties' clear intent to limit the guaranty to $50 million as to both Winget and his will substitute. App.215a.

Shortly thereafter, in 2014, Winget paid the $50 million to the Agent, revoked the revocable will substitute,

3. This was no surprise; the Agent had been the successor trustee of Winget's will-substitute trust since 1987.

and put his property in a more tax-advantageous estate-planning vehicle.

D. The Sixth Circuit rules integrated contracts cannot be reformed and will substitutes are distinct legal entities.

In a 2015 unpublished opinion, the Sixth Circuit reversed the district court's decision and held that: (1) Winget and his estate-planning trust were "*distinct* legal persons;" and (2) integrated contracts cannot be equitably reformed, even to conform the contract to the parties' unambiguous intent. *JPMorgan Chase Bank, N.A.* v. *Winget*, 602 F. App'x 246 (6th Cir. 2015). App.125a–69a. Because the 2015 Opinion established new law that conflicted with existing law, Winget moved for its publication. The court denied Winget's motion without comment. On remand, the district court entered a $425 million judgment (including interest, now well over $1 billion) against Winget's revocable, will-substitute trust.

Shortly after remand, the Agent claimed Winget committed a fraudulent transfer when he revoked his will substitute in 2014 (now supposedly a distinct legal person), even though the Agent was aware of Winget's right as settlor to revoke it when the Agent executed the guaranty in 2002 yet did nothing to restrict it. 8/5/16 Counterclaims. In 2017, the district court agreed with the Agent, holding that Winget's 2014 revocation was a constructive fraudulent transfer. App.92a–124a. Respecting the district court's decision, Winget put his property back in the revocable will substitute and reserved his right to appeal after final judgment. 2/26/18 Notice of Compliance.

Once Winget returned the property to his will substitute—consisting almost entirely of LLCs he created and grew long *after* the 2002 guaranty—the Agent attempted to execute on the returned property and claimed Winget was unjustly enriched by the revocation. Winget resisted, noting he owed the Agent nothing, and that the property in his revocable, will-substitute trust ("self-storage unit") belonged to him, not the trust itself or its trustee. The district court again sided with the Agent, resulting in multiple orders and appeals establishing the Agent's execution rights against the trust res worth nearly $1 billion. Importantly, none of those appellate opinions addressed whether Winget lawfully exercised his right to revoke his will substitute in 2014. *JPMorgan Chase Bank, N.A.* v. *Winget,* 942 F.3d 748, 750 n.1 (6th Cir. 2019) (reserving the question "whether the district court was correct" in holding Winget committed a fraudulent conveyance in 2014 when he "revoke[d] the Trust and simply remove[d] all the trust property").

On June 1, 2021, the district court certified its 2017 fraudulent transfer order as a final judgment under Fed. R. Civ. P. 54(b). App.47a–61a. It also certified as final its 2021 equitable award to the Agent of a constructive trust over two promissory notes and $127 million Winget received from the LLCs after the will substitute was revoked. *Id.* Winget timely appealed those rulings to the Sixth Circuit. 6/4/21 Notice of Appeal.

E. In an unpublished decision, the Sixth Circuit annuls the revocable will substitute, replacing it with an irrevocable trust.

Four months after the appeal was fully briefed, the Sixth Circuit requested additional briefing from both

parties on nine discrete questions pertaining to trust and federal tax law. Then, on July 1, 2022, without oral argument, the Sixth Circuit issued a 34-page opinion, which included a twelve-page dissent. App.3a–46a.

Rejecting both parties' position that Winget's will-substitute trust was *always* revocable, the majority held *sua sponte* that the default on the trust's *distinct* guaranty in 2003, when Venture defaulted (Winget never defaulted), converted Winget's revocable will substitute into an *irrevocable* trust in that year. App.14a. According to the majority, in 2014 settlor Winget revoked an *irrevocable* trust–the one retroactively created by the Sixth Circuit in 2022–making that revocation a constructive fraudulent transfer. This in turn entitled the Agent to the two promissory notes and approximately $50 million of the LLC distributions Winget received after the trust was revoked. Notably, the majority refused to award the Agent $79 million in post-revocation distributions Winget used to pay the trust-held LLCs' taxes. App.24a. The majority held he was not personally responsible for those taxes under the U.S. tax code because, at the time those taxes accrued, the LLCs were held in an irrevocable trust, not a revocable will substitute. App.23a.

In a cutting dissent, former Chief Judge Alice Batchelder admonished the majority for straying "far afield from ordinary trust law," and "craft[ing] new, and increasingly creative, proclamations about the law of revocable trusts." App.43a, 45a. She also expressed the "vain hope" the holdings in the opinion would not spread beyond the confines of this case. App.46a.

Exercising its unfettered discretion to refuse to publish any of its decisions, even those establishing new

law, the Sixth Circuit satisfied Judge Batchelder's hope. Just like the 2015 unpublished decision, the Sixth Circuit's 2022 decision crafts entirely new trust and federal tax law that purportedly binds only one person—Larry Winget.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit violated the probate exception to federal jurisdiction.

A. The majority annulled Winget's revocable, will-substitute trust.

The Agent seeks relief in this case against a revocable, will-substitute trust, its *only* alleged debtor.[4] Winget owes the Agent nothing. Importantly, the Agent has always acknowledged its (so-called) debtor is a revocable estate-planning mechanism. 9/17/21 Appellee Br., p. 6 ("[T]he Agent agrees that Mr. Winget [settlor] had the right to move property in and out of his trust as he saw fit, both before and after the Guaranty was signed."). And, as former Chief Judge Batchelder correctly observed, because Winget revoked a *revocable* trust in 2014, his removal of property from it was not a fraudulent transfer. App.41a-42a, 46a (Batchelder, J., dissenting). That's because the revocable will substitute and settlor Winget were legally *indistinct* from one another. *Id.*

But instead of accepting this reality and rejecting the Agent's fraud claims, the Sixth Circuit majority chose

4. That Winget's will-substitute trust is a distinct debtor from him as settlor is a legal fiction created by the Sixth Circuit that contradicts this Court's holding in *Americold Realty Tr.*, 577 U.S. at 383.

to *sua sponte* annul—retroactive to 2003—the written instrument that created the *revocable* will substitute and replace it with an *irrevocable* trust. App.12a, 41a–44a. Now, according to the panel majority, instead of revoking a *revocable* trust, settlor Winget revoked an *irrevocable* one.

Though the panel majority did not use the word "annul" to describe its actions, nullifying the will substitute's controlling feature—its revocability—did just that. *Sutton* v. *English*, 246 U.S. 199, 208 (1918) (a federal court lacks jurisdiction to dispose of an issue that turns on annulling a material provision of a will). The panel majority acknowledges the materiality of making irrevocable what was previously revocable by holding the transformation altered how assets held in the now-irrevocable trust are taxed under the Internal Revenue Code. App.22a–23a. Similarly, the dissent concludes this holding is so material that it makes the Agent a *new* beneficiary, with priority over the beneficiaries named by the settlor in the will substitute. App.42a-44a. Accordingly, the panel majority's decision to retroactively annul Winget's revocable, will-substitute trust and replace it with an irrevocable trust exceeded its jurisdiction.

The "probate exception" limits a federal court's jurisdiction. *Marshall* v. *Marshall*, 547 U.S. 293, 299 (2006). It "reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate." *Jones* v. *Brennan*, 465 F.3d 304, 306 (7th Cir. 2006). Because self-settled trusts are will substitutes, claims impacting their administration or annulment fall within the probate exception. *Evans* v. *Pearson Enterprises, Inc.*, 434 F.3d 839, 849 (6th Cir. 2006) ("Refusing to hear cases regarding will substitutes is consistent with *Markham*

because adjudication…would frequently interfere with probate administration."); *In re Marshall,* 392 F.3d 1118, 1135 (9th Cir. 2004), rev'd on other grounds, *Marshall* v. *Marshall*, 547 U.S. 293 (2006) (plaintiff "cannot avoid the probate exception simply by stating that the trust which she claims was to be created for her benefit was an inter vivos [will-substitute] trust"); *Golden ex rel. Golden* v. *Golden*, 382 F.3d 348, 359 (3d Cir. 2004), rev'd in part on other grounds, *Marshall* v. *Marshall,* 547 U.S. 293 (2006) ("We agree with the Court of Appeals for the Seventh Circuit in holding that causes of action involving trusts are treated under the probate exception in the same way as actions involving wills.").

The probate exception applies to self-settled inter vivos trusts because they are not like other trusts–they are "the functional equivalent of a will." UTC, Comment to Art 6.[5] Accord *Bullis* v. *Downes*, 612 N.W.2d 435, 439 (Mich. 2000) ("To consider a revocable trust as a traditional instrument fails to recognize that it actually functions as a will…"); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) ("Only nomenclature distinguishes the remainder interest created by [a revocable] trust from the mere expectancy arising under a will."). This means federal jurisdiction does not extend to annulling the terms of a revocable, will-substitute trust. That is the exclusive province of state probate courts. *Marshall*, 547 U.S. at 299; M.C.L. 700.1302(b).

5. Accord Reporter's Comment in Estates and Protected Individuals Code with Reporters' Commentary, Article II (February 2022 edition) ("Because of the widespread use of revocable trusts as will substitutes, a trend in recent years has been to align the legal treatment of them. The [Michigan Trust Code] follows this trend.").

Yet, that is precisely the line the Sixth Circuit crossed here. In *Marshall,* this Court agreed with the lower court's conclusion that "because…success on [the petitioner's] counterclaim did not necessitate any declaration that [the] will was invalid," federal jurisdiction would not interfere with the probate proceedings and thus the "probate exception" did not apply. *Id.* at 312. But here, annulment of Winget's revocable, will-substitute trust was required to find a constructive fraudulent transfer. Because if the trust remained *revocable*, then settlor Winget and his will substitute remained indistinct from each other. And settlor Winget could not fraudulently transfer something from himself to himself. Accordingly, the panel majority's annulment of the revocable will substitute exceeded its jurisdiction. *Sutton* v. *English*, 246 U.S. 199, 208 (1918) ("The present suit being, in an essential feature, a suit to annul [a] will…it follows from what we have said that the controversy is not within the jurisdiction of the courts of the United States.").

To be clear, the Sixth Circuit did not rule—as the Agent argued both in the district court and on appeal—that though settlor Winget (a non-debtor) otherwise had the legal right to revoke it "at any time and for any reason," exercising that right violated the Michigan Uniform Fraudulent Transfer Act. 9/17/21 Appellee Brief, p. 6; 8/17/20 Objections to Judicial Sale, p. 7 n. 2. The Sixth Circuit could not adopt that position because, as the dissent points out, if the trust—the only alleged debtor here—is revocable, then "Winget [a non-debtor] owns the assets [in it], *all of them*, and happens to keep them in his revocable trust. The Trust does not own any assets." App.33a. That means it was not a fraudulent transfer when Winget demanded *his* property back. App.40a–42a, 46a.

In sum, instead of recognizing the Agent's alleged debtor was a revocable, will-substitute trust (as the parties and the district court did) and adopting the legal consequences that flow from it, the majority annulled it *sua sponte* as of 2003. Worse, the majority replaced it with an irrevocable trust. This in turn made settlor Winget's otherwise lawful 2014 revocation of a *revocable* trust suddenly fraudulent; all of which was done for the sake of "finality." App.12a–15a, 30a. This exceeded the Sixth Circuit's jurisdiction. *Marshall*, 547 U.S. at 299 (2006).

B. By exceeding its jurisdiction, the Sixth Circuit created problems the probate exception was intended to avoid.

If the majority's decision is allowed to stand, it will have far-reaching consequences for the creation and administration of revocable, will-substitute trusts.

Consider the impact on the current administration of what was once settlor Winget's revocable, will-substitute trust. For starters, as the dissent points out, a revocable trust is like "a self-storage unit" and "[o]ver time, you might move any number of things to and from, in and out of the storage unit." App.33a. You can "fill it, change it, empty it, close it. That is the promise of a revocable trust: you, as settlor, can revoke it at any time." *Id.* In short, the settlor does not "risk ever losing control over [ ] assets in a revocable trust." *Id.* In stark contrast, "a settlor who creates an *irrevocable* trust relinquishes control of the assets" held there. App.32a.

The panel majority's annulment of the revocable will substitute stripped the settlor of his control over

the trust property, including his power to control what property goes to which beneficiary at death. App.43a. That decision fundamentally altered how the once revocable will substitute will be administered upon settlor Winget's death.[6]

In addition, the fiduciary obligations of the settlor and trustee under this new irrevocable trust are different than they were. M.C.L. 700.7603 (UTC § 603).[7] Yet, the panel majority failed to provide guidance on how those differences impact the trust's administration. Does the trustee have a fiduciary duty to file reports about the trust res with the ten beneficiaries now that the trust has been deemed irrevocable? Did that duty start in 2003? App.249a–50a. What rights can those beneficiaries claim in the res formerly held in the now-annulled revocable trust? What are settlor Winget's rights in the trust res under this new irrevocable trust? *Id.* Does he have the right to change beneficiaries, or are they now fixed? App.32a (Once irrevocable "[t]he settlor cannot change the terms, change the contents, or dissolve the trust."). Does settlor Winget have *any* control over the res held in the now-irrevocable trust, short of revoking it? *Cf.* M.C.L.

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6. That the panel majority annulled Winget's will substitute *before* his death is not disqualifying. It is annulment of the will substitute that triggers application of the probate exception, not the status of its grantor. Put differently, the probate exception does not allow a federal court to do while the settlor is alive what it is prohibited from doing after his death (i.e., annul his will substitute).

7. The cited provisions herein are from the Michigan Trust Code, with corresponding UTC cites. UTC §1101 ("In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.").

700.7602(4) (UTC § 602(d)); App.249a-250a. If Winget dies, are his personal creditors now subordinate to the Agent, the newly created beneficiary of the irrevocable trust? App.42a–44a.; *cf.* M.C.L. 700.7506(1)(b) (UTC § 505(a)(3)).[8]

The Sixth Circuit's annulment of the revocable, will-substitute trust altered the rules for administering Winget's estate *here and now*, as well as at death, and created new rules it failed to define. This illustrates why federal courts must refrain from annulling will substitutes. To this point, a probate proceeding has been filed under state law seeking guidance on how the rules for administration have been changed by the Sixth Circuit's annulment, and answers to the other administrative questions created by its decision. App.249a–50a.

But the fallout from the annulment goes beyond confusion over how to currently administer the estate held in the now-irrevocable trust. When settlor Winget contributed assets to his will-substitute trust, he did so with the understanding there would be no gift tax because the trust was *revocable*. Yet, according to the Sixth Circuit, the trust became irrevocable in 2003. App.14a. Does that mean Winget now has gift tax liability (perhaps in the millions) for the many assets he placed in what he believed was a revocable will substitute *after* 2003? Was he required to file gift tax returns beginning in 2003? Must he do so now? Again, these are questions the Sixth Circuit, after annulling the revocable, will-substitute, left unanswered.

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8. Comment to UTC § 505: "Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges."

The takeaway is that there are sound policy reasons behind the probate exception that have been undermined by the Sixth Circuit's decision. The jurisdiction for administering or annulling estate-planning mechanisms like revocable will substitutes resides in the state probate courts because they "have developed a proficiency in core probate… matters… hav[ing] procedures tailored to them." *Struck* v. *Cook Cnty. Pub. Guardian,* 508 F.3d 858, 860 (7th Cir. 2007). And these unique procedures allow them to anticipate and address the consequences of their estate-related rulings and fix the unintended ones. This case illustrates the fallout from federal courts failing to honor this simple truth.

II. A revocable, will-substitute trust is not a separate legal entity.

Judge Batchelder is correct that this case first went off the rails in 2015 when the Sixth Circuit held, in an unpublished decision, that Winget's revocable, will-substitute trust was a "distinct legal person[]" from its settlor and that, unlike its settlor, it gave an unlimited guaranty to the Agent. App.144a; *JPMorgan Chase Bank, N.A.* v. *Winget*, 602 F. App'x 246, 256 (6th Cir. 2015). Apart from betraying the parties' proven intent, no court had ever held that a revocable, will-substitute trust was anything other than the "alter ego" of its settlor. And for good reason. As this Court recognized in *Americold Realty Tr.* v. *Conagra Foods, Inc.,* 577 U.S. 378, 383 (2016), a trust is "not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people." The UTC incorporates this general principle of trust law. M.C.L. 700.1203 (UTC § 106).

Then, in its 2022 Opinion, the Sixth Circuit made things worse. It held that because a revocable, will-substitute trust is "a separate legal person" from its settlor, movement of property between them was a constructive fraudulent transfer. App.13a–15a, 44a–46a.[9] This was a dramatic expansion of its 2015 holding, which did not go so far as to grant the trust distinct rights in the res that preempted or altered the settlor's rights. The Sixth Circuit now emphatically crossed that line. Compare App.144a. (*Winget,* 602 F. App'x at 256); App.13a. And it did so through a "needlessly complicated" re-interpretation of what a revocable, will-substitute trust is. App.40a (Batchelder, J., dissenting).

According to the majority, because of its status as a "separate legal person," Winget's will substitute could change the rights of "third parties, like…settlors," including eliminating the settlor's right to revoke, making the revocable will substitute *irrevocable.* App.12a–13a. But that is legally impossible because the trust is a "fiduciary relationship" between the settlor and trustee, not a separate legal person. *Americold Realty Tr.,* 577 U.S. at 383.

After all, a will-substitute trust does not act on its own but through a trustee. And a trustee's duties are owed exclusively to the settlor of a revocable trust and do *not* include the power to unilaterally alter the trust

9. As it did in 2015 and 2020, in 2022 the court again rejected Winget's assertion that a revocable, will-substitute trust is not a distinct legal person but merely a "fiduciary relationship with respect to property" that holds only bare legal title. 8/18/2021 Appellants' Br., p. 28, quoting M. Civ. JI 179.02; *Americold Realty Tr.*, 577 U.S. at 383.

instrument. M.C.L. 700.7603 (UTC § 603) ("While the trust is revocable…the duties of the trustee are owed exclusively to the settlor.")[10]; M.C.L. 700.7602(4) (UTC § 602(d)) ("Upon revocation … the trustee shall deliver the trust property as the settlor directs."); M.C.L. 700.7808 (UTC § 808(a)) ("While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.").[11] Accord Trust, § 3.1, 8/18/21 Appellants' Brief, pp. 10-11 ("The settlor shall have the right at any time . . . to revoke or amend this Trust by the Settlor's act alone[.]").

In other words, under the UTC, a revocable trust (or its trustee) can't unilaterally act to change *anything*, and certainly not the trust's revocability. Only the settlor can do that. Just as a store manager that an owner hires cannot sell the store without the owner's approval.

A. If Winget's will substitute is not a separate legal person, there was no fraudulent transfer.

The dissent correctly observed that had the majority held that "the [revocable will-substitute trust] and Winget are not separate entities," it would be clear that "Winget owns all the assets," the trust "owns nothing," and "Winget's revocation of the revocable Trust was not a fraudulent transfer." App.46a. This analysis squares

10. Comment to UTC § 603: "This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust."

11. Comment to UTC § 808: "Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a written direction from the settlor even if it is contrary to the terms of the trust."

with the Uniform Fraudulent Conveyance Act ("UFTA").[12] That uniform statute—adopted in 45 states, including Michigan—is concerned with a debtor "parting with an asset" to defraud creditors. M.C.L. 566.31(q). Given this goal, it logically defines "asset" as "property of the debtor." M.C.L. 566.31(1)(b). But as Judge Batchelder noted, the revocable will substitute did not own the res it held because it is not a separate legal person from its settlor. App.45a; *Americold Realty Tr.,* 577 U.S. at 383. Instead, the *trustee* held the res, and did so "exclusively for the benefit of the settlor" because the settlor retains all powers of ownership. M.C.L. 700.7603 (UTC § 603). Accord Bogert, The Law of Trusts and Trustees, § 964 (June 2022 Update) ("[A] settlor's power of revocation is the equivalent of ownership of the assets subject to the power…").

In short, under UFTA, the trustee (or the will substitute) owns nothing it can fraudulently transfer. Indeed, all the trustee of a revocable trust ever holds is bare legal title in the res. *U.S.* v. *Whiting Pools Inc.*, 462 U.S. 198, 205 n. 8 (1983) (describing legal title held by a trustee as a "minor interest" which gives the holder no "equitable interest in the property"); 90 C.J.S. Trusts § 249 (November 2022 Update) ("Where a trust is valid, the trustee is the holder of the legal title and the beneficiary holds the equitable estate or beneficial interest."). And as to that interest, "the trustee [of a revocable trust] shall deliver the trust property [bare legal title] as the settlor directs." M.C.L. 700.7602(4) (UTC § 602(d)).

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12. The UFTA "must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of the Act among the states enacting it." 37 C.J.S. Fraudulent Conveyances § 4 (November 2022 Update).

So, when settlor Winget entrusted the trustee with *bare legal title* in his property, he did so subject to his right to demand it back. And because what was returned to him was only *bare legal title* in the trust res, the trustee was *not* "parting with an asset." This means there was no fraudulent conveyance under UFTA.

B. The panel majority's decision creates a mature circuit split.

None of this is controversial. Numerous circuits have held that delivery by a debtor-trustee of *bare legal title* to someone else cannot be a fraudulent transfer. For example, the First Circuit held that if a debtor holds "only the bare legal title…conveyance to [the equitable title owner] did not deplete the assets of the [debtor]" and there is no fraudulent transfer. *Capital Finance Corp.* v. *Leveen*, 217 F.2d 36, 38 (1st Cir. 1954).

Similarly, the Fifth Circuit held that because a trustee-debtor "had legal title to the fund [and] no equitable interest in the funds transferred to Chase, that transfer cannot be avoided" as a fraudulent transfer. *Jenkins* v. *Chase*, 81 F.3d 592, 597 (5th Cir. 1996); accord *Krommenhoek* v. *A-Mart Precious Metals, Inc., (In re Bybee)*, 945 F.2d 309 (9th Cir. 1991) ("[Debtor] held only the bare legal title to the property transferred [so]…[t]he trustee, therefore, cannot avoid the transfer pursuant to 11 U.S.C. § 548.").[13]

13. Courts look to fraudulent conveyance cases under the Bankruptcy Code when interpreting UFTA. *In re Spatz*, 222 B.R. 157, 164 (N.D. Ill. 1998) ("Because the provisions of the UFTA parallel § 548 of the Bankruptcy Code, findings made under the Bankruptcy Code are applicable to actions under the UFTA.").

In fact, even a prior Sixth Circuit panel, which the majority here refused to follow, held that "assets held in trust…are not subject to fraudulent conveyance claims because the holder of the trust has only legal title." *In re Dayton Title Agency, Inc.*, 724 F.3d 675, 680 (6th Cir. 2013), citing *In re Cannon II,* 277 F.3d 838 (6th Cir. 2002) (holding debtors "funds deposited . . . in express trust for his clients . . . are not subject to . . . avoidance power").

The Tenth and D.C. Circuits are also in accord. They have held that legal title in the hands of a trustee is "without value susceptible of attachment" and cannot be fraudulently transferred. *McVay* v. *W. Plains Ser*v. *Corp.*, 823 F.2d 1395, 1396 (10th Cir. 1987); *Atlas Portland Cement* v. *Fox*, 265 F. 444, 446 (D.C. Cir. 1920) ("[T]he lien of a judgment does not attach…to…naked legal title."). Accord 7 C.J.S. Attachment § 78 (November 2022 Update) ("If a debtor merely holds property as an intermediary for a third party…then the creditor cannot attach it.").

Contradicting these cases and the plain language of UFTA, the Sixth Circuit *sua sponte* held that "ownership is irrelevant" under UFTA, and a fraudulent transfer occurs when a trustee of a revocable, will-substitute trust (the debtor) complies with a revocation demand by the settlor (a non-debtor) and returns only the bare legal title it held in the trust res. App.8a-9a. That the court chose not to publish its lengthy opinion on these issues of national consequence only amplifies the need for this Court's review. Though unpublished, the decision has already garnered national attention. In November 2022, a paper on this case was presented to the Asset Protection Committee of the American College of Trust and Estate Counsel at its national meeting. It stated that "resolution

of the issues raised in the case may have far-reaching effects. Certain aspects of trust law may be significantly impacted depending on how this case progresses."

The confusion this decision will foment if allowed to stand is easy to imagine. Consider the following. An individual with pre-existing creditors moves her property into a revocable, will-substitute trust. She then executes a loan agreement with a *new* creditor, both individually and as trustee of the new trust, and then defaults. Under the law in five other circuits, revocation of the trust at that point would *not* be a fraudulent transfer—even after default—because the trustee did not transfer anything it owned as part of the revocation; it merely returned the settlor's property pursuant to its fiduciary duty under the UTC. UTC § 602(d).

But under the Sixth Circuit's decision, the default by the trust (according to the majority, a separate legal entity from the settlor) means the new creditor *can* claim the revocation violated UFTA because it was revocation of a now-*irrevocable* trust. App.8a-9a. And it certainly would do so, even though it took the same promise from the settlor. Because forcing the settlor to return the property to the now-irrevocable trust would mean the new creditor could execute against the property *to the exclusion* of the settlor's other prior-in-time creditors.

This hypothetical demonstrates how the majority's decision defies common sense and destroys the commercial predictability created by the UTC, UFTA and the decisions of five other circuits. Because this is so, "restrain[ing] the opinions and holdings in this case to just this case" will not be so easy. App.46a (Batchelder, J., dissenting).

C. Treating will substitutes as distinct legal persons prejudices and penalizes the millions who use them.

The consequences of allowing will-substitute trusts to act as separate legal persons will extend well beyond this case, as the dissent explains. App.44a-46a. And the damage it could do has already been acknowledged in academic circles.[14]

Revocable trusts are widely used in the U.S., accounting in 2011 for over $860 billion in institutionally-administered assets.[15] Their popularity is based on the predictability they provide for their settlors and those dealing with them. That predictability includes assurances under the law (prior to this decision) that: (1) property stored there will not be subject to federal gift tax (26 C.F.R. 25.2511-2); (2) the assets stored there during the settlor's life will remain under her sole control, allowing flexibility in their ongoing administration (M.C.L. 700.7602 (UTC § 602)); (3) the settlor has the sole right to name and change beneficiaries of her estate; and (4) creditors of the settlor can count on accessing the assets

14. *E.g.*, Prof. Charles E. Rounds, Jr., "Judge Alice Batchelder endeavors to limit via a dissenting opinion the damage one federal appellate court has surely done to the institution of the trust," www.jdsupra.com/legalnews/judge-alice-m-batchelder-endeavors-to-l-06897/

15. When settlor-administered trusts are included, nearly $1 trillion in assets are held in revocable trusts. Thomas P. Gallanis, *Will-Substitutes: a US Perspective*, *in* PASSING WEALTH ON DEATH: WILL-SUBSTITUTES IN COMPARATIVE PERSPECTIVE, Ch. 1, n.8 (Alexandra Braun and Anne Röthel, eds., 2016) (internal citation omitted).

stored there to satisfy any outstanding obligations (M.C.L. 700.7506 (UTC § 505)).

But this predictability depends, as the dissent cogently stated, on the legal reality that a revocable, will-substitute trust "is a storage place, not a distinct legal entity" and that the settlor "owns the assets, *all of them*, and happens to keep them in his revocable trust." App.33a. In short, its revocability makes it *indistinct* from the settlor. And that means during her lifetime, the settlor can count on complete control of the res of a revocable trust, even to the exclusion of the powers given a trustee. UTC § 602(d); UTC § 808(a).

So prized are revocable estate-planning mechanisms that the UTC says all trusts (including will substitutes) are revocable unless the trust instrument says otherwise. M.C.L. 700.7602(1) (UTC § 602(a)). Thus, before the Sixth Circuit's decision, those dealing with a trust could assume it was revocable unless it expressly said otherwise, and act accordingly. But if the majority's decision stands, that predictability will be lost.

Take this case. Though the instrument establishing Winget's will substitute recites that "[t]he settlor shall have the right at any time . . . to revoke or amend this Trust by the Settlor's act alone," according to the panel majority, that language has not controlled since 2003. Trust, § 3.1, 8/18/21 Appellants' Br., pp. 10–11. So, neither the settlor Winget, his creditors, nor the beneficiaries are entitled to the rights that spring from that language under the UTC. What's more, in the future no one dealing with what the law deems a revocable, will-substitute trust can rely on the UTC to guide their actions. The result is the opposite of predictability; it is legal roulette.

This is illustrated by the uncertainties the Sixth Circuit's decision introduced to the taxation of revocable trusts and their settlors. Before the decision, it was simple: the settlor was responsible for income taxes on assets held in her revocable, will-substitute trust and no gift tax was triggered by holding them there. 26 U.S.C. 2501(a); 26 C.F.R. 25.2511-2. But income taxes on assets held in an irrevocable trust are generally owed by the trust itself because the settlor has surrendered control over them. *Id.* For that reason (surrender of control), assets a settlor placed in an irrevocable trust may be subject to gift tax. *Sanford's Est.* v. *Comm'r of Internal Revenue*, 308 U.S. 39, 43 (1939) (holding that "retention of control over the disposition of the trust property, whether for the benefit of the donor or others" is controlling for gift tax liability).

And here is the crucial point: under the Sixth Circuit's decision, a revocable, will-substitute trust (because it's a separate legal person) can now transform itself into an irrevocable trust without the settlor's assent; even over her objection. So, what was once a predictable and simple assessment of a settlor's tax liability under the Internal Revenue Code has been made confusing and unpredictable.

For example, assume, as here, the revocable, will-substitute trust converts itself to an irrevocable trust (as the majority ruled) without the settlor's knowledge or assent, and the settlor finds out about this transformation 19 years later. Who owed the income taxes on the assets held in trust during all those years? The settlor, or the trust? If the trust was irrevocable, it is typically responsible for the income taxes. App.44a. But what if, as here, the settlor pays those taxes while it is irrevocable

because the instrument creating the will-substitute trust *says* it's revocable? Is the settlor entitled to file amended returns to recoup those income tax payments when the once-revocable will substitute is declared irrevocable–which in Winget's case amounts to hundreds of millions of dollars? The Sixth Circuit's opinion appears to say "yes." App.22a-23a. But there's a catch. The settlor Winget is bound by the three-year statute of limitations for amending returns, meaning he must "eat" the income taxes he paid (but didn't owe) for the other 16 years. 26 U.S.C. 6511(a).

And what about the now-irrevocable trust's income tax obligations? Does it need to file amended returns and pay taxes from the trust res for the three years the settlor is entitled to a refund for taxes he erroneously paid? What about the windfall the irrevocable trust's creditor will enjoy if the hundreds of millions in income taxes owed for the other 16 years do not have to be paid by the irrevocable trust out of the trust res because the settlor already unknowingly paid them? Does the settlor have rights against the irrevocable trust res to recoup the income taxes mistakenly paid on its behalf? And does that right to recoupment have priority over the irrevocable trust's creditor?

Finally, what about the additional assets placed by the settlor in trust *after* it has been converted (retroactively) to an irrevocable trust without his consent? Is the settlor responsible for the gift tax (perhaps millions) potentially owed (retroactively) on those assets? 26 U.S.C. 2501(a); 26 C.F.R. 25.2511-2. What happens if the irrevocable trust's creditor is paid off and it then becomes revocable again?

App.12a-13a.[16] Can the settlor then seek a refund of the gift taxes paid?

All this illustrates the wild conceptual trap created by the Sixth Circuit's decision. It abandons predictable rules of taxation based on settled uniform laws, the UTC among them, in favor of admitted uncertainty. App.23a ("[T]he typical [tax] rules for revocable trusts may not apply [to Winget's now-irrevocable trust]."). And in the process, it creates an inscrutable matrix that leaves unsuspecting settlors at risk of paying millions in taxes they do not owe and cannot get back. Or worse, they could place their property in trust believing it is revocable, only to learn later (even years later) that gift taxes, not to mention penalties and interest, must be paid on that property because their will substitute was converted to an irrevocable trust without their knowledge or consent.

The panel majority provides no answers to the federal tax questions its decision creates. Which means that if that decision stands, the burden for sorting out these questions will fall to the Internal Revenue Service, the federal courts, and ultimately perhaps this Court.

In sum, if the Sixth Circuit's decision is not reversed, the UTC provisions stating that a trust is revocable unless it expressly states otherwise (M.C.L. 700.7602(1) (UTC § 602(a))), will be set aside. And those relying on its provisions (settlors, beneficiaries, creditors and others) as an anchor of predictability will be unfairly prejudiced as that predictability is replaced by legal peril

16. While this is hypothetically possible under the Sixth Circuit's *new* rule, it is not possible here because the debt far exceeds the value of the trust-held assets.

not knowable under current law, and inevitable litigation revolving around these "new, and increasingly creative proclamations about the law of revocable trusts." App.45a.

D. The Sixth Circuit's decision realigns the rights of creditors dealing with settlors of revocable, will-substitute trusts.

Treating revocable, will-substitute trusts as distinct legal persons also rewrites creditors' rights under the UTC. Before the panel majority's decision, creditors of a settlor could execute against property held in a revocable trust because the law deems the settlor (holding equitable title and the right to revoke) that property's owner. M.C.L. 700.7506(1)(a) (UTC § 505(a)(1)); see also M.C.L. 556.128; 566.131. This means all creditors of settlors of revocable will substitutes, known or unknown, existing or future, could count on the settlors' ownership of the trust res. Conversely, as the dissent points out, there is no assurance of the settlor's ownership of the trust res—and thus his creditors' access to it—if the trust is retroactively rendered irrevocable. App.32a.

In other words, before the Sixth Circuit's decision, the UTC provided a creditor with absolute and unambiguous protection when dealing with a settlor of a revocable, will-substitute trust. The settlor's promise was always enforceable against the trust res. But according to the Sixth Circuit, none of that matters now, and which creditor (the settlor's or the revocable trust's) has rights in the trust res is up for grabs. App.9a. This is because the will substitute is a "separate legal person," and can make itself irrevocable without the settlor's knowledge, and even over his objection. A decision to enter a construction contract

that then goes into default would do it. At that point, *only* creditors of the will-substitute trust, now rendered irrevocable by the default, could execute on property held there to the prejudice of the settlor's creditors. Allowing that decision to stand will scramble the rights of creditors under the UTC.

The following hypothetical shows the chaos the Sixth Circuit's decision will sow in what were once routine transactions. A lender loans money to a settlor who recently moved his property into a revocable will substitute while having several pre-existing creditors. Normally, the new lender would be fully protected by securing a promise to repay only from the settlor. M.C.L. 700.7506 (UTC § 505). But the Sixth Circuit's decision makes it more advantageous for the new lender to take the promise to repay *not* from the settlor, but from the trustee of the will-substitute trust, because if he does so and there is a default, the revocable, will substitute will become an irrevocable trust until the trustee's promise is satisfied. App.13a. Further, while the settlor could possibly have that debt discharged or reduced by filing for bankruptcy, a trust has no such right.[17] So, under the Sixth Circuit's ruling, if the will-substitute trust defaults on its promise to the new creditor, the settlor's existing creditors *will not* be able to reach the trust assets to satisfy their claims until (if ever) the new creditor of the trust (with super-priority) is paid out of the trust assets.

17. See 11 U.S.C. 109 (only a "person" may be a bankruptcy debtor); 11 U.S.C. 101 (a "person" includes an "individual, partnership or corporation"); *In re Armstead & Margaret Wayson Trust,* 29 B.R. 58, 58–59 (Bankr. D. Md. 1982) ("Generally, trusts are not eligible for relief in the bankruptcy court. There is good reason for this in that trusts do not have a separate legal existence from the trustee.").

Contra M.C.L. 700.7506(1)(a) (UTC § 505(a)(1)); M.C.L. 556.128; 566.131.

In sum, if the Sixth Circuit's decision is allowed to stand, it will realign the rights of creditors of a settlor in contravention of the UTC. Because the principle at issue is one that affects all 36 states that have adopted the UTC, this decision has national implications and warrants this Court's review.

III. The Sixth Circuit's unchecked discretion to refuse to publish its decisions is unconstitutional.

In her dissent, Judge Batchelder expressed the "vain hope that this small gesture [her dissenting opinion] might help restrain the opinions and holdings in this case to just this case." App.46a. But a more significant gesture—one that limited the majority's holdings to this case alone—was the panel's denial of Winget's motion for publication. App.1a–2a. Unpublished decisions in the Sixth Circuit "carry no precedential weight" and "have no binding effect on anyone other than the parties to the action." *Sheets* v. *Moore*, 97 F.3d 164, 167 (6th Cir. 1996); *Bell* v. *Johnson*, 308 F.3d 594, 611 (6th Cir. 2002). So, by refusing to publish its decision, the Sixth Circuit successfully made its "new, and increasingly creative, proclamations about the law of revocable trusts" purportedly binding on only one person: Larry Winget. App.45a. That decision was both erroneous and unconstitutional.

The Sixth Circuit's Internal Operating Procedures state a panel merely "considers" seven factors when deciding whether to publish a decision in the Federal Reporter. 6 Cir. I.O.P. 32.1(b)(1). Those factors include

whether the decision "[e]stablishes a new rule of law," "modifies an existing rule of law," "[c]reates or resolves a conflict of authority within this circuit or between this circuit and another," "[d]iscusses a legal or factual issue of continuing public interest," or "[i]s accompanied by a… dissenting opinion." *Id.* But critically, even if a decision meets all these criteria, the panel *still* has the discretion to refuse to publish. *Id.*

Here, the panel exercised that unfettered discretion and refused to publish its July 1, 2022, opinion even though the decision created new law regarding the operation of an estate-planning tool used by millions, resolved a dispute involving a billion dollars, included a 12-page dissent, and conflicted with its own prior published decisions and those of five other circuits. App.1a-2a. That discretion—which nearly every federal appellate circuit shares—violates Article III.

As Judge Richard Arnold famously explained in *Anastasoff* v. *U.S.*, 223 F.3d 898 (8th Cir. 2000), the Framers intended "the doctrine of precedent" to act as a limitation on the "judicial power delegated to the courts by Article III of the Constitution." *Id.* at 900. The ever-growing use of unpublished opinions by the Sixth Circuit—and federal appellate courts generally—breaches that constitutional limitation by making adherence to the doctrine of precedent discretionary.[18]

18. More than 87% of the opinions issued by the federal courts of appeal between 2015 and 2020 were unpublished. Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1 (2021).

Here, the unchecked power to deny precedential force to any given decision emboldened the Sixth Circuit to stray "far afield" from established and nationally-uniform trust law in this case, while eliminating any obligation to follow that newly formed path in the next. App.43a. As such, it went well beyond the Sixth Circuit's Article III authority.

The Sixth Circuit's July 1, 2022, decision fashioned a new strain of trust law that purports to bind only Winget. The panel majority created at least three new rules of law that contradict the UTC and this Court's settled precedent: (1) a revocable, will-substitute trust is a separate legal person from its settlor; (2) a trustee of a revocable trust can unilaterally render the trust irrevocable by entering a contract with a third party that goes unsatisfied; and (3) a settlor's exercise of an express revocation right is a constructive fraudulent conveyance. App.12a-15a. The Sixth Circuit reached beyond the jurisdictional limitation of the "probate exception" to create these new rules, which conflict with prior decisions of this Court, five other Circuits, and the Sixth Circuit itself.

Under the circumstances—to quote Justice Thomas in *Plumely* v. *Austin,* 574 U.S. 1127 (2015)— "[i]t is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit." *Id.* The Sixth Circuit's discretion to refuse to publish a decision merely to avoid creating binding precedent or avoid the rigors of distinguishing existing binding authority, is unconstitutional and should be struck down. As Justice Story long ago eloquently explained:

> The case is not alone considered as decided and settled; but the principles of the decision

> are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence . . . . It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

Joseph Story, *Commentaries on the Constitution of the United States* §§ 377–78 (1833), quoted in *Anastasoff*, 223 F.3d at 903–04.

* * *

The Court should grant the petition and either: (1) reaffirm the probate exception to federal jurisdiction and vacate the decision below; or (2) reverse the panel majority opinion on the merits, restoring order to the law of revocable trusts under the UTC. The Court should also denounce the Sixth Circuit's discretionary publication standards as inconsistent with Article III. Because this case implicates the federal tax code, the views of the Solicitor General may be warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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DECEMBER 2022

APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 21-1568

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

and

ALTER DOMUS LLC,

Plaintiff-Appellee,

v.

LARRY J. WINGET; LARRY J. WINGET LIVING TRUST,

Defendants-Appellants.

Case No. 21-1568

ORDER

BEFORE: SUTTON, Chief Circuit Judge; BATCHELDER, and THAPAR, Circuit Judges.

Appendix A

Upon consideration of the appellant's motion to publish this Court's July 1, 2022 opinion, It is **ORDERED** that the motion be, and it hereby is **DENIED**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

/s/

Issued: August 17, 2022

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED JULY 1, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 21-1568

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

ALTER DOMUS LLC,

Plaintiff-Appellee,

v.

LARRY J. WINGET; LARRY J. WINGET LIVING TRUST,

Defendants-Appellants.

July 1, 2022, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

OPINION

Before: SUTTON, Chief Judge; BATCHELDER and THAPAR, Circuit Judges.

Appendix B

THAPAR, J., delivered the opinion of the court in which SUTTON, C.J., joined. BATCHELDER, J. (pp. 23-34), delivered a separate dissenting opinion.

THAPAR, Circuit Judge. A tale as old as time? Not quite. But for the past fifteen years JPMorgan Chase Bank has been trying to collect a nearly half-a-billion-dollar debt that Larry Winget and the Larry J. Winget Living Trust guaranteed. Unsurprisingly, they don't want to pay. And as a result, we've already handled eight appeals arising out of this case and related litigation.

Today, we address whether Winget can revoke the Trust, making the trust assets unreachable to Chase. He cannot.

I.

This case arises out of a $450 million loan that Larry Winget's holding company, Venture, obtained to buy a European company. But that company eventually became insolvent, triggering default and acceleration clauses in the loan agreement. JPMorgan Chase Bank—the administrative agent for the lenders—required new collateral to prevent acceleration of the debt.[1] So Winget agreed to guarantee the loan both in his individual capacity and as a representative of the Larry J. Winget Living Trust; Winget is the Trust's settlor (the person who creates the trust), trustee, and sole beneficiary. The

1. Alter Domus, LLC is now the administrative agent and thus the appellee in this case. For ease of reference, we refer only to Chase.

guaranty agreement limited Winget's personal liability to $50 million but did not similarly limit the Trust's liability.

In 2003, Venture filed for bankruptcy. This triggered a default under the parties' guaranty agreement and the debt became due. Chase sued both Winget and the Trust to recover. Winget paid $50 million and no longer owes the bank any money in his personal capacity. But the Trust is liable for the rest of the debt, which now amounts to more than $750 million.

Winget, as trustee of the Trust, has resisted paying the Trust's debt at every step. In 2014, nearly six years after Chase sued to recover the debt, Winget revoked the Trust and removed all trust assets. According to Winget, the trust instrument (the document which created the Trust) gave him "the right at any time . . . to revoke or amend th[e] Trust" by his act alone. R. 696-1, Pg. ID 25418. Winget kept the revocation secret for over a year. During this time, the district court entered an amended final judgment establishing that the Trust owed Chase nearly half-a-billion dollars under the guaranty agreement. And the parties were actively litigating whether Chase could use the trust assets—which, unbeknownst to anyone but Winget, no longer existed—to satisfy that debt.

Winget came clean when he sought a declaratory judgment that would establish that, given the revocation, Chase has no further recourse against him or the assets that were once held in the Trust. Chase counter-claimed, arguing that the revocation was a constructively fraudulent transfer under the Michigan Uniform Fraudulent Transfer

Act (MUFTA). The district court agreed with Chase and granted its motion for judgment on the pleadings. Winget didn't appeal this ruling. Rather, he rescinded his revocation, retitling to the Trust all property that it held at the time of the revocation.

But Winget had one more card to play. Before he rescinded the revocation, various LLCs that had been held in the Trust (until Winget revoked it) distributed hundreds of millions of dollars in cash and promissory notes to Winget. When Chase learned about these distributions, it sued Winget for unjust enrichment. Chase moved for summary judgment and sought a constructive trust over the distributions. The district court granted the motion and ordered Winget to place the distributions (both cash and promissory notes) in a constructive trust. In the same order, the district court dismissed Winget's action for declaratory judgment.

The district court entered a final judgment on the fraudulent-transfer claim, the unjust-enrichment claim, and Winget's declaratory-judgment action. Winget appealed all three rulings.[2] Given the procedural history

2. After Winget reinstated the Trust, the district court enjoined Winget from further interfering with the trust property. We upheld the injunction, and it remains in place today. *See JPMorgan Chase Bank, N.A. v. Winget*, 801 F. App'x 962 (6th Cir. 2020). According to Chase, Winget's claim for declaratory relief is moot given this injunction. But Winget can (and did) appeal the fraudulent-transfer decision. And since Chase prevails, Winget's claim for declaratory relief necessarily must fail. After all, a declaration that Chase has no recourse against the trust assets is the inverse of whether Chase is entitled to the assets based on a fraudulent transfer. So we need not address mootness nor the declaratory-judgment action.

and the issues presented in the appeal, we directed the parties to submit supplemental briefing on several questions.

II.

We start with the fraudulent-transfer claim and review de novo the district court's order granting Chase judgment on the pleadings.

A.

A prerequisite to any fraudulent-transfer claim is that a transfer in fact occurred. *See* Mich. Comp. Laws § 566.35(1). MUFTA defines transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset." Mich. Comp. Laws § 566.31(q). Thus, when a creditor has access to the assets, and a debtor takes action to fraudulently put those assets beyond the creditor's reach, a creditor has a basis for relief. *Glazer v. Beer*, 343 Mich. 495, 72 N.W.2d 141, 143 (Mich. 1955).[3]

3. *Glazer* involved the Michigan Uniform Fraudulent Conveyance Act (MUFCA), which was replaced by MUFTA in 1998. But courts interpret the relevant provisions the same under both statutes. *See In re Harlin*, 321 B.R. 836, 839-40 (E.D. Mich. 2005); *see also* Jeffrey L. LaBine, *Michigan's Adoption of the Uniform Fraudulent Transfer Act: An Examination of the Changes Effected to the State of Fraudulent Conveyance Law*, 45 Wayne L. Rev. 1479, 1481, 1488, 1491-92, 1500 (1999).

The revocation of the Trust constitutes such a transfer. Before the revocation, the Trust had assets that creditors like Chase could take to fulfill the Trust's debt. *See JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d 748, 750-51 (6th Cir. 2019). But after the revocation, those assets were placed beyond Chase's reach. In other words, the revocation caused the Trust to effectively "part[] with" its assets. Mich. Comp. Laws § 566.31(q). To be sure, the revocation could be considered involuntary as it was done by Winget, not the Trust. But MUFTA explicitly sweeps involuntary transfers within its ambit. *Id.* Thus, the revocation is a transfer under MUFTA.

Winget thinks otherwise. The thrust of his argument is that a debtor can fraudulently transfer only "that which the debtor actually owns." *In re CyberCo Holdings, Inc.*, 382 B.R. 118, 142 (Bankr. W.D. Mich. 2008). And as we explained before, trusts don't usually "own" property. *Winget*, 942 F.3d at 750. Rather, they hold property for the benefit of others. *See, e.g., Wellpoint, Inc. v. Comm'r*, 599 F.3d 641, 648 (7th Cir. 2010); Restatement (Third) of Trusts § 2 cmt. d (Am. L. Inst. 2003). Because he was the Trust's settlor and maintained the power to revoke, Winget suggests that he—rather than the Trust—owned the property held by it. So, according to Winget, revoking the Trust didn't transfer anything; he simply maintained property he already owned.

This is not the first time Winget has made an "ownership" argument. In a prior appeal, he asserted that because he (a non-debtor) "owns" the trust property, Chase can't take it to satisfy the *Trust's* debt. *See Winget*,

942 F.3d at 750. But we rejected that argument, explaining that "if ownership mattered, creditors of a trust . . . could almost never recover from the trust property." *Id.* And that, we said, conflicts with not only Michigan law but also hornbook trust law. *Id.*[4]

At bottom, Winget takes issue with our prior ruling. *See id.* at 750-52. For if there was no initial transfer of property into the Trust (and thus no transfer when it was revoked), presumably there are no trust assets that Chase can reach. In both cases, the assets are (and always were) Winget's as settlor. But just as before, ownership is irrelevant. MUFTA's understanding of "transfer" does not turn on who owns the assets. Instead, it turns on how the revocation affected Chase's access to the assets. *See Glazer*, 72 N.W.2d at 143; *cf. Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1302 (11th Cir. 2020) (interpreting identical language in the Florida Uniform Fraudulent Transfer Act to mean that a transfer occurs "[a]s long as the debtor relinquishes some interest in or control over the asset . . . even if he remains the technical owner of the asset"). The revocation placed the trust assets beyond Chase's reach. Thus, the revocation was a transfer.

Winget still pushes back. He suggests that this case resembles *Meoli v. The Huntington National Bank*, 848 F.3d 716 (6th Cir. 2017). There, we held that a bankruptcy trustee could not hold a bank liable for

4. Further, under Winget's theory of ownership, neither a revocable trust nor an irrevocable trust would ever own property. And no one disputes that when an irrevocable trust breaks a contract, a creditor can go after the assets held by the irrevocable trust.

checking deposits that the debtor made to the bank under a fraudulent-transfer theory. *Id.* at 725-28. We reasoned that the bank acted as a mere conduit and did not maintain sufficient "dominion and control" over the deposits to be a "transferee" under the bankruptcy code. *Id.* at 725-26.[5] Winget argues that the Trust similarly lacked "dominion and control" over the trust assets here because he could demand the property back at any time, much like the debtor in *Meoli* could demand its money from its checking account. According to Winget, without "dominion and control," the Trust was not a transferee when he first placed the property into the Trust. And so the Trust could not be a transferor when Winget later revoked the Trust. Winget again emphasizes that a "debtor can only transfer . . . that which the debtor actually owns." Reply Br. 15 (quoting *In re CyberCo Holdings*, 382 B.R. at 142).

Winget's comparison is unconvincing. In *Meoli*, we emphasized that the bank's "obligation to maintain liquidity" was "sufficiently important to defeat any dominion and control" that the bank might otherwise have over the funds. 848 F.3d at 726 (internal quotation marks omitted). And here, although Winget could demand the trust property back at any time, the Trust did not have to remain liquid. Indeed, so long as the property remained in the Trust, the trustee explicitly had the power to enter contracts and make decisions that could affect the value of the assets in a way that a depository bank can't.

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5. Although there are some differences between fraudulent transfer under the bankruptcy code and MUFTA, those differences are not relevant here. *Compare* 11 U.S.C. § 548(a), *with* Mich. Comp. Laws § 566.35; *see also* 4 Norton Bankr. L. & Prac. 3d § 67:1.

B.

Having established that a transfer occurred, we now consider whether the transfer was fraudulent. Chase does not contend that Winget *intended* to defraud it by revoking the Trust. Rather, it argues the revocation was constructively fraudulent. *See* Mich. Comp. Laws § 566.35(1). A transfer of assets is constructively fraudulent if: (1) the creditor's claim "arose before the transfer," (2) the debtor was insolvent at the time of transfer or "became insolvent as a result of the transfer," and (3) the debtor did not receive "a reasonably equivalent value in exchange for the transfer." *Id.; Dillard v. Schlussel*, 308 Mich. App. 429, 865 N.W.2d 648, 656 (Mich. Ct. App. 2014). Here, all three elements are met.

First, Chase's claim arose well before Winget revoked the Trust. MUFTA defines a "claim" as the "right to payment, whether or not the right is reduced to judgment." Mich. Comp. Laws § 566.31(c). Chase's right to payment arose when Venture began bankruptcy proceedings in 2003. That's because the bankruptcy constituted a default under the company's loan agreement with Chase. And under default, Chase could enforce the guaranty against Winget and the Trust. So Chase's claim arose more than ten years before Winget's 2014 revocation.

Second, the Trust was insolvent after the revocation. Under the Act, a debtor is insolvent if "the sum of the debtor's debts is greater than the sum of the debtor's assets." Mich. Comp. Laws § 566.32. Here, the revocation documents state that Winget revoked the Trust in its

entirety. Thus, its assets were zero. Because it owed money to Chase under the guaranty agreement, the Trust was, by definition, insolvent.

Third, the Trust did not receive "reasonably equivalent value in exchange" for the revocation. Indeed, Winget admits that the Trust received nothing. That's the nature of a revocable trust; the settlor can usually revoke at any time, for any reason. The reasonably-equivalent-value requirement thus feels out of place in the revocable-trust context. After all, a trust ceases to exist after it is revoked so it can never receive "reasonably equivalent value." But that doesn't mean a revocation can't be fraudulent. The Trust has a duty to maintain value given its obligation to repay Chase and that in turn determines whether the revocation was fraudulent. *Cf. McCaslin v. Schouten*, 294 Mich. 180, 292 N.W. 696, 699 (Mich. 1940) (explaining that what constitutes reasonably equivalent value is "determined from the standpoint of creditors," not debtors). From Chase's perspective, the revocation depleted the Trust, and in exchange, the Trust received nothing from which it could pay the outstanding debt.

Winget complains that this interferes with his contractual right to revoke the Trust at any time. But his right is not unlimited. As we explained in our prior opinion, trusts—both revocable and irrevocable—can enter binding contracts. *Winget*, 942 F.3d at 750. A necessary consequence is that a trust's contractual obligation may affect the rights of third parties, like beneficiaries and settlors, even if they are not themselves parties to the contract. Here, the Trust guaranteed Venture's loan.

So when Venture defaulted, the Trust had to pay Chase and could do so with the trust assets. *See id.* at 750-51. That's when Chase's claim to the assets arose. At that time, Winget no longer had an unfettered right to the trust assets—at least not until Chase was repaid. And Winget could no longer revoke the Trust since doing so after Chase's claim arose would (and did) deplete the trust assets, preventing the Trust from fulfilling its obligation to Chase. In this way, Winget's right to revoke was limited by the Trust's obligation to Chase—an obligation Winget himself assumed as trustee.

Winget disagrees. He argues that the Trust's obligation to Chase didn't impact his revocation right since he and the Trust are separate legal persons with separate obligations to Chase. Because he fulfilled his individual obligation, Winget suggests that Chase has no recourse against him for the Trust's debt. Winget is correct: We previously held that he is a separate legal person from the Trust. Indeed, throughout the contract setting up the loan, Winget and the Trust are listed as separate entities. But that doesn't give Winget the right to revoke the Trust after Chase's claim arose. Doing so would allow Winget to interfere with Chase's ability to recover from the Trust under the guaranty agreement. And that arguably constitutes a separate tort: intentional interference with contract. *Cf.* Restatement (Second) of Torts § 766 cmt. b (Am. L. Inst. 1979) (explaining that "there is a general duty not to interfere intentionally with another's reasonable business expectancies . . . with third persons"). It doesn't matter that Winget was not a party to the Trust's contract with Chase; those who tortiously

interfere rarely are. *See id.; see also Tata Consultancy Servs. v. Sys. Int'l, Inc.*, 31 F.3d 416, 423-24 (6th Cir. 1994) (outlining the development of tortious interference under Michigan law). So separate legal personhood doesn't give Winget license to revoke the Trust to Chase's detriment.

Winget resists this conclusion. Because his right to revoke predated the guaranty agreement, Winget says, Chase had notice of his revocation right and chose not to limit it when negotiating the guaranty. He asserts that we must enforce the parties' agreement as written and find his revocation not fraudulent. Anything else, according to Winget, would rewrite the parties' agreement.

But this goes too far. The guaranty does not say one way or the other how Winget's revocation right interacts with the Trust's obligation. That is a fundamental difference between this case and the case Winget cites for support. *See Cyber Solutions Int'l, LLC v. Pro Mktg. Sales, Inc.*, 634 F. App'x 557 (6th Cir. 2016). There, the agreement explicitly noted that the lender was "assuming the risk" that its rights "might be disrupted" by an earlier lender's security agreement. *Id.* at 565. So contrary to Winget's assertion, restricting his revocation right here does not rewrite the guaranty. It simply applies a default rule in the face of contractual silence.

Winget still pushes back. He likens this case to a priority dispute between creditors and argues that he has the superior claim to the trust assets. In making this argument, Winget emphasizes that Chase was a subsequent, unsecured creditor. But this makes no

difference to whether a fraudulent transfer occurred. MUFTA was enacted in large part to protect unsecured creditors like Chase. *See Dillard*, 865 N.W.2d at 662. And here, it appears Winget revoked the Trust just so Chase (an unsecured creditor) could not reach the trust assets. That's exactly the type of conduct MUFTA aims to prevent.

C.

Perhaps in a last-ditch effort, Winget argues that "fact questions" preclude us from ruling for Chase. He disputes whether he as settlor intended to allow the Trust's guaranty to bind his property or restrict his revocation rights. But that's not relevant. Winget's intent is not part of the analysis for a constructive-fraudulent-transfer claim. *See* Mich. Comp. Laws § 566.35. And nothing in the terms of the guaranty agreement suggests that was the case. In fact, the agreement implicitly recognizes that Winget and the Trust are separate legal entities and that both Winget and the Trust are bound by the agreement. That should have been enough to put Winget on notice that Chase could recover from the Trust upon default.

Because all three elements of fraudulent transfer are met, Chase is entitled to judgment on the pleadings.

III.

Chase also contends that Winget was unjustly enriched by the LLC distributions (both the promissory notes and cash) that he received during the revocation

period (after Winget revoked the Trust and before he rescinded the revocation). The district court agreed and granted Chase summary judgment on the unjust-enrichment claim. As a remedy, it imposed a constructive trust over the promissory notes and cash distributions. We review the grant and the remedy in turn.

A.

The doctrine of unjust enrichment is rooted in the idea that no one should be allowed to profit inequitably at another's expense. *Wright v. Genesee County*, 504 Mich. 410, 934 N.W.2d 805, 809 (Mich. 2019). To maintain an unjust-enrichment claim under Michigan law, a plaintiff must show (1) the defendant received a benefit from the plaintiff that (2) resulted in an inequity to the plaintiff. *AFT Mich. v. Michigan*, 303 Mich. App. 651, 846 N.W.2d 583, 590 (Mich. Ct. App. 2014). The remedy is restitution. *See Wright*, 934 N.W.2d at 809-10. That's because the goal is not to compensate for an injury (like it would be with a tort or breach-of-contract claim), but to return to the plaintiff the benefit that "unjustly enriched" the defendant.

To begin, we must consider the nature of the LLC distributions and who is entitled to them. Before the revocation, the Trust held membership interests in the LLCs that later distributed cash and promissory notes to Winget during the revocation period. Those who hold membership interests in an LLC are generally entitled to its distributions. But under the amended final judgment Chase had a right to execute on the trust assets—

including the LLCs' membership interests—to fulfill the Trust's debt. *See Winget*, 942 F.3d at 750-52. Chase would have typically moved for charging orders entitling it to all distributions arising from the Trust's membership interests. *See* Mich. Comp. Laws § 450.4507(1)-(2). But before Chase could do so, Winget revoked the Trust and retitled the trust property (including the membership interests) in his own name. Because Winget now held the LLC-membership interests, he received the distributions that would have otherwise gone to Chase under the charging orders.

Retracing this chain of events makes clear that Chase satisfied the elements of unjust enrichment: (1) Winget received a benefit (distributions from the membership interests) that (2) resulted in inequity to Chase. The inequity? Chase could no longer receive the distributions that it would have received with charging orders but for the fraudulent revocation. In other words, Winget "profited inequitably" at Chase's expense. *Wright*, 934 N.W.2d at 809 (cleaned up).

Winget rejects this conclusion on two main grounds. He denies that he was unjustly enriched by the promissory notes and disputes the amount by which the cash distributions unjustly enriched him.

1.

Start with the promissory notes. One of the LLCs distributed the promissory notes to Start with the promissory notes. One of the LLCs distributed the

promissory notes to Winget after he revoked the Trust. Winget suggests he was not unjustly enriched by them because they reflect a debt the LLC already owed Winget. Rather than take about $100 million in cash distributions, Winget says he loaned that money back to the LLC to fund operations. And Winget argues that the promissory notes he allegedly received in exchange for these loans merely reflect this debt.

But the timing is key. Chase's right to the LLC's distributions arose once it could obtain a charging order (i.e., when the amended final judgment issued). *See* Mich. Comp. Laws § 450.4507(1)-(2). So if the promissory notes reflect a debt that predates the amended final judgment, they'd be outside the scope of a charging order and Chase isn't entitled to them. But if they're a debt incurred after the judgment, Chase is entitled to them.

Winget argues the former. And to bolster his argument, he points to the deposition testimony of several individuals, including Timothy Bradley, the LLC's manager. The testimony supports Winget's allegation that, for several years before the amended final judgment, rather than taking cash distributions as an LLC member, Winget loaned that money back to the LLC to fund operating costs and the promissory notes represent those loans.

But there's a problem for Winget. The promissory notes include integration clauses that explain "there are no conditions or understandings which are not expressed in this Note." R. 926-26, Pg. ID 30460; R. 926-27, Pg. ID

30465. That means we can't look beyond the four corners of the notes to determine whether they represent a debt from before the amended final judgment. *See JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 256 (6th Cir. 2015) ("[W]here the parties include an explicit integration clause within a contract, that clause is conclusive that the parties intended the contract to be the final and complete expression of their agreement."). Based on the language of the notes, we know only that the LLC "promise[d] to pay" Winget $150,000,000. And that the effective date of these promises was June 29, 2017—nearly two years after the amended final judgment. There is no mention of an earlier agreement. So we can't assume the notes reflect an earlier debt to Winget. And because Chase was entitled to all distributions when the promissory notes were penned, Winget was unjustly enriched by them.

In his supplemental brief, Winget argues that the Trust was not a party to the loans between the LLC and Winget, nor was the Trust a party to the promissory notes that represent those loans. Winget suggests this means the Trust would have had no right to the promissory notes and thus Chase—as the Trust's judgment creditor—has no right to them either.

But these facts don't add up. Winget claims that he personally loaned the money to the LLC rather than receive cash distributions as the LLC's member. Yet until he revoked the Trust, Winget was not a member of the LLC—the Trust was. Indeed, the Trust was the LLC's only member. And distributions are issued to members, not third parties (which Winget was at the time he alleges

the loans were made). That means the LLC would have made distributions to the Trust, not Winget. And it would have been the Trust, not Winget, who loaned back the cash to cover the LLC's operating costs.

There's a simple explanation for why the Trust wasn't a party to the promissory notes: Winget revoked the Trust before the notes were memorialized. Thus, the Trust didn't exist at the time the promissory notes were distributed. But since the revocation was fraudulent, we must consider what would have happened but for the revocation. And but for the revocation, the Trust would have been the LLC's member and the party to whom the LLC issued the promissory notes. So Chase would have been entitled to them under the charging orders.

2.

As for the cash distributions, Winget argues he should not be liable for the portion that he used to pay the federal taxes on the LLCs' income (about $79 million). According to Winget, he was not unjustly enriched by this amount since it was always "earmarked" for taxes. If Chase can recover this portion, Winget suggests, it will receive a greater benefit than he retained. And that violates the purpose of restitution. *See Wright*, 934 N.W.2d at 809-10.

Whether Winget was unjustly enriched by the $79 million paid in taxes depends on whether he is personally liable for the taxes on the LLCs' income. And that in turn depends on who is liable for the Trust's taxes.

First, the LLCs' income. The LLCs elected to be "pass-through" entities for federal income-tax purposes. *See* 26 U.S.C. § 1366. That means the LLCs aren't taxed directly like a C corporation would be. Rather, the LLCs' income, losses, deductions, and credits "pass through" to its members. *See S Corporations*, I.R.S. (Jan. 18, 2022), https://www.irs.gov/businesses/small-businesses-self-employed/s-corporations. The members then report their allocable share of the LLC's income on their personal tax returns and are taxed at their individual income-tax rates. 26 U.S.C. § 1366. Here, the Trust was the member of the relevant LLCs until Winget revoked the Trust. So the Trust was personally responsible for the taxes on the LLCs' income; the LLCs' income would thus be taxed based on the Trust's tax classification.

LLC members—like the Trust—can't pay for income tax associated with an LLC directly from the LLC's assets. *Cf. Florence Cement Co. v. Vettraino*, 292 Mich. App. 461, 807 N.W.2d 917, 922-23 (Mich. Ct. App. 2011) (explaining that LLC members cannot "treat[] their personal liabilities" as the LLC's liabilities). Rather, the Trust would typically seek a distribution to cover the taxes. But a member with a charging order on its membership interest—like the Trust—can't seek a distribution. That's because, under Michigan's charging-order statute, judgment creditors (here, Chase) are entitled to all distributions regardless of the distribution's purpose. *See* Mich. Comp. Laws § 450.4507(1)-(2). So any distribution here would have gone directly to Chase rather than the Trust.

But even under a charging order, the Trust would remain a member of the LLCs and thus would be liable for the income tax arising from its membership interests. *See id.* § 450.4507(4) ("[T]he member that is the subject of the charging order remains a member of the limited liability company and retains all rights and powers of membership except the right to receive distributions to the extent charged."); *cf. United States v. Basye*, 410 U.S. 441, 453-54, 93 S. Ct. 1080, 35 L. Ed. 2d 412 (1973) ("[I]t is axiomatic that each [member] must pay taxes on his distributive share of the partnership's income without regard to whether that amount is actually distributed to him."); *see also* 1 Ribstein and Keatinge on Ltd. Liab. Cos. § 10:24 (June 2022 Update); Jay D. Adkisson, Carter G. Bishop & Thomas E. Rutledge, *Recent Developments in Charging Orders*, Bus. L. Today, Feb. 2013, at 1-2. To pay the taxes on the LLCs' income, then, the Trust would have had to come up with the money itself.[6]

Who is liable for the Trust's taxes? The district court didn't answer that question. Rather, it assumed without explanation that Winget would be personally liable because the LLCs elected to be taxed as pass-through entities. But that skips a step. The Trust—not Winget—was the member of the LLCs before the Trust was revoked. So who is liable for the taxes on the LLCs' income depends on who is liable for the Trust's taxes. And whether Winget was unjustly enriched by the $79 million

6. If at some point the Trust becomes insolvent, the IRS would have priority to any distribution issued by the LLCs rather than Chase. *See* 14A Mertens Law of Fed. Income Tax'n § 54:147 (May 2022 Update).

turns on this question. If Winget is personally liable, he would have had to pay for the taxes himself, leaving the trust assets to repay Chase. But if the Trust is liable, it would have paid for the taxes out of its own assets and that in turn would have diminished the assets available to Chase. Winget was unjustly enriched only if the former is true.

It isn't clear that Winget was personally liable for the Trust's income tax. For under the Internal Revenue Code, the settlor of a revocable trust typically remains liable for the income tax of the trust only so long as his power to revoke is "exercisable." 26 U.S.C. § 676(a); *see also* Bogert's The Law of Trusts and Trustees § 264.5 (June 2021 Update). Winget was the settlor of the Trust but his power to revoke was likely not "exercisable." That's because his ability to revoke was limited by the Trust's obligation to repay Chase. Indeed, when Winget exercised his right to revoke, it resulted in a fraudulent transfer. So the typical rules for revocable trusts may not apply.

Chase doesn't argue that Winget's revocation right was exercisable. Nor does it point to another provision of the Internal Revenue Code that should apply instead. And that's a problem. After all, it's Chase's burden to show that Winget was unjustly enriched by the full amount of the cash distributions, including the $79 million he paid in taxes. *See AFT Mich.*, 846 N.W.2d at 590. To meet that burden, Chase needed to prove that Winget is personally liable for the Trust's taxes and thus couldn't pay for them out of the trust assets. It didn't meet that burden.

Thus, the district court should have excluded the $79 million from Chase's relief. It didn't. So we reverse that aspect of the district court's decision. That said, Winget was unjustly enriched by the remaining cash distributions. Indeed, Chase has shown it is entitled to all but the $79 million that Winget paid in taxes.

B.

Finally, we turn to the remedy: the constructive trust imposed on the promissory notes and cash distributions. Winget challenges that decision as an abuse of discretion. *See Anchor v. O'Toole*, 94 F.3d 1014, 1025 (6th Cir. 1996).

A constructive trust is "not a real trust" like Winget's Trust. *See* Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt. b (Am. L. Inst. 2011). Rather, it is an equitable remedy that comes into existence after a court determines that the plaintiff is entitled to specific property in the defendant's possession. *In re Omegas Grp., Inc.*, 16 F.3d 1443, 1451 (6th Cir. 1994); *see also In re Filibeck Estate*, 305 Mich. App. 550, 853 N.W.2d 448, 449-50 (Mich. Ct. App. 2014). The "trust" language is merely a metaphor: The defendant (here, Winget) holds the designated property "in constructive trust" for the plaintiff (here, Chase). *See* Restatement (Third) of Restitution & Unjust Enrichment § 55 cmt. b (Am. L. Inst. 2011). Translation: The plaintiff has a superior claim to property in the defendant's possession, so the defendant is simply "holding" the property for the plaintiff until it is returned. The practical result is a "mandatory injunction" directing the defendant to surrender the property to the plaintiff. *Id.*

Appendix B

Under Michigan law, a constructive trust may be imposed when "necessary to do equity or to prevent unjust enrichment." *Kammer Asphalt Paving Co. v. E. China Twp. Sch.*, 443 Mich. 176, 504 N.W.2d 635, 641 (Mich. 1993) (citation omitted). Constructive trusts are often imposed when the property at issue was "obtained through fraud, misrepresentation, concealment, undue influence," or another circumstance that makes it "unconscionable" for the defendant to "retain and enjoy the property." *Id.* (citation omitted).

And that's exactly what happened here. Winget obtained the promissory notes and cash distributions only because of his *fraudulent* revocation—precisely the behavior that justifies a constructive trust. *See id.* Further, when he rescinded the revocation, Winget told the court that he returned the trust property to "exactly the condition it was [in] immediately before the Trust was revoked." R. 777, Pg. ID 27032. Yet he kept the cash distributions and promissory notes for himself. This behavior is arguably concealment. In any event, Winget's actions directly contributed to the reason the district court imposed the constructive trust. *See Kammer Asphalt Paving*, 504 N.W.2d at 641. Thus, the district court did not abuse its discretion.

Still, Winget attacks the district court's decision on three fronts. First, he argues that a constructive trust is inappropriate when money damages are calculable and the target of the constructive trust is solvent. And here, the Trust is solvent so, Winget says, a constructive trust wasn't necessary.

But that's not the law. In Michigan, a court may impose a constructive trust whenever "necessary to do equity or to prevent unjust enrichment." *Id.* And Michigan courts have upheld constructive trusts against solvent parties. *See, e.g., Sloan v. Silberstein*, 2 Mich. App. 660, 141 N.W.2d 332, 338-40 (Mich. Ct. App. 1966). True, Chase could have sought a money judgment against the Trust. So a constructive trust may be a belt-and-suspenders remedy; that is, it is just a way to ensure the Trust will pay up. *See* Restatement (Third) of Restitution and Unjust Enrichment § 55 cmt. c (Am. L. Inst. 2011). But that doesn't mean the district court abused its direction by imposing one. *Cf. Winget*, 942 F.3d at 751-52 (describing the "extremely broad" authority that Michigan gives courts to execute judgments (citation omitted)). Indeed, there was reason to believe that Winget—after secretly revoking the Trust—might try to pull another fast one on Chase. A constructive trust ensures he can't.

Next, Winget objects to the fact that the constructive trust directs the assets directly to Chase rather than the LLCs that gave him the distributions (both cash and promissory notes). As he sees it, the LLCs can't be fully restored (the goal of restitution) if the assets go to Chase. But he's got the analysis flip-flopped: The goal of restitution is to extract the unjust benefit from the wrongdoer (Winget) and to return that benefit to the wronged party. *See Wright*, 934 N.W.2d at 810. Here, Chase is the wronged party, not the LLCs. Indeed, had Winget not revoked the Trust, Chase would have been entitled to the distributions—not the LLCs. So the district court did not abuse its direction by imposing a constructive

trust on the promissory notes and cash distributions (save for the $79 million paid to the IRS).

And last, Winget argues that imposing a constructive trust on the $79 million he paid to the IRS is "impossible" because those funds are no longer "identifiable." Appellants Br. 51. We need not address this argument. As mentioned above, Chase has not met its burden to prove Winget was unjustly enriched by the $79 million. That means Chase is not entitled to the $79 million currently held in constructive trust and the district court abused its discretion by imposing a constructive trust on this money.

C.

Winget makes additional arguments about the interaction between the fraudulent-transfer claim and the unjust-enrichment claim. He objects to the fact that the two claims are based on the same wrongful conduct: the revocation. And he suggests the unjust-enrichment claim (including the constructive-trust remedy) can't stand because courts may not "grant equitable relief without first determining that the plaintiff has no adequate remedy at law." *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 662 (6th Cir. 1996). Winget argues that MUFTA—not equity—provides the remedy. But that misstates Michigan law. MUFTA doesn't supplant common-law remedies like unjust enrichment, it supplements them. Mich. Comp. Laws § 566.42. That means Chase can seek relief under both theories. *See Morris Pumps v. Centerline Piping, Inc.*, 273 Mich. App. 187, 729 N.W.2d 898, 907 (Mich. Ct. App. 2006). And as for the remedy, Michigan courts have

held that a constructive trust may be imposed "even where a legal remedy exists." *Reed & Noyce, Inc. v. Mun. Contractors, Inc.*, 106 Mich. App. 113, 308 N.W.2d 445, 448 (Mich. Ct. App. 1981). So in this regard, Winget's gripe with the district court's ruling rings hollow.

IV.

According to the dissent, the above analysis stems from flawed premises. *See* Dissenting Op. 33. Rather than consider the issues presented in this appeal, it would wind back the clock seven years and reverse our prior decision that held the Trust had a binding contract with Chase. *Id.* at 12. The dissent makes several points as to why that decision could be wrong. And if we were working on a blank slate, we would take seriously each of these arguments as well as the competing arguments on the other side. But we aren't working on a blank slate. Our slate is chock full of prior decisions—each building from and relying on our *unchallenged* prior holding that the Trust and Chase have a binding contract.

Before we disturb seven years of litigation based on a single bad apple, we have an obligation to weigh prudential concerns and consider the consequences. *See* 18B C. Wright & A. Miller, *Federal Practice and Procedure* § 4478 (3d ed. Apr. 2022 Update). Indeed, the Supreme Court has explained that courts should be "loath[]" to revisit prior decisions absent "extraordinary circumstances." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988). Here, we can't properly consider whether

extraordinary circumstances might justify revisiting our prior opinion. That's because neither party has asked us to review the so-called rotten apple. The last time Winget challenged the ruling from that appeal was when he sought certiorari in the U.S. Supreme Court. But the Court denied cert. *Winget v. JPMorgan Chase Bank, N.A.*, 577 U.S. 1048, 136 S. Ct. 689, 193 L. Ed. 2d 520 (2015) (mem.). Since then, everyone—court and parties included—has operated within the confines of the ruling, for better or worse. Winget even accepted the ruling as law of the case in a prior appeal. *See* Brief of Appellants at 20 n.6, *JPMorgan Chase Bank, N.A. v. Winget*, No. 19-2194 (6th Cir. Dec. 16, 2019). That concession arguably waived any argument challenging the holding. The dissent doesn't explain why we should overturn a decision that Winget not only waived but has not asked us to review. *See Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019) (explaining that a party forfeits an argument if he does not raise it below); *cf. Bousley v. United States*, 523 U.S. 614, 622-23, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (requiring parties to preserve arguments even when binding precedent forecloses them).

To reconsider our prior holding *unprompted* would run contrary to the principle of party presentation—a principle the Supreme Court has told us to take seriously. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579-82, 206 L. Ed. 2d 866 (2020). And for good reason. To start, our adversarial system depends on it. We assume that counsel—rather than courts—know how to best serve their clients. *Id.* at 1579. Courts are merely "passive instruments of government." *Id.* (citation omitted). Thus,

we should not "sally forth each day looking for wrongs to right." *Id.* (citation omitted). Unnecessarily considering (or reconsidering) issues not raised by the parties turns this relationship on its head.

What's more, had Winget asked us to revisit our prior ruling, Chase could have responded. Indeed, Chase might have equally convincing arguments that would support that holding. But we don't know, because Winget didn't ask us to revisit our ruling. In light of the circumstances, it would be inappropriate for us to reconsider seven years of litigation and dozens of judicial opinions.

* * *

This litigation may feel like the story that never ends. But for the sake of finality and the swift adjudication of justice—two bedrock principles of our judicial system—we hope this marks the final chapter. We affirm in part and reverse in part.

Appendix B

ALICE M. BATCHELDER, Circuit Judge, dissenting. During the past 15 years, this dispute has generated over 50 judicial opinions: nine in this court and more than 40 in the district court. Almost all are sound. Several are very good, even excellent. One, however, is rotten. And at least the way I see it, this one bad apple spoils the whole bunch.

Rather than continue to accept, and work around, that rotten opinion—and the obstacles that continue to sprout from its holding—I would prefer to correct that decision, apply the law in plain terms, and end this litigation in the way that Judge Cohn decided ten years ago. Therefore, despite my concession that the majority has written a legally sound and rather good opinion, and my recognition of the importance of finality, I will respectfully dissent.

I.

A word about revocable trusts. "Under Michigan law, a revocable trust is not a separate legal entity with regard to the rights of creditors." *Mickam v. Joseph Louis Palace Tr.*, 849 F. Supp. 516, 523 (E.D. Mich. 1993) (relying on M.C.L. § 556.128); *accord* M.C.L. § 700.7506(1)(a) ("During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."); *see also In re Hertsberg Inter Vivos Tr.*, 457 Mich. 430, 578 N.W.2d 289, 291 (Mich. 1998).

A revocable (or living) trust is just a conceptual way for a person (the settlor or grantor) to organize or manage his or her assets. The settlor transfers title to the assets to the revocable trust but retains full ownership and control

over those assets. To the extent that the trustee has any role, the trustee acts at the will of the settlor and owes a fiduciary duty to the settlor. While the settlor is alive, the beneficiary has no rights whatsoever. The settlor can change the terms, change the contents, or even dissolve a revocable trust at any time, for any reason. Accordingly, the settlor's creditors can reach the assets held in the trust. And the settlor must pay the taxes incurred by assets held in the trust—the trust does not have a tax-identification number or file a tax return.[1]

In stark contrast, a settlor who creates an *irrevocable* trust relinquishes control of the assets to the trustee, who manages the trust under a fiduciary duty to the *beneficiary*. The irrevocable trust becomes its own separate legal entity. The settlor cannot change the terms, change the contents, or dissolve the trust. The settlor's creditors cannot reach the trust assets. And the trustee would file a tax return for the irrevocable trust using a tax-identification number for the trust.

In conceptual terms, opening a revocable trust is like renting a storage unit at the local self-storage facility. You

1. The real benefits of a revocable trust take effect only after the settlor dies, at which point the settlor—being dead—is no longer able to revoke the trust and it passes (i.e., its contents pass) to the beneficiary(-ies). The most significant benefit is that, by passing via the trust, the transfer of assets avoids probate. The trust might also provide the settlor an easier means of managing the assets after death or during the transition, and in some cases might reduce or defer estate taxes, particularly if some assets are domiciled in another state. Therefore, a revocable trust is almost always used as an estate planning tool—namely, as a will substitute—and is commonly referred to as a *living trust*.

rent a unit and put some of your belongings in there. Over time, you might move any number of things to and from, in and out of the storage unit. That is how it works. You can theoretically put *all* your belongings in there if you want. Or you can empty it and close it, and terminate the lease. So it goes with a revocable trust: fill it, change it, empty it, close it. That is the promise of a revocable trust: you, as settlor, can revoke it at any time. The tradeoff is that your placing of your assets in a revocable trust does not protect your assets from your creditors. But neither do you risk ever losing control over your assets in a revocable trust. Like a self-storage unit, a revocable trust is fundamentally just a place where a settlor keeps his or her assets.

This case involves Larry Winget's revocable trust, which "held most, if not all, of Winget's assets." *JP Morgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 961 (E.D. Mich. 2012). As if to make this even easier, Winget is the Trust's settlor, trustee, and sole beneficiary. The key point is that Winget owns the assets, *all of them*, and happens to keep them in his revocable trust. The Trust does not own any assets. As settlor, Winget can move his assets to and from, in and out, of his revocable trust at any time, for any reason. He can put *all* his assets in it if he wants. Or he can empty it and close it. The revocable trust is a storage place, not a distinct legal entity.

II.

The short story. Winget's company, Venture, borrowed $450 million from Chase and defaulted on the loan with about $350 million outstanding. With Venture facing likely

bankruptcy, Chase was left facing a cents-on-the dollar collection. Rather than call the loan, force liquidation, and suffer a substantial ($300-plus million) loss on this loan, Chase and Winget negotiated a loan forbearance agreement in which Chase would continue to extend the $350 million loan in exchange for Winget's new personal Guaranty of certain collateral, with a $50 million limit.

Thereafter ensued a back-and-forth negotiation to finalize the draft written agreement. In one of the proposed edits, Chase added Winget's Trust to the designation of Guarantor because Winget kept the pledged assets in the Trust. Note that, legally, this edit did not change anything: Winget—not the Trust—owned and controlled the assets; Chase, as creditor, could reach those assets in the Trust as if Winget owned them himself; and Winget could remove those assets from the Trust (or even close the Trust) at any time, for any reason. Even at this late date, Chase concedes as much. *See* Chase Br. at 6, (Dkt. No. 19, Sept. 17, 2021) ("Indeed, [Chase] agrees that Mr. Winget had the right to move property in and out of his trust as he saw fit, both before and after the Guaranty was signed."). Because the Trust is revocable, the pledge of assets by Winget-and-Trust is no different from the pledge of assets by Winget alone insofar as Chase's claim to those assets. The Trust did not—and could not—make a Guaranty pledge that was distinct from Winget's. Reciprocally, Winget could not have substituted the Trust as Guarantor to protect himself personally from Chase's claims; Chase could reach through the Trust to collect from Winget in the same way it could reach through Winget to collect from the Trust. Winget is the owner. The

revocable Trust is a storage space for Winget's assets, not a distinct legal entity.

But, during that back-and-forth exchange of the countless proposed edits to the draft written agreement, the parties made a mistake: the editors changed the provision listing the Guarantor to include both Winget and the Trust, but they did not similarly change the provision for the $50-million limit, which was left naming only Winget (not the Trust). We know this was a mistake because the district court held an eight-day trial, heard witnesses, scrutinized evidence, and considered the competing claims. Chase claimed that Winget and the Trust had each given a separate guaranty and, while Winget had limited his guaranty to $50 million, the Trust had given Chase an unlimited guaranty. Winget countered that such an outcome was not their agreement, but was a mistake; that both parties had intended and agreed that the Guaranty was limited to $50 million and the inclusion of the reference to the Trust did not change that. Judge Cohn issued a thorough and meticulous opinion finding as a factual certainty and explaining beyond any doubt that the final version's failure to include the Trust in the limitation provision was a mistake:

> The Winget Trust for purposes of this case is no different than Larry Winget individually. A living, or inter vivos trust, is a common estate planning tool which is often used to control the distribution of assets. *See* Restatement (Third) of Trusts § 25 Validity and Effect of Revocable Inter Vivos Trust (2003). Here, Winget was the

> settlor, trustee, and beneficiary of the Winget Trust. As settlor, Winget owned the assets in the Winget Trust. *See* M.C.L. § 556.128. The Winget Trust was essentially Winget's alter ego. Winget used the Winget Trust to hold ownership of many of his assets, including the pledged stock. It had no special significance for purposes of this case.
>
> The Winget Trust was purposely added to the [Guaranty] and related documents to secure ownership of the pledged stock. It was not added to secure any additional liability. As such, the failure to include the Winget Trust under [the limitation provision] was a mistake. It was a mistake that was overlooked by both parties. It is a mistake that the Court has the power to correct.

Winget, 901 F. Supp. 2d at 972 (minor edits to capitalization). The court held that the $50-million limitation applied to Winget and the Trust together. Winget wired a $50 million payment to Chase. *JP Morgan Chase Bank, NA v. Winget*, No. 08-13845, 2014 U.S. Dist. LEXIS 13757, 2014 WL 320686, at *1 n.1 (E.D. Mich. Jan. 29, 2014). Thus, while certain collateral claims and issues remained, this effectively ended Chase's claim to recover against Winget or the Trust under the terms of the Guaranty.

III.

Now the bad apple. When Chase claimed on appeal that the parties had not been mistaken, the panel agreed and held that "[t]he agreement executed by Winget, the Trust, and Chase reflected the parties' intent as a matter of law," such that the parties necessarily intended that Winget and the Trust were separate entities with "Winget, and only Winget [alone], as having limited exposure." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 258-59 (6th Cir. 2015). Not only does that proposition fail as a matter of common sense, it is fundamentally flawed as a matter of trust law. The Trust, being a revocable trust, is not a distinct legal entity separate from Winget; it is just a place for Winget to store his assets. The only aspect of the analysis with which I can agree is the off-the-cuff statement that "the district court should never have held a trial in the first instance." *Id.* at 258. That is true, but not for the reasons stated in the opinion. Rather, a trial was unnecessary because the "mistake" theory was unnecessary. For purposes of Chase's creditor claim, Winget and the Trust necessarily merged into Winget alone; they are not separate entities, they are both just Winget as the one and only true owner of the assets. Winget pledged the assets to guaranty the loan and the agreement limited that pledge to $50 million.

The opinion's proffered analysis of this issue is specious. After characterizing the district court's decision as based on a "scrivener's error" (in which parties reach an agreement, or meeting of the minds, but then make a mistake when memorializing that agreement, i.e., reducing

it to written form), the opinion rejects and completely discards the district court's trial-based findings of fact in favor of its own factual finding: "We disagree with the district court's interpretation and conclude that there was no prior agreement between the parties." *Id.* at 258. The opinion offers three reasons: (1) there was no "binding contract" until the parties signed the final version; (2) the pre-agreement documents were not a binding agreement; and (3) the agreement contained an integration clause. *Id.* The first two "reasons" do not disprove a scrivener's error, they are universal circumstances underlying a scrivener's error: the parties reached a mutual understanding but, during the back-and-forth bickering over the written specifics, committed a mutual mistake that was erroneously included in the final, binding document.

Reliance on the integration clause is equally wrong. Once it is established (as the district court did here) that the parties were mistaken about the substantive terms of the document (i.e., the important parts), the only reasonable corollary is that those same parties were equally mistaken about the integration clause. If this purported "reason" were valid, and the inclusion of a boilerplate integration clause necessarily overcomes any and all mutual mistakes in the formation of a contract (meeting of the minds), then the doctrine of mutual mistake would cease to exist.

Instead, "[i]t is widely agreed that oral testimony is admissible to prove fraud or misrepresentation, mistake or illegality. [And] [t]his exception to the parol evidence rule applies even if the testimony contradicts the terms of a completely integrated writing." 6 Peter Linzer, *Corbin on*

Contracts § 25.20, at 277 (2010). As for Michigan law, parol evidence is generally not admissible to vary the terms of a contract which is clear, unambiguous, and fully integrated, but this "overlooks the prerequisite to the application of the parol evidence rule: there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." *NAG Enterprises, Inc. v. All State Indus., Inc.*, 407 Mich. 407, 285 N.W.2d 770, 771 (Mich. 1979). Thus, it is well settled that parties may submit parol evidence to prove that an agreement was the product of mistake. *Goldberg v. Cities Service Oil Co.*, 275 Mich. 199, 266 NW 321, 325 (Mich. 1936); *Scott v. Grow*, 301 Mich. 226, 3 N.W.2d 254, 258 (Mich. 1942) ("It is not necessary . . . [to show] that particular words were misunderstood. It is sufficient that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effectuate their intention." (quoting 5 Williston on Contracts, Rev. Ed., § 1585)).

We were wrong in *Winget*, 602 F. App'x at 257-59. The district court was right in *Winget*, 901 F. Supp. 2d at 972. And this case should have ended with the determination that Winget and the Trust were one and the same, with the $50 million limitation applicable to both.

Instead, because we held that Winget and the Trust are separate entities and the Trust agreed to an unlimited guaranty, Chase has pursued litigation against the Trust in an effort to take assets that the Trust does not own, could not have pledged, and did not agree to pledge.

IV.

This brings us to the present appeal and the majority opinion, which confronts and decides certain needlessly complicated questions. These questions are "needlessly complicated" because our prior (incorrect) holding compels the majority to proceed from the flawed premise that Winget's revocable Trust is something other than an ordinary revocable trust.

Consider the "transfer" question—whether Winget "transferred" assets when he removed assets from his revocable Trust (i.e., revoked his revocable trust). *See* Maj. Op. § II.A. In any other case—every other case—this is a simple question with a simple answer: because this is a *revocable* trust, there was no transfer. Winget owned the assets, regardless of where he kept them. *See* M.C.L. § 556.128 ("When the grantor in a conveyance reserves to himself an unqualified power of revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned."). Winget's act of closing the Trust did not "dispose of or part with" any assets. The Michigan Uniform Fraudulent Transfers Act (MUFTA) defines "transfer" as: "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, *of disposing of or parting with* an asset or an interest in an asset." M.C.L. § 566.31(q) (emphasis added). Here, Winget owned the assets both before and after he closed the Trust. As a matter of Michigan trust law, Winget's movement of the assets out of his *revocable* Trust did not affect Chase's rights at all. *See* M.C.L. § 700.7506(1)(a) ("During the

lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.").

It is only due to our faulty holding in *Winget*, 602 F. App'x at 257-59—contrary to Michigan law, *see Mickam*, 849 F. Supp. at 523—that this revocable Trust is not a normal revocable trust, but is instead treated as a distinct legal entity that pledged to Chase the assets therein. This requires that the Trust—not Winget—own the assets, inasmuch as the word "assets" involves ownership. *See, e.g.*, Merriam-Webster Online (offering a definition of "assets" as "the entire property of a person, association, corporation, or estate applicable or subject to the payment of debts"); Dictionary.com ("items or resources owned by a person, business, or government"). If the Trust does not own these items, then they would hardly qualify as the Trust's "assets."

The majority navigates this complication by proposing that "ownership is irrelevant" to the fraudulent transfer; the act of moving the assets beyond Chase's reach makes this a "transfer." If ownership mattered, and Winget owned the assets (unequivocally the situation under ordinary Michigan trust law), then Winget's act of closing the Trust did not transfer (dispose of or part with) any assets, *see* M.C.L. § 566.31(q). Therefore, the Trust entity must have disposed of or parted with the assets (by returning them from whence they came, namely, Winget's personal ownership and possession), thus moving them beyond Chase's reach. Of course, if this were an ordinary revocable trust, this movement of assets would not put them beyond Chase's reach.

The question of "fraudulent" is similarly convoluted. *See* Maj. Op. § II.B. Under ordinary trust law, the assets held in the Trust are entirely Winget's assets, so Chase's claim against the Trust would just fold back into a claim against Winget, whether Winget placed the assets in the Trust or not. *See* M.C.L. §§ 556.128 & 700.7506(1)(a). Of course, Chase agreed to limit its recovery from Winget to $50 million. But, otherwise, Winget could not avoid Chase's claim by transferring assets to or from his Trust, and therefore could not commit a "fraudulent" transfer.

Our prior faulty opinion in *Winget*, 602 F. App'x at 257-59, again complicates this by holding that the Trust is its own entity, and it owns the assets. The majority declares that the Trust is the "debtor," and finds that "the Trust was insolvent after the revocation," inasmuch as "its assets were zero." This presupposes that the Trust—not Winget—owned the assets; if Winget owned the assets and simply stored them in his revocable trust, then the "Trust's assets" were zero all along. Similarly, a finding that the Trust did not receive reasonably equivalent value in exchange for the revocation also presupposes that the Trust owned the assets. If the Trust "owned" nothing, then it *did* receive equivalent value. Namely, nothing. Of course, on this same reasoning, Winget received nothing when he placed his assets into the Trust, certainly unaware that he was "transferring ownership" and could not recover his assets from his revocable trust without paying equivalent value in exchange (i.e., buying his own property back from his own Trust).

Appendix B

On Winget's argument that as the settlor of a revocable trust he has a fundamental right revoke the trust at any time, the majority answers that his right is not unlimited: the Trust's contractual obligation to its creditor prevents the settlor from revoking the revocable trust. Thus, as a practical matter, this means a trustee can convert a revocable trust into an irrevocable trust by entering a contract with a third-party, effectively making the third-party the trust beneficiary, and can do so, apparently, without the settlor's agreement or participation. In fact, the majority suggests that a settlor who removes his encumbered assets from his revocable trust does not just assume the obligations against those assets, *see* M.C.L. §§ 556.128 & 700.7506(1)(a), that settlor commits an intentional-interference-with-contract tort. That is far afield from ordinary trust law.

Finally, consider the taxes. *See* Maj. Op. at § III.A.2. Under ordinary trust principles, the settlor of a revocable trust pays any incurred taxes—a revocable trust does not even have a tax-identification number, much less a means of filing or paying taxes. Again, the basic principle of revocable trusts is that the trust does not own anything, it is just a place for the settlor to store his assets. Because the settlor owns the assets placed in the trust, the settlor pays the taxes. Again, considering this question under ordinary trust law, Winget—the settlor—owned the assets held in the trust, including the LLC distributions, so Winget was obliged to report the income on his personal income tax returns and was responsible for paying the taxes incurred by the LLCs.

The majority recognizes that "the typical rules for revocable trusts may not apply" and suggests that the Trust may have been responsible for paying its own taxes. As a practical matter, this would require the Trust (i.e., the trustee, Winget, I suppose) to formally convert the Trust to an irrevocable trust, to obtain a tax-identification number from the IRS, prepare and file a tax return, and pay the requisite taxes to the IRS. Of course, the IRS was expecting Winget—as the settlor of the revocable Trust—to pay the taxes, so this new undertaking might involve a filing amendment (reducing Winget's personal taxable income and, correspondingly, his tax liability), a refund of Winget's $79 million overpayment, or a repayment by the Trust to Winget for the taxes he erroneously paid on the Trust's behalf (perhaps with its own tax consequences).

All of this is merely to demonstrate, or emphasize, how very far we have ranged from ordinary trust law. And to submit that, along these lines, things are getting worse, not better.

V.

Our prior faulty opinion in *Winget*, 602 F. App'x at 257-59, stated or necessarily implied three findings or conclusions that have served as premises for all of the judicial decisions that have followed: (1) the revocable Winget Trust is a separate legal entity, distinct from its settlor, Larry Winget; (2) the Trust entity—not the settlor, Winget—owns the assets held in the revocable Trust; and (3) the trustee of this Trust entity (Winget) pledged the "Trust's assets" as an unlimited Guaranty on

Chase's entire loan. I find all three to be legally unsound and factually untrue.

The majority's opinion, like other judicial opinions since *Winget*, 602 F. App'x at 257-59, accepts these premises and ingeniously builds its analysis around them, leading to certain new propositions that will likely serve as premises for future judicial decisions: (1) the Trust's pledge of assets converted Winget's revocable trust to an irrevocable trust, forfeiting Winget's ownership and control of the assets (and eliminating his tax obligation); and (2) Winget's attempt to control his assets (i.e., revoke his revocable trust) under ordinary principles of revocable trusts was not only a fraudulent transfer, but possibly an intentional-interference-with-contract tort.

For all of my criticism here, I recognize that the majority here, like others before, has diligently and thoroughly built its analysis around the given premises to reach a justifiable and defensible conclusion. But I also recognize that, in so doing, with every successive judicial opinion in this case, or application of these opinions as precedent, we do further damage to trust law.

Rather than continue to craft new, and increasingly creative, proclamations about the law of revocable trusts, I would prefer to admit our mistake in *Winget*, 602 F. App'x at 257-59, correct it, and apply plain and ordinary revocable-trust principles in a plain and ordinary way.

I believe that Judge Cohn was correct: "The Winget Trust for purposes of this case is no different than Larry

Winget individually." *Winget*, 901 F. Supp. 2d at 972. Therefore, the $50-million limitation applied to Winget and the Trust together, Winget has paid Chase that $50 million, and Chase has no further recourse against Winget (or the Trust) on the Guaranty.

Moreover, I believe that the Trust and Winget are not separate entities; the Trust, being a revocable trust, is just a place for Winget to put his assets and Winget had every right to fill it, change it, empty it, or close it however he saw fit. Winget owns all the assets, the Trust "owns" nothing. Winget's revocation of the revocable Trust was not a fraudulent transfer—indeed was not a transfer at all—nor was it an intentional-interference-with-contract tort. And Winget is personally liable for the taxes incurred by the Trust.

Given the importance of finality—and the majority's compelling defense of it, *see* Maj. Op. at § IV—I should concur. But in the perhaps vain hope that this small gesture might help restrain the opinions and holdings in this case to just this case, I will respectfully dissent.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JUNE 1, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 08-13845

ALTER DOMUS, LLC,

Plaintiff and Counter-Defendant,

v.

LARRY J. WINGET AND THE LARRY J. WINGET LIVING TRUST,

Defendants and Counter-Plaintiffs.

June 1, 2021, Decided
June 1, 2021, Filed

Honorable DAVID M. LAWSON

ORDER GRANTING MOTIONS FOR ENTRY OF FINAL JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 54(B), DENYING MOTION TO HOLD DEFENDANTS IN CONTEMPT, DENYING PLAINTIFF'S MOTION TO FILE SECOND MOTION FOR SUMMARY JUDGMENT, AND STRIKING MOTION FOR SUMMARY JUDGMENT FILED UNDER SEAL

Appendix C

Both the plaintiff and the defendants have asked the Court to treat as final certain aspects of its order entered on January 5, 2021 granting in part the plaintiff's motion for partial summary judgment as to its unjust enrichment claim, imposing a constructive trust, denying the defendants' motion for summary judgment, and dismissing defendant Winget's complaint for declaratory relief. Although claims remain to be adjudicated in this post-judgment-collection phase of this long-standing lawsuit, entry of a final judgment under Federal Rule of Civil Procedure 54(b) will facilitate the parties' return to the court of appeals for the twelfth time. The plaintiff also asks the Court to order immediate compliance with the constructive trust ruling and to hold the defendants in contempt for failing to do so.

Plaintiff Alter Domus has taken over for JP Morgan Chase as the agent of a group of lenders seeking to collect a judgment from the defendants that has swelled to nearly a billion dollars. On July 28, 2015, an amended final judgment was entered against the defendants as guarantors of a loan to Venture Holdings LLC. The judgment at that time was for $425,113,115.59. Defendant Larry Winget's exposure under that judgment was limited to $50 million. The initial collection efforts focused on the Larry J. Winget Living Trust. In January 2104, Winget removed all of the trust assets, and on October 1, 2015 he filed a declaratory judgment action (*Winget v. Chase*, No. 15-13469, which has been labeled "the Avoidance Action") seeking a declaration that then-agent Chase had no further recourse against Winget or the assets that were once held in the Winget Trust. Chase filed a counterclaim alleging that Winget's

asset stripping from the Trust was a fraudulent transfer and unjustly enriched him. This Court's predecessor, the Honorable Avern Cohn, consolidated that case with the present one, reasoning that the proceedings, especially the counterclaim, was akin to a collection proceeding for the amended judgment previously entered.

On July 5, 2017, Judge Cohn granted Chase's motion for judgment on the pleadings on its fraudulent transfer claim brought under the Michigan Uniform Fraudulent Transfer Act ("MUFTA") Mich. Comp. Laws § 566.35 (now the Michigan Uniform Voidable Transactions Act). The order allowed Chase to prevail on liability only. That was one of the rare liability orders entered in this case that was not appealed. About six months later, Winget informed the Court that he had rescinded his revocation of the Winget Trust and retitled in the name of the Trust all property interests that had been titled in the Trust's name as of the day before he revoked the Trust. Chase did not believe that action restored the status quo ante, and it maintained that actions Winget took in the interim (the "Revocation Period") damaged Chase's recourse to the Trust assets and unjustly enriched Winget.

Chase sought the imposition of a constructive trust on certain assets and proceeds generated by Trust property during the Revocation Period and moved for summary judgment on the unjust enrichment count of its counterclaim in the Avoidance Action that had been consolidated. Later, Winget filed a motion for summary judgment in the Avoidance Action, seeking a declaration that he always owned the property held by the Trust

and that he could remove that property at his discretion, despite Chase's judgment against the Trust.

On January 5, 2021, the Court granted in part Chase's motion for partial summary judgment, imposed a constructive trust, denied the defendants' motion for summary judgment, dismissed Winget's declaratory judgment complaint, and denied Winget's motion to stay the collection proceedings. The Court held that Winget unjustly enriched himself as to most of the distributions subject to the motion but found that a trial was necessary to determine whether Winget unjustly enriched himself with approximately $45 million in distributions in 2015 (before the Amended Final Judgment became effective).

The January 5 order fully adjudicated Winget's declaratory judgment complaint, but there are open issues on Chase's counterclaim that preclude entry of a final judgment in that consolidated action. One issue related to an evidentiary hearing to determine if Winget is liable on the unjust enrichment count for the aforementioned $45 million in distributions in 2015. Another is the damages determination on the MUFTA count of Chase's counterclaim. There are also other collection issues concerning the procedures for a judicial sale of trust assets in accordance with the Execution Order. Alter Domus also recently filed a motion seeking leave to file yet another summary judgment motion addressing Winget's conduct during the Revocation Period relating to one of the business entities in which the Trust held stock.

Appendix C

I.

Larry Winget moves for entry of final judgment under Rule 54(b) as to the Court's dismissal of his complaint for declaratory relief. He reasons that if the court of appeals overturns this Court's ruling and holds that Winget had the right to transfer Trust assets and remove them beyond the plaintiff's reach, this case will be finished. Alter Domus does not oppose that relief, reasoning that it makes sense to get that inevitable appeal behind it so that perhaps its collection efforts will be streamlined. It counters with a motion of its own to enter final judgment on the unjust enrichment count of its counterclaim. It states that it abandons its claim to the remaining $45 million in dispute, now rendering final the decision on that count. Winget opposes that motion because more remains to be done of the MUFTA count, which is intertwined with the unjust enrichment claim.

Rule 54(b) states that "[w]hen an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). Certification under this rule requires two separate findings. *In Re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 273 (6th Cir. 2019) (citing *Gen. Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994)). "First, the district court must expressly direct the entry of final judgment as to one or more but fewer than all the claims or parties in a case. Second, the district court must expressly determine that there is no just reason to delay appellate review."

Ibid. (quoting *Gen. Acquisition*, 23 F.3d at 1026) (cleaned up)). The Court must also explain how it "concluded that immediate review of the challenged ruling is desirable." *Adler v. Elk Glenn, LLC*, 758 F.3d 737, 738 (6th Cir. 2014) (*citing Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 601-62 (6th Cir. 1986)).

There is no question that the Court's decision granting summary judgment of dismissal on Winget's complaint in the Avoidance Action was final as to that complaint. That decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945). In the same way, the decision granting the plaintiff summary judgment on the unjust enrichment was final as to that count of the counterclaim, especially now that Alter Domus has abandoned any claim to the $45 million. The Court's decision did not dispose of all of the claims in the Avoidance Action because the extent of Alter Domus's damages on the MUFTA count of the counterclaim is an open question.

Is there any just reason for delaying entry of a final judgment on either of those claims in order to pave the way for the parties' return trip to the court of appeals? The Sixth Circuit points the district court to the following non-exclusive list of factors for that decision:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district

> court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Gen. Acquisition, 23 F.3d at 1030 (citations omitted).

Recall that this case is in post-judgment mode. After the amended final judgment was entered in 2015, the parties focused their energy on the fight over who controlled the Trust assets and whether Winget himself should have to pay anything beyond $50 million for interfering with the plaintiff's collection efforts from the Trust. This Court's orders (Judge Cohn's order granting judgment on the pleadings on the MUFTA count and the January 2021 order adjudicating multiple motions) have settled the liability question. Included in that resolution was an issue Winget deemed pivotal: whether he could revoke the Trust and remove all the trust property. The court of appeals once identified that as an open question. *See JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d 748, 750 n.1 (6th Cir. 2019) (observing that its holding that "a party who has a contract with a trust can recover from the property held by the trust" did "not resolve whether Winget could revoke the Trust and simply remove all the trust property," and that "if Winget 'owns' the trust property, that may affect whether the district

court['s fraudulent conveyance decision] was correct"). This Court's January 2021 order answered that looming question, but now Winget wants a second (actually a twelfth) opinion from the court of appeals.

There is no just reason for delaying the entry of a final judgment on either the dismissal of the declaratory judgment complaint or the unjust enrichment *and* MUTFA counts of the counterclaim. As Winget reasons, if the Sixth Circuit concludes that Winget owns the Trust property and lawfully revoked the Trust in 2014, it would end entirely this consolidated action as Winget would be entitled to dismissal of all counterclaims against him. The collection proceedings would also conclude because Alter Domus would have no property of value against which to execute. Conversely, if the Sixth Circuit affirms the Court's decision, then the collection process will be expedited because Alter Domus's right to execute on all interests in the Trust property would be settled.

That reasoning applies with equal force to both motions for entry of a final judgment under Rule 54(b). It is not undermined by the pendency of the damage component of the MUFTA count. If Winget prevails on his argument, the MUFTA count fails. If he doesn't, then collection continues under that count and the unjust enrichment count. There is little chance that the court of appeals would have to consider any issues twice. If Winget does not prevail on his avoidance theory, the ruling on Alter Domus's unjust enrichment claim is upheld; and if the plaintiff is able to satisfy the amended judgment from the assets it collects, then the damage component of the

MUFTA claim need not be pursued. The plaintiff, after all, is entitled to only one satisfaction of its judgment. And if the judgment is not fully satisfied, the damages component of the fraudulent MUFTA count essentially will involve asset tracing, which is a conventional post-judgment collection issue that can be taken up at the appropriate time.

There is no just reason for delaying entry of a final judgment on rulings that dismissed the declaratory judgment complaint and the orders granting judgment on liability on the MUFTA and the unjust enrichment counts of the counterclaim, which also imposed a constructive trust over certain assets.

II.

In the January 2021 order, the Court imposed a constructive trust on the following assets in Winget's possession or control:

A. Cash Distributions in the amount of $104,775,478, which were distributed to defendant Larry J. Winget between August 11, 2015 and February 26, 2018;

B. a $135 million demand promissory note issued by JVIS on June 29, 2017 to the Larry J. Winget 2015 Retained Annuity Trust that was assigned to Winget;

C. a $15 million demand promissory note issued by JVIS on June 29, 2017 to Winget; and

D. a $22.5 million payment, plus any other payments made to Winget on account of the promissory notes.

The Court also ordered Winget to:

A. pay to Chase the $104,775,478 in Cash Distributions;

B. assign the promissory notes referenced in paragraphs B and C, above, to Chase; and

C. pay Chase the amounts paid on the promissory notes, including the $22.5 million payment.

Following a status conference with the Court on January 20, 2021, Winget's counsel apparently told counsel for the plaintiff that his client did not intend to comply with the constructive trust order, taking the position that the order was interim in nature and that immediate compliance was not required. Alter Domus then filed a motion for an order compelling Winget's immediate compliance with the Court's order and requiring Winget to show cause why he should not be held in contempt.

A party may be held in contempt for the failure to abide by a judgment ordering the turnover of property. Fed. R. Civ. P. 70(e). Winget maintains that January 2021 order, however, is not a "judgment" within the

contemplation of Rule 70. Alter Domus says that doesn't matter, because the constructive trust imposed by the Court is a form of post-judgment equitable relief entered pursuant to the Court's broad discretion under Federal Rule of Civil Procedure 69(a)(1) and Michigan law.

Rule 69 governs the execution of money judgments. It provides that "[t]he procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(1). Upon the entry of a final judgment, Michigan law provides courts with "'extremely broad' authority to execute on their judgments." *Winget*, 942 F.3d at 751-52 (quoting *Rogers v. Webster*, No. 84-1096, 1985 U.S. App. LEXIS 13968, 1985 WL 13788, at *1 (6th Cir. Oct. 22, 1985)).

There already is a judgment entered in this case. When the Court imposed a constructive trust, it emphasized that "[i]t bears repeating that this case is in post-judgment collection posture, where Chase has a judgment allowing it to recover from the trust property." Op. Re: MSJs, ECF No 986, PageID.31893; *see also* Order Granting Mot. to Strike Jury Demand, ECF No 770, PageID.26848 ("As such, the Court has already indicated that [the Agent's] counterclaims are part of the [2008] litigation over the Guaranty."); Order Adopting R&R, ECF No. 914, ("In further pursuit of its post-judgment remedies, [the Agent] filed the Corporate Stock Motion and the Constructive Trust Motion, as supplemented."). Despite Winget's adamant representations, the fact that the plaintiff's claims were brought as counterclaims to

Winget's 2015 declaratory judgment complaint, rather than proceedings ancillary to judgment in the 2008 action, does not matter. The plaintiff filed its compulsory counterclaims under Federal Rule of Civil Procedure 13 because Winget filed a separate declaratory judgment action after revoking the Trust in an attempt to avoid his Trust's guarantee obligation. Had Winget never filed a separate action, the plaintiff would have sought the exact same relief in the 2008 action.

Moreover, there is a final judgment entered against Winget. As the Sixth Circuit observed, "[the district court entered judgment [against Winget and his Trust] over four years ago. . . . Winget has already paid Chase $50 million, so he no longer owes the bank any money (at least for the guarantee). But the Trust has yet to satisfy *its* obligation under the agreement and now owes the bank over $750 million." *Winget*, 942 F.3d at 749. Rather than viewing the counterclaims in the Avoidance Action as a separate case against Winget individually, this proceeding is actually a post-judgment effort to collect property from the Trust that had been fraudulently removed by the Trust beneficiary. The Court's order, therefore, is more properly viewed as post-judgment equitable relief.

The significance of that distinction tends to fade even more, now that the Court has certified the decision as a final judgment under Rule 54(b). There should be no doubt about the enforceability of the constructive trust and turnover order.

Winget's questioning of the finality of the January 2021 order was not baseless, though. The imposition of the constructive trust and the order to disgorge certain assets was based on the plaintiff's unjust enrichment claim that was not finally adjudicated because of the lingering question over Winget's liability for $45 million in distributions. Moreover, Rule 70 allows the Court to hold a party in contempt for failing to "perform [a] specific act [ordered by the Court] . . . *within the time specified*." Fed. R. Civ. P. 70(a), (e) (emphasis added). The Court's opinion never actually specified a time for compliance.

Of course, it is a "basic proposition that all orders and judgments of courts must be complied with promptly." *Maness v. Meyes*, 419 U.S. 449, 458 (1975). But a finding of contempt, and even lesser sanctions, must be based on the violation of a court order that is "clear and unambiguous." *Liberty Capital Grp., LLC v. Capwill*, 462 F.3d 543, 550-51 (6th Cir. 2006) ("This Court requires that the prior order be 'clear and unambiguous' to support a finding of contempt . . . . Ambiguities must be resolved in the favor of the party charged with contempt."). The Court cannot make such a finding under the present circumstances.

III.

Alter Domus also has filed a motion for leave to file another summary judgment motion on its counterclaim filed in the Avoidance Action. That motion purports to address Winget's conduct during the Revocation Period with respect to the business operations of companies in which the Trust owned stock, known as Mayco

International LLC and Mayco Freight LLC, which in turn had been held by a trust entity called PIM. Alter Domus alleges that Winget transferred the Mayco business from PIM into a newly created entity, placing certain revenues beyond the Trust and the grasp of the plaintiff as a judgment creditor. That conduct, argues the plaintiff, is relevant to its damages on the MUFTA count of its counterclaim. Winget, of course, vehemently denies those allegations.

The Court sees no utility in entertaining that motion at this time, particularly since the underlying basis of the claim will be subject to an appeal, if one is filed, of the Rule 54(b) judgment that will be entered. If Winget does not file an appeal from that judgment (which is extremely unlikely), then the plaintiff may renew its motion. For now, however, the motion for leave to file another summary judgment motion will be denied and the underlying motion for summary judgment, filed under seal, will be stricken.

IV.

There is no just reason for delaying entry of a final judgment on (1) the dismissal of the declaratory judgment complaint, (2) the order granting judgment on the pleadings on liability on the MUFTA count of the counterclaim, and (3) the grant of summary judgment on the unjust enrichment count of the counterclaim and imposition of a constructive trust over certain assets.

Accordingly, it is **ORDERED** that the defendants' motion for entry of a final judgment under Federal Rule of Civil Procedure 54(b) (ECF No. 992) is **GRANTED**.

It is further **ORDERED** that the plaintiff's motion for entry of a final judgment under Federal Rule of Civil Procedure 54(b) (ECF No. 1003) is **GRANTED IN PART**. Final judgment will be entered on the unjust enrichment count of the counterclaim. The motion is **DENIED** in all other respects.

It is further **ORDERED** that final judgment will enter on the order granting judgment on the pleadings on the fraudulent transfer count (*see* ECF No. 732) and the order granting summary judgment on the unjust enrichment count (*see* ECF No. 986) of the Avoidance Action counterclaim, and the order granting summary judgment of dismissal of the declaratory action complaint in the Avoidance Action (*see* ECF No. 986).

It is further **ORDERED** that the plaintiff's motion for immediate compliance with the Court's previous orders (ECF No. 995) is **DENIED as moot**.

It is further **ORDERED** that the plaintiff's motion for leave to file a second summary judgment motion (ECF No. 1008) is **DENIED**.

It is further **ORDERED** that the plaintiff's second motion for summary judgment filed under seal (ECF No. 1009) is **STRICKEN**.

/s/ David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: June 1, 2021

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JANUARY 5, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Number 08-13845

JPMORGAN CHASE BANK, N.A.,

Plaintiff and Counter-Defendant,

v.

LARRY J. WINGET AND THE LARRY J. WINGET LIVING TRUST,

Defendants and Counter-Plaintiffs.

January 5, 2021, Decided
January 5, 2021, Filed

DAVID M. LAWSON, United States District Judge.

OPINION AND ORDER OVERRULING OBJECTIONS, ADOPTING SPECIAL MASTER'S REPORT AND RECOMMENDATION, GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, IMPOSING CONSTRUCTIVE TRUST, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION TO STAY COLLECTION PROCEEDINGS, AND SCHEDULING STATUS CONFERENCE

Appendix D

In the last century (1999), Venture Holdings LLC (owned by defendant Larry J. Winget) entered into a credit agreement with a group of lenders. In a 2002 amendment to the credit agreement, defendants Winget and the Larry J. Winget Living Trust guaranteed the loan of almost a half-billion dollars. Plaintiff JPMorgan Chase Bank is the administrative agent for the lenders. Venture Holdings declared bankruptcy in March 2003, an event of default that made all obligations due and payable. After pursuing collection in the bankruptcy proceedings, the lenders were still owed millions of dollars, and on October 28, 2005, Chase sued Winget and his trust to enforce the guarantees, which eventually led to the present case filed in 2008. Winget and the trust have spent the last decade-and-a-half attempting to avoid their obligations. Through twists and turns, including multiple decisions by my predecessor, the Honorable Avern Cohn (who, regrettably, has retired), and at least eight trips to the court of appeals, the case now presents itself in the later stages (perhaps) of Chase's collection efforts directed at the trust, in "the latest episode in a longstanding saga that must now come to a close." Those words were written by court of appeals Judge Alice Batchelder in her 2017 opinion deciding the fourth appeal. *See JPMorgan Chase v. Winget*, 678 F. App'x 355 (6th Cir. 2017). With no pretense to finality, *see JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d 748, 752 (6th Cir. 2019) ("We now know better than to think that our decision today will close the book for good."), the Court will address Chase's pending summary judgment motion, which was thoroughly vetted by the Special Master Judge Cohn appointed for that purpose.

Appendix D

I.

Through previous decisions by this Court and the court of appeals, Winget's exposure under the Guarantee has been limited to $50 million (which he has paid), but his trust is liable for the full amount of the debt. The litigation over the past few years has focused on Winget's strategy of parlaying his limited personal exposure into a device to insulate the trust assets from Chase's collection efforts. Those machinations largely have been unsuccessful. It is useful to trace the path that bought the parties to this point in the litigation.

Although the loan is over 20 years old, this dispute dates back to 2003, when a group of companies owned by Winget or the Winget Trust filed for bankruptcy. Before the bankruptcy, Chase, as agent for a group of lenders, had extended a nearly half-billion-dollar credit facility to the companies in a Credit Agreement. To support that Credit Agreement, Winget and the Winget Trust both guaranteed the obligations under the Credit Agreement and partially secured the facility through a pledge of assets. The Guaranty provided that the guaranteed obligations would not be "released, discharged or otherwise affected by . . . any change in the corporate existence, structure or ownership of the Borrower or any other guarantor of any of the Guaranteed Obligations." ECF No. 1-3 at 3, § 4(iv). After the March 2003 bankruptcy, and after pursuing collection in the bankruptcy proceedings, the lenders were still owed over $300 million under the Credit Agreement. ECF No. 1 ¶ 23.

Appendix D

On October 28, 2005, Chase sued Winget seeking (1) specific performance of the provision in the Guaranty that granted Chase inspection rights and (2) a declaration that Chase had used all reasonable efforts before seeking to foreclose on the Pledge Agreements ("Inspection Action"). *Chase v. Winget*, 05-74141. Eventually, Judge Cohn entered judgment in favor of Chase on count 1 of the complaint and dismissed count 2 without prejudice. *See* case no. 05-74141, ECF No. 50. Winget appealed, and the Sixth Circuit affirmed. *Chase v. Winget*, 510 F.3d 577 (6th Cir. 2007).

On August 2, 2006, Winget sued Chase and others asking for a declaration that Chase had *not* used all reasonable efforts before seeking to enforce the Pledge Agreements, as required by the Guaranty and Section 5.2 of the Pledge Agreements. *Winget v. Chase*, 06-13490. Chase and others moved to dismiss on the grounds the issue was raised and resolved in the Venture bankruptcy; therefore, Winget's claims were barred by *res judicata*. The Court granted the defendants' motion and dismissed the case. *Winget v. Chase*, 2007 U.S. Dist. LEXIS 15968, 2007 WL 715342 (E.D. Mich. Mar. 7, 2007). Winget appealed and, again, the Sixth Circuit affirmed. *Winget v. Chase*, 537 F.3d 565 (6th Cir. 2008).

Finally, Chase filed the present action in 2008 against Winget and the Winget Trust seeking to enforce the Guaranty and Pledge Agreements. On December 20, 2013, after years of litigation and intervening appeals, this Court granted Chase's motion for entry of judgment on its claims against Winget and the trust. On January

24, 2014, the Court entered a final judgment (the "Final Judgment") against Winget and the trust in the amount of $425,113,115.59, plus attorney's fees and costs under Section 17 of the Guaranty (ECF No. 487). The Court, however, ruled that Chase's recourse was limited as to both Winget *and* the Winget Trust to $50 million. This finding was based on a determination, following a bench trial, that the parties had made a mutual mistake in not applying the $50 million liability limitation to *both* Winget *and* his trust, and therefore the Guaranty should be reformed to correct that "error." (ECF No. 365). Chase appealed. The court of appeals reversed in part, concluding that Chase's recourse against Winget was limited to $50 million, but it found no basis to support a mutual mistake and held that Chase's recourse against the Winget Trust was not limited. The case was remanded for entry of judgment so stating. In January 2014, Winget paid Chase $50 million.

On July 28, 2015, the Court entered an Amended Final Judgment against Winget and the Trust in the amount of $425,113,115.59. Chase began collection efforts under Federal Rule of Civil Procedure 69 and Michigan law against the Winget Trust. These collection efforts included writs of garnishment and serving discovery on Winget and the Winget Trust. During these post-judgment proceedings, Chase learned that, effective January 1, 2014, which was almost 12 years after the execution of the Guaranty (in 2002), and nearly six years after Chase filed this lawsuit, Winget had revoked the Winget Trust and removed all of the trust assets. Winget did not reveal the revocation to Chase and, as the Court previously stated, kept the fact of revocation "*in pectore* [a Latin phrase

roughly translated as "close to the chest"] until Chase began collection efforts." ECF No. 732, PageID.26284.

On October 1, 2015, following the secret revocation, and approximately four months after the entry of the Amended Final Judgment, and while the Amended Final Judgment was on appeal, Winget filed a separate action for declaratory relief, *Winget v. Chase*, No. 15-13469 ("the Avoidance Action"), seeking a declaration that Chase has no further recourse against Winget or the assets that were once held in the Winget Trust. Chase filed counterclaims, which essentially contended that Winget's revocation was a fraudulent transfer. The Court determined that Chase's counterclaims were the functional equivalent of post-judgment proceedings in the present case and therefore consolidated the Avoidance Action with this case and directed that all pleadings be filed in this case. *See* ECF No. 686.

On December 1, 2016, Chase moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on Count II of its counterclaims for constructive fraudulent transfer (the "Constructive Fraudulent Transfer Claim") under the Michigan Uniform Fraudulent Transfer Act ("MUFTA") Mich. Comp. Laws § 566.35 (now the Michigan Uniform Voidable Transactions Act).

On July 5, 2017, Judge Cohn issued an order (the "Fraudulent Transfer Order") finding that all of the elements of a constructive fraudulent transfer claim had been satisfied and that Chase was entitled to judgment on the pleadings as to liability only. (ECF No. 732). The

Fraudulent Transfer Order did not reach the issue of relief and damages. Winget and the Winget Trust moved for reconsideration of the Fraudulent Transfer Order. (ECF No. 734). The motion was denied. (ECF No. 751). Winget and the Winget Trust did not appeal the Fraudulent Transfer Order. Instead, the parties proceeded with discovery as to the damages Chase suffered from the revocation.

Meanwhile, the Sixth Circuit affirmed entry of the Final Amended Judgment. *JPMorgan Chase Bank, N.A. v. Winget*, 678 F. App'x 355 (6th Cir. 2017).

On February 26, 2018, Winget informed the Court that, in compliance with the Fraudulent Transfer Order, he had rescinded his revocation of the Winget Trust, revived and reinstated it, and retitled in the name of the Winget Trust all property interests that were titled in the name of the Trust as of December 31, 2013, which was the day before Winget says that he revoked the Trust. Winget took this action voluntarily and filed an unsolicited "Notice of Compliance." *See* ECF No. 777.

On June 21, 2018, the Court granted Chase's Motion for Entry of Final Judgment regarding pre-judgment interest, which increased the judgment amount to $778,276,929.23. ECF No. 823. The Court also entered intervening orders granting Chase's application for costs and expenses related to its efforts to enforce its rights against Winget and the Winget Trust, further adding to Winget and the Winget Trust's financial obligation to Chase.

Shortly thereafter, Chase requested entry of charging orders (the "Charging Order Motions") with respect to membership interests in certain limited liability companies (LLCs) (the "Membership Interests") held by the Trust. ECF Nos. 791-820. Winget and the Winget Trust responded to the Charging Order Motions, arguing among other things, that the Winget Trust does not own the subject membership interests or any other property for that matter. Rather, Winget reasoned, as settlor of the Winget Trust, he owns all of the property held in the Trust; and because he satisfied the judgment against him individually by paying $50 million to Chase, Chase cannot execute on property that Winget owns as settlor of the Winget Trust. The Court disagreed with Winget's argument, granted the Charging Order Motions, and entered the requested Charging Orders on August 15, 2019. ECF Nos. 839-853. In connection with entry of the Charging Orders, the Court stayed the Avoidance Action and directed Chase to focus its collection efforts on the assets held in the Winget Trust. ECF No. 855.

Winget appealed entry of the Charging Orders. Significantly, Winget argued that because Winget "owned" all of the Winget Trust property, the Guaranty did not allow Chase to attach that property through charging liens or otherwise. That argument did not take root. On November 7, 2019, the Sixth Circuit affirmed entry of the Charging Orders and rejected Winget's argument, explaining that "it doesn't matter who 'owns' the trust property," because "a party who has a contract with a trust can recover from the property held by the trust." *JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d at

750. Thus, the Sixth Circuit held that Chase could recover against the Winget Trust from the property held by the Winget Trust (the "Charging Order Opinion"). *See* ECF No. 924.

After entry of the Charging Orders, Chase filed additional motions related to its collection efforts, including a Motion for a Constructive Trust (ECF No. 860) and a Motion for Writ of Execution on Corporate Stock (ECF No. 863). Winget filed a Motion to Stay these collection efforts pending his appeal of the Charging Orders. ECF No. 873. The Court referred the motions to a Special Master. *See* ECF No. 890.

The Special Master recommended that the constructive trust motion should be denied without prejudice and dealt with in the Avoidance Action, which had been stayed, and recommended that the Court allow the Avoidance Action to go forward. The Special Master also recommended that Chase's Motion for Writ of Execution on Corporate Stock be granted and Winget's motion to stay be denied. ECF No. 906.

The Court agreed and adopted the Special Master's recommendations. ECF No. 914. The Court thereafter entered the appropriate orders, including an order granting Chase's Motion for Writ of Execution on Corporate Stock ("Execution Order") and enjoined Winget from interfering with the Winget Trust property while the parties proceeded with a judicial sale of the stock. ECF No. 915. Winget and the Winget Trust appealed the injunction portion of the Execution Order, and the Sixth

Circuit affirmed. *JPMorgan Chase Bank, N.A. v. Winget*, 801 F. App'x 962 (6th Cir. 2020).

That brings us to the present matter before the Court. After the stay of the Avoidance Action Proceeding was lifted and five days after the Sixth Circuit issued its Charging Order Opinion, Chase filed a motion for partial summary judgment, ECF No. 926, requesting summary judgment on Count V (the "Unjust Enrichment Claim") of its amended counterclaims against Winget, ECF No. 771, and largely requests the same relief as the Constructive Trust Motion. The Court referred the motion for partial summary judgment to the Special Master. On March 19, 2020, the Special Master issued a Report and Recommendation (R&R) on Chase's motion. The parties have filed objections to the R&R.

Winget filed a motion in the Avoidance Action, consolidated with this case as noted earlier, for a summary judgment declaring that he always owned the property held by his trust and that he could remove that property at his discretion, despite Chase's judgment against the trust. ECF No. 971. Winget also moved to stay all collection proceedings until the issues raised in the various motions are resolved. ECF No. 974.

After the court of appeals issued its mandate in the latest appeal, Chase filed a notice of proposed form of judicial sale. ECF No. 970. Chase also filed a motion to set a status conference to discuss the judicial proceedings. ECF No. 979.

Appendix D

II.

A.

As noted above, when the Winget Trust was revoked on January 1, 2014, the LLC Membership Interests held by the Winget Trust were transferred to Winget. After the Membership Interests were transferred, Winget received cash distributions from the LLCs as well as certain promissory notes that Winget says evidence the LLCs' indebtedness to him. In an attempt to recapture these distributions for itself, Chase filed a motion to impose a constructive trust on LLC membership distributions, including the payments and obligations made during the "Revocation Period" (between July 28, 2015 and February 26, 2018). Chase supplemented its motion about six months later. Chase wants the Court to impose a constructive trust on the cash distributions, the promissory notes, and certain payments made to Winget on those promissory notes during that time.

Chase measures the Revocation Period as beginning on the date Chase obtained the Amended Final Judgment against the Trust (July 28, 2015) and ending on the date Winget informed the parties that he had rescinded his revocation of the Trust (February 26, 2018). Chase argues that during that period, Winget received $148,490,481.00 in cash distributions from the LLCs (the "Cash Distributions") and promissory notes from certain entities.

The first promissory note is in the amount of $135 million and initially was issued to the Larry J. Winget 2016 Retained Annuity Trust and then transferred to Winget. One of the LLCs, JVIS—U.S.A., LLC, made a $22.5 million payment to Winget on that note. The second promissory note is for $15 million. As a result of Winget receiving the cash and notes, Chase argues, Winget was unjustly enriched in an amount totaling $298,490,481.00 ($148,490,481.00 in Cash Distributions and $150 million in promissory notes) at Chase's expense. As a remedy, Chase seeks a constructive trust on the Cash Distributions and the notes.

> The Special Master found that the following facts are undisputed:
>
> The Court entered the Amended Final Judgment on July 28, 2015;
>
> Under the Amended Final Judgment, Chase had rights to execute on the assets of the Trust, including obtaining charging orders as to the [LLC's] Membership Interests[;]
>
> Winget revoked the Winget Trust effective January 1, 2014;
>
> Prior to the Trust's revocation, the Winget Trust held membership interests in the LLCs;
>
> After the Trust's revocation, Winget retitled the property held by the Trust as of December

> 21, 2013 in his name, including the Membership Interests formerly held by the Winget Trust;
>
> On February 26, 2018, Winget informed both Chase and the Court that he had rescinded his revocation of the Trust and retitled in the name of the Trust all property interests titled in the name of the Trust as of December 31, 2013;
>
> The property retitled in the name of the Trust included the Membership Interests;
>
> Between the date the Amended Final Judgment was entered (July 28, 2015) and the date Winget informed Chase and the Court that he had rescinded his revocation of the Trust (February 26, 2018), Winget received distributions on account of those Membership Interests;
>
> Winget does not deny that he did not return the distributions to the LLCs that were retitled in the name of the Winget Trust.

R&R at 15-16, ECF No. 949-1, PageID.31186-87 (record citations omitted).

The Special Master also concluded based on these undisputed facts that Chase was entitled to relief on its unjust enrichment claim because Winget received a benefit from assets that properly should have been within Chase's reach, and that an inequity exists to Chase as a result of Winget's retention of those benefits. The Special

Master, however, agreed with Winget that the operative time period began not on July 28, 2015, the date of the Amended Final Judgment, but on August 11, 2015, which was14 days after entry of the Amended Final Judgment, because Chase could not have executed on the judgment before then. *See* Fed. R. Civ. P. 62(a) (2009) ("Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 14 days after its entry, unless the court orders otherwise.").

The Special Master recommended that the Court grant summary judgment to Chase on its unjust enrichment claim set forth in Count V of its counterclaims against Winget with respect to distributions made between August 11, 2015 and February 26, 2018. As a remedy, the Special Master recommended that the Court place a constructive trust upon (i) the Cash Distributions in the amount of $104,775,478, which Winget has admitted were distributed to him between August 11, 2015 and February 26, 2018, (ii) the $135 million demand promissory note issued by JVIS on June 29, 2017 to the Larry J. Winget 2015 Retained Annuity Trust that was assigned to Winget, (iii) the $15 million demand promissory note issued by JVIS on June 29, 2017 to Winget, and (iv) the $22.5 million payment, plus any other payments made to Winget on account of the promissory notes. The Special Master further recommended that the terms of the constructive trust imposed by the Court require Winget to pay to Chase the $104,775,478 in Cash Distributions, (ii) assign the promissory notes to Chase, and (iii) pay Chase the amounts paid on the promissory notes, including the $22.5 million payment.

Finally, the Special Master recommended that an evidentiary hearing be held with respect to the remaining $45,365,000 of the cash distributions that Chase alleges Winget received during the Revocation Period, and which Winget contends were made before August 10, 2015. The Special Master found the record was not sufficiently clear as to whether Winget received those distributions before August 10, 2015.

Both parties have objected to the R&R.

B.

Upon objection, the Special Master's recommendations are given fresh review. Fed. R. Civ. P. 53(f)(3); *see also* Order Appointing Special Master, ECF No. 890, PageID.29327 (citing 28 U.S.C. § 636(b)(1)) (stating that "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made").

1.

Chase takes issue with the Special Master fixing the beginning date of the Revocation Period to account for the automatic stay of execution for 14 days after the Amended Judgment was entered as required by the 2009 version of Rule 62(a). It appears that Chase believes that the court of appeals's mandate had an effect on the operative date of this Court's Amended Judgment. However, the mandate merely gave legal effect to the court of appeals's ruling, which "remand[ed the case] with instructions to

enter judgment in favor of Chase on Count I of Chase's complaint." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 266 (6th Cir. 2015). There is no suggestion, and no authority has been cited to support the idea, that any aspect of Rule 62(a) was suspended. The Special Master was correct in his determination of the Revocation Period.

Chase also argues that it met its summary judgment burden showing that the distributions at issue were made after the effective date of the Amended Final Judgment. Chase insists that, Winget's evidence to the contrary, an affidavit by Bryan Pukoff, Winget's CPA, is conclusory and fails to create a genuine issue of material fact.

It was Chase's burden, however, to demonstrate that Winget was unjustly enriched through the distributions tied to the LLCs' membership interests that would have been subject to the charging orders. That does not merely impact "damages," as Chase contends, but it goes to the heart of Chase's argument that an inequity occurred. Chase, therefore, bore the burden to prove that the misdirected assets inequitably were distributed and retained by Winget. *Kammer Asphalt Paving Co. v. E. China Twp. Sch.*, 443 Mich. 176, 188, 504 N.W.2d 635, 642 (1993) ("The burden of proof is upon the person seeking the imposition of such a trust.") (citing *MacKenzie v. Fritzinger*, 370 Mich. 284, 121 N.W.2d 410 (1963)). And to meet that burden, Chase had to show by uncontested evidence that the distributions were made during the Revocation Period.

Chase did not provide any evidence that the entirety of the 2015 distributions were made during the Revocation Period. Chase did not meet its initial burden, which made it unnecessary for Winget to offer proof to establish a genuine issue of material fact on this topic, regardless of what Michigan law says with respect to proving the amount of damages.

Moreover, Winget denied that a $500,000 distribution was made after August 10, 2015. In addition, the Rescission Agreement discusses the return of distributions by the Winget Family Trust by the companies whose "Equity Ownership Interests" were transferred to the Winget Family Trust and then distributed to Winget. The Court believes, therefore, that there is a question of material fact with respect to the $45,365,000 that Winget says was distributed before August 10, 2015, including the $500,000 distribution made to VCIP.

Chase's objections will be overruled.

2.

Winget's objections repeat many of the arguments considered and rejected many times in this case. He divides them into seven arguments, but they are based on three basic premises: (1) that Winget always owned the property titled in the name of the trust, and therefore the transfer of title to him was in reality no transfer at all; (2) some cash distributions and promissory notes were made for the payment of taxes and in recognition of antecedent debts; and (3) equitable remedies (constructive

trust, unjust enrichment) should not be recognized when Chase has an adequate remedy at law in the form of the fraudulent transfer action.

a.

Winget's main argument is that the Winget Trust never owned the trust property. For openers, he poses a blanket objection based on the idea that the Special Master did not account for the Sixth Circuit's comment contained in a footnote to its penultimate opinion in this case, which questioned whether Winget could lawfully revoke the trust and remove the trust property. *See JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d 748, 750 n.1 (6th Cir. 2019). Winget argues that the footnote casts doubt on whether Judge Cohn's constructive fraudulent transfer ruling was proper, and because the Unjust Enrichment Claim is based on the fraudulent transfer, the propriety of the constructive fraudulent transfer claim must be fully briefed and decided before Chase has any rights to an equitable remedy. But according to that footnote, the court of appeals invited the parties to present that question for a decision there, and they declined.

In its 2019 opinion, the Sixth Circuit upheld Chase's right to enforce its judgment against property titled in the name of the trust, regardless of who "owned" the trust property. *Id.* at 750 (holding that "it doesn't matter who 'owns' the trust property (at least as trust law uses that term). After all, trusts usually don't 'own' property. So if ownership mattered, creditors of a trust — revocable or not — could almost never recover from the trust property.

And that would surely surprise the many authorities who have written to the contrary.") (citations omitted). The court then dropped this footnote:

> To be sure, this does not resolve whether Winget could revoke the Trust and simply remove all the trust property. Winget tried to do exactly that back in 2014 but later reversed course. In related proceedings, the district court held that this revocation was a fraudulent conveyance under Michigan law. *See* Mich. Comp. Laws § 566.35. But if Winget "owns" the trust property, that may affect whether the district court was correct. At oral argument, we asked the parties whether we should address this issue in the current appeal. But they did not pursue that suggestion. Our decision therefore does not address the fraudulent conveyance issue.

Id. at 75-n.1. One wonders why Winget did not seek a definitive answer from the court of appeals then. Instead, he now asks this Court to unwind its previous decisions against him on this point. But there is no good reason to do so.

In 2017, Judge Cohn addressed this argument face-on and rejected it:

> Winget and the Winget Trust however have consistently argued that the Winget Trust, through its trustee (Winget), owned only "bare legal title" to the assets titled in its name, and

> that Winget himself was always the real owner of the property throughout the course of these proceedings. As such, the argument goes, the transfer of the assets to Winget as a result of the revocation of the Winget Trust was not a "transfer"; Winget simply retained property he already owned.
>
> Winget's argument is inconsistent with fraudulent transfer law and basic trust principles. . . .
>
> Under Winget's theory, . . . a settlor who causes a trust to enter into a binding contractual obligation could erase that obligation simply by revoking the trust, thereby unilaterally insulating that property from the trust's creditors. Winget has not cited any legal authority to support such a result. . . .
>
> [T]he Winget Trust, through its trustee, owned the property titled in its name. When Winget revoked the Winget Trust, all of the Winget Trust's rights in this property became "fully vested in Larry J. Winget, individually." This was a transfer of the Winget Trust's property to Winget within the meaning of MUFTA.

ECF No. 732 PageID.26287-89.

Winget argues that this decision is based on an erroneous reading of the court of appeals's 2015 opinion,

which held "that Winget and the Trust are separate and distinct legal persons." *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 256 (6th Cir. 2015). That, however, mischaracterizes Judge Cohn's reasoning. His only reference to the 2015 court of appeals decision in his 2017 opinion and order reiterated the idea that Winget and his trust are distinct, and the judgment can be enforced against each. Judge Cohn wrote:

> To accept Winget's argument would mean that Chase cannot reach property held by the Winget Trust under any circumstances — even if property had continued to remain in the Winget Trust to this day because that property was not "owned" by the Winget Trust. This position is tantamount to saying any contract with a trust is unenforceable; a trust would no longer be a "separate legal entity" but instead become nothing more than an alter-ego of the settlor. There is no support for this position in statutory or case law. Moreover, it is contrary to the law of this case in which the Sixth Circuit held that Winget and the Winget Trust were separate and distinct entities for purposes of the obligations under Section 3 of the Guaranty, *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 256 (6th Cir. 2015).

Id. at PageID.26292-93.

As can be seen, the question has already been decided by this Court, as has the question of whether the revocation

of the Trust was a constructive fraudulent transfer. The Sixth Circuit's opinion does not change that fact. Winget also argues that, because it is the constructive fraudulent transfer that gives rise to the unjust enrichment claim, Chase's remedies under MUFTA must be determined first. But if the issue of the ownership of the Trust assets must be determined first, it would also preclude a determination of Chase's remedies under MUFTA as well. It serves no useful purpose to replow this ground.

Winget says that it is unfair to "punish" him for relying on earlier rulings from this Court in 2011 and 2012 that he in fact owned the trust assets. He fashioned this argument to the Special Master under the law-of-the-case doctrine, but now refashions it as an equitable plea. In the earlier decision, Judge Cohn held that the trust was Winget's "*alter ego.*" *JP Morgan Chase Bank, N.A. v. Winget*, 901 F. Supp. 2d 955, 972 (E.D. Mich. 2012). But, as noted, Chase timely appealed that decision and it was reversed. 602 F. App'x 246 (6th Cir. 2015). Relying on a challenged district court opinion by drawing assets from a potentially vulnerable trust is not the sort of conduct that favors equitable consideration. The objections based on Winget's recycled argument that the trust did not "own" property are overruled.

Aside from Winget's misguided reliance on the idea that shifting title to the trust property did not amount to a "transfer," he does not object to the conclusion that Chase established its unjust enrichment theory as a matter of law.

b.

Winget also says it is inequitable for Winget to have to pay Chase the $79 million he already paid to the IRS for taxes on the LLCs. He further argues that the R&R ignores testimony that the promissory notes reflect debt to Winget arising before the Amended Final Judgment.

The Special Master thoroughly discussed the purpose and timing of the Promissory Notes, and the Court agrees with and adopts his conclusions. As he noted, the undisputed evidence establishes that JVIS did not authorize the Promissory Notes until January 1, 2017, and neither of the Promissory Notes became binding on JVIS until June 29. 2017. Also notably, both Promissory Notes call for interest to begin accruing as of the execution dates, and do not provide for retroactive interest.

It is undisputed that from the distribution the LLCs made to Winget, he used $79 million to pay taxes. Because the LLCs elected to be taxed as pass-through entities, that tax liability was Winget's personal obligation. The Court agrees with the Special Master that Winget was unjustly enriched by that distribution, even though the money was used to pay taxes that the LLCs would have been obliged to pay had they elected to be taxed as a corporation.

c.

Winget argues that Chase has adequate remedies at law and a constructive trust is not an appropriate remedy. Once again, the Special Master thoroughly addressed that argument, and the Court agrees with his conclusion.

Appendix D

It bears repeating that this case is in a post-judgment collection posture, where Chase has a judgment allowing it to recover from the trust property. "And Michigan has given its courts 'extremely broad' authority to execute on their judgments. *JPMorgan Chase Bank, N.A. v. Winget*, 942 F.3d 748, 751-52 (6th Cir. 2019) (citing *Rogers v. Webster*, No. 84-1096, 1985 U.S. App. LEXIS 13968, 1985 WL 13788, at *1 (6th Cir. Oct. 22, 1985) (per curiam)).

It is true that "recognition of a constructive trust requires that the money or property on which the trust is imposed must be 'clearly traced' to the beneficiary of the constructive trust." *United States v. One Silicon Valley Bank Account*, 549 F. Supp. 2d 940, 955-56 (W.D. Mich. 2008) (citing *Biddle v. Biddle*, 202 Mich. 160, 167, 168 N.W. 92, 94 (1918); *In re CyberCo Holdings, Inc.*, 382 B.R. 118, 129 (Bankr. W.D. Mich. 2008)). But here, Winget takes no issue with the origin and destination of the transferred assets. Instead, he argues that Chase should look to other remedies to satisfy its judgment. As the Special Master observed, however, even if the unjust enrichment claim may be the only route to recover the distributions made during the Revocation Period, there may be an adequate remedy for Chase under MUFTA. But remedies also exist under the Michigan Revised Judicature Act or under a common law cause of action for unjust enrichment. Chase has elected to advance the unjust enrichment claim, and it is entitled to prevail on that claim.

The Court finds no merit in Winget's other objections.

Appendix D

III.

Winget's motion for summary judgment in the Avoidance Action is merely the opposite side of the same coin as his defense against Chase's affirmative collection efforts against the trust. Winget cites authority supporting the argument that when the trustee, settlor, and beneficiary of a trust are one and the same person, the settlor can do with the trust property whatever he wants. Based on that premise, Winget asks the Court to declare that he could defund the trust and remove its assets, which in this case effectively would place those assets beyond the reach of its creditors who can no longer collect from Winget himself. As noted above, Judge Cohn rejected that argument in earlier rulings. Winget repeats the argument that those earlier rulings were founded on an incorrect reading of the court of appeals's decisions.

Winget accurately cites the provisions of the Michigan Trust Code, but those statutes address the relationships between a revocable trust's settlor, trustee, beneficiaries. They do not say who "owns" trust property, and they do not undermine the holding of the court of appeals that the creditor of a trust is entitled to collect a judgment against a trust from the property held by the trust. *See Winget*, 942 F.3d at 751.

For his ownership premise, Winget relies on Michigan Compiled Laws § 556.128, which prevents a settlor from insulating assets from creditors by the expedient of titling them in a revocable trust. *Ibid.* ("When the grantor in a conveyance reserves to himself an unqualified power of

revocation, he is thereafter deemed still to be the absolute owner of the estate conveyed, so far as the rights of his creditors and purchasers are concerned."). That means that a judgment creditor of a settlor can reach trust assets. It does not mean that assets titled in the name of a trust cannot be used to satisfy a judgment against the trust. Such a holding would directly contradict the court of appeals, which noted that "these statutes merely codify the principle that creditors can recover from the beneficial interest. They do not repeal the principle that creditors of the trust can recover from the trust property as well." *Winget*, 942 F.3d at 751.

Winget also makes too much of the court of appeals's comment that "trusts usually don't 'own' property." *Winget*, 942 F.3d at 750. That comment followed the court's declaration that it did not matter who "owned" the trust property, since "if ownership mattered, creditors of a trust — revocable or not — could almost never recover from the trust property. And that would surely surprise the many authorities who have written to the contrary." *Ibid.*

Winget offered all of this on the way to his ultimate conclusion that his secret defunding of the trust could not amount to constructive fraud because all the assets were his to do with as he pleased. But that does not change the fact that those assets were titled in the name of the trust, and Chase had a judgment against the trust that remained unsatisfied. And even if Winget could somehow lawfully remove those assets from the trust (which this court has held repeatedly he could not), he voluntarily returned them. This Court has enjoined their further removal,

and that injunction was affirmed by the court of appeals. *Winget*, 801 F. App'x 962. And that court, referring to its footnote in the earlier opinion, stated that "whether Winget could have revoked the Trust before the district court enjoined him from interfering with it is beside the point now. Michigan law gives the district court the power to enjoin actions contrary to its collection orders." *Id.* at 963.

Winget's arguments in his summary judgment motion mirror those already asserted several times in this Court, including in response to Chase's motion for partial summary judgment. Winget has had ample opportunity to present those arguments, and they fail as a matter of law. The Court will deny Winget's motion for summary judgment on his Avoidance Action complaint and grant summary judgment of dismissal to Chase. *See* Fed. R. Civ. P. 56(f)(1).

Winget also moved to stay collection proceedings until his summary judgment motion was decided. That motion will be denied as moot.

IV.

As noted above, the Sixth Circuit affirmed Judge Cohn's order imposing a writ of execution on trust property and enjoining Winget from transferring assets. Shortly after the mandate issued in that appeal, and in accordance with the Court's execution order (ECF No. 915), Chase submitted a proposed form of judicial sale on May 15, 2020. Chase also filed a motion for a status

conference as a follow-up to its notice of proposed form of judicial sale. The Court's execution order contemplates a status conference following submission of the proposed form of judicial sale "to discuss the proposed form of sale and further execution of the writ." ECF No. 915, PageID.29784.

The Execution Order provides for a status conference, and the Court will schedule one, to be attended by the Special Master. Chase is entitled to the sale, and because the procedure is complicated, the Court contemplates having the sale process overseen by the Special Master, who is familiar with the case and these type of sale proceedings.

V.

After fresh review of the motion for partial summary judgment, the Special Master's report and recommendation, and the parties' objections, Chase is entitled to a judgment as a matter of law on its unjust enrichment claim as to nearly all of the assets transferred to defendant Larry Winget from the Larry J. Winget Living Trust. The Special Master was correct in his application of the law to the facts and in finding that there is a dispute as to whether approximately $45 million in cash distributions were made before the Amended Final Judgment became effective.

Accordingly, it is **ORDERED** that plaintiff JPMorgan Chase Bank's motion for partial summary judgment (ECF No. 926) is **GRANTED IN PART**.

It is further **ORDERED** that a constructive trust is imposed on the following assets in the possession or control of defendant Larry J. Winget:

A. Cash Distributions in the amount of $104,775,478, which were distributed to defendant Larry J. Winget between August 11, 2015 and February 26, 2018;

B. a $135 million demand promissory note issued by JVIS on June 29, 2017 to the Larry J. Winget 2015 Retained Annuity Trust that was assigned to Winget;

C. a $15 million demand promissory note issued by JVIS on June 29, 2017 to Winget; and

D. a $22.5 million payment, plus any other payments made to Winget on account of the promissory notes.

It is further **ORDERED** that, under the terms of the constructive trust Winget must

A. pay to Chase the $104,775,478 in Cash Distributions;

B. assign the promissory notes referenced in paragraphs B and C, above, to Chase; and

C. pay Chase the amounts paid on the promissory notes, including the $22.5 million payment.

It is further **ORDERED** that an evidentiary hearing be held with respect to the remaining $45,365,000 of the cash distributions that Chase alleges Winget received during the Revocation Period, and which Winget contends were made before August 10, 2015. The hearing will take place after a determination of the procedures for a judicial sale of trust assets in accordance with the Execution Order.

It is further **ORDERED** that Winget's motion for summary judgment (ECF No. 971) is **DENIED**.

It is further **ORDERED** that the declaratory judgment complaint (Case Number 15-13469, ECF No. 1) is **DISMISSED WITH PREJUDICE**.

It is further **ORDERED** that the motion to stay collection efforts (ECF No. 974) is **DENIED as moot**.

It is further **ORDERED** that the motion for a status conference (ECF No. 979) is **GRANTED**. The parties and the Special Master shall appear for a status conference to be conducted via videoconference on **January 20, 2021 at 9:00 a.m.**

/s/ David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: January 5, 2021

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED JULY 5, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 08-13845

JPMORGAN CHASE BANK, N.A.,

Plaintiff/Counter-Defendant,

v.

LARRY J. WINGET AND THE LARRY J. WINGET LIVING TRUST,

Defendants/Counter-Plaintiffs.

MEMORANDUM AND ORDER STAYING PROCEEDINGS ON CHASE'S CHASE'S SUPPLEMENTAL MOTION FOR COSTS AND EXPENSES OF COLLECTION PURSUANT TO FINAL JUDGMENT (Doc. 709) AND GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS (Doc. 699) AND GRANTING CHASE'S MOTION TO COMPEL COMPLIANCE WITH COURT ORDER (Doc. 719)

Appendix E

AND
GRANTING CHASE'S MOTION TO COMPEL
(Doc. 720)[1]

July 5, 2017, Decided;
July 5, 2017, Filed

I. Introduction

In the words of Judge Batchelder, [b]efore [the Court] is the latest episode in a longstanding saga that must now come to a close." *JPMorgan Chase v. Winget*, 15-1924, 678 Fed. Appx. 355, 2017 U.S. App. LEXIS 2281 (6th Cir. Feb. 6, 2017). Regrettably, this commercial dispute resists closure. J. P. Morgan Chase (Chase) is the administrative agent for a group of lenders that extended credit to Venture Holdings Company, LLC (Venture) under a credit agreement. In 2008, Chase sued Larry J. Winget (Winget) and the Larry J. Winget Living Trust (Winget Trust) to enforce a Guaranty and two (2) Pledge Agreements entered into by Winget and signed by Winget and the Winget Trust in 2002, guaranteeing the obligations of Venture. As will be explained, the Court entered a judgment in favor of Chase that enforced the Guaranty and Pledge Agreements against Winget and the Winget Trust, as separately liable. It also entered an order awarding Chase attorney fees and costs incurred in connection with enforcing the Guaranty. As will also be explained, following the revelation that Winget transferred all of the

1. Upon review of the parties' papers, the Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78(b); E.D. Mich. LR 7.1(f)(2).

Winget Trust's assets to Winget, Chase has claimed that the transfer was fraudulent.

Before the Court are the following motions:

Chase's Supplemental Motion for Costs and Expenses of Collection Pursuant to Final Judgment (Doc. 709)

Chase's Motion for Judgment on the Pleadings (Doc. 699)

Chase's Motion to Compel Compliance with Court Order (Doc. 719)

Chase's Motion to Compel (Doc. 720)

For the reasons that follow, Chase's motion for costs and expenses will be held in abeyance pending a ruling from the Court of Appeals for the Sixth Circuit on Winget's appeals.

Chase's motion for judgment on the pleadings will be granted as to liability only on its constructive fraud claim.

Chase's motions to compel will be granted.

II. Chase's Motion for Costs and Expenses

A. Relevant Background

After years of litigation and multiple appeals, the Court entered an Amended Final Judgment against Winget and

the Winget Trust in the amount of $425,113,115.59 and limiting Chase's recourse as to Winget as to $50 million as provided for in the Guaranty (Doc. 568). Winget appealed the Amended Final Judgment. The Court of Appeals for the Sixth Circuit affirmed. *JP Morgan Chase v. Winget*, No. 15-1924, 678 Fed. Appx. 355, 2017 U.S. App. LEXIS 2281 (Feb. 6, 2017).

The Court also issued an order awarding Chase $11,154,874.65 in attorney fees and expenses (Fee Order) associated with its efforts to enforce the Guaranty and Pledge Agreements through May 31, 2015. (Doc. 671). Winget and the Winget Trust have appealed the Fee Order.

Winget then moved for partial satisfaction of the Amended Final Judgment, contending that his payment of $50 million satisfied the Fee Order (Doc. 672). The Court denied the motion (Satisfaction Order). (Doc. 683). Winget and the Winget Trust have appealed the Satisfaction Order.

Winget's appeal of Fee Order and the Satisfaction Order was heard by the Court of Appeals for the Sixth Circuit on June 13, 2017.

During the pendency of these appeals, Chase has moved for the costs and expenses incurred since the issuance of the Fee Order in the amount of $2,000,316.24, which it says is the amount of costs and expenses incurred by Chase for the services of Sidley Austin LLP and Dickinson Wright PLLC between June 1, 2015 and November 30, 2016.

In response, Winget argues:

I. The Court should refrain from deciding this motion until the Sixth Circuit has decided Winget and the Trust's pending appeal of the Fee Order and Satisfaction Order

II. Chase should not be awarded expenses related to the prosecution of its fraudulent transfer claim

III. Chase's attorneys' hourly rates grossly exceed the prevailing market rate and should be significantly reduced

IV. Chase's attorneys' hours are excessive and reflect duplicative work and over-staffing

V. Chase's attorney and paralegal rates are excessive and inappropriate to the extent they charge professional rates for administrative tasks

VI. Chase's fees should further be reduced to exclude excessive, inappropriate or otherwise unrecoverable "expenses," including research fees, travel costs, fees associated with inappropriate collection actions taken by Chase, vague entries, redacted invoices

In reply, Chase argues:

I. There Is No Basis for a Stay Pending Resolution of Winget's Appeal of this Court's Prior Ruling on Costs and Expenses

II. Chase Is Entitled to All Costs and Expenses Incurred in Collecting the Guaranteed Obligations from the Trust

III. The Court Has Already Determined that the Rates Incurred and Paid by Chase are Reasonable

IV. Winget's Argument that Chase's Attorneys' Hours Reflect Duplicative Work and Overstaffing Is Unsupported

V. Chase Is Entitled to Recover the Time Spent by Paralegals

VI. Winget's Other Proposed Reductions Are Without Merit

B. Discussion

Winget and the Winget Trust's argument that the Court should stay a ruling on Chase's motion pending the outcome of the appeal has merit. In opposing a stay, Chase says:

> Winget cannot wield an appeal to delay Chase's collection of the fees and expenses he is obligated to pay. At most, the Sixth Circuit

> will have ruled by the time the Court decides this Motion and will provide guidance, or, the Sixth Circuit will have not ruled and Winget can seek to have any appeal consolidated with an appeal from the resolution of this motion. In either case, delay is not warranted.

(Doc. 718 at p. 6).

The problem for Chase is that the Sixth Circuit has not yet ruled on the appeals but the appeals have been submitted. So, there is no guidance from the Sixth Circuit and consolidation at this point is not an option. It would not be prudent for the Court to award Chase additional costs and expenses under the circumstances. In the event of a reversal of the Fee Order and/or Satisfaction Order, Chase would have to modify its request.

That said, the Court does note that Winget and the Winget Trust's additional arguments are not likely to carry the day. As Chase notes, the Court has already found the attorney hourly rates reasonable. The Court has also already found that Chase is entitled to all of the costs of collection on the Amended Final Judgment which included prior cases. Chase's fraudulent conveyance claim which was necessarily precipitated by Winget's revocation of the Winget Trust is related to Chase's efforts to collect on the Amended Final Judgment. At best, Winget and the Winget Trust may be able to convince the Court that certain discrete entries are excessive or otherwise not recoverable. Even so, Chase's request would in all probability not be significantly reduced.

Appendix E

III. Chase's Motion for Judgment on the Pleadings

A. Relevant Background

After entry of the Amended Final Judgment, Chase began collection efforts under Michigan law, including issuing writs of garnishment and serving discovery on Winget and the Winget Trust. During these post-judgment proceedings, Chase learned that in January of 2014, Winget revoked the Winget Trust, a fact, as the Court has previously observed, Winget kept in pectore until Chase began collection efforts.

Following the revocation, in early 2015, Winget filed an action for declaratory relief, 15-13469, seeking a declaration that Chase has no further recourse against Winget, including assets that were once part of the Winget Trust. Chase filed a counterclaim, asserting several claims which essentially boil down to the contention that Winget's revocation of the Winget Trust was a fraudulent transfer or conveyance. Because Chase's counterclaim was the functional equivalent of post-judgment proceedings in the 2008 case, the Court consolidated the 2015 and 2008 cases and directed all filings under the 2008 case. (Doc. 686).

Chase moves for judgment on the pleadings on its counterclaim for constructive fraud only, contending that the "pleadings and certain judicial admissions" conclusively establish all of the necessary elements of a constructive fraudulent conveyance under Michigan law.

B. Legal Standard

A motion for judgment on the pleadings under Rule 12(c) uses the same pleading standard applicable under Rule 12(b)(6). *See Wee Care Child Ctr., Inc. v. Lumpkin*, 680 F.3d 841, 846 (6th Cir. 2012)). Thus, "[f]or purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008) (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)). A motion under Rule 12(c) must be granted "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 526 (6th Cir. 2006) (internal quotation marks omitted). In evaluating a motion for judgment on the pleadings, the Court "may consider the pleadings, exhibits attached to the pleadings, matters incorporated by reference into the pleadings, and judicially-noticed facts." *Coleman v. Story*, 2015 U.S. Dist. LEXIS 85248, 2015 WL 4040750, at *2 (E.D. Mich. July 1, 2015).

C. Discussion

The Michigan Uniform Fraudulent Transfer Act (MUFTA) defines two types of fraudulent transfers. The first are transfers made "[w]ith actual intent to hinder, delay, or defraud" a creditor and applies to transfers made either before or after the creditor's claim arose. M.C.L.

566.34(1)(a). Although Chase has alleged a claim of actual fraud, it has not moved for judgment on the pleadings on this claim. Indeed, a determination of whether a debtor acted with intent is generally fraught with issues of fact. *See Dillard v. Schlussel*, 308 Mich. App. 429, 865 N.W.2d 648 (2014).

The second, commonly called "fraud in law" or constructive fraud, deems certain transactions fraudulent regardless of the creditor's ability to prove the debtor's actual intent. It applies only to transfers made after the creditor's claim arose. It is this claim that Chase has moved for judgment on the pleadings.

The statute on constructive fraudulent transfers provides:

> Sec. 5. (1) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (2) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent

> at that time, and the insider had reasonable cause to believe that the debtor was insolvent.
>
> (3) Subject to section 2(2),1 a creditor making a claim for relief under subsection (1) or (2) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

M.C.L. § 566.35

Under the MUFTA, a transfer of assets is constructively fraudulent if "(1) the creditor's claim arose before the transfer, (2) the debtor was insolvent or became insolvent as a result of the transfer, and (3) the debtor did not receive reasonably equivalent value in exchange for the transfer." *Dillard*, 308 Mich. App. at 457 (internal quotation marks omitted). The "actual intent of one who transfers assets to others without a fair consideration is unimportant where it leaves the transferor insolvent." *Hudson v. Maher*, 55 Mich. App. 90, 222 N.W.2d 47 (1974), citing *Farrell v. Paulus*, 309 Mich. 441, 15 N.W.2d 700 (1944).

Chase says Winget's revocation of the Winget Trust constituted a transfer of assets and that every element of constructive fraudulent conveyance has been satisfied based on the "pleadings and other judicial admissions." The Court agrees.

Appendix E

1. There was a Transfer from the Winget Trust to Winget

As an initial matter, the existence of a "transfer" is a prerequisite to a fraudulent conveyance claim. During these proceedings, the Winget Trust held property titled in the name of the Winget Trust. See Doc. 696-3, Ex. C to Chase's Counterclaims (stock certificates of various companies reflecting the Winget Trust's ownership of shares.) The Trust Revocation, attached to and referenced in Chase's counterclaims, states that the Trust was revoked in January 2014. As a result of the revocation, all rights with respect to any assets held by the Winget Trust "fully vested in Larry J. Winget, individually."

In his answer, Winget does not deny the factual bases that support Chase's claim of transfer. Instead, he argues the revocation of the Winget Trust and subsequent re-titling of assets in Winget's name was not a legal "transfer" of the Winget Trust's assets to Winget because the property formerly titled in the name of the Winget Trust always belonged to Winget.

This argument is wrong as a matter of law. A revocable living trust is a distinct legal entity. *See In re Lewiston*, 539 B.R. 154, 159 (E.D. Mich. 2015) (citing Restatement (Third) of Trusts § 2 cmt. a) (holding that a living trust is "a distinct legal entity, consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries") (internal quotation marks omitted). As a separate legal entity, a living trust is capable of owning property and entering into obligations. *See, e.g.*,

Crosby v. Post, 2009 Mich. App. LEXIS 2411, 2009 WL 3931070, at *1 (Mich. Ct. App. Nov. 19, 2009) (stating that a living trust "owns" real property); *In re Wetzel*, 2008 Mich. App. LEXIS 509, 2008 WL 681877, at *1-3 (Mich. Ct. App. Mar. 13, 2008) (evaluating whether a living trust "owned" property and employing typical property-law requirements of conveyance to determine if a settlor/trustee actually transferred her property to a revocable living trust).

Winget and the Winget Trust however have consistently argued that the Winget Trust, through its trustee (Winget), owned only "bare legal title" to the assets titled in its name, and that Winget himself was always the real owner of the property throughout the course of these proceedings. As such, the argument goes, the transfer of the assets to Winget as a result of the revocation of the Winget Trust was not a "transfer"; Winget simply retained property he already owned.

Winget's argument is inconsistent with fraudulent transfer law and basic trust principles. Under Michigan law, a trustee, acting as an agent and fiduciary of a trust, has broad authority to manage the property held by a trust. M.C.L. §§ 700.7816, 700.7817. The trustee can buy, sell, encumber, and otherwise manage trust property as any other owner would. *Id.; see also Lewiston*, 539 B.R. at 159 ("Under Michigan law, a living trust has specific rights, duties, restrictions, consequences, and conditions related to Trust assets."). Encumbrances on trust property incurred by the trustee remain with the property held in the trust regardless of later changes to the trust itself.

Under Winget's theory, however, a settlor who causes a trust to enter into a binding contractual obligation could erase that obligation simply by revoking the trust, thereby unilaterally insulating that property from the trust's creditors. Winget has not cited any legal authority to support such a result. Instead, Winget and the Winget Trust confuse the issue by relying on authority addressing the rights of a trustee's personal creditors to pursue assets held by the trustee in trust for another. This is not the situation here, which involves the rights of a creditor of the trust itself.

Regarding the rights of a creditor to access assets held by a trustee, a trustee is a fiduciary with the power to manage the trust property on behalf of the trust's beneficiaries. *See Lewiston*, 539 B.R. at 159. The trustee holds no personal interest in the trust property apart from the bare legal title necessary to manage it. Because the trustee does not have a personal interest in the property, a trustee's personal creditors cannot execute on trust property held on behalf of others to satisfy the trustee's own personal debts. *See In re Cannon*, 277 F.3d 838, 849-51 (6th Cir. 2002) (holding that property held in trust for an attorney's clients could not be used to satisfy the personal debts of the attorney); *In re Dayton Title Agency, Inc.*, 724 F.3d 675, 679-80 (6th Cir. 2013) (holding that property held in trust could not be used to satisfy the personal debts of the trustee). Simply put, "because the debtor does not own an equitable interest in property he holds in trust for another, that interest is not property of the [debtor's] estate." *Cannon*, 277 F.3d at 849 (internal quotation marks omitted). Thus, the personal debts of the

trustee cannot be satisfied by the trust corpus. They do not support the proposition that the separate and binding obligations of the trust itself may be fully extinguished unilaterally by a transfer of the trust corpus to the settlor in his individual capacity.

Thus, the Winget Trust, through its trustee, owned the property titled in its name. When Winget revoked the Winget Trust, all of the Winget Trust's rights in this property became "fully vested in Larry J. Winget, individually." This was a transfer of the Winget Trust's property to Winget within the meaning of MUFTA.

2. Chase's Claim Arose before the Transfer

Chase also says that the pleadings conclusively establish the first element of constructive fraud: Chase's "claim arose before the transfer was made or the obligation was incurred." M.C.L. § 566.35(1). The Court agrees.

The MUFTA defines a "claim" as a "right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." M.C.L. § 566.31(c). As the Michigan Court of Appeals has repeatedly recognized, a "claim need not be reduced to judgment or undisputed" to satisfy the MUFTA's definition. *Mather Investors, LLC v. Larson*, 271 Mich. App. 254, 720 N.W.2d 575, 578 (Mich. Ct. App. 2006); *see also Zigmond Chiropractic, P.C. v. AAA Mich. Auto. Ins. Ass'n*, 2012 Mich. App. LEXIS 1567, 2012 WL 3198465, at *6 (Mich. Ct. App. Aug. 7, 2012) ("[D]efendant

did not need to secure a judgment . . . before defendant first filed a [claim under the MUFTA]."); *Americorp Fin. Grp., Inc. v. Powerhouse Licensing, LLC*, 2007 Mich. App. LEXIS 139, 2007 WL 189374, at *4 (Mich. Ct. App. Jan. 25, 2007) ("[T]he term 'claim' is defined broadly to encompass 'a right to payment,' without the imposition of restrictions such as the necessity of reduction to a judgment.").

Here, Venture and its subsidiaries commenced bankruptcy proceedings under Chapter 11 on March 28, 2003. The petitions were converted to Chapter 7 cases on January 17, 2006. After the disposition of the debtors' assets in bankruptcy, Chase and the lenders held a claim against the debtors' estates for amounts still due and owing under the Credit Agreement. Chase then began proceedings to enforce the Guaranty and pledge agreements against Winget and the Winget Trust on September 8, 2008. Chase's right to payment therefore arose no later than September 8, 2008—more than five years before the Winget Trust's revocation, which Winget has represented occurred in January 2014. The fact that the Amended Final Judgment against the Winget Trust did not enter until after the revocation does not change that Chase had a "claim" within the meaning of MUFTA at the time of the revocation.

Thus, the record establishes that Chase's claim - a right to payment from the Winget Trust - arose well before the transfer.

3. The Winget Trust Became Insolvent as a Result of the Transfer

The second element of Chase's constructive fraud claim requires that the Winget Trust became insolvent as a result of the revocation. This fact is evident from the record. The trust revocation document states that "Larry J. Winget . . . hereby revokes the Trust in its entirety." An entity that no longer exists obviously has no assets with which to satisfy its obligations, and is therefore by definition insolvent. See M.C.L. § 566.32 ("A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation."). Thus, this element is satisfied.

4. The Winget Trust Did Not Receive Reasonably Equivalent Value for the Assets Transferred

Chase further says that the pleadings and Winget's judicial admission in his motion to dismiss counterclaims establish the final element of Chase's constructive fraud claim: that the Winget Trust did not receive reasonably equivalent value for the assets transferred. The Court agrees. Winget has admitted the Winget Trust received nothing at all. Winget's motion to dismiss Chase's counterclaims explained: "Winget paid and the Living Trust received 'reasonably equivalent value' for [the transfer]: Nothing." See Winget's Motion to Dismiss at 11, Winget, 15-13469, Doc. No. 15. Winget went on to explain "the Living Trust received exactly what its bare legal title was worth ($0.00) upon revocation." *Id.* at 12. These "deliberate factual assertions" from Winget's brief

constitute judicial admissions that the Trust received nothing in exchange for the transfer to Winget. *See Ford v. New Century Mortg. Corp.*, 797 F. Supp. 2d 862, 868 (N.D. Ohio, June 22, 2011) (explaining that deliberate and clear statements in briefs are considered judicial admissions).

Winget, however, says that "nothing" was reasonably equivalent value for any transfer because again, according to Winget, the trustee held only "bare legal title" to the assets, which Winget asserts had no value as a matter of law. Again, Winget confuses the trustee's own personal obligations with the obligations of the Winget Trust itself. As explained above, a trustee's own personal creditors cannot use the trustee's possession of legal title of the assets he holds in trust for another to satisfy the trustee's personal obligations, the same cannot be said regarding creditors of the trust. The Winget Trust did in fact hold assets beyond legal title. Chase has a claim against those assets. Upon revocation, these assets were transferred to Winget, who has admitted he paid nothing for them.

Because the revocation of the Winget Trust caused a transfer of value to Winget for which Winget's admits not payment was made, Chase has satisfied all of the elements for a constructive fraud claim and is therefore entitled to judgment on the pleadings as to liability based on constructive fraud. The issue of relief and damages, as Chase seems to concede, has not been conclusively established because of outstanding discovery disputes.

5. Winget's Arguments Do Not Carry the Day

As Chase correctly notes, each of Winget's legal arguments in response to the motion rests on a single premise-that the Winget Trust never "owned" any property as a matter of law. This premise, as explained above, turns principles of trusts and fraudulent-transfer law on its head. Winget's position ignores that a revocable trust is a separate and distinct legal entity capable of owning property and entering into obligations. Although a trustee does not have a personal interest in the trust corpus, it does not follow that the trust itself can never own anything. To accept Winget's argument would mean that Chase cannot reach property held by the Winget Trust under any circumstances—even if property had continued to remain in the Winget Trust to this day because that property was not "owned" by the Winget Trust. This position is tantamount to saying any contract with a trust is unenforceable; a trust would no longer be a "separate legal entity" but instead become nothing more than an alter-ego of the settlor. There is no support for this position in statutory or case law. Moreover, it is contrary to the law of this case in which the Sixth Circuit held that Winget and the Winget Trust were separate and distinct entities for purposes of the obligations under Section 3 of the Guaranty, *JPMorgan Chase Bank, N.A. v. Winget*, 602 F. App'x 246, 256 (6th Cir. 2015). Finally, and most disturbingly, it also implies that the years-long litigation regarding the Winget Trust's obligations under the Guaranty were a colossal waste of the Court's time and resources inasmuch as Winget's current position is that Chase never had any right of recourse to the Winget

Trust from the moment the Winget's Trust breached the Guaranty until the present day.

Additionally, the cases Winget cites are inapposite. They all involve claims by creditors of a trustee seeking to satisfy the trustee's own personal debts using trust assets. These cases stand for the known proposition that a trustee, who manages property on behalf of a trust, does not have a personal interest in the trust's assets reachable by the trustee's personal creditors. *See, e.g., In re Dayton Title Agency, Inc.*, 724 F.3d 675, 679-80 (6th Cir. 2013); *In re Cannon*, 277 F.3d 838, 849-51 (6th Cir. 2002).

This case is different. The Amended Judgment is against the Winget Trust. Under the Guaranty, as interpreted by the Sixth Circuit, the Winget Trust—separately from Winget—guaranteed the obligations in the Credit Agreement. As a result, the Winget Trust—again, as distinct from Winget personally—owes a $425 million debt to Chase. Chase was entitled to seek recourse against the property held in the Winget Trust to satisfy this debt and may recover the property constructively fraudulently conveyed by the Winget Trust to Winget.

In sum, Chase is entitled to judgment on the pleadings on its constructive fraud claim.

IV. Chase's Motions to Compel

A. General Background

While Chase's motion for judgment on the pleadings has been pending, Chase sought discovery from Winget

as to the assets once held in the Winget Trust to aid in execution on the Amended Final Judgment and for determining damages on its fraud claims. Getting this information has not been easy. The discovery Chase seeks is the subject of its motion to compel compliance and motion to compel.

Having concluded above that the revocation of the Winget Trust satisfies all of the elements for constructive fraud, the motions to compel become relevant to Chase's efforts to locate the former Winget Trust assets in order to collect on the Amended Final Judgment against the Winget Trust.

1. Chase's Motion to Compel Compliance

a. Relevant Background

In September 2016, Chase filed a motion to compel production of documents responsive to Chase's First Set of Document Requests in Aid of Execution of Judgment. (Doc. 692.) The first document request at issue in the motion sought "documents relating to Winget's and/or the Larry J. Winget Living Trust's (the "Winget Trust") financial condition," including "any federal and state tax returns for 2002 through 2014, together with all schedules and attachments thereto." (Doc. 692-4 at 6.)

The Court granted Chase's motion to compel on December 15, 2016, stating Chase "has the right to obtain all relevant documents—in unredacted form." (Doc. 700 at 6). Chase then submitted a proposed form of order on

the motion to compel, and Winget filed an objection. (Doc. 701.) Winget objected that Chase's proposed Order "would include Winget's personal tax returns." (*Id.* at 2.) Hoping to avoid this result, Winget submitted an "alternative proposed Order," which would have required Winget to produce "documents in their individual or joint possession, custody, or control showing all assets held in or titled in the name of the Winget Trust through the Relevant Period." (Doc. 701-1 at 3.)

The Court entered Chase's order, which says that Winget **"shall produce all documents in his possession, custody or control that are responsive to Chase's requests consistent with this Order."** (Doc. 702 at p. 2, emphasis added.)

Chase says that Winget has not complied with the Court's order. Instead, Chase says Winget produced tax return documents on February 3, 2017 that are so heavily redacted that Chase says they are meaningless. Chase says that Winget's production is in violation of the Court's order and inhibits Chase's ability to assess the Winget Trust's holdings through the relevant period.

In correspondence to Chase, Winget argued that Chase is only entitled to know what was in the Trust throughout the relevant period, stating that "[n]othing in the Court's Opinion or Order indicates that Chase is entitled to income and financial information from Winget's jointly filed tax returns." (Chase's Ex. A, Letter from Hubbard 2/10/2017 Ltr. at 1.)

In responding to Chase's motion, Winget offers a different argument. Winget says that Chase is entitled only to the names of assets once held by the Winget Trust and nothing else.

b. Discussion

Chase has the better view. Indeed, Winget's argument has already been rejected. As noted above, after the Court granting Chase's Motion to Compel (Doc. 700), Chase tendered a form of order at the Court's request. (See Doc. 700 at p. 2 (instructing Chase to submit a proposed order). Winget opposed Chase's proposed order, noting that, if entered, the proposed order would obligate Winget to produce documents that included "Winget's personal tax returns." (Doc. 701.) The Court entered Chase's order two days later, thereby rejecting Winget's objection. (Doc. 702.).

Undeterred, Winget points to language in the Court's order granting Chase's motion to compel where the Court recognized Chase's need to know "what was in the Winget Trust throughout the relevant period." See Doc. 700 at p. 4.

Winget's argument misunderstands Chase's argument and interprets the Court's statement of "relevant period" too narrowly. The Court's comments came in rejecting a variety of positions articulated by Winget, including Winget's argument that Chase was not entitled to any discovery at all beyond the heavily redacted "proffer" of summary information that Winget had provided, and that the offer to make Larry Winget available for a deposition

relieved him of any additional need to produce documents. The fact that the Court acknowledged that Chase had a right to information about what was in the Trust in rejecting Winget's argument to the contrary does not mean the Court intended to limit the scope of discovery to only that information. Indeed, were that the Court's intent, it would have entered Winget's alternative proposed order.

Winget also says that Chase's decision to bring a motion to compel compliance is in contravention to the 2008 pre-trial order and the Court's standing orders regarding discovery disputes. In other words, Winget says that Chase should have arranged a conference call with the Court before filing its motion. While that is generally the Court's preferred method, the parties have shown this course is no longer fruitful. The Court has expressed to both parties that it has come to believe that telephone conferences had been abused in this litigation. One example is from a January 26, 2016 telephone conference regarding Winget's motion for partial satisfaction for judgment. The Court told the parties that the appropriate course going forward was for the parties to file a motion rather than seeking informal guidance from the Court.

Chase is entitled to the relief it seeks in its motion to compel compliance. Winget must produce unredacted tax returns.

Appendix E

2. Chase's Motion to Compel

a. Relevant Background

Chase says that Winget has refused to respond to reasonable discovery requests. In this motion, Chase seeks to compel Winget to provide information to enable Chase to ascertain the nature and whereabouts of the property held in Trust. Chase says that Winget's objections lack merit. Chase therefore asks the Court to compel Winget to fully and completely respond to Chase's second request for production of documents by immediately producing all documents in his possession, custody, or control that are responsive to Chase's requests. Chase also says it intends to move for reasonable expenses and attorneys' fees incurred in bringing this motion. Fed. R. Civ. P. 37(a)(5)(A) if the Court grants the motion.

Chase's second set of discovery requests are reflected in the attached responses of Larry Winget (Exhibit A) and the Winget Trust (Exhibit B). Essentially, there are three requests with subparts. Chase has asked Winget for the following:

> 1. Any and all documents related to the income, expenses, assets, liabilities, profits, losses, inventory, cash flows, property holdings, or any other document evidencing the value of the following...

Chase goes on to list twenty-seven [1(a) through 1(aa)] entities believed to be once owned by Winget and or the Winget Trust.

2. Any and all documents related to the income, expenses, assets, liabilities, profits, losses, inventory, cash flows, property holdings, or any other document evidencing the value of any and all of the subsidiaries of the entities identified in the Request 1(a) through 1(aa).

3. Any and all documents and/or communications related to the revocation of the Larry J. Winget Trust.

b. Discussion

Winget's continued resistance to Chase's requests for information about the assets previously held in the Trust is purportedly based on this Court's statement in granting Chase's motion to compel that Chase "wants to know what assets were held by the Trust, and when and how they were transferred." Winget appears to interpret this statement to mean Chase is entitled only to the names of the assets previously held in the Trust, and nothing more. This is wrong and it ignores the remainder of the Court's opinion and order, which plainly compels Winget to produce "**all documents" responsive to Chase's first request for production of documents, (Dkt. 702 at 1), including "[a]ny and all documents relating to [Winget's] financial condition**." (Doc. 700 at p. 4, emphasis added (describing Chase's requests for financial information about the property previously held in the Trust as "relevant to Chase's post-judgment efforts to learn what was held through the Trust and what has happened to those assets").) In fact, the Court said that

Chase is entitled to "full discovery of the assets currently or previously held in or titled in the name of [the Trust] and the whereabouts of those assets." (Doc. 702 at p. 1.) The "detailed financial information" that Winget refuses to produce is plainly within the scope of the Court's opinion and order.

The Court's order granting Chase's motion to compel did not limit discovery in this case. The Court compelled Winget to respond to Chase's first set of requests seeking financial and other information about the property previously held in the Trust. Winget's contention that an order compelling him to respond in full to one set of document requests effectively created limits on a later set of document requests is simply wrong. Winget's misinterpretation of this Court's previous order does not absolve him of his responsibility to respond to Chase's second discovery request.

Putting aside Winget's misinterpretation of the Court's order, none of Winget's additional objections have merit.

Winget says that the documents Chase seeks have no relevance to this litigation. Not so. The documents are central to an essential element of Chase's claims against Winget, damages. Chase must have discovery as to the value of the assets that were previously held in the Trust in order to prove damages on its counterclaims and to enforce the Amended Final Judgment. Winget's assertion that "[d]isclosure of each asset previously held in the Trust and its disposition" is sufficient for Chase to pursue its

fraudulent conveyance claims is not correct. Again, the Court has already spoken on this. In opposing Chase's prior motion to compel, Winget argued that Chase could not obtain "detailed information about [Mr. Winget's] personal assets" until it had prevailed on its fraudulent conveyance claims. The Court rejected this and other arguments by ordering Winget to produce "all documents in his possession, custody or control that are responsive to Chase's requests." (Doc. 702 at 2.) The requests at issue did not seek only the names of entities once held by the Trust, but also documents relating to "assets, liabilities, net income, and cash flows." (See, e.g., Doc. 689-3, Chase Request No. 1.)

Winget also argues discovery as to asset value is unnecessary because "[i]t is an uncontroverted fact that the entities held in Trust were worth more than nothing at the time of revocation of the Trust." (Doc. 726 at p. 10 n.5.) According to Winget, because no party contests that the assets had some value, Chase is not entitled to prove what that value was. This argument confuses the existence of a fraudulent or constructively fraudulent transfer with the amount of damages. Chase is entitled to discovery aimed at both questions.

Winget also argues that Chase's requests are overbroad. However, Winget has not identified what documents responsive to Chase's requests existed and were not being produced or to negotiate in good faith regarding the scope of production. Winget has done neither. Winget's unsupported "overbroad" argument does not carry the day.

Winget also relies on Michigan's Limited Liability Company Act in a further effort to avoid producing relevant documents. This act applies to satisfaction of a judgment against a member of an LLC. See generally M.C.L. § 450.4507 (providing that a court "may charge the membership interest of the member with payment of the unsatisfied amount of judgment"). Based on this statute, Winget says that Chase is not permitted to discover any information about the financial condition of LLCs that were once held in the Trust. Not so. Chase's second set of document requests does not seek to foreclose on a debtor's membership interest in an LLC. Chase does have a judgment against the Winget Trust but the Winget Trust is no longer a member of any of the LLCs in question. By Winget's own statements, the Winget Trust transferred all of its assets to Winget in January 2014. Chase seeks discovery regarding the nature and whereabouts of the property transferred from the Winget Trust to Larry Winget in order to prove up its counterclaims. Chase is not seeking to satisfy a judgment against Larry Winget's LLC membership interest—it is seeking discovery into the assets that were fraudulently transferred. The statute therefore has no application to Chase's discovery requests.

The closest Winget comes to mentioning access to information about an LLC's holdings is M.C.L. § 450.4507(6), which deals with the right to an accounting. This section provides:

> A court order to which a member may have been entitled that requires a limited liability company to ... provide an accounting ... is not

> available to a judgment creditor of that member attempting to satisfy a judgment out of the member's membership interest.

This language of the statute is inapplicable. Chase has a judgment against the Trust (which is not an LLC) and is pursuing fraudulent conveyance claims against Larry Winget (who is also not an LLC). Chase has not asked the court to "charge [any] membership interest of [Winget] with payment," order "any distribution or distributions to which [Winget] is entitled" be paid to Chase, or foreclose on any membership interest.

To the extent Winget is arguing that the statute prohibits Chase from obtaining discovery regarding the assets of companies previously held by the Trust on the grounds that those companies are LLCs, this argument lacks merit. This argument conflates an "accounting" with civil discovery, but case law makes clear they are different. Michigan law provides that a member of an LLC "may have a formal accounting of the limited liability company's affairs ... whenever circumstances render it just and reasonable." M.C.L. § 450.4503(5). Courts have noted that because "a suit for an accounting invokes a court's equitable powers," an accounting is inappropriate where "discovery is sufficient to determine the amounts at issue." *Weiner v. Weiner*, 2008 U.S. Dist. LEXIS 21163, 2008 WL 746960, at *8 (W.D. Mich. Mar. 18, 2008) (internal quotation marks omitted). The availability of a formal accounting has nothing to do with whether discovery is permissible. Winget's reliance on the Limited Liability Company Act is therefore misplaced.

Finally, Winget says the documents are protected by attorney client privilege or the work product doctrine. Winget also says the request amounts to "Chase may as well have demanded this firm's entire file." (Doc. 726 at 13.) Winget therefore says that creating a log would be overly burdensome.

Winget is mistaken. Chase simply seeks documents (or a log of documents) related to the decision to revoke the Trust and the revocation itself. Considering the actual scope of the request, it is clear that Chase is entitled to any non-privileged documents related to the Trust's revocation and a log of any documents over which Winget asserts privilege.

Moreover, Federal Rule of Civil Procedure 26 is clear: when a party makes a claim of privilege, it must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5)(A); see also, e.g., *Smith v. ComputerTraining.com, Inc.*, 2014 U.S. Dist. LEXIS 119373, 2014 WL 4231175, at *3 (E.D. Mich. Aug. 27, 2014) ("A privilege log must contain the basis for withholding discovery of the document and sufficient detail beyond conclusory allegations to demonstrate the fulfillment of the legal requirements for application of the privilege.") A privilege log is also necessary to allow Chase to assess whether Winget is improperly claiming privilege over documents that do not contain legal advice or amount to work product. Further, a log will help Chase

to determine whether the crime-fraud exception to any claim of privilege applies. While Winget argues Chase is seeking a "fishing expedition" because "Chase has no evidence that the crime/fraud exception applies," Chase has justified its right to make the inquiry. Among other things, Winget has acknowledged that Larry Winget "paid the Trust nothing for the assets transferred out of the Trust" which is a marker of a fraudulent conveyance. *See Estate of Page v. Slagh*, 2007 U.S. Dist. LEXIS 33577, 2007 WL 1385957, at *2 (W.D. Mich. May 8, 2007) (invoking the crime-fraud exception because "the timing and effect of the [allegedly fraudulent] transfers at issue in this case raise a reasonable suspicion that the transfers were undertaken in violation of the MUFTA"). Moreover, Winget has asserted that documents related to the revocation of the Trust are subject to privilege or work product protection, indicating that attorneys played a role in that revocation. Thus, Winget's assertion that Chase has put forward no basis to suggest the crime-fraud exception may apply is incorrect.

V. Conclusion

For the reasons stated above, Chase's motion for costs and expenses is HELD IN ABEYANCE pending a ruling from the Court of Appeals for the Sixth Circuit on Winget's appeals.

Chase's motion for judgment on the pleadings is GRANTED as to liability only on its constructive fraud claim.

Chase's motions to compel are GRANTED.

What is left of this case is (1) a ruling on Chase's motion for costs and expenses after the Sixth Circuit resolves the appeals, (2) Chase's efforts to collect on the Amended Final Judgment.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES
DISTRICT JUDGE

Dated: July 5, 2017
Detroit, Michigan

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 20, 2015

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 14-1158, 14-1172 and 14-1276

JPMORGAN CHASE BANK, N.A.,

Plaintiff-Appellant/Cross-Appellee,

v.

LARRY WINGET; LARRY J. WINGET LIVING TRUST,

Defendants-Appellees/Cross-Appellants.

February 20, 2015, Filed

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

BEFORE: COLE, Chief Judge; and GRIFFIN, Circuit Judge; and CARR, District Judge.[1]

GRIFFIN, Circuit Judge.

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1. The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

Appendix F

This diversity action is the latest chapter in a longstanding dispute between the parties over a credit agreement between defendant JPMorgan Chase ("Chase") and entities owned and operated by plaintiff Larry Winget, some assets of which are held by the Larry J. Winget Living Trust ("the Trust"). In these cross-appeals, Chase appeals the district court's decision to reform the parties' Guaranty Agreement; in that decision, the district court rewrote the agreement, capping the Trust's exposure coextensively with Winget's. Winget and the Trust appeal the district court's grant of summary judgment to Chase on its remaining claims, and the district court's entry of final judgment and denial of sanctions against Chase's attorneys. For the following reasons, we reverse the district court's reformation decision and remand to the district court with instructions to enter judgment as to Count I of Chase's complaint in favor of Chase, consistent with the holding of this opinion. However, we affirm the district court's judgment in all other respects.

I.

A.

Winget is an inventor and businessman. In the 1970s, he formed Venture Holdings Company, LLC ("Venture"). Venture included subsidiaries engaged in the business of manufacturing auto parts. Winget controlled other non-Venture enterprises as well, specifically a company in South Africa, the stock of which was held by PIM Management Co. ("PIM"), and a company in Australia, the stock of which was held by Venco #1, LLC ("Venco"). Both PIM and Venco are Michigan entities.

Appendix F

In 1999, Venture received $450 million in financing to obtain a European company called Puguform. Multiple lenders contributed funds to the loan, and Chase was the administrative agent for the lenders.[1] Puguform eventually became insolvent, triggering defaults and acceleration clauses in the 1999 credit agreement. All parties wanted to avoid a default by Venture. In exchange for forbearance, however, Chase and the lenders required new, additional collateral. Accordingly, the parties negotiated an amendment to the credit agreement ("the Eighth Amendment") that would forestall the acceleration. In October 2002, the parties' respective obligations under the amended agreement were codified into four documents: The Eighth Amendment, a Guaranty Agreement ("Guaranty"), and two Pledge Agreements.

The opening paragraph of the Guaranty described both Winget personally and the Trust collectively as "the 'Guarantor.'" Section 3 of the Guaranty contained the following provisions:

> [T]he Guarantor hereby absolutely and unconditionally guarantees, as primary obligor and not as surety, the full and punctual payment . . . and performance of the Secured Obligations, including without limitation any such Secured Obligations incurred or accrued during the pendency of any bankruptcy, insolvency, receivership, or other similar proceeding . . . .

1. Some of the documents in the record refer to Bank One, Chase's predecessor.

* * *

> Notwithstanding anything herein or elsewhere to the contrary, no action will be brought for the repayment of the Guaranteed Obligations under this Guaranty and no judgment therefor will be obtained or enforced against Larry Winget other than with respect to the Pledged Stock [described in the Pledge Agreements] in accordance with provisions of the related pledge agreements . . . .

Critically, although Section 3 specifically mentions that Winget's personal exposure is limited, it does not mention the Trust at all.

The Pledge Agreements contain several provisions relevant to this appeal. First, as PIM and Venco were part of the new collateral over which the parties negotiated, the Pledge Agreements granted the lenders security interests in the stock of PIM and Venco, respectively. For purposes of this appeal, the security interest granted to the lenders in PIM stock may be referred to herein as the "Winget-PIM pledge."

> Second, in Section 10, the Pledge Agreements specify that
>
> [i]n the event that (i) [Chase] receives for application on the Obligations an amount of not less than $50,000,000 from the sale or financing of the Pledgor's Australia or South

> Africa operations or from one [or] more outside sources . . . the obligations of the Pledgor hereunder shall be deemed satisfied and the pledge created hereby shall be terminated.

Third, the Pledge Agreements each contain an identically-worded "Last Resort" provision, which states:

> Notwithstanding anything herein or elsewhere to the contrary, [the lenders] shall not exercise any rights or remedies . . . until all reasonable efforts shall have been made by [them] to collect the Obligations from other collateral held by [the lenders] . . . it being intended that the Collateral provided by this Pledge Agreement shall be realized upon by [the lenders] only as a last resort.

As this court previously noted, "[t]he 'other collateral' that must first be pursued by [Chase] is not defined." *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007) (*Winget I*).

> Fourth, the PIM pledge includes the following relevant language, in Section 12:
>
> [The lenders] acknowledge[] and agree[] that the purpose of this Pledge Agreement is to allow a pledge of [PIM's] shares for the sole purpose of obtaining security in the shares of [one of the Venture-controlled entities,] Venture Holdings BV and Venture Asia Pacific . . . which are held by [PIM].

At some point, PIM executed a pledge of Venture Holdings BV, as well as a pledge of shares in Venture Asia Pacific. For purposes of this appeal, this is referred to as the "PIM-VB pledge."

> The Eighth Amendment contains an integration clause, which states, in relevant part:
>
> The Credit Agreement, as previously amended and as amended by this Amendment, constitutes the entire understanding of the parties with respect to the subject matter hereof and may only be modified or amended by a writing signed by the party to be charged.

In March 2003, Venture filed for Chapter 11 bankruptcy. This triggered a default under the Eighth Amendment. In April 2005,

> the bankruptcy court ordered the sale of substantially all of Venture and Deluxe's[2] assets pursuant to Section 363 of the Bankruptcy Code (the "Sale Order"). The sale commenced in May 2005, and the proceeds of the sale were applied to Venture's outstanding balance under the Credit Agreement. Following the sale, however, a large amount of Venture's debt remained outstanding under the Credit Agreement.

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2. Deluxe was another entity that provided guarantees in the Eighth Amendment.

Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565, 571 (6th Cir. 2008) (*Winget II*). Specifically, the district court found that approximately $375 million remained due. *Winget v. JP Morgan Chase Bank, N.A.*, 2007 U.S. Dist. LEXIS 15968, 2007 WL 715342, at *2 (E.D. Mich. Mar. 7, 2007).

Later in 2005, Chase brought suit to exercise its rights to inspect the books and records of PIM and Venco; this court affirmed that Chase was entitled to inspect the books. *Winget I*, 510 F.3d at 579.

Meanwhile, Winget sued Chase, alleging, inter alia, that Chase and the lenders engaged in a scheme to devalue some of the Venture-controlled entities prior to the bankruptcy proceeding. *See Winget II*, 537 F.3d at 577-81. This court held that those claims were barred by res judicata because they could—and should—have been brought in the bankruptcy proceeding. *Id.* This court also held that

> to the extent that Winget's claims challenge the [lenders'] compliance with the Last Resort Conditions, such claims are premature. These claims are premature because the [lenders] have not yet enforced the Guaranty Documents; when they do so, Winget may then bring a claim that the [lenders] actions violated the Last Resort Conditions.

Id. at 581.

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In September 2008, the lenders filed the instant action to enforce the Guaranty and Pledge Agreements. The complaint contained three counts: Count I sought to enforce the Guaranty against the Trust; Count II sought to enforce the Guaranty against Winget personally; and Count III sought to enforce the Pledge Agreements against Winget and the Trust.

B.

On November 7, 2008, the Trust filed a motion for judgment on the pleadings as to Count I, arguing that it was undisputed that the Guaranty "provides that no judgment can be obtained against the Trust except with respect to the pledged stock of [PIM] . . . and [Venco]." The district court disagreed, holding that "Section 3 is unambiguous. It names Winget, and Winget alone, in connection with limiting liability under the Guarantee to the Pledged Stock. There is no exception for actions against the Winget Trust."

In response to this ruling, Winget and the Trust moved in January 2009 to amend their answer to include a counterclaim for reformation of the Guaranty. The district court granted the motion.

The counterclaim alleged that the failure to include the Trust in Section 3 was a mutual mistake and that "(i) the written terms of the Guaranty and the Pledge Agreements [should] be read . . . to impose only limited and conditional liability on Winget and the Trust and (ii) the obligations of the Trust to [the lenders] would be no

greater in any respect than the obligations of Winget to [the lenders]." It requested reformation of Section 3 consistent with these allegations.

Following over two years of discovery and motion practice, Chase filed a motion for summary judgment in August 2011. The motion argued: (1) that Chase had recourse against the Trust for Venture's unpaid debt because Section 3 is unambiguous; and (2) that the Trust's mutual mistake claim and request for reformation failed as a matter of law.

The district court denied Chase's motion for summary judgment in December 2011. The district court rejected Chase's argument that, because the Guaranty was an unambiguous, fully integrated agreement, no reformation was appropriate, holding "[t]he issue is not whether the Guaranty is ambiguous or unambiguous; the issue is whether the Guaranty should be reformed to reflect the parties' true agreement." The court determined that, based on parol evidence—specifically, documentary evidence developed during the parties' negotiation over the Eighth Amendment—a genuine issue of material fact existed as to the parties' true intent.

The parties proceeded to a bench trial, at which the district court heard testimony from a number of live witnesses. Most of these witnesses were lawyers who were involved in drafting the Eighth Amendment. In general, Chase's witnesses testified that the omission of the Trust from the Eighth Amendment was intentional and meant to secure an unlimited guarantee from the Trust. By

contrast, Winget's and the Trust's attorneys—and Winget himself—testified that the parties all understood at the time of the Eight Amendment's drafting that the Trust's exposure was to be coextensive with Winget's.

On October 17, 2012, following trial, the district court issued its decision on reformation. The district court made more than fifty findings of fact, not all of which are relevant to the issues on appeal. In broad strokes, however, the district court found: (1) that Winget's and the Trust's witnesses were generally credible, whereas Chase's witnesses generally were not—especially because, according to the district court, "there is no suggestion in the evidence that [the inclusion of the Trust as a guarantor was done for the purpose of] enhancing the lenders' collateral position"; (2) that the majority of the parol evidence developed during the negotiations over the Eighth Amendment indicated that the parties intended for Winget and the Trust to be treated as one and the same; and (3) none of the parties otherwise mentioned or discussed the Trust separately and distinctly from Winget, and no one ever mentioned or discussed the Trust having unlimited exposure. Ultimately, the district court concluded:

> The Winget Trust was purposely added to the Eighth Amendment and related documents to secure ownership of the pledged stock. It was not added to secure any additional liability. As such, the failure to include the Winget Trust under Section 3 was a mistake. It was a mistake that was overlooked by both parties. It is a mistake that the court has the power to correct.

Accordingly, the district court reformed Section 3 by adding a term to read:

> . . . no action will be brought for the repayment of the Guaranty Obligations under this Guaranty and no judgment therefore [sic] no judgment [sic] will [sic] obtained or enforced against Larry Winget *and The Larry J. Winget Living Trust* other than with respect to the Pledged Stock.

(Emphasis added.)

C.

After the district court issued its reformation decision, the parties proceeded to litigate the remaining two counts of Chase's complaint. On November 1, 2012, the district court issued a scheduling order. Noting that the issues for trial had been defined at an October 31 status conference, the court set the following issues for trial:

> (1) The enforceability of the Pledge Agreements relating to [PIM and Venco] in light of the pledge of shares in Venture Holdings, BV, and the pledge of shares in Venture Asia Pacific.
>
> (2) Reasonableness of the efforts by Chase to sell the collateral remaining subsequent to the sale of Venture's assets in the bankruptcy court.

> (3) The text of the judgment to be entered in favor of Chase should it prevail at trial.

The Scheduling Order indicated that "[a]ny objections to this order shall be filed within five business days." No objections were filed.

On December 4, 2012, Chase filed a motion for partial summary judgment on what it characterized as Winget's and the Trust's "enforceability defense" and their "delay" defense. These defenses tracked roughly with the first two issues laid out in the district court's scheduling order. Chase summarized the "enforceability defense" as Winget's and the Trust's assertions in various places in the district court record that the Winget-PIM pledge became unenforceable upon the execution of the PIM-BV pledge. Chase argued, among other things, that the language of the Winget-PIM pledge was unambiguously enforceable because nothing in the Guaranty or Pledge Agreements rendered the Winget-PIM pledge unenforceable upon execution of the PIM-BV pledge.

Chase summarized the "delay defense" as Winget's and the Trust's assertions in various places in the district court record that "Chase has not satisfied the Last Resort provision because Chase 'unreasonably' delayed in liquidating the Other Collateral [referenced in the Last Resort provision], thereby lowering its value." Chase argued, among other things, that the "delay defense" was barred by res judicata. Specifically, Chase argued that Winget's and the Trust's theory was functionally the same one they advanced in *Winget II*, which the district

court and this court had rejected. Chase also noted that the district court in the instant action had previously ruled that, due to *Winget II* and principles of res judicata, "[e]vents prior to May 2, 2005, the date the Venture bankruptcy sale . . . closed, are not relevant to the issue which is the subject of Counts II and III."

Winget and the Trust opposed the summary judgment motion, arguing, among other things, that fact questions remained as to whether Chase's efforts to collect on the other collateral was reasonable within the meaning of the Pledge Agreements, and that res judicata did not bar them from challenging the reasonableness of Chase's efforts. About six months after it filed its opposition to summary judgment, Winget and the Trust filed a supplemental response to Chase's summary judgment motion. The supplemental response asserted that two months before Venture filed for bankruptcy, Venture was approached by Hyundai, which had offered Venture an $800 million contract to produce parts for its automobiles. All that had been needed, Winget and the Trust asserted, was for Chase to advance $8 million in up-front cash to secure the deal. However, according to Winget and the Trust, Chase had refused to front the cash, and then prevented Winget from fronting the money out of his own pocket by threatening to stop supplying Venture with capital in the event the Hyundai proposal went forward at all. Thus, according to Winget and the Trust, whether Chase acted unreasonably in preventing the Hyundai proposal from coming to fruition remained a litigable issue.

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The district court granted Chase's motion for summary judgment. As for the "enforceability defense," the district court reasoned that the plain text of the Pledge Agreements belied Winget's and the Trust's assertions. The court held that the agreements make "no allowance for any type of unenforceability upon execution of the PIM-BV Pledge. Winget's argument is inconsistent with these provisions, and there is no ambiguity that could reasonably allow the result he seeks." The district court similarly rejected the "delay defense" for two reasons. First, the court noted that "every [item of 'other collateral'] was an asset of the Venture or Deluxe bankruptcy estates, and their disposition was subject to the bankruptcy process. . . . At bottom, Winget's Delay Defense is a challenge to [the orders of the bankruptcy court and the Sixth Circuit]. Res judicata bars Winget from challenging their disposition." The district court reiterated its earlier holding that "[e]vents prior to May 2, 2005 . . . are not relevant to the issue which is the subject of Counts II and III." Second, the court ruled that the Last Resort provisions were "a timing requirement that ensures that [the] pledges are the last collateral in line for collection. . . . Nothing in the Last Resort provision[s] condition[s] Chase's rights on receiving 'optimal' liquidation value—to be judged in hindsight—for every item of Other Collateral." Finally, the district court rejected Winget's and the Trust's arguments regarding the Hyundai proposal on the basis that the issue should have been raised in the bankruptcy court and was thus barred by res judicata.

On October 1, 2013, Chase filed a motion for entry of final judgment under Rule 54 arguing, in short, that

between the district court's reformation decision and its grant of summary judgment, all outstanding issues in the case had been resolved. On December 20, 2013, the district court granted Chase's order for entry of final judgment. The court held:

> Winget's defenses—the enforceability and delay defenses—presented the only factual arguments [relevant to the issues in Chase's complaint]. When the Court granted summary judgment on these defenses, there was nothing more to adjudicate. . . . Overall, there remain no factual issues for trial and no defenses to judgment. Chase has satisfied the last resort provision, and it is entitled to judgment in its favor on Counts I, II, and III.

The court emphasized that, contrary to Winget's and the Trust's characterization, it was not "granting Chase summary judgment sua sponte. Rather, the Court is entering a judgment in favor of Chase based on the Court's reformation decision and its summary judgment ruling disposing of Winget's defenses."

After the district court entered its final judgment order, Winget wired a $50 million payment to Chase. During the course of litigating the language of the final judgment, Winget and the Trust argued that the final judgment should reflect that the $50 million payment satisfied and discharged Winget's and the Trust's obligations. The district court disagreed, holding that "[t]ermination of the Pledges only affects the scope of

Chase's recourse, not the extent of Winget's liability. . . . That liability will not be discharged by the termination of the pledges. Winget's proposed language as to 'satisfaction' and 'discharge' of his liabilities is not reflected in any of this Court's holdings. . . ." The district court thus entered an order that: (1) reiterated the court's reformation decision; (2) as to Count I of Chase's complaint, entered judgment against the Trust in the amount of $425,113,115.59, but limited Chase's "recourse for collection . . . to the terms of Section 3 of the Guaranty"; (3) as to Count II of Chase's complaint, entered judgment against Winget personally in the amount of $425,113,115.59, but limited "Chase's recourse for collection . . . to the terms of Section 3 of the Guaranty"; (4) as to Count III of Chase's complaint, entered judgment in favor of Chase and against Winget and the Trust, holding that Chase is "entitled to enforce all rights granted to it in the Pledges, subject to the Pledgor's rights under Section 10 of the Pledges to terminate the Pledges." Finally, the district court ordered that Winget and the Trust were liable to Chase, under Section 17 of the Guaranty, for costs and attorney fees incurred by Chase.

D.

Meanwhile, on September 21, 2012, Winget and the Trust filed a motion for sanctions against Chase and its counsel under Federal Rule of Civil Procedure 11. Essentially, Winget and the Trust argued that because the facts supporting its reformation argument were, in their view, undeniable, Chase's opposition to reformation was sanctionable.

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On November 2, 2012—about two weeks after the district court issued its reformation decision in favor of Winget and the Trust—Winget and the Trust filed a motion for sanctions under 28 U.S.C. § 1927, this time specifically against Chase's attorney, William Burgess. The argument was essentially the same as in the Rule 11 motion—that the parties understood at the time of the Guaranty's drafting that their intent was to limit the Trust's exposure to $50 million, and therefore Burgess's assertions to the contrary at trial and in filings were false and sanctionable. The § 1927 motion argued that Burgess specifically directed the falsehoods—thus, he was uniquely positioned to be singled out for sanctions. The § 1927 motion also bolstered its analysis with the then-recent reformation decision, arguing, in short, that because the district court had agreed with Winget and the Trust about reforming the Guaranty, sanctions were appropriate.

The district court denied the § 1927 motion. The court held that none of the cases cited by Winget and the Trust "come close to supporting sanctions under § 1927," and that Winget and the Trust "have failed to establish any misconduct on the part of Burgess. Rather, Winget seeks sanctions against Burgess for a litigation position, which was not frivolous, taken by Chase where Burgess's role in asserting that position is minor at best. Section 1927 simply does not allow for sanctions under these circumstances."

Having summarized the extensive procedural history of this case, we now turn to the issues raised by the parties in this appeal.

II.

In its sole issue on appeal, Chase claims that the district court erred when it reformed the Guaranty, rewriting the parties' agreement to make the Trust's exposure coextensive with Winget's. We agree.

A.

This claim raises issues of the availability of equitable remedies and of contract interpretation. Reformation of a contract due to mutual mistake is an equitable remedy. *Hearne v. Marine Ins. Co.*, 87 U.S. 488, 490, 22 L. Ed. 395 (1874). Generally, "[whether] there is equitable ground for reformation is a question of law for the court," 66 Am. Jur. 2d Reformation of Instruments § 111; *see also McDonald v. Farm Bureau Ins. Co.*, 480 Mich. 191, 747 N.W.2d 811, 815 (Mich. 2008). We review de novo questions of law. *Cutter v. Wilkinson*, 423 F.3d 579, 584 (6th Cir. 2005). If an equitable remedy is available, and the district court imposes one, we review that decision for an abuse of discretion. *Anchor v. O'Toole*, 94 F.3d 1014, 1025 (6th Cir. 1996).

"Questions of contract interpretation . . . generally are considered to be questions of law subject to de novo review." *Meridian Leasing, Inc. v. Associated Aviation Underwriters, Inc.*, 409 F.3d 342, 346 (6th Cir. 2005).

B.

A federal court, sitting in diversity, is required to "apply state law in accordance with the then controlling decision of the highest state court." *Bailey Farms, Inc. v. NOR-AM Chemical Co.*, 27 F.3d 188, 191 (6th Cir. 1994). "Further, a federal court in a diversity action is obligated to apply the law it believes the highest court of the state would apply if it were faced with the issue." *Standard Fire Ins. Co. v. Ford Motor Co.*, 723 F.3d 690, 692 (6th Cir. 2013) (internal quotation marks omitted). We may also look to "published intermediate state appellate court decisions unless we are convinced that the highest court would decide differently." *Id.* at 697 (citation omitted). Thus, our task is to determine whether the Michigan Supreme Court would exercise the "extraordinary . . . remedy" of reformation in the case of an unambiguous, fully integrated agreement by sophisticated and well-represented parties in an arms-length transaction. 66 Am. Jur. 2d Reformation of Instruments § 1. We conclude that it would not and therefore reverse the district court's reformation decision.

The district court found that the Guaranty was unambiguous, and we agree. Winget and the Trust do not argue that the Guaranty is ambiguous. Rather, they argue that the parties made a mutual mistake by omitting the Trust from Section 3. Ambiguity and mutual mistake are distinct legal concepts under Michigan law; indeed, "[a]n omission or mistake is not an ambiguity." *Zilwaukee Twp. v. Saginaw Bay City Ry. Co.*, 213 Mich. 61, 181 N.W. 37, 40 (Mich. 1921).

"A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a [contractual term] does not, in itself, establish an ambiguity." *Cole v. Ladbroke Racing Mich., Inc.*, 241 Mich. App. 1, 614 N.W.2d 169, 176 (Mich. 2000) (internal citation omitted). The opening paragraph of the Guaranty lists Winget and the Trust as separate entities—accordingly, the parties understood that Winget and the Trust were not interchangeable. Confirming this interpretation is the fact that Winget and the Trust were collectively defined as "guarantor" in the Guaranty's opening paragraph, but in Section 3, Winget is named separately and individually. For these reasons, there is only one interpretation to which the Guaranty is "reasonably susceptible": that Winget and the Trust are separate and distinct legal persons.

> A fundamental tenet of [Michigan] jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*. Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract. [The Michigan Supreme Court has previously held] that the general rule of contracts is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.

Rory v. Cont'l Ins. Co., 473 Mich. 457, 703 N.W.2d 23, 30 (Mich. 2005) (internal quotation marks, footnotes, and alterations omitted). In other words, "[i]f the contractual language is unambiguous, courts must interpret and enforce the contract as written, *because an unambiguous contract reflects the parties' intent as a matter of law.*" *In re Smith Trust*, 480 Mich. 19, 745 N.W.2d 754, 758 (Mich. 2008) (emphasis added). *See also Quality Prods. and Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 666 N.W.2d 251, 259 (Mich. 2003). Additionally, where the parties include an explicit integration clause within a contract, that clause is conclusive that the parties intended the contract to be the final and complete expression of their agreement. *See Hamade v. Sunoco Inc. (R & M)*, 271 Mich. App. 145, 721 N.W.2d 233, 248 (Mich. Ct. App. 2006).

Because reformation is an extraordinary equitable remedy, "courts are required to proceed with the utmost caution in exercising jurisdiction to reform written instruments." *Olsen v. Porter*, 213 Mich. App. 25, 539 N.W.2d 523, 525 (Mich. Ct. App. 1995). Reformation is permitted only under very limited circumstances. Among those circumstances is the parties' mutual mistake of fact. *Mate v. Wolverine Mut. Ins. Co.*, 233 Mich. App. 14, 592 N.W.2d 379, 384 (Mich. Ct. App. 1998) (holding that reformation is a remedy in mutual mistake cases). In cases where the parties were mutually mistaken about some essential fact, a court may vary from the default presumption and admit parol evidence to determine the parties' true intent. *Scott v. Grow*, 301 Mich. 226, 3 N.W.2d 254, 259 (Mich. 1942). A mutual mistake of fact is "an erroneous belief, which is shared and relied on by both

parties, about a material fact that affects the substance of the transaction." *Ford Motor Co. v. City of Woodhaven*, 475 Mich. 425, 716 N.W.2d 247, 256 (Mich. 2006).

In one strand of mutual mistake cases under Michigan law, a "material fact" is a fact contemplated by the agreement itself. For example, in *Ford Motor Co.*, the most recent Michigan Supreme Court case on point, Ford

> filed a personal property statement with the appropriate taxing jurisdiction, [the defendant, City of Woodhaven]. But Ford misreported some of the information in its personal property statements. Because respondents' assessors accepted and relied on Ford's personal property statements as accurate when calculating Ford's tax liability, respondents issued tax bills for amounts in excess of what would have been due had the statements been accurate.

Id. at 249.[3] The Michigan Supreme Court determined that, because both Ford and the tax assessors believed that Ford owned the property when it in fact did not, a mutual mistake of fact existed. *Id.* at 258-59. In other words, the court determined that the fact at issue was whether Ford actually owned the property described in the tax filings.

3. Although *Ford Motor Co.* dealt with a statutory provision that contained the term "mutual mistake," the court looked to contract law in Michigan for guidance and opined at length over the definition of the term in that context.

Another example is the seminal case *Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919 (Mich. 1887). There, Walker agreed to sell Sherwood a cow that both parties believed to be barren. Sherwood bought the cow for a price less than would normally have been paid for a fertile cow. As it turned out, the cow was fertile, and Walker refused to accept payment for the cow. The Michigan Supreme Court reasoned that because the fertility of the cow went to the "whole substance of the agreement[,]" the mutual mistake of the parties as to that fact was grounds for equitable relief. *Id.* at 923. In *Sherwood*, the "fact" at issue was the cow's fertility, which was certainly contemplated by the parties in their agreement.

The instant case is different from the above-cited cases. This case deals not with the parties' mistake as to a fact contemplated by, and thus memorialized in, the agreement, but rather with the alleged omission from the agreement of a material term based on an alleged mutual understanding not represented in the contract.

Nor is this case consistent with the second strand of mutual mistake cases in Michigan: those which remedy a "scrivener's error." In the mine-run "scrivener's error" case, the parties reach an agreement and, when memorializing that agreement, mistakenly forget to include a term or incorrectly describe an agreed-upon term. For example, in *Scott*, a deed erroneously failed to identify two grantees as husband and wife, listing them instead as "tenants by entireties and not as joint tenants." 3 N.W.2d at 255. The Michigan Supreme Court held that

> [w]herever an instrument is drawn with the intention of carrying into execution *an agreement previously made*, but which by mistake of the draftsman or scrivener, either as to law or fact, does not fulfill the intention, but violates it, there is ground to correct the mistake by reforming the instrument.

Scott, 3 N.W.2d at 259 (emphasis added). Indeed, as *Scott* suggests, "[s]uccess in [a case alleging a scrivener's error] requires that the parties to an instrument execute it in the mutually mistaken belief that its terms are those of a valid prior agreement." *City of Farmington Hills v. Farmington Hills Police Officers Ass'n*, 79 Mich. App. 581, 262 N.W.2d 866, 869 (Mich. Ct. App. 1977) (citing *Scott*, 3 N.W.2d at 258). The district court seemed to approach this case through this lens. Citing *Scott*, it noted that "a court of equity has the authority to reform a contract to make the contract conform to the agreement actually made by the contracting parties," and that "if a written instrument fails to express the intention of the parties," a court may reform the instrument. Thus, in the district court's view, the Eighth Amendment, Guaranty, and Pledge Agreements simply codified a prior agreement of the parties, in which they had agreed that the Trust's exposure was to be the same as Winget's personally. That this coextensive exposure was not reflected in the ultimate instrument was the result of mutual mistake, according to the district court.

We disagree with the district court's interpretation and conclude that there was no prior agreement between

the parties. The Eighth Amendment was, and remains, the *only* agreement between the parties. We arrive at this conclusion for the following reasons. First, Winget and the Trust concede that there was no agreement between the parties prior to the Eighth Amendment. At oral argument, Winget's and the Trust's counsel was asked, "[w]hen . . . did a binding contract come into existence?" Counsel responded, "[a] contract came into existence at the time the Eighth Amendment was executed." Second, the pre-Eighth Amendment documents on which Winget and the Trust rely are not evidence of a contract. For example, one such document upon which Winget and the Trust heavily rely as evidence of the parties' intent—a "Summary Term Sheet" which summarizes the proposed agreement—states explicitly that it is "intended as an outline only and does not purport to summarize all the . . . provisions which would be contained in definitive legal documentation for the agreement contemplated hereby." Even more directly, the Term Sheet also states that it "is not a commitment . . . ."

Third, and critically, the Eighth Amendment contains an integration clause stating that the agreement as written down "constitutes the entire understanding of the parties with respect to the subject matter hereof and may only be modified or amended by a writing signed by the party to be charged." Accordingly, the parties understood that the Eighth Amendment was itself the agreement of the parties, and not merely a transcription of a previous agreement. Moreover, in Michigan, "[r]eliance on pre-contractual representations is unreasonable as a matter of law when the contract contains an integration clause."

N. Warehousing, Inc. v. Dep't of Educ., 475 Mich. 859, 714 N.W.2d 287, 287 (Mich. 2006). That is because "an integration clause nullifies all antecedent agreements," and therefore "when the terms of a commitment and a subsequently enacted [contract] conflict and the [contract] contains an integration clause, the terms of the [contract] must control." *Archambo v. Lawyers Title Ins. Corp.*, 466 Mich. 402, 646 N.W.2d 170, 177 (Mich. 2002) (citing 3 Corbin, Contracts § 578, p. 404). Thus, even assuming that the Term Sheet or any other pre-Eighth Amendment documents did amount to a binding agreement, that agreement would have been nullified by the Eighth Amendment, rendering the Eighth Amendment the only agreement between the parties. Therefore the district court's apparent conclusion that the omission of the Trust from Section 3 of the Guaranty was a mere "scrivener's error" is unsupported.

For these reasons, we conclude that the district court's finding of mutual mistake was erroneous. Therefore, we conclude that the equitable remedy of reformation was not available. The district court held a trial to determine what the parties had agreed upon. However, because the Eighth Amendment, Guaranty, and Pledge Agreements constituted the only agreement between the parties, and because the agreement is unambiguous, the district court should never have held a trial in the first instance. The agreement executed by Winget, the Trust, and Chase "reflect[ed] the parties' intent as a matter of law," and contrary to the district court's conclusion, the parties did not agree to treat Winget and the Trust as one and the same. *In re Smith Trust*, 745 N.W.2d at 758. Rather, the

plain text of Section 3 names Winget, and only Winget, as having limited exposure. The district court's decision to rewrite the parties' agreement to add a term must be reversed. We therefore remand this case to the district court with instructions to enter judgment on behalf of Chase on Count I of Chase's complaint, consistent with our holding.

III.

We now turn to the issues raised by Winget and the Trust in their cross-appeal. Winget and the Trust first argue that the district court erred by concluding that their "enforceability" and "delay" defenses are barred by res judicata. These defenses are not so barred, Winget and the Trust argue, because of the Supreme Court's holding in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), and this court's later decision in *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012). We disagree.

A.

The applicability of *Stern* and *Waldman* to Winget's and the Trust's defenses is a question of law and is therefore reviewed de novo. *See Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997).

Winget's and the Trust's argument on this issue also implicates the district court's summary judgment ruling. "We review de novo the district court's grant of summary judgment. Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving

party, there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 526 (6th Cir. 2014) (internal citation omitted).

B.

In *Stern*, the Supreme Court addressed claims arising from the bankruptcy of Vickie Marshall ("Vickie"), also known as Anna Nicole Smith. Vickie's husband, Howard Marshall ("Howard"), omitted her from his will. Vickie filed suit in a state court against Howard's son, Pierce, alleging that he fraudulently induced Howard to sign a living trust excluding Vickie. 131 S. Ct. at 2601. After Howard's death, Vickie filed for bankruptcy. Pierce filed a complaint in the bankruptcy court, claiming that Vickie had defamed him; he also sought a declaration that his defamation claim was non-dischargeable in bankruptcy. *Id*. Pierce filed a proof of claim and sought damages on his defamation claim from Vickie's bankruptcy estate. Vickie responded by filing a tortious interference counterclaim, alleging that Pierce improperly prevented Howard from providing her with half his property, as the couple had intended. *Id*. The bankruptcy court found in Vickie's favor on both Pierce's defamation claim and on her counterclaim for tortious interference. *Id*.

The issue for the Supreme Court was whether the bankruptcy court had jurisdiction—statutorily and constitutionally—to resolve Vickie's counterclaim for tortious interference. *Id*. at 2600-01. The Court

reasoned that, although the bankruptcy court had statutory authority to resolve the counterclaim, it lacked constitutional authority to do so. The Court held that Vickie's counterclaim was "a state law action independent of the federal bankruptcy law and not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy." *Id.* at 2611. Thus, the Court held that, by entering a final judgment on a state-law claim unrelated to the bankruptcy proceeding, the bankruptcy court "exercised the judicial power" reserved for Article III courts. *Id.* at 2601.

In *Waldman*, this court summed up Stern as follows:

> When a debtor pleads an action under federal bankruptcy law and seeks disallowance of a creditor's proof of claim against the estate . . . the bankruptcy court's authority is at its constitutional maximum. But when a debtor pleads an action arising only under state-law . . . or when the debtor pleads an action that would augment the bankrupt estate, but not "necessarily be resolved in the claims allowance process[,]" . . . then the bankruptcy court is constitutionally prohibited from entering final judgment.

Waldman, 698 F.3d at 919 (internal citations omitted).

Thus, our inquiry in this case is where Winget's and the Trust's defenses fall on this spectrum. Are Winget's and the Trust's defenses matters of pure state law, or

are they the types of defenses that must necessarily be resolved in the bankruptcy court? To that end, it is important to note that Winget and the Trust never say *which* of their defenses is applicable to their arguments under *Stern* and *Waldman*. In reality, only the "delay defense" is.

The district court correctly synthesized Winget's and the Trust's defenses into two categories: "enforceability" and "delay." Winget and the Trust do not object to this framing of the issues. The "enforceability defense" alleged that the Winget-PIM pledge became unenforceable after the execution of the PIM-BV pledge. This defense is in no way predicated on the bankruptcy proceeding. It is purely a matter of contract interpretation, and that is how the district court resolved it. The district court did not rely on the bankruptcy proceeding in resolving the "enforceability defense" because no party asked it to. Indeed, the district court's holding that "[e]vents prior to May 2, 2005 . . . are not relevant"—which appears to be the primary holding to which Winget and the Trust object in their *Stern* argument—was made specifically with respect to the "delay defense" and not the "enforceability defense." Whether the district court was correct in resolving the "enforceability defense" in Chase's favor is one of the issues on appeal and is analyzed in full below. But this resolution does not depend on the bankruptcy, and thus, neither *Stern* nor *Waldman* is applicable to the "enforceability defense." Accordingly, we reject Winget's and the Trust's arguments to the extent they request that we reverse the district court's ruling on the "enforceability defense" because of its ruling on res judicata arising from the Venture bankruptcy.

However, the district court's resolution of the "delay defense" was predicated on res judicata arising from the Venture and Deluxe bankruptcy case. We conclude that because the "delay defense" focuses on the value of the assets disposed of in the bankruptcy, it is not a pure common law claim like the one at issue in *Stern*, but rather goes—as this court previously found—to "the heart of the [bankruptcy] Sale Order[s]." *Winget II*, 537 F.3d at 580.

The crux of the "delay defense" is that Chase violated the Last Resort provisions—which require that Chase seek recourse through "other collateral" before exercising its rights under the Pledge Agreements—by "unreasonably" delaying liquidation of Venture's and Deluxe's assets in order to lower their value. In other words, by arguing that Chase acted "unreasonably" in disposing of "other collateral" in violation of the Last Resort provisions, Winget and the Trust challenge the value of the assets disposed of in the Venture bankruptcy—at least to the extent the "other collateral" consists of assets disposed of in the bankruptcies.[4] Winget and the Trust had an opportunity to challenge the value of those assets in the bankruptcy proceedings, and the bankruptcy court is the appropriate forum for such arguments. *Stern* did not deprive the bankruptcy court of its jurisdiction to consider the "delay defense" because—despite Winget's and the Trust's attempts to label it as a pure common law argument—the "delay defense" at its core is simply another challenge to the value of the bankruptcy assets.

4. To the extent that the "other collateral" includes the Hyundai proposal, we address that claim below.

Case law supports this conclusion. *Compare In re Bellingham Ins. Agency, Inc.*, 702 F.3d 553, 562 (9th Cir. 2012) (holding that state-law fraudulent-transfer claims brought by the bankruptcy trustee could not be resolved by the bankruptcy court in light of *Stern*) *with In re Spillman Dev. Grp. Ltd.*, 710 F.3d 299, 305-06 (5th Cir. 2013) (holding that the bankruptcy court's authority to issue a judgment about a creditor's credit bid did not run afoul of *Stern* because, unlike in *Stern*, where Vickie's counterclaim was "in no way reliant or dependent on proceedings in bankruptcy—it just happened to have been a counterclaim to a claim asserted in a bankruptcy proceeding," the creditor's claim was not a state law action independent of the federal bankruptcy law but was "inextricably intertwined with the interpretation of a right created by federal bankruptcy law"). Accordingly, the district court did not err in granting summary judgment to Chase on the "delay defense" based on res judicata, despite the holdings of *Stern* and *Waldman*.

IV.

Next, Winget and the Trust argue that the district court erred by granting Chase summary judgment on their "enforceability" and "delay" defenses for reasons other than the holdings of *Stern* and *Waldman*. We disagree.

A.

We first address the "enforceability defense." Winget and the Trust argue that the lenders' security interest in

PIM (i.e. the Winget-PIM pledge) became unenforceable after Winget "cause[d] PIM to provide Chase with a pledge of its shares in Venture Australia [and BV]" (i.e. the PIM-BV Pledge). In other words, Winget and the Trust argue, as they did below, that "the parties intended the [Winget-]PIM Pledge to function merely as a placeholder" and that once the PIM-BV pledge was executed, the Winget-PIM pledge became unenforceable by operation of the "sole purpose" language of Section 12 of the Pledge Agreements.

As explained above, unambiguous contracts must be enforced as written, and generally only in the case of ambiguity are courts permitted to consider extrinsic evidence of parties' intent. *Rory*, 703 N.W.2d at 30; *In re Smith Trust*, 745 N.W.2d at 758. Winget and the Trust simultaneously argue that the PIM Pledge Agreement is ambiguous and unambiguous—on the one hand arguing that its plain language supports their position, while on the other hand arguing that the PIM Pledge Agreement "create[s] an ambiguity not subject to resolution as a matter of law." We conclude that the district court's analysis was correct—the contract language unambiguously provides that Chase is entitled to summary judgment on this defense.

The PIM pledge specified how it could be terminated. Section 7.14 states:

> This Pledge Agreement shall continue in effect . . . until no Obligations or commitments or commitments by [Chase] which could give

> rise to Obligations shall be outstanding, except as provided in Section 10 . . . .

Section 10 stated, in pertinent part:

> [i]n the event that . . . [Chase] receives for application on the Obligations an amount of not less than $50,000,000 from the sale or financing of the Pledgor's Australia or South Africa operations or from one [or] more outside sources . . . the obligations of the Pledgor hereunder shall be deemed satisfied and the pledge created hereby shall be terminated.

The Pledge Agreement thus unambiguously specifies that the way to satisfy the pledgor's obligation under the agreement was to pay Chase $50 million. Section 12 does not provide otherwise. The "sole purpose" language in Section 12 creates restrictions on Chase's actions in collecting on the pledge—it does not provide that Chase's rights to PIM become unenforceable upon the satisfaction of the PIM-BV pledge. Indeed, after the "sole purpose" language, Section 12 states: "Therefore, [Chase] agrees to not interfere with [PIM] (i) operating its business; (ii) disposing, transferring, or encumbering its [non-BV assets], and (iii) to reasonably cooperate with the Pledgor and [PIM] in consummating any transaction in which the Pledgor proposes to separate the [non-BV assets] from the assets of [PIM]." Other sections of the contract confirm this interpretation of Section 12: the Eighth Amendment lists *both* PIM and BV as collateral, as does the Last Resort provision of the Pledge Agreement. *See Vushaj v.*

Farm Bureau Gen. Ins. Co. of Michigan, 284 Mich. App. 513, 773 N.W.2d 758, 760 (Mich. Ct. App. 2009) (terms used in a contract must be read in context along with other provisions). Indeed, as the district court noted, even Section 12 itself "contemplates enforcement of the Winget-PIM pledge by requiring that, when Chase takes control of PIM's stock, it cooperate in transactions to transfer non-BV assets from PIM."

Winget's and the Trust's argument to the contrary is unavailing. They argue that the Pledge Agreement provides for the unenforceability of the Winget-PIM pledge because Section 12 was specifically negotiated, whereas Sections 7.4 and 10 are "boilerplate." However "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp v. United Ins. Grp. Agency, Inc.*, 468 Mich. 459, 663 N.W.2d 447, 453 (Mich. 2003). Interpreting the contract in the way Winget and the Trust propose would render the portions of the contract that list both PIM and BV stock nugatory because this interpretation would ignore Sections 7.4 and 10 altogether. Thus, Winget's and the Trust's argument that the contract unambiguously supports their "enforceability defense" fails.

Winget and the Trust also assert that the "sole purpose" language conflicts with the section of the Pledge Agreement establishing the Winget-PIM pledge. However, as explained above, there is no conflict—Section 12 provides restrictions on Chase's rights to collect; it does not deprive Chase of its security interest.

Thus, the district court did not err by granting summary judgment to Chase on the "enforceability defense."

B.

We next address the district court's grant of summary judgment as to the "delay defense." Winget and the Trust first argue that by interpreting the Last Resort provisions as a "timing requirement that ensures that Winget's pledges are the last collateral in line for collection," the district court read out of the Last Resort provisions the requirement that Chase's efforts to collect on the "other collateral" be "reasonable."

To the extent the "other collateral" in the Last Resort provisions consists of assets disposed of in the Venture bankruptcy, the district court did not err in its res judicata holding. As explained above, because the "delay defense" challenges the "reasonableness" of Chase's conduct in influencing the value of the assets, the appropriate forum for those claims was the bankruptcy court. In short, because Winget's and the Trust's "reasonableness" argument under the Last Resort provisions is functionally an argument challenging the value of the assets in the bankruptcy, the "reasonableness" issue as to the bankruptcy assets has already been litigated.

Winget and the Trust argue, however, that the "other collateral" was not limited to the assets disposed of in the bankruptcy. They assert that the Hyundai proposal was "other collateral" outside the Venture bankruptcy.

Thus, they say, whether Chase complied with the Last Resort provisions as to this asset is still at issue, and the district court erred by denying discovery on this issue. However, as the district court noted, the Hyundai proposal "never proceeded beyond letters of intent." Winget and the Trust did not dispute this fact below, arguing instead that Chase prevented Venture from completing the deal by failing to provide the up-front cash necessary to finalize the deal, and stopped Winget from providing it himself. This, they argue, was unreasonable and in violation of the Last Resort provisions. We disagree. The Last Resort provisions require that Chase exercise "reasonable efforts . . . to collect . . . from *other collateral*." Because the Hyundai proposal was never finalized, it was not "collateral" on which Chase could collect.[5] The fact that Chase may have prevented the Hyundai proposal from *becoming* "collateral" is immaterial under the plain text of the Eighth Amendment documents. Winget and the

5. Winget and the Trust deny that the Hyundai proposal never progressed beyond letters of intent by relying on one word from the deposition of Larry Nyhan, a Chase attorney. Nyhan was asked by Winget's and the Trust's attorney if "the Hyundai letter of intent that awarded Venture new business would have been considered an asset of the company?" Nyhan responded, "yes." Both in their brief and at oral argument, Winget and the Trust asserted that Nyhan accordingly "admitted that the Hyundai Contract was an asset of Venture that was subject to Chase's security interest." We disagree with this reading of the transcript. Winget's and the Trust's attorney's question to Nyhan referred to the Hyundai proposal as a "letter of intent," not as a "contract," and appeared to be asking, hypothetically, whether an arrangement with Hyundai "would have" been considered an asset of the company in the event that the deal progressed beyond the stages of letters of intent.

Trust point to no document requiring Chase to advance the funds to make the Hyundai proposal "collateral," and nothing in the contract prevented Chase from using its leverage to stop Winget himself from allowing Venture to complete the deal. In short, the Last Resort provisions do not apply to the Hyundai proposal at all.

Moreover, even assuming that the Hyundai proposal had progressed beyond the point that it did, and that a contract with Hyundai had become an asset of Venture, we would still affirm the district court. There are several provisions of the bankruptcy code that provide a debtor recourse as to the disposal of assets in the course of a bankruptcy proceeding, and Winget and the Trust did not avail themselves of these provisions with regard to the Hyundai proposal during the Venture bankruptcy. Thus, we agree with the district court that the proper forum for Winget and the Trust to raise these concerns would have been the bankruptcy court.

V.

On September 10, 2012, while the reformation issue was being litigated, Winget and the Trust filed a motion for summary judgment, alleging that Count I of Chase's complaint should be dismissed because it should have been litigated in *Winget I*. The motion argued that Chase "deliberately split its claims, bringing suit only to compel monitoring of the guarantor companies in South Africa and Australia, and for strategic reasons choosing not to enforce the . . . Guaranty against the Trust until 2008." The district court denied the motion. We agree with the district court.

Appendix F

The elements of res judicata are well established:

> A claim is barred by the res judicata effect of prior litigation if all of the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Browning v. Levy, 283 F.3d 761, 771 (6th Cir. 2002) (citation and quotation marks omitted).

Only the fourth element is at issue here. An identity of claims means "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Sanders Confectionery Prods. v. Heller Fin., Inc.*, 973 F.2d 474, 484 (6th Cir. 1992) (citation omitted). *Winget I* was an action about inspection rights—Chase "sought to inspect the financial records of [PIM and Venco]" as well as of Winget personally. *Winget I*, 510 F.3d at 579-80. Chase sought inspection rights to determine whether and how to enforce the guaranties. *Id.* at 585 (noting that the purpose of the inspection rights was "to ensure that there is sufficient collateral to satisfy Winget's debt"). This case, by contrast, is about actually enforcing the guaranties.

Even assuming that there is an identity of facts creating the right of action, the current case required entirely different evidence from *Winget I*. The present

case required evidence about how much Winget owed, whether the guaranties were enforceable as a legal matter, and whether certain assets had been disposed of. Winget and the Trust offer no argument that these two cases required the same evidence.

Moreover, *Winget I* arose from Winget's refusal to let Chase inspect the books; there, Winget argued that "the sole right of [Chase] under [the guaranty] documents is to enforce its security interest and apply the proceeds to satisfaction of the Guaranteed Obligations." *Id.* This court disagreed, holding that Chase had the right to inspect the books in case Chase "needs to enforce its security interest at a later time." *Id.* In other words, *Winget I* indicates that this court previously recognized that the right to inspection and the right to enforcement are distinct. And, based on Winget's litigation position in *Winget I*, it appears that he did as well. By arguing that Chase's only right was enforcement of the guaranties, he was in essence inviting Chase to do precisely what he and his Trust now oppose: enforce the guaranties.

VI.

Next, Winget and the Trust argue that the entry of final judgment was improper—indeed, they argue it was unconstitutional—because it deprived them of an opportunity to develop and present numerous defenses under Michigan common law and the UCC that they had not previously raised. We disagree.

Appendix F

On November 1, 2012, the district court issued a scheduling order clarifying the issues to be resolved at trial. Those were limited to: (1) the "enforceability defense"; (2) the "delay defense"; and (3) the text of a final judgment should Chase prevail. The scheduling order provided that any objections to it must occur within five days. Winget and the Trust did not file any objections to the issues framed by the district court based on their common law/UCC defenses. In fact, the first mention of Chase's duties under common law and the UCC arose in Winget's and the Trust's opposition to Chase's motion for final judgment.

The purpose of scheduling orders issued pursuant to Rule 16 of the Federal Rules of Civil Procedure is, among other things, "to promote familiarity with the issues actually involved in the lawsuit so that parties can accurately appraise their cases and substantially reduce the danger of surprise at trial." *Clarksville-Montgomery Cnty. Sch. Sys. v. U.S. Gypsum Co.*, 925 F.2d 993, 998 (6th Cir. 1991). In accordance with this principle, objections not made to scheduling orders are waived. *Id.* In this case, the Scheduling Order defined the scope of the issues for trial. Winget's and the Trust's common law/UCC issues are beyond the scope of the parameters in that order. Winget and the Trust admit as much, writing that the district court's order "resolved *only* the issue of contractual defenses" available to them. True. But these were the only issues in the Scheduling Order to which Winget and the Trust did not object. The time for Winget and the Trust to raise issues for trial beyond those listed in the Scheduling Order was within the time period specified

therein. Contrary to their assertions, Winget and the Trust did not "place[] in issue Chase's compliance with . . . Article 9 [of the UCC]," at least not in a timely manner.

> Once a summary judgment has been entered, no further proceedings in the action are feasible. Thus, in the two-party, single-claim situation the granting of a summary judgment is a "judgment" within the definition of Rule 54(a) and an appeal is proper. The same is true in the multiple-claim or multiple-party situation if the summary judgment disposes of all the claims between or among all the parties.

10A Wright, Miller, et al., Federal Practice and Procedure § 2715 (3d ed.). Following the district court's reformation decision and its order granting summary judgment to Chase on the delay and enforceability defenses, all issues listed in the Scheduling Order had been resolved. Accordingly, there were no more outstanding issues. Thus, the district court's entry of final judgment was proper.

In a footnote, Winget and the Trust also assert that "the district court erroneously interpreted . . . Section 17 of the Guaranty as entitling Chase to an award of fees and costs in prosecuting this action despite Winget's payment . . . of $50 million to Chase . . . ." Although framed as an attack only on the section of the final judgment order's provision regarding attorney fees, Winget and the Trust attempt to resurrect their argument from the district court "that the parties agreed [that Winget's and the Trust's] liability under the guaranty for the

Venture debt was limited to $50 million." Indeed, the footnote in Winget's and the Trust's brief states "[u]nder the terms of the Guaranty and Pledges, [the $50 million] payment terminated all of Winget's obligations . . . ." In other words, Winget and the Trust attempt yet again to argue that their payment of $50 million satisfied all their obligations.

Winget and the Trust forfeited any argument that the payment of $50 million terminated their obligations by raising the issue only in a footnote.

> [I]t is generally held that an argument is not raised where it is simply noted in a footnote absent any recitation of legal standards or legal authority. . . . This conclusion is logical, given that a footnote merely supplements an existing argument; it is not, by definition, used to present a new argument or idea.

Calvert v. Wilson, 288 F.3d 823, 836-37 (6th Cir. 2002) (internal citations omitted). For these reasons, we affirm the district court on this issue.

VII.

Finally, Winget and the Trust argue that the district court erred by denying their motions to impose sanctions on Chase's attorneys. We disagree.

We review for an abuse of discretion "the decision [of the district court] to impose sanctions pursuant to Rule

11 . . . [and] 28 U.S.C. § 1927 . . . ." *Jones v. Ill. Cent. R.R. Co.*, 617 F.3d 843, 850 (6th Cir. 2010). "A court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *Id.*

"[T]he test for the imposition of Rule 11 sanctions [is] . . . whether the individual's conduct was reasonable under the circumstances." *Union Planters Bank v. L & J Dev. Co.*, 115 F.3d 378, 384 (6th Cir. 1997) (citation omitted). Similarly,

> [a] court may sanction an attorney under § 1927 for unreasonably and vexatiously multiplying the proceedings even in the absence of any "conscious impropriety." *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 396 (6th Cir. 2009) (citation omitted). The proper inquiry is not whether an attorney acted in bad faith; rather, a court should consider whether "an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims."

Hall v. Liberty Life Assur. Co. of Boston, 595 F.3d 270, 275-76 (6th Cir. 2010) (citation omitted).

Winget and the Trust argue that in light of the parol evidence as to the formation of the Guaranty, which the district court relied on in its reformation decision, sanctions

are appropriate under both Rule 11 and § 1927 because any litigation strategy asking the court to disregard the parol evidence was frivolous. However, in light of the fact that we agree with Chase on Winget's and the Trust's reformation claim, the district court did not abuse its discretion. A litigation strategy, perhaps obviously, is not "unreasonable" or "frivolous" if it is successful.

VIII.

For the foregoing reasons, we affirm the district court's judgment with respect to all claims brought in Winget's and the Trust's cross-appeal. As for Chase's claim regarding the district court's reformation decision, we reverse the judgment of the district court and remand with instructions to enter judgment in favor of Chase on Count I of Chase's complaint.

APPENDIX G — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, FILED OCTOBER 17, 2012

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 08-13845
HON. AVERN COHN

JP MORGAN CHASE BANK, N.A.,

Plaintiff/Counter-Defendant,

v.

LARRY WINGET AND THE LARRY WINGET LIVING TRUST,

Defendants/Counter-Plaintiffs.

October 17, 2012, Decided;
October 17, 2012, Filed

DECISION ON REFORMATION

I. Introduction

This is a commercial finance dispute. Plaintiff, JP Morgan Chase Bank, N.A. (Chase, hereafter Agent)[1] is the

1. Initially, the Administrative Agent was First National Bank of Chicago; JP Morgan Chase Bank, N.A. is the successor,

Administrative Agent for a group of lenders which includes the Agent, that initially extended credit to Venture Holdings Company, LLC (Venture) in 1999 under a Credit Agreement. Venture defaulted on the Credit Agreement and eventually went into bankruptcy. Currently, over 400 Million Dollars is unpaid under the Credit Agreement. The Agent is suing defendants, Larry Winget (Winget) and The Larry Winget Living Trust (Winget Trust) [2] to enforce a Guaranty and two (2) Pledge Agreements entered into by Winget and signed by Winget and the Winget Trust in 2002, guaranteeing the obligations of Venture. The Guaranty and Pledge Agreements are part of the Eighth Amendment To Credit Agreement. Particularly, the Agent makes three (3) claims:

Count I	Enforcement of Guaranty Against the Winget Trust
Count II	Enforcement of Guaranty Against Winget
Count III	Enforcement of Pledge Agreements Against Winget and The Winget Trust

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by merger, to First National Bank of Chicago. In its papers, the Agent has referred to itself as Chase, at the Court's direction. For purposes of this decision, the Court prefers to use the term Agent, rather than Chase.

2. Winget and the Winget Trust will sometimes be referred to collectively as Winget.

As to Count I, the Agent takes the position that while the Guaranty is limited to $50 million dollars as to Winget, it is unlimited as to the Winget Trust. Winget has filed a counterclaim seeking reformation of the Guaranty as to the Winget Trust to limit its obligations to the same as that of Winget.

As will be explained below, the reformation issue relates to Section 3 of the Guaranty, which reads in relevant part:

> SECTION 3. *The Guaranty.* Subject to the last paragraph of this Section 3, the Guarantor hereby and unconditionally guarantees, as primary obligor and not as surety, the full and punctual payment . . .of the Guaranteed Obligations . . .
>
> . . .Notwithstanding anything herein or elsewhere to the contrary, *no action will be brought for the repayment of the Guaranteed Obligations* under this Guaranty and no judgment therefore will be obtained or enforced *against Larry Winget other than with respect to the Pledged Stock* in accordance with the provisions of the related pledge agreements[.]

The Agent says that the Guaranty is only limited as to Winget, not the Winget Trust because Section 3 states only "Larry Winget" and not "Larry Winget and the Winget Trust." Winget disagrees, contending that the failure to state "and the Winget Trust" in Section 3 was a mistake.

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The Court bifurcated the counterclaim and set it down for separate trial. For eight (8) days in August, 2012, the issue of reformation was tried to the Court. For the reasons which follow, see Parts IV. and VI., which constitute the findings of fact and the conclusions of law required by Fed. R. Civ. P. 52(a), the Court finds that reformation of the Guaranty limiting the scope of the liability of the Winget Trust to the scope of the liability of Winget is appropriate.

II. Background Decisions

The following decisions describe the background of the reformation issue:

- *JP Morgan Chase Bank, NA v. Winget and the Winget Living Trust*, 510 F.3d 577 (6th Cir. 2007)
  (Decision affirming the Court's grant of the Agent's specific performance of inspection rights).

- *Winget and Winget Living Trust v. JP Morgan Chase Bank, NA, et al.*, 537 F.3d 565 (6th Cir. 2008)
  (Decision affirms the Court's dismissal on *res judicata* grounds Winget's suit that Agent and lenders engaged in a scheme to coerce him into contributing certain assets to a collateral pool).

- Memorandum and Order Granting Defendants' Motion for Leave to Amend Answer (Doc. 40) (The Court gave Winget and the Winget Trust leave to "amend their answer to allege additional affirmative defenses of mistake, *res judicata* and estoppel (equitable and judicial) and a counterclaim seeking reformation of the Guaranty on grounds of mistake." This followed the Court's denial of the Winget Trust's motion seeking a ruling that the language of the Guaranty limited the liability of both Winget and the Winget Trust to the pledged stock (Doc. 29)).

- Memorandum Denying Plaintiff's Motion for Summary Judgment on Count I and on Defendants' Counterclaim (Doc. 191) (Doc. 214), 2011 U.S. Dist. LEXIS 143039, 2011 WL 6181438 (E.D. Mich. Dec. 13, 2011) (The Court explained the reasons why "there is sufficient evidence of mutual mistake such that reformation of the Guaranty and Pledge Agreements against the Winget Trust may be appropriate").

III. The Trial

A. Witnesses

1. Winget and Winget Trust

Witnesses called by Winget and the Winget Trust in person or by deposition at trial were:

- Roy Gallagher (Gallagher) - a former Vice President of Ernst & Young Corporate Finance (EYCF), who did financial studies of Venture for Chase and Dickinson Wright, LLC (Dickinson), the law firm which represented Chase

- Richard Babcock (Babcock) - an officer of the Agent who negotiated the Term Sheet on behalf of the Agent

- Linda Thompson (Thompson) - an officer of the Agent who negotiated the Term Sheet on behalf of the Agent

- Ralph R. McKee (McKee) - Winget's principal lawyer

- Winget - Defendant and Counter-Plaintiff

- James Butler (Butler) - a Finance Manager at Venture who was involved in negotiating the Term Sheet and the language of the Eighth Amendment and related documents on behalf of Venture

- J.T. Atkins (Atkins) - a financial analyst and advisor to Winget in the Venture bankruptcy

- Daniel Terpsma (Terpsma) - a banker and commercial lender who expressed an expert

opinion that based on his examination of the record, the Agent did not rely on the guarantee of the Winget Trust to enhance the lenders' collateral position

- William Burgess (Burgess) - a lawyer with Dickinson who represented the Agent in the drafting of the Eighth Amendment and related documents, and in the Venture bankruptcy

- Larry Nyhan (Nyhan) - a lawyer who represented the Agent in the Venture bankruptcy

- David Potrykus (Potrykus) - a Black Diamond Capital Management, LLC representative. Black Diamond was a lender.

2. The Agent

Witnesses called by the Agent in person or by deposition at trial were:

- Babcock (see above)

- Jonathan Bell (Bell) - a lawyer for Venture in the Venture bankruptcy

- Timothy Bradley (Bradley) - a lawyer for Winget in the drafting of the language of the Eighth Amendment and supporting documents

- Burgess (see above)
- Nyhan (see above)
- Potrykus (see above)
- Edward R. Renwick (Renwick) - a Yucaipa Companies, LLC (Yucaipa) representative. Yucaipa was a lender
- William P. Shield (Shield) - a lawyer with Dickinson who drafted the Term Sheet
- Dawn Faxon-Singer (Faxon-Singer) - a lawyer with Dickinson who drafted the language of the Eighth Amendment and its related documents
- Thompson (see above)
- Matthew Clemente (Clemente) - a lawyer for the Agent in the Venture bankruptcy

3. Commentary

Several comments are in order regarding the testimony of the witnesses:

- There is a distinction between the negotiations regarding the terms of the Eighth Amendment and negotiations regarding the language of the Eighth

Amendment and the related documents. Babcock and Thompson negotiated the terms of the Eighth Amendment with Winget. The lawyers for the Agent and the lawyers for Winget negotiated the language of the Eighth Amendment and the related documents.

- Burgess had the responsibility for drafting the language of the Eighth Amendment and the related documents. Faxon-Singer did the actual drafting of the language of the Eighth Amendment and the related documents.

- Shield had the responsibility for drafting the Term Sheet which described the business deal which was memorialized by the Eighth Amendment and the related documents.

- As explained below in Part IV., neither Burgess nor Shields were credible witnesses.

B. Exhibits

1. Generally

Numerous exhibits were admitted in evidence at the trial. Post-trial, the parties filed lists of the exhibits as follows:

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Common Exhibits - 13 (Doc. 338)

Winget Exhibits - 70 (Doc. 340)

Chase Exhibits - 34 (Doc. 339)

The exhibits included drafts of the Term Sheet, drafts of the Eighth Amendment, the Pledges and the Guaranty e-mails, the Agent's Problem Credit Reports, Intralink postings (the Intralink was the mechanism by which the Agent communicated with the lenders); the Agent's Credit Approval Summaries; transcripts of hearings and depositions, and the like.

2. Significant Exhibits

The significant exhibits are:

Description	*Exhibit*
• Larry J. Winget Living Trust (July 01, 1999)	C 1
• Venture Holdings Trust Credit Agreement (May 27, 1999)	C 10
• Venture Holdings Company, LLC Proposed Forbearance Agreement Summary Term Sheet (October 09, 2002)	C 2

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Description	*Exhibit*
• Draft of Pledge Agreement (October 20, 2002)	W 19
• Draft of Pledge Agreement (October 21, 2002)	C 5
• Draft of Guaranty (October 18, 2002)	C 3
• Draft of Guaranty (October 22, 2002)	C 6
• Eighth Amendment and related documents (October 21, 2002)[3]	C 11
• Guaranty (October 21 2002)	C 11 Tab 5
• Pledge Agreements (October 21, 2002) PIM Management Company Venco #1 , LLC	C 11 Tab 11 Tab 12
• E-mail to lenders (October 21, 2002)	W 21
• Apollo Management, LP Memorandum re:Venture (October 21, 2002)	W 26

3. The majority of the Eighth Amendment and related documents, including the Guaranty, were executed on or about

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Description	*Exhibit*
• Credit Approval Summary (April 4, 2004)	W 54
• Winget's Personal Financial Statement (October 21, 2002)	W 20
• Schedule of Liens	W 58
• E-mail - posting of Term Sheet on Intralink (October 9, 2002)	W 15
• Court of Appeals for the Sixth Circuit Brief (excerpt) (May 7, 2007)	W 84
• EYCF Summary of Papers	W 6, W 14
• Eighth Amendment Summary of Correspondence (October 18, 2002 - October 28, 2002)	W 78
• The Complaint For Specific Performance And Declaratory Judgment filed by the Agent in the 2005 case	W 92

October 28, 2002, but dated effective October 21, 2002.

• The Agent's Reply Brief in the 2005 case (Doc. 29)	W 82

Description	*Exhibit*
• Credit File	W 80
• Complaint	Doc. 1

3. Commentary

Like the witnesses, some commentary is called for with respect to the exhibits.

- The only copy of the Winget Trust instrument in evidence came from Winget. The Agent did not have a copy of the Winget Trust instrument in its files.

- No financial statement of the Winget Trust was admitted in evidence. The only financial statement in evidence was that of Winget.

- The first document making any mention of the unlimited liability of the Winget Trust was a footnote reference in the brief filed by the Agent in the Court of Appeals for the Sixth Circuit in Winget's appeal of the dismissal of his case charging that the Agent was involved in a scheme to coerce him (the 2007 case). The brief was filed May 7, 2007.

- The second document making any mention of the unlimited liability of the Winget Trust was the complaint filed in this case on September 8, 2008.

- There was no reference to the unlimited liability of the Winget Trust in any Credit Approval Summary or Problem Credit Report in the files of the Agent.

- None of the correspondence between the Agent and the lenders contain any reference to the unlimited liability of the Winget Trust.

- There was no mention of the unlimited liability of the Winget Trust in the Venture bankruptcy.

- There was no mention of the unlimited liability of the Winget Trust in any document prepared by EYCF.

IV. Findings of Fact

The following are the factual findings required by Fed. R. Civ. P. 52. The findings are based on an assessment of the credibility of the witnesses, weighing the testimony of the witnesses and the exhibits, and drawing such inferences from the evidence as is appropriate, all with due consideration of the pretrial findings of fact proffered

by the parties. [4]

Regarding the credibility of the witnesses, given that the Winget Trust was added as a party to the Guaranty shortly before the Eighth Amendment and related documents were signed, and there is no suggestion in the evidence that the Agent looked to this inclusion as enhancing the lenders' collateral position, substantially more weight has been given to the testimony of witnesses called by Winget, particularly Winget and Terpsma, than the testimony of witnesses called by the Agent.

1. Between 1999 and 2002, the Agent acted on behalf of a group of lenders, including the Agent, that advanced credit to Venture. Venture was owned by Winget.

2. Winget created a living trust in 1987. The Winget Trust held most, if not all, of Winget's assets. The instrument in evidence appears to be a restatement. *See* C 1.

3. There was no mention ever made of a distinction between Winget personally and the Winget Trust in the course of dealings between the Agent, Venture and Winget at any relevant time.

4. In October of 2002, the Agent and Winget entered into the Eighth Amendment To Credit Agreement. In

4. These factual findings include by reference the Joint Narrative Statement Of Facts For Count I And Defendants' Counterclaim (Doc. 291) to the extent such findings supplement the factual findings below.

October, 2002, Venture was in severe financial condition as a consequence of the bankruptcy of some of its European subsidiaries. The purpose of the Eighth Amendment was to extend forbearance for a time by the Agent in exercising its rights as a creditor of Venture under the Credit Agreement for the default of Venture.

5. Aside from the forbearance by the Agent for a time, a primary purpose of the Eighth Amendment was to enhance the Agent's collateral position to the extent it had deteriorated since the Seventh Amendment To Credit Agreement.

6. From the onset of the negotiations for the Eighth Amendment, Winget insisted that any additional support by him would be limited to the pledge of certain identified assets, and among those assets was his ownership of certain assets he owned in South Africa and Australia, PIM Management Company (PIM), a Michigan corporation, and Venco #1, LLC (Venco), a Michigan limited liability company. As to these assets, Winget's liability was limited to a cap of $50 Million Dollars.

8. Winget explained his position regarding his guaranty as follows:

> I understood and the bank agreed that this new collateral for the Eighth Amendment — the pledges and guaranty of South Africa and Australia — would be released upon payment of $50 million regardless of what else happened. My personal assets outside of South Africa and

Australia were to be totally excluded. That was the business deal and that was what I agreed to. I understand that eventually this agreement was reflected in part in a document which is entitled "Guaranty," but I did not consider the bank to be asking for a personal guaranty in the normal sense of the word, because I was not agreeing to take on responsibility for Venture's debt to the lenders, but only to pledge certain company shares in support of that debt. I do not remember anyone ever telling me that the bank was asking for an unlimited guaranty by either myself or my Trust, and I would never have agreed to any personal guaranty of the debt that had unlimited access to my personal assets, including those held by my Trust. In fact, one of the things I specifically demanded of the bank as a condition of reaching agreement on the Eighth Amendment was that I would have no personal liability and my assets, other than those I had specifically agreed to put up as collateral, could not be pulled in. I discussed this with Ms. Thompson and Mr. Babcock during our meeting at Venture and I made clear to Mr. McKee as my representative, as well as the legal and financial teams working for me and Venture, that my personal assets were not to be placed at risk. In fact, the bank and I agreed that the prior guaranty I signed in connection with the Sixth Amendment, which had maximum potential liability to myself and the guarantor companies of a combined $33

> million, was to be released in connection with the Eighth Amendment. I made it perfectly clear to the bank on repeated occasions that my personal assets, other than those directly tied to Venture's operations and the $50 million guaranty of South Africa and Australia, were off the table.

9. The business terms of the Eighth Amendment were reflected in a document labeled Term Sheet. It was negotiated primarily between Babcock and Thompson on behalf of the Agent and Winget on his own behalf. Shield drafted the Term Sheet. C 2.

10. Various drafts of the Term Sheet were circulated in early October. None of the drafts mentioned the unlimited liability of the Winget Trust.

11. Winget had a personal meeting with Babcock and Thompson before agreeing to the Term Sheet. There was no discussion among them as to the Winget Trust being a party to the Guaranty or the Pledges. Babcock and Thompson have no recollection of ever discussing the Winget Trust during the course of negotiating the Eighth Amendment. When asked why the Winget Trust was added as a party to the Guaranty and Pledges, both Babcock and Thompson said they could not remember a reason.

12. Babcock testified as follows:

> Q. Okay. The underlying question is you don't

have any memory of discussing with Ms. Thompson whether the Guaranty was a limited or unlimited Guaranty in any respect, right?

A. Correct.

Q. And my question to you is if it made a $200 million difference to this Bank wouldn't you agree that that would be important enough for you to remember?

A. Yes.

Q. If it made a $100 million difference to the Bank, that would be important enough to remember, right?

A. That's a material amount.

Q. So the answer is yes?

A. Yes.

13. Thompson similarly testified:

Q. Can you say with certainty that in 2002, 2003, and 2004 you described a Guaranty provided in connection with the Venture Holdings financing arrangement as a Larry Winget Living Trust Guaranty?

A. I don't recall making that distinction. I don't

remember.

Q. You don't recall making a distinction between Larry Winget and the Larry Winget Trust?

A. I don't remember discussing, I don't remember discussion the Larry Winget Living Trust.

14. Gallagher likewise testified that he had no recollection of an unlimited Guaranty but rather only a 50 million Guaranty.

Q. Do you have a memory of an unlimited guaranty of the Winget Trust being on the table at any time?

A. I do not.

Q. Do you have a memory of ever doing any collateral analysis involving the assets of the Larry J Winget Living Trust?

A. I do not.

Q. Do you remember an unlimited guaranty of the Larry J. Winget Living Trust being part of the Eighth Amendment in any way?

A. I do not.

Q. And during these negotiations do you ever

recall anyone saying that South Africa and Australia were already in the collateral pool to an unlimited extent?

A. That's not something I recall, no.

Q. Your memory was, your memory was that they were collateralized up to 50 million under the Eighth Amendment.

A. Yes.

15. Relevant portions of the Term Sheet, C 2, read as follows:

> 1. Larry Winget to provide unlimited secured guaranties of Venture Heavy Machinery, Venture Equipment Acquisition Company, Venture Real Estate Acquisition Company, Realven Corporation, Deluxe Pattern Corporation, Venture Real Estate Inc., Venture Automotive Corp., Farm and County Real Estate Company, Patent Holding Company, Sales and Engineering (management agreement only), and the Australia and South Africa operations (the "Venture/Peguform Affiliates"), to the maximum extent permitted by law and existing agreements, and Larry Winget to pledge 100% of the ownership interest in the Venture/Peguform Affiliates. The guaranties of the Australia and South Africa operations and the guaranty supporting

the pledge of the stock of the Australia and South Africa operations would be guaranties of collection and nonrecourse to Larry Winget personally other than the stock pledged (such guaranties and pledges defined as the "South Africa/Australia Support").

* * *

1. Banks to forbear on all existing defaults until April 15, 2003. The Borrower has voluntarily determined not to make any payments on the bonds during the forbearance period and agreed to provide notice to the Banks an adequate time prior to making any such payment, with the forbearance ending upon such notice.

2. If the Borrower is in compliance with the forbearance, the South Africa/Australia Support would be released upon the earliest to occur of (I) payment to the Banks of at least $50,000,000 from a sale or financing of the Australia and South Africa operations or stock or from one or more other sources (excluding the Borrower, any of its subsidiaries, any of the existing or proposed guarantors (except for Larry Winget) or any of the existing or proposed collateral pledged in favor of the Banks); (ii) payment to the Banks of at least $250,000,000 from the sale of all or part of the Peguform platform (which includes South Africa and all foreign subsidiaries of

> Venture other than Canada); or (iii) any other transaction acceptable to the Required Banks.

C 2.

16. A multitude of related documents constituted the Eighth Amendment. Negotiating the language of the Eighth Amendment and the related documents were handled by the lawyers for the parties. C 11. Burgess acted on behalf of the Agent; Lieberman and McKee acted on behalf of Venture and Winget. Faxon-Singer did the actual drafting. At no time during the course of the drafting was the unlimited liability of the Winget Trust discussed, much less mentioned.

17. Prior to October 22, 2002, the Agent counsel generated "versions" 1, 2, 3, 4, and 5 of the Guaranty. C 3, 4, 5. All of these versions defined "Guarantor" to include only Winget.

18. On October 22, 2002, the Agent's counsel, Faxon-Singer, circulated to Bradley and McKee "version 6" of the Guaranty, which shows changes made from "version 4" to "version 6." C 6.

19. The "version 6" black line shows, in bold, underlined text that the definition of 'Guarantor" was changed to, "collectively," "Larry Winget and the Larry J. Winget Living Trust." C 6.

20. The "version 6" black line shows no changes to Section 3. C 6

21. From October 24 through October 28, the Agent's counsel circulated "versions" 7, 8, 9, 10, 11, 14, and 15 of the Guaranty. *See* W 78.

22. Faxon-Singer's testimony and McKee's testimony is consistent as to the reason for the addition of the Winget Trust to the Guaranty. McKee explained it best in stating "[the Agent] wanted the Trust added to these [Eighth Amendment and related] documents in order to make sure the pledges were being provided by the actual technical owner of the stock because [the Agent's] counsel had expressed uncertainty as to whether Mr. Winget or his revocable Living Trust owned particular assets."

23. Prior to the signing of the Eighth Amendment, the Agent never expressed or manifested the intention that the Winget Trust, or Winget, would have unlimited liability to the Agent as a guarantor of Venture's indebtedness under the Credit Agreement in contrast to Winget's limited liability.

24. As noted above, the first draft of the Guaranty was circulated on October 18, 2002. The operative language of Recital B in the draft reads as follows:

> It is a condition precedent to the Administrative Agent and the Lenders to the Eighth Amendment to the Credit Agreement that the Guarantor execute and deliver this Guaranty whereby the Guarantor shall guarantee the Guaranteed Obligations on a non-recourse basis, as defined below.

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The operative language of the second paragraph of Section 3 reads in part as follows:

> Notwithstanding anything herein or elsewhere to the contrary, no action will be brought for the repayment of the Guaranteed Obligations under this Guaranty and no judgment therefor will be obtained or enforced against Larry Winget other than with respect to the Pledged Stock in accordance with the provisions of the related pledge agreements, provided that the Guarantor shall be fully and personally liable for any damages arising from any violations of any of the agreements of the Guarantor herein in favor of the Lenders.

This language carried through to the final draft of the Guaranty.

25. Also as noted above, the Winget Trust was added as a party to the Guaranty on October 22, 2002. This was done by including "The Larry J. Winget Living Trust" in the preamble as follows:

GUARANTY

> THIS GUARANTY (this "Guaranty") is made as of the 21st day of October, 2002, by Larry Winget and the Larry J. Winget Living Trust (collectively, the "Guarantor") in favor of Bank One, NA, a national banking association having its principal office in Chicago, as Administrative Agent (the "Administrative

> Agent"), for the benefit of itself and the Lenders, under the Credit Agreement referred to below

and adding the Winget Trust as a signatory. Larry Winget signed the Guaranty on behalf of himself and on behalf of the Winget Trust. C 11, Tab. 5.

26. The Winget Trust was added as a party to drafts of the PIM Pledge and Venco Pledge, on October 20, 2002. C 11, Tabs 11 and 12.

27. Each Pledge Agreement includes the following language:

> 10. SPECIFIC PROVISION FOR SATISFACTION OF PLEDGE AGREEMENT.
>
> Notwithstanding Section 7.14 and notwithstanding any other provision in this Pledge Agreement or elsewhere, in the event that (I) the Agent receives for application on the Obligations an amount of not less than $50,000,000 from the sale or financing of the Pledgor's Australia or South Africa operations or from one more outside sources (not including the Borrower, any Subsidiary of the Borrower, any Guarantor, any Affiliate Guarantor (other than PIM, Venco #1, LLC, Venture Holdings B.V., Venture Asia Pacific (Pty) Ltd. or Venture Otto South Africa (Pty) Ltd.) or other Collateral), all as defined and described in

> paragraph 5.9(e) of the Eighth Amendment to the Credit Agreement) or (ii) payment to the Agent of not less than $250,000,000 from the sale of all or a part of the Peguform business or assets (which includes (x) all of the Borrower's Foreign Subsidiaries other than its Canadian Subsidiary and (y) Venture Otto South Africa (Pty) Ltd.), the obligations of the Pledgor hereunder shall be deemed satisfied and the pledge created hereby shall be terminated.

C 11, Tabs 11 and 12.

28. There was no consciousness on the part of anyone involved in negotiating the language of Eighth Amendment and related documents existence of the Winget Trust until around October 20, 2002, when the role of the Winget Trust and Winget's financial life became a topic of discussion. This discussion was prompted by a question as to the exact ownership of Winget's assets being pledged to support the lender's collateral position. This included PIM and Venco, which were part of the collateral pledged to the lenders. Investigation disclosed that Winget's stock in PIM and Winget's interest in Venco were in the name of the Winget Trust.

29. At no time before the signing of the Eighth Amendment and related documents did the Agent require or obtain a copy of the Winget Trust instrument or a balance sheet of the Winget Trust. At no time after the signing of the Eighth Amendment and related documents did the Agent ask for or obtain a copy of the Winget Trust instrument or a balance sheet of the Winget Trust.

30. Babcock testified that federal bank regulations require that a bank secure financial statements from a guarantor.

31. The documents related to the Eighth Amendment include a financial statement from Winget. The facing page of the Eighth Amendment, closing list and list of related documents are attached as Exhibit A.

32. There is no limitation in the Guaranty or the Pledge Agreements relating to Winget's right to amend or terminate the Winget Trust, transfer of assets into or out of the Winget Trust, or to the management of the Winget Trust.

33. The reason that the Winget Trust was made a party to the Guaranty and the Pledge Agreements is simple, and stated in part above. During the course of the drafting process there was an uncertainty as to the exact ownership of the newly pledged assets, including the stock of PIM and an interest in Venco. No one involved in the drafting process of the Eighth Amendment and related documents has any recollection of any discussion regarding enhancing the lenders' collateral position by having the unlimited guaranty of the Winget Trust.

34. Bradley, one of the lawyers representing Winget in the drafting of the Guaranty testified as follows:

> THE COURT: No, what was your understanding of the reason for the Trust being added to the Guaranty?

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* * *

> MR. BRADLEY: The Larry J. Winget Living Trust was the owner of all of the pledged shares. It was added to the Pledge Agreement because it was the owner of all of the pledged shares. It was added to the Guaranty because the Guaranty was in support of the pledge. So, because Larry wasn't the owner of the shares, the Larry J. Winget Living Trust was the owner of shares, it was added to the pledge and added to the supporting Guaranty.

35. The text of a draft of the Eighth Amendment not including the related documents was circulated by the Agent via Intralink, the method the Agent used in communicating with the lenders, on October 21, 2002, for approval and sign off. This was prior to the Winget Trust being added as a party to the Guaranty, and prior to the finalization of the text of the Pledge Agreements. No mention was made in any transmission to the lenders of an unlimited guaranty by the Winget Trust.

36. Neither Winget nor anyone representing him in the negotiation of the language of the Eighth Amendment and related documents ever expressed an intention of providing an unlimited guaranty of the Winget Trust of the Venture debt.

37. Likewise, no one representing the Agent in the negotiation of the terms of the documents comprising the Eighth Amendment ever expressed the intention of

obtaining an unlimited guaranty from the Winget Trust, or that the addition of the Winget Trust as a signatory to the Guaranty and Pledge Agreements was for the purpose of enhancing the lenders' collateral position beyond what was described in the Term Sheet.

38. Following the signing of the Eighth Amendment and related documents on October 28, 2002, as of October 21, 2002:

- The Agent has no recollection of ever describing to the lenders the obligation of the Winget Trust under the Guaranty as unlimited.

- The Agent, in its interval reporting on its own behalf as a lender, and in reporting to the lenders, never made any distinction between Winget and the Winget Trust.

- Every report in the Agent's Credit File, every Problem Credit Report, and every report sent to the lenders described the Guaranty as capped at $50 Million Dollars. *See* W 80

39. Every analysis by EYCF which referenced the Guaranty, describes it as having a value limited to $50 Million Dollars. *See* W 6, W 14

40. An unlimited guarantee of the Winget Trust would have added at least $100 Million Dollars as a source of

repayment for the Venture debt. This would have been a material source of repayment, and would have been disclosed by the Agent to the lenders.

41. At various times after October 28, 2002, the Agent described the Guaranty to third parties. In each instance, the Guaranty was described as limited to $50 Million. These statements included:

- the Second Amended Disclosure Statement filed in the Venture bankruptcy proceedings
- during a 22 day trial in the bankruptcy court in which Winget's obligations under a Contribution Agreement were an issue
- the Complaint in the 2005 case filed by the Agent asserting its inspection rights
- various documents filed in the 2005 case

42. As expressed by Terpsma in his testimony:

- The Agent's actions, analysis and communications are not consistent with the existence of an unlimited guaranty from the Winget Trust
- An unlimited guaranty from the Winget Trust, with a minimum value of $150 million, would have been considered a material source of repayment for the Venture debt

- If the Agent, as the administrative agent for the lenders, and as a participating lender, had believed that it held an unlimited guaranty of the Winget Trust — whether it was secured by pledged assets or not — it would have required specific financial information from the Winget Trust including, at a minimum, descriptions and financial records of assets held by the Winget Trust and periodic financial reporting from those entities

- If the Agent, as the administrative agent for the lenders, and as a lender itself, had believed that it held an unlimited guaranty of the Winget Trust —whether it was secured by pledged assets or not — it would have undertaken analysis of the collectability of the Winget Trust, and would have communicated the existence of such a guaranty and its analysis of the collectability of that guaranty to the lenders

43. Exemplary of the manner in which the Agent viewed the singular obligation of Winget and the Winget Trust are:

- The Agent's description of the collateral it held in the form of the Guaranty in a lien schedule it filed in the Venture bankruptcy on May 10, 2004, as follows (W 58):

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EXHIBIT 1

COLLATERAL PLEDGED BY WINGET TO EXISTING BANK FACILITY PURSUANT TO EIGHTH AMENDMENT				
NAME	Sub-ordination Agreement	Guaranty	Security Agreement	DESCRIPTION
Larry Winget & Larry Winget Living Trust	Yes	Yes Limited to pledged stock unless he violated guaranty		

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EXHIBIT 1

COLLATERAL PLEDGED BY WINGET TO EXISTING BANK FACILITY PURSUANT TO EIGHTH AMENDMENT				
Mortgage	DESCRIPTION	Pledge	DESCRIPTION	Transferred Winget Equity
		Yes	All stock: I-9 Capital stock: 10 Membership Interests: 11	

- The Credit Approval Summary requesting approval to foreclose on the pledges describes the Guaranty as follows (W 54):

> GUARANTEES/FINANCIAL CAPACITY OF GUARANTORS:
>
> The bank group has the guaranty of all domestic subsidiaries and the guaranty of all of Larry Winget's affiliated entities including the Australian and South African operations up to $50,000.

44. As further support that the Agent viewed Winget and the Winget's Trust's liability as the same is the following allegation in the Agent's Complaint For Specific Performance And Declaratory Judgment (W 92) in the 2005 case, which describes the Guaranty as follows:

> 15. Under the terms of the Guaranty (at § 3), Winget's obligations as guarantor can be satisfied through recourse to stock pledged by Winget, including stock in P.I.M. and Venco that was contemporaneously pledged by Winget in two pledge agreements dated October 21, 2002 (hereinafter, "Winget/P.I.M. Pledge Agreement," and "Winget/Venco Pledge Agreement," attached hereto as Exhibits B and C and hereinafter, collectively, "Pledge Agreements").

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45. The Agent's reply brief in support of its motion for judgment on the pleadings in the 2005 case (W 82) similarly described the Guaranty at p. 2, as follows:

> . . .The bargain struck by the parties in the Winget Guaranty is unambiguous: the obligations of Winget are absolute and unconditional; the Agent's right to collect the guaranteed obligations is limited to the Pledged Stock . . . .

46. The first mention in the record by the Agent of an unlimited Guaranty against the Winget Trust appears in a brief filed in the Sixth Circuit on May 7, 2007 in Winget's appeal in the 2005 case. The body of the brief states in part "the Agent's recourse against Larry Winget for *payment* on the Winget Guaranty is limited to foreclosure on certain pledged stock - including the stock of PIM and Venco. Any such foreclosure must occur pursuant to the terms of the Pledge Agreement." After this statement there is a footnote which reads *"[n]o such limitations apply to the Agent's right to recover on the Guaranty from the Trust.*" W 84 (emphasis added).

47. What is not explained in the record is the lapse of time from October 2002, when the Eighth Amendment and related documents were executed, to May 2007, when the Agent's position with respect to the unlimited liability of the Winget Trust is first disclosed.

48. Recital O of the Eighth Amendment describes the obligation of "The Principal" ("Larry J. Winget and the Larry J. Winget Trust") as follows:

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O. The Principal has agreed (I) that each of Venture Heavy Machinery Limited Liability Company, a Michigan limited liability company, Venture Real Estate Acquisition Company, a Michigan corporation, Venture Equipment Acquisition Company, a Michigan corporation, Realven Corporation, a Michigan corporation, Deluxe Pattern Corporation, a Michigan corporation, Venture Real Estate, Inc., a Michigan corporation, Venture Automotive Corp., a Michigan corporation, Farm & Country Real Estate Company, a Michigan corporation, Patent Holding Company, a Michigan corporation; P.I.M Management Company, a Michigan corporation and Venco #1 LLC, a Michigan limited liability company (collectively the "Affiliate Guarantors") will execute and deliver to the Administrative Agent, for the benefit of itself and the Lenders, unlimited secured guaranties of the Secured Obligations (provided that the guaranties of P.I.M. Management Company and Venco #1 LLC, indirect owners of a majority of the stock of Venture Asia Pacific (Pty) Ltd. ("Venture Australia") and Venture Otto South Africa (Pty) Ltd. ("Venture South Africa"), shall be guaranties of collection only, including following collection efforts with respect to the Guarantors and the other Affiliate Guarantors, and provided, further, that the guaranty of P.I.M, Management Company shall be limited to assets relates to Venture Australia, Venture Holdings

B.V. and Venture South Africa (collectively the. "Foreign Issuers") and grant liens and security interests in all of their respective assets (and with respect to P.I.M. Management Company and Venco #1 LLC, a pledge their stock and of 65% of the ownership interests in the Foreign Issuers, enforceable only following collection efforts against the Borrower, the Guarantors and the other Affiliate Guarantors and, as to P.I.M. Management Company, limited to the assets related to the Foreign Issuers), each to the maximum extent permitted by applicable law and to the extent not prohibited by existing contractual restrictions; (ii) that .the Principal will pledge to the Administrative Agent, for the benefit of itself and the Lenders, 100% of his ownership interest in each of the Affiliate Guarantors and any holding companies for any of such Affiliate Guarantors (such pledge to be limited to any such holding company's interest in the Affiliate Guarantors) and (iii) to cause Venture Sales & Engineering, Corp., a Michigan corporation. to execute a collateral assignment of its commission agreement with the Borrower.

49. The Winget Trust's obligation is co-extensive with that of Winget as expressed in Recital O.

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V. The Agent's Position

A. The Absence of Evidence

The Agent's position that the Winget Trust and Winget the individual are not one in the same for purposes of the Eighth Amendment and related documents does not hold water. The factual findings detailed above make clear that the Winget Trust was added to the Guaranty solely for the purpose of capturing the ownership of the collateral in the PIM and Venco Pledges, which was held in the name of the Winget Trust. It was not added to enhance the lenders' collateral position, much less an unlimited obligation, on the part of the Winget Trust.

The only support for the Agent's position is found in the strained testimony from the lawyers for the Agent. All of them essentially said that because there was never expressed intention that Section 3 meant anything other than what the plain language reveals, the fact that the Winget Trust was not included in Section 3 means that the Winget Trust's liability was unlimited. The Agent says everyone who reviewed the Eighth Amendment and related documents, particularly Section 3, must have understood the plain meaning and therefore no mistake was made. This view, which went unexpressed by the Agent for years, is not borne out by any evidence.

B. Burgess's Credibility

Burgess was not a credible witness. In explaining the apparent inconsistent statements as to the liability of the Winget Trust, Burgess testified as follows.

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> THE COURT: . . .Mr. Anding . . .was about to ask you . . .how you reconcile your understanding today of the statements that were made in pleadings in this Court in 2005 and 2007 with the current claim regarding the Guaranty by the [Winget] Trust . . . .
>
> MR. BURGESS: I can reconcile them. The focus of the Agent's recovery and enforcement efforts for quite some time proceeded along the lines that we were just talking about, that the pursuit of specific, identifiable collateral or specific identifiable entities is typically much swifter, less costly, in most cases in my experience more certain than is the ultimate pursuit, as we have witnessed in this very case, of an unsecured guaranty where there are many additional steps that will need to be taken in order to ultimately recover the value of the obligation undertaken. And the officers of the bank and legal counsel to . . .my best recollection had been focused on those items of specific collateral for quite some time, including the Contribution Agreement and our earlier efforts at enforcement.

This statement is fatuous. At no point in his testimony did Burgess provide support for the Agent's position that the parties knew and intended that the Winget Trust's liability was unlimited.

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C. Shield's Credibility

Shield likewise was not a credible witness. In being questioned about the nature of a living trust, he testified.

> THE COURT: Did you know that the [Winget] Trust, Witness, was characterized as the Larry Winget Living Trust?
>
> MR. SHIELD: I don't recall exactly how the [Winget] Trust was referred to.
>
> * * *
>
> MR. SHIELD: I'm familiar with the concept of a trust . . . .
>
> THE COURT: I didn't say trust, Mr. Shield.
>
> * * *
>
> THE COURT: I said, are you familiar with the concept of a living trust?
>
> MR. SHIELD: I'm not sure of the exact meaning or what it would be in this case.
>
> THE COURT: I didn't ask you about this case, Mr. Shield. just answer my question.
>
> * * *

> THE COURT: I don't know that you have ever been a witness, but you are a very good lawyer, and my question was very precise. Are you familiar with the concept of a living trust?
>
> MR. SHIELD: No.
>
> THE COURT: Now, the document itself was labeled Larry Winget Living Trust. In an earlier opinion or decision in this case I explicitly defined what a living trust was. I find it incredible that the senior partner of a major law firm which represents banks, as Mr. Shield says he does, would answer that he doesn't know anything about a living trust . . . .

D. Conclusion on the Agent's Position

The absence of any credible testimonial evidence from those who negotiated the language of the Eighth Amendment as to the liability of the Winget Trust and the absence of any documentary evidence which would support treating the obligations of the Winget Trust different from Winget cuts against the Agent. The Agent cannot simply point to the plain language of Section 3 in order to prevail against Winget. The issue for trial was not whether Section 3 was ambiguous or unambiguous, the issue was whether Section 3 should be reformed to reflect the parties' true and intended agreement. The Agent has failed to persuade the Court that Section 3 should not be reformed.

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VI. Conclusions of Law

A. The Law of Reformation

Under Michigan law, a court of equity has the authority to reform a contract to make the contract conform to the agreement actually made by the contracting parties. *Casey v. Auto-Owners Ins Co*, 273 Mich. App. 388, 398, 729 N.W.2d 277 (2006). If a written instrument fails to express the intention of the parties because of a mutual mistake, the court may enforce the equitable remedy of reformation. *Scott v. Grow*, 301 Mich. 226, 237, 3 N.W.2d 254 (1942).

To obtain reformation, a party must establish by clear and satisfactory evidence of a mutual mistake. *Lee State Bank v. McElheny*, 227 Mich. 322, 327, 198 N.W. 928 (1924). One Michigan court stated that the mistake must be proven "beyond cavil." *Emery v. Clark*, 303 Mich. 461, 470, 6 N.W.2d 746 (1942). A "mutual mistake of fact" is " 'an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.' " *Briggs Tax Service, LLC v. Detroit Pub Schools*, 485 Mich. 69, 77, 780 N.W.2d 753 (2010); quoting *Ford Motor Co v. City of Woodhaven*, 475 Mich. 425, 442, 716 N.W.2d 247; 475 Mich. 425, 716 N.W.2d 247 (2006)). A mutual mistake must relate to a fact in existence when the contract was executed. *Lenawee Co Bd of Health v. Messerly*, 417 Mich. 17, 24, 331 N.W.2d 203 (1982). Parol evidence can be used to determine whether reformation is warranted on the basis of mistake. *Scott*, 301 Mich. at 239.

Moreover, Michigan courts have said that while generally the mistake must be mutual, reformation may also be had where one party is aware that the other party has made a mistake and conceals it, thereby producing an inequitable result. As explained in *Retan v. Clark*, 220 Mich. 493, 496, 190 N.W. 244 (1922):

> It is a general rule that equity will not relieve by reformation unless the mistake is mutual. *A. E. Wood & Co. v. Standard Drug Store*, 192 Mich. 453, 158 N. W. 844; *Schlossman v. Rouse*, 197 Mich. 399, 163 N. W. 889; *Standard Oil Co. v. Murray*, 214 Mich. 299, 183 N. W. 55; *Gustin v. McKay*, 196 Mich. 131, 162 N. W. 996.
>
> But here there was mistake on the part of the plaintiffs and knowledge of the mistake and concealment thereof on the part of the defendants, both producing the inequitable result. Of a case of this class it is said in 23 R. C. L. 331, citing cases:
>
> > 'There is, however, still another class of cases-that where one party to an instrument has made a mistake and the other party knows it and conceals the truth from him. Such inequitable conduct accompanying a mistake is generally held to be sufficient ground for reformation of the instrument in question.'

Finally, in *Citibank, N.A. v. Morgan Stanley & Co.*, 797 F. Supp. 2d 254 (S.D.N.Y. 2011), the district court, in considering a claim for reformation on the grounds of mutual mistake regarding a complex commercial transaction, noted the relevance of a parties' course of performance in determining whether a mutual mistake has been made. The district court stated in relevant part:

> Procedurally, there is a " 'heavy presumption that a deliberately prepared and executed [agreement] manifest[s] the true intention[s] of the parties,' especially between counselled businessmen" and "a correspondingly high order of evidence is required to overcome that presumption." In particular, "mutual mistake must be established by clear and convincing evidence." " 'Only thus can the benefits of the written form be preserved.' " Although a "mutual mistake must exist at the time the agreement is signed," "the parties' course of performance under the contract is considered to be the most persuasive evidence of the agreed intention of the parties."

Id. at 265 (footnotes omitted).

B. The Law as Applied to this Case

Winget has established grounds for reformation under the standard set forth above. While the plain language of Section 3 of the Guaranty references only Larry Winget as having limited liability, this section does not reflect the

parties' intent. Rather, Winget has proven "beyond cavil" that the Winget Trust was added *solely* to ensure that the pledged collateral was owned by Winget. It was not added to expand upon or create any additional liability on the part of the Winget Trust.

The Winget Trust for purposes of this case is no different than Larry Winget individually. A living, or inter vivos trust, is a common estate planning tool which is often used to control the distribution of assets. *See* Restatement (Third) of Trusts § 25 Validity And Effect Of Revocable Inter Vivos Trust (2003). Here, Winget was the settlor, trustee, and beneficiary of the Winget Trust. As settlor, Winget owned the assets in the Winget Trust. *See* M.C.L. § 556.128. The Winget Trust was essentially Winget's alter ego. Winget used the Winget Trust to hold ownership of many of his assets, including the pledged stock. It had no special significance for purposes of this case.

The Winget Trust was purposely added to the Eighth Amendment and related documents to secure ownership of the pledged stock. It was not added to secure any additional liability. As such, the failure to include the Winget Trust under Section 3 was a mistake. It was a mistake that was overlooked by both parties. It is a mistake that the Court has the power to correct. As Justice Joseph Story put it:.

> It is upon the same ground that Equity interferes in cases of written instruments, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a

> mutual mistake. To allow it to prevail in such a case, would be to work a surprise, or fraud, upon both parties and certainly upon the one who is the sufferer . . . . *A Court of Equity would be of little value, if it could suppress only positive frauds, and leave mutual mistake, innocently made, to work intolerable mischiefs, contrary to the intention of the parties*. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under a shelter of a rule framed to promote it.

Joseph Story, Commentaries on Equity Jurisprudence, Chapter V. Mistake, § 155 (7th ed. 1857) (emphasis added).

When all is said and done, the evidence at trial confirmed what the Court said of the case in denying the Agent's motion for summary judgment:

> [T]he record contains credible evidence from which a reasonable conclusion can be drawn that the parties agreed that liability of Winget and the Winget Trust was not more than $50 million, i.e. Winget and the Winget Trust were viewed and treated as indistinguishable. Because Section 3 reads otherwise, defendants have made out of a case for reformation based on mutual mistake . . . .

An appropriate judgment will be entered in favor of Winget on its counterclaim for reformation.

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Dated: October 17, 2012

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

APPENDIX H — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1568

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

ALTER DOMUS LLC,

Plaintiff-Appellee,

v.

LARRY J. WINGET; LARRY J. WINGET LIVING TRUST,

Defendants-Appellants.

ORDER

BEFORE: SUTTON, Chief Judge; BATCHELDER and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision

of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT
/s/
Deborah S. Hunt, Clerk

* Judge Bush recused himself from participation in this ruling.

APPENDIX I — AMENDED PETITION OF THE STATE OF MICHIGAN, OAKLAND COUNTY PROBATE COURT, FILED OCTOBER 20, 2022

STATE OF MICHIGAN
OAKLAND COUNTY PROBATE COURT

Case No. 2022-409,601-TV

In the matter of the LARRY J. WINGET LIVING TRUST UNDER TRUST AGREEMENT, dated December 23, 1987, as Amended

Hon. Linda S. Hallmark

TRUSTEE AND SETTLOR'S AMENDED PETITION FOR REFORMATION, CONSTRUCTION, INSTRUCTIONS, AND OTHER RELIEF

Petitioner Larry J. Winget, as Trustee and Settlor of the Larry J. Winget Living Trust dated December 23, 1987, by and through his counsel Warner Norcross + Judd LLP, hereby brings his Amended Petition for Reformation, Construction, Instructions, and Other Relief, stating as follows (the "**Petition**"):

INTRODUCTION

This Petition involves the Larry J. Winget Living Trust dated December 23, 1987 (the "**Trust**") created by Larry J. Winget ("**Larry**"). The Trust was a traditional revocable trust in which Larry serves as Trustee and

fully controls the Trust's and his assets. However, a recent Sixth Circuit opinion has retroactively replaced the otherwise express revocable Trust with an irrevocable one as of 2003 and ruled it will remain irrevocable as long as a Trust creditor's loan remains unpaid. This Probate Court's intervention is appropriate because:

1. The Trustee and Settlor require instruction on important administration issues in light of the Sixth Circuit's 2022 ruling retroactively replacing (effective as of 2003) Larry's revocable will substitute Trust with an irrevocable Trust, including the fiduciary rights and obligations of: (1) Larry as Settlor; (2) the Trustee with respect to the administration of the Trust res as to the ten beneficiaries of the Trust; and (3) the beneficiaries' interests in the Trust res (the "**Trust Administration Issues**").

2. This Court has exclusive jurisdiction to nullify LLC membership interest contributions Larry made to the Trust after 2003 when Larry believed it was revocable and before the Sixth Circuit's 2022 opinion making the Trust irrevocable (the "**Equitable Relief Issue**"). Larry never intended to lose control of these newly contributed LLCs and create even the potential of millions of dollars in gift tax, nor did the creditor rely upon these assets being in the Trust because they were not contributed to the Trust until long after the loan was in place and in default.

3. Neither the Trust Administration Issues nor the Equitable Relief Issue have been raised with or decided by the Sixth Circuit. These issues did not even arise until the

Sixth Circuit's surprise (*sua sponte*) July 1, 2022 opinion that created an irrevocable trust. And under Michigan law, this Court has, in addition to exclusive subject matter jurisdiction, the expertise and unique procedural forum that allows hailing into court all interested parties to address these newly raised and emergent issues.

4. Finally, none of the relief sought herein seeks to set aside any orders duly entered by the federal district court with respect to any of the trust res, including the writ of execution covering certain corporate stock held by the Trust or the charging orders covering certain Trust held LLC membership interests.

INTERESTED PARTIES, JURISDICTION AND VENUE

Pursuant to the Estates and Protected Individuals Code, the Probate Court has exclusive jurisdiction over this proceeding seeking Trust reformation, modification, construction, instruction, and other relief that concerns the Trust:

The court has exclusive legal and equitable jurisdiction of all the following: . . .

> (b) A proceeding that concerns the validity, **internal affairs, or settlement of a trust**; the **administration, distribution, modification, reformation**, or termination of a trust; or the **declaration of rights that involve a trust, trustee, or trust beneficiary**, including, but

> not limited to, proceedings to do all of the following: . . .
>
> > (v) Determine a **question that arises in the administration or distribution of a trust,** including a question of **construction** of a will or **trust**.
> >
> > (vi) **Instruct a trustee** and determine relative to a trustee the existence or nonexistence of an immunity, **power, privilege, duty, or right**.
> >
> > (viii) Determine an action or proceeding that involves **settlement of an irrevocable trust**.
>
> (d) **A proceeding** to require, hear, or settle the accounts of a fiduciary and to order, upon request of an interested person, **instructions or directions to a fiduciary** that concern an estate within the court's jurisdiction.

MCL 700.1302(b), (d) (emphasis added). *See also* MCL 700.7201(1), (3)(e), (f), and (h).

Oakland County Probate Court is the appropriate venue. The Trust is not registered and Trustee Larry Winget resides and administers the Trust in Oakland County, Michigan. MCL 700.7204(b); MCL 700.7209(1).

Appendix I

The interested parties to this Petition are as follows: (1) Larry J. Winget - Petitioner, Trustee, Settlor, Trust beneficiary; (2) Larry's wife Alicia Winget – Trust beneficiary; (3) Larry's children Larry Joseph Winget Jr., Adelicia Jo Jean Tignanelli, Norman Matthew Winget, Annalisa J. Toth, Gwendolyn Cameron (deceased) and her children Francis J. (Cameron) Boone, Abigail M. Cameron, Spencer J. Cameron and Natalie A. Cameron – Trust beneficiaries; and (4) Alter Domus, LLC - as agent for certain lenders and Trust creditor. None are legally disabled.

FACTUAL BACKGROUND

I. Trust's Creation

1. On December 23, 1987, Larry created the Larry J. Winget Living Trust (the "**Trust**"), a will-substitute revocable trust. **Ex A**, Trust Instrument.

2. Larry is initial Trustee and continues to serve as the sole Trustee. *Id* at Intro.

3. Larry is the sole beneficiary of the Trust during his lifetime. *Id* at 4.1-4.3.

4. Larry created the Trust in 1987 for typical estate-planning reasons; to serve as a will substitute and to maintain full control over its assets during his lifetime.

5. Larry can revoke or amend the Trust by its express terms. *Id* at 3.1.

6. Larry as settlor can add and remove assets to the Trust at will. *Id* at 2.1, 2.2, 4.1.

7. Because the Trust is revocable, Larry pays the income taxes associated with the Trust and does not file a separate tax return.

II. Larry Establishes Venture, Venco and PIM

8. In the 1970's, Larry formed Venture Holdings Company, LLC ("**Venture**") which along with certain subsidiaries and affiliated companies were suppliers to the automotive industry.

9. In 1995, Winget purchased an Australian automotive parts business ("**Australia**"), the stock of which was principally held by Venco # 1, LLC ("**Venco**").

10. In 1997, Winget bought a substantial interest in a South African automotive parts business ("**South Africa**"), the stock of which was held by P.I.M. Management Co. ("**PIM**").

III. The Chase Debt

11. In 1999, J.P. Morgan Chase Bank N.A., as the lender and agent for other lenders, (Alter Domus, LLC is the current agent) ("**Chase**"), loaned $450 million to Venture under a certain Credit Agreement, which was amended multiple times.

12. In 2002, a German Venture affiliate's insolvency proceedings triggered a default under the Credit Agreement, as amended.

13. Chase demanded additional collateral in exchange for forbearing from calling the Credit Agreement and over $700 million in additional assets were pledged to secure the $450 million loan.

14. Chase also demanded other security, including Larry's unlimited guaranty.

15. Larry refused, but did agree to a non-recourse guaranty tied to the Pledge of South Africa (through PIM) and Australia (through Venco), then held in the Trust, provided the pledged property was released upon payment of $50 million.

16. The above Guaranty and Pledge ("**Guaranty**") were part of the 2002 Eighth Amendment to the Credit Agreement (the "**Eighth Amendment**") negotiated between Venture and Chase and the Guaranty was signed by Larry individually and Larry as Trustee of the Trust.

17. The Guaranty limited Larry's personal liability and the Trust's (as it was indistinct from Larry as its settlor) to $50 million.

18. The Trust's assets as of 2002 - when the Eighth Amendment and Guaranty were signed by Chase, Larry, and Larry on the Trust's behalf - are reflected on the attached chart. **Ex B**, Trust Assets Chart.

19. In 2002, Chase (a named successor trustee under the Trust) knew the Trust was revocable but neither the Credit Agreement nor Guaranty restricted Larry's rights to remove, amend, terminate, or transfer assets into or out of the Trust.

20. On March 28, 2003, Venture filed a bankruptcy petition, an event of default under the Eighth Amendment and Guaranty.

21. In 2005, Chase sued to compel monitoring of the guarantor companies in South Africa and Australia only, and this 2005 lawsuit was reduced to final Judgment on December 15, 2006.

IV. Larry Contributes New Assets into the Trust

22. As noted above, the terms of the Eighth Amendment and Guaranty did not restrict or limit Larry's powers and privileges relating to his Trust.

23. Since its formation (including 2006 and in the years thereafter), Larry believed his rights with respect to his Trust remained unlimited, and that he could add and remove assets from the Trust as provided by its terms.

24. On March 22, 2006, Larry contributed membership interests of JVIS-USA LLC to the Trust. *Id*, Trust Assets Chart at item 31.

25. In 2007, Larry contributed membership interests of Deluxe Technologies and Global IP Holdings LLC to the Trust. *Id*, Trust Assets Chart at items 32 and 33.

26. On October 29, 2009, Larry contributed membership interests of Almont Real Estate Investments LLC to the Trust. *Id*, Trust Assets Chart at item 34.

27. In 2010, Larry contributed membership interests of Claw Logistics LLC to the Trust. *Id*, Trust Assets Chart at item 35.

28. In 2011, Larry contributed membership interests of MCE Properties LLC to the Trust. *Id*, Trust Assets Chart at item 36.

29. None of the LLC membership interests in the above entities were held by the Trust when the Trust executed the Guaranty with Chase in 2002 or when it went into default in 2003.

30. All of the above contributions to the Trust were of the LLC membership interests only.

31. It is these newly contributed LLC membership interests (2006-2011) that are the subject of the Equitable Relief Issue.

V. Guaranty Litigation

32. In 2008, Chase sued Larry and the Trust in the Eastern District of Michigan to enforce the Guaranty, claiming for the first time ever that the Trust's Guaranty was distinct from Larry's, as settlor, which was limited to $50 million.

33. On October 17, 2012, the district court issued a decision following trial siding with Larry that the $50 million limit applied to both him as settlor and the Trust. Specifically, the district court noted:

> [T]he Winget Trust was added to the Guaranty solely for the purpose of capturing the ownership of the collateral in the PIM and Venco Pledges, which was held in the name of the Winget Trust. *It was not added to enhance the lenders' collateral position, much less an unlimited obligation, on the part of the Winget Trust*… The Agent says everyone who reviewed the Eighth Amendment and related documents, particularly Section 3, must have understood the plain meaning and therefore no mistake was made. This view, which went unexpressed by the Agent for years, is not borne out by any evidence.

34. In 2014, Larry paid Chase the $50 million Judgment amount and the Pledge of the assets then held by the Trust was released, leaving the Trust res free and clear of any encumbrance.

35. While Chase appealed the district court's reformation decision, that decision plus Larry's payment of the $50 million Judgment at that point ended Chase's rights to recover against Larry or the Trust under the Guaranty.

VI. Larry Revokes the Trust & Resulting Litigation

36. Thereafter in 2014, Larry revoked the Trust in accordance with its express terms to engage in more sophisticated estate planning which importantly included placing JVIS USA (contributed to the Trust in 2006) in a GRAT.

37. In 2015, the district court's reformation ruling was reversed, and an Amended Judgment was entered against the Trust by the district court on July 28, 2015, in the amount of $425,113,115.59. Larry's obligations under the Judgment remained fully paid.

38. In 2015, Chase filed new litigation against Larry and the Trust, claiming that Larry's revocation of the Trust in 2014 constituted a constructive fraudulent conveyance. The district court agreed in a decision issued in 2017 but did not find Larry intended any fraud by the revocation.

39. Given the constructive fraudulent transfer finding, in 2018 Larry rescinded the Trust's revocation (and the GRAT), retitling all the assets back into the Trust.

40. Larry appealed the district court's decision that exercising his right of revocation under this revocable will-substitute Trust was a constructive fraudulent conveyance.

41. On July 1, 2022, the Sixth Circuit *sua sponte* held for the first time that the Trust became irrevocable

without Larry's consent in 2003 when the Chase loan went into default, a position even Chase did not advocate[1]:

> Winget complains that this interferes with his contractual right to revoke the Trust at any time. But his right is not unlimited. As we explained in our prior opinion, trusts—both revocable and irrevocable—can enter binding contracts. Winget, 942 F.3d at 750. A necessary consequence is that a trust's contractual obligation may affect the rights of third parties, like beneficiaries and settlors, even if they are not themselves parties to the contract. Here, the Trust guaranteed Venture's loan. So when Venture defaulted, the Trust had to pay Chase and could do so with the trust assets. See *id.* at 750–51. That's when Chase's claim to the assets arose. At that time, Winget no longer had an unfettered right to the trust assets—at least not until Chase was repaid. And Winget could no longer revoke the Trust since doing so after Chase's claim arose would (and did) deplete the trust assets, preventing the Trust from fulfilling its obligation to Chase. In this way, Winget's right to revoke was limited by the Trust's obligation to Chase—an obligation Winget himself assumed as trustee.

---

1. *Compare* "Winget had the right to move property in and out of his Trust, as he saw fit, both before and *after* the Guaranty was signed." Appellee's (Chase's) Brief ("Brief"), p. 6 (emphasis added). **Ex C**, Brief Excerpt.

Ex D, 7/1/22 Sixth Circuit Opinion.[2]

42. Thus, despite the Trust's express terms, the Trust, according to the Sixth Circuit, became irrevocable in 2003 upon entry of its 2022 opinion. *Id.*

VII. Charging Orders and Writ of Execution

43. In 2018, Chase, based on the Judgment secured against the Trust, asked for and received charging orders against the LLC membership interests, including those described above (paragraphs 24-28), that were then held by the Trust (the "**Charging Orders**"). **Ex E**, Charging Orders. This is a because a writ of execution may not issue as to LLC membership interests. The Charging Orders provide that Chase has the right to distributions made by the LLC on the membership interest, but only if the LLC decides to make a distribution. Under Michigan law this is Chase's "*exclusive remedy*" against the LLC membership interests as a Trust creditor. MCL 450.4507(6) ("This section provides the exclusive remedy by which a judgment creditor of a member may satisfy a judgment out of the member's membership interest in a limited liability company."). The Charging Orders are

2. The Sixth Circuit's Dissent does a thorough job of explaining how the Sixth Circuit's majority opinion is "far afield from ordinary trust law," "converted Winget's revocable trust to an irrevocable trust," and means a trustee can convert a revocable trust to an irrevocable trust without the settlor's consent by merely failing to perform a contract, even one, such as here, that the settlor (Larry) *refused* to join. **Ex D**, 7/1/22 Sixth Circuit Opinion, Dissent, pp. 23-34.

also a lien on the LLC membership interests, but Chase is prohibited from foreclosing on that lien. MCL 450.4507(5) ("A charging order is a lien on the membership interest of the member that is the subject of the charging order. However, a person may not foreclose on that lien or on the membership interest under this act or any other law…").

44. In 2019, Chase also asked for and received a writ of execution against the stock of enumerated corporations ("**Writ of Execution**"). **Ex F**, Writ of Execution. For the limited purpose of assuring this stock was not removed from the Trust prior to its sale, Chase asked that the Writ of Execution include the following status quo language: "Larry J. Winget and the [Trust] . . . are enjoined from selling, transferring, assigning, encumbering, destroying, concealing, or otherwise disposing of the assets owned, titled in the name of, or otherwise held by the Trust or its trustees outside of the ordinary course of business." The Writ of Execution so provides.

VIII. Pending Contempt Motion in District Court

45. On October 10, 2022, after the initial petition in this proceeding was filed in this case, Chase filed a Motion for Contempt and Injunctive Relief with the U.S. District Court for the Eastern District of Michigan ("**Contempt Motion**").

46. In the Contempt Motion, Chase contends the Writ of Execution containing the status quo language prevents this Court from entertaining this Petition.

47. Larry has responded to this Contempt Motion. **Ex G**, Response.

48. Presumably, Chase will take the same position in response to this Petition.

49. The Writ of Execution has *no* relevance to this Petition, and does not bar the relief sought, for any and all of the following reasons:

A. The Writ of Execution does not prevent Larry from seeking adjudication of legal rights.

B. The Writ of Execution only applies to stock held by the Trust and this petition requests no remedial relief as to it.

C. This Petition seeks remedial relief only as to the LLC membership interests contributed after 2003 and the Writ of Execution does not, as a matter of law, apply to those assets held by the Trust. MCL 450.4507(6).

D. The questions presented in this Petition did not even exist before the Sixth Circuit's July 1, 2022 opinion, and thus, have not been litigated in the federal courts. Nor was there a need for Probate Court intervention before the Sixth Circuit's unexpected ruling that this revocable Trust was converted to an irrevocable Trust.

50. But to be clear, if the relief sought in this Petition is granted in full, Larry stipulates that the LLC

membership interests remain subject to and subordinate to the Charging Orders unless and until the district court lifts the Charging Orders.

51. Meaning, this Petition does not seek to place the LLC membership interests "beyond the reach of" Chase nor affect the Charging Orders.

LEGAL SUPPORT

I. EQUITABLE RELIEF ISSUE: REMEDIES TO ADDRESS POST-2003 TRUST LLC CONTRIBUTIONS.

Larry made LLC contributions to the Trust when Larry believed it remained revocable after 2003, until the Sixth Circuit's 2022 opinion making the Trust irrevocable. Larry never intended to lose control of these newly contributed LLC assets, nor did Chase rely upon these assets being in the Trust because they were not contributed to the Trust until after the loan was already in place and in default.

The Probate Court is a court of equity. In exercising this equity, the Court is directed to construe and apply the Michigan Trust Code so that settlors of trusts - like Larry - have confidence that their intentions as expressed in their trust documents will be carried out:

> Article VII **shall be construed and applied** to promote its underlying purposes and policies.

> The following are the underlying purposes and policies of article VII: . . . (c) To foster certainty in the law **so that settlors of trusts** will **have confidence** that their **instructions will be carried out** as **expressed in the terms of the trust**.

MCL 700.8201 (emphasis added). Larry thought he had a revocable Trust in which he retained full control of its assets because that is what the terms of his Trust expressed. Larry asks this Court to remedy this inequity by entering an Order nullifying the LLC contributions to the Trust on the basis of reformation, modification, mistake, ineffective gift and/or imposition of a constructive trust.

A. Reformation to Remedy a Mistake

The Trust can be reformed to conform to Larry as Settlor's intent that he retained control over the assets contributed to the Trust after 2003, the date on which the revocable trust was retroactively nullified (unbeknownst to Larry) and an irrevocable Trust (according to the Sixth Circuit) substituted in its place. The Probate Court has exclusive jurisdiction over a proceeding seeking trust reformation. MCL 700.1302(b) ("The court has exclusive legal and equitable jurisdiction of all the following: . . . a proceeding that concerns . . . reformation . . . of a trust.").

Reformation is an equitable remedy that applies to trusts as well as in other contexts to give effect to the donor's intention and prevent unjust enrichment. "Equity

rests the rationale for reformation on two related grounds: giving effect to donor's intention and preventing unjust enrichment." **Ex H**, Restatement (Third) of Property, Wills & Don. Trans. § 12.1 (2003).

Michigan law has long recognized reformation as an equitable tool to remedy mistakes by the settlor or giftor relating to trusts and gifts. *Tuttle v Doty*, 203 Mich 1; 168 NW 990 (1918) (holding a gift induced by a mistake of fact may be set aside on that ground"); *Stone v Stone*, 319 Mich 194; 29 NW2d 271 (1947) (and noting "We held in *Tuttle v. Doty* that a gift induced by a mistake of fact may be set aside on that ground"); *Miller v National Bank of Detroit*, 325 Mich 395; 38 NW2d 863 (1949).

In *Stone*, the Michigan Supreme Court held that when an individual enters a transaction based upon on his antecedent legal rights and for the purpose of exercising those legal rights, and thereafter the legal rights are redefined by a legal determination that undermines the purpose of the transaction, equity will grant relief to remedy the mistake. *Stone*, 319 Mich at 199.

In *Stone*, husband and wife transferred an undivided one-half interest in a partnership business to each of their children, making their children one-quarter interest owners of the business. The transfers were made for minimizing income taxes on the belief that four separate tax returns could be filed for each partner and in so doing avoiding higher tax brackets. Post-transfer, the U.S. Supreme Court issued an opinion that in a partnership between husband and wife in which the wife contributed no

services, no genuine partnership existed for tax purposes and that the husband should be taxed on the income. As a result of this ruling, the husband's tax return had to be revised to capture all of the partnerships' income taxes and at an increased income tax rate. Given the "purpose of the transfers ha[d] failed utterly," the husband and wife brought suit to nullify the transfers made without consideration "because induced by mistake of fact and law and because of the failure of the family plan upon which the transfers were predicated." *Id* at 197. The Court granted the request to nullify the business interest transfers because plaintiffs were "mistaken as to their own antecedent and existing private legal rights" and so "equitable relief is properly invoked." *Id* at 199-200.

Likewise, in *Miller*, the Michigan Supreme Court extended this analysis to trusts and held, "[w]here a donor of a trust is ignorant or mistaken with respect to his antecedent or existing private legal rights as to one purpose sought to be accomplished by the transaction but is fully informed thereof as to another purpose also sought to be accomplished thereby, [e]quity [will] grant a reformation or rescission of the transaction[.]" *Miller*, 325 Mich at 396 & 404. In *Miller*, the court reformed nine trusts which were created for tax avoidance purposes, but the IRS later issued a determination that resulted in the trusts not accomplishing the settlor's tax objectives. In reforming the trusts to rescind assets contributed to the nine trusts, the court reasoned that "the only thing that motivated Mr. Miller in causing the trusts to be formed was his desire to minimize in a supposedly lawful manner his income tax; and had he not believed that would be

accomplished in the manner attempted he would not have caused the trusts to be created." *Id* at 401-402.

Like in *Stone* and *Miller*, Larry created the Trust as a will substitute and a way to maintain full control over the assets during his lifetime. Like the IRS's subsequent and unexpected decision in *Stone* and *Miller* that frustrated the settlor's purpose of creating the trusts, the Sixth Circuit's 2022 subsequent and unexpected decision that the Trust was irrevocable as of 2003 frustrates Larry's purpose of maintaining full control of the Trust's assets. And like *Stone* and *Miller* Larry's intention to contribute the property free of gift tax could potentially be frustrated by the retroactive conversion of the Trust to an irrevocable one. In sum, like in *Stone* and *Miller*, reformation of the Trust and rescission of the contribution of the post-2003 assets is an appropriate remedy.

The Michigan Trust Code also provides a statutory basis for reforming a trust to correct a settlor's mistake:

> **The court may reform the terms of a trust**, even if unambiguous, to conform the terms **to the Settlor's intention** if it is proved by clear and convincing evidence that both the Settlor's intent and the terms of the trust were **affected by a mistake of fact or law**, whether in expression or inducement.

MCL 700.7415 (emphasis added). The Sixth Circuit's opinion that the Trust became irrevocable in 2003 nullifies the revocable trust then in place. Larry as the settlor

never intended for the Trust to be irrevocable during this lifetime. Larry could not have anticipated in 2006 or the years thereafter that the Sixth Circuit would make such a ruling in 2022 and was mistaken to believe that the Trust would remain revocable during his lifetime. Here, a mistake of fact or law occurred at the time Larry contributed assets to the Trust in 2006 and the years thereafter, when Larry believed that the Trust remained subject to his control.

This Probate Court has authority to reform the Trust under case law and statutory law to exclude the post-2003 contributions to the Trust to conform to Larry's intent in 2006 and the years thereafter that he retained the full rights of the settlor of a revocable Trust in that properties he contributed were not completed gifts, that he retained dominion and control over the assets, and could take them out of the Trust at any time.

B. Trust Modification

The Probate Court has exclusive jurisdiction over a proceeding seeking trust modification. MCL 700.1302(b) ("The court has exclusive legal and equitable jurisdiction of all the following: . . . a proceeding that concerns . . . modification . . . of a trust.").

1. Tax Objectives

The Trust can be modified to conform to Larry as Settlor's intent that he retain control over the assets contributed to the Trust to achieve Larry's tax objections

when he set up the Trust. The Probate Court has exclusive jurisdiction over a proceeding seeking trust modification. MCL 700.1302(b) ("The court has exclusive legal and equitable jurisdiction of all the following: . . . a proceeding that concerns . . . modification . . . of a trust.").

MCL 700.7416 authorizes this Court to modify the Trust's terms to achieve the Settlor's tax objectives:

> To achieve the Settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the Settlor's probable intention. The court may provide that the modification has retroactive effect.

The potential inability of Larry as settlor to reclaim assets contributed to the Trust post- 2003 would prevent him from achieving the following tax objectives with respect to that property: (1) make annual exclusion outright gifts to family or charity; (2) establish new trusts or contribute assets to existing trusts for family members or charity (such as creating a new GRAT or QPRT); (3) remove those assets to give to his wife so she could engage in planning or improve existing assets, such as a residence; and/or (4) assuring there is no gift tax liability. These inequitable consequences never intended by Larry as settlor can be remedied without disturbing the 2022 Sixth Circuit's decision by nullifying the post-2003 transfers to the Trust.

2. Unanticipated Circumstances

Further, MCL 700.7412(2) also authorizes this Court to modify the Trust's terms because the Settlor did not anticipate in 2006 that the Sixth Circuit would rule sixteen (16) years later in 2022 that the Trust was irrevocable as a matter of law when the Chase loan went into default in 2003:

> The court may modify the **administrative or dispositive terms of a trust** or terminate the trust if, **because of circumstances not anticipated by the Settlor**, modification or termination will further the **Settlor's stated purpose** or, if there is no stated purpose, the Settlor's probable intention.

MCL 700.7412(2) (emphasis added).

Larry did not anticipate that the Sixth Circuit would deem the Trust irrevocable as of 2003 when the Trust by its express terms is revocable and Larry did not release any of his rights in the Trust through the Chase lending documents.

Larry would never have contributed additional assets to the Trust after 2003 if he thought he would have lost control over them or even create the potential for millions of dollars in gift tax. This Court has authority to determine that Larry's post-2003 contributions to the Trust are nullified and in so doing modify the Trust without disturbing the Sixth Circuit's ruling.

C. Incomplete Gift: Lack of Intent to Make Gift to Trust

The Probate Court has exclusive jurisdiction over a proceeding seeking a determination of whether particular assets are owned by a trust and therefore affect its administration. MCL 700.1302(b) ("The court has exclusive legal and equitable jurisdiction of all the following: . . . a proceeding that concerns the . . . settlement of a trust; the administration, distribution, . . . or the declaration of rights that involve a trust, trustee, or trust beneficiary[.]").

If Larry did not make a completed gift to the Trust of the post-2003 contributions, then the Trust never held legal title to the assets. Moreover, because Larry never intended to make a gift to an irrevocable trust and lose control and dominion over these assets, there is an incomplete gift and the post-2003 contributions should be deemed owned by Larry individually.

"It may be stated generally that the three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift." *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). "This means that a gift *inter vivos* must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the **power of recall by the donor**." *Osius*, citing *Lumberg v Commonwealth Bank*, 295 Mich 566, 568; 295 NW 266 (1940) (emphasis added). While "the presence of a filed gift tax return is not conclusive

evidence that a gift was made," such a return may serve as evidence "tend[ing] to show that a gift has been made[.]" *In re Rudell Estate*, 286 Mich App 391, 405; 780 NW2d 884 (2009). "When there is no evidence of donative intent, courts will find that no gift has been made." *Id* at 404, citing *Osius* at 611.

In the case of *Casey Estate*, the Michigan Court of Appeals held that the gift was not effective because the giftor retained the power of recall. *In re Casey Estate*, 306 Mich App 252; 856 NW2d 556 (2014). In *Casey Estate*, the petitioner and decedent's son claimed decedent made an *inter vivos* gift of the contents of his safe by providing the petitioner with the safe combination and telling the petitioner that the contents "belonged to him." In rejecting this analysis, the Court held the gift was ineffective because the decedent retained control and the power of recall:

> [A]lthough decedent provided him the combination to the safe and indicated that the contents of the safe belonged to him, it was the decedent who retained dominion and control over the safe and its contents. The safe was located in the decedent's office at PSI, a company exclusively owned by the decedent. In addition, the decedent retained control of the combination, which he could change at any time, thereby precluding Bruce's access to the safe's contents. This means the decedent retained not only control, but the power of recall. There was no delivery.

Id at 264.

Like the decedent in *Casey Estate*, Larry always maintained the metaphorical key and combination to his Trust assets and had the sole authority to shift assets in and out of the Trust according to his tax and estate planning considerations. Larry never intended to relinquish dominion and control over the Trust assets and maintaining this control was his exact intention in forming his Trust as a revocable instrument. Larry never intended, nor could have imagined, that continuing to place assets in his Trust, during a time at which that trust was still revocable on its face and by his intent, would render those assets permanently outside of his dominion and control or create even the potential of millions of dollars in gift tax on property he never intended to gift. Said another way, Larry's intent was to use the revocable Trust as a storage unit that he could fill with assets, change the contents, empty or close. **Ex D**, 7/1/22 Sixth Circuit Opinion, Dissent, p. 24. But he intended the assets always remain his.

As further evidence that Larry did not intend to make an irrevocable gift of the post-2003 contributions to the Trust, Larry did not file a gift tax return because Larry continued to reasonably believe he maintained dominion and control of the assets and they could be recalled by him at any time. *Rudell Estate, supra.*

Larry seeks a determination from this Court that his post-2003 contributions to the Trust were not completed gifts, and therefore, were never owned by the Trust and remain owned by Larry individually.

D. Constructive Trust

The Court also has the power to place a constructive trust over the post-2003 Trust contributions for the benefit of Larry individually. "A constructive trust is an equitable remedy created not by intent or by agreement, but by the operation of law." *In re Filibeck Estate*, 305 Mich App 550, 552-554; 853 NW2d 448 (2014) (internal citation omitted). "The imposition of a constructive trust makes the holder of legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest." *Id.* "A constructive trust may be imposed when necessary to do equity or to prevent unjust enrichment[.]" *Id.*

Because the post-2003 Trust contributions came well after the Eighth Amendment and related loan modification documents with Chase were executed, Chase could not have relied upon Larry's additional contributions to the Trust in deciding whether to modify the loan. Nor did the loan documents with Chase restrict Larry's rights in his revocable Trust. It would be inequitable for Chase to be permitted to collect on new assets that were contributed to the Trust by Larry under the mistaken belief they remained in Larry's control and could be recalled by Larry at will.

II. TRUST ADMINISTRATION ISSUES: TRUSTEE AND SETTLOR'S REQUEST FOR CONSTRUCTION & INSTRUCTION OF JUDICIALLY-CREATED IRREVOCABLE TRUST

Whether - and when - a Trust becomes irrevocable has direct Trust administration implications and only this

Probate Court with its expertise in trusts is positioned to provide Larry as Trustee and Settlor such guidance.

As the Sixth Circuit's dissent articulated clearly, revocable versus irrevocable trusts are administered very differently:

> **A revocable (or living) trust** is just a **conceptual way** for a person (the settlor or grantor) to organize or **manage** his or her **assets**. The **settlor** transfers title to the assets to the revocable trust but **retains full ownership and control over those assets**. To the extent that the trustee has any role, the trustee acts at the will of the settlor and owes a fiduciary duty to the settlor. **While the settlor is alive, the beneficiary has no rights whatsoever**. The settlor can change the terms, change the contents, or even dissolve a revocable trust at any time, for any reason. Accordingly, the **settlor's creditors can reach the assets** held in the trust. And the **settlor must pay the taxes incurred by assets held in the trust**—the trust does not have a tax-identification number or file a tax return.
>
> ***In stark contrast***, a **settlor** who creates an ***irrevocable*** **trust relinquishes control of the assets** to the trustee, who manages the trust under a fiduciary duty to the *beneficiary*. The irrevocable trust becomes its own separate legal entity. The settlor cannot change the

> terms, change the contents, or dissolve the trust. The **settlor's creditors cannot reach the trust assets**. And the trustee would file a tax return for the irrevocable trust using a tax-identification number for the trust.

Ex D, 7/1/22 Sixth Circuit Opinion, Dissent, pp. 23-24 (emphasis added).

The Sixth Circuit Dissent went on to provide an example of how conversion from revocable to irrevocable without Larry's consent "needlessly complicate[s]" Trust administration and "is far afield from ordinary trust law":

> **The majority recognizes that "the typical rules for revocable trusts may not apply" and suggests that the Trust may have been responsible for paying its own taxes.** As a practical matter, this would require the Trust (i.e., the trustee, Winget, I suppose) to formally convert the Trust to an irrevocable trust, to obtain a tax-identification number from the IRS, prepare and file a tax return, and pay the requisite taxes to the IRS. Of course, the IRS was expecting Winget—as the settlor of the revocable Trust—to pay the taxes, so this new undertaking might involve a filing amendment (reducing Winget's personal taxable income and, correspondingly, his tax liability), a refund of Winget's $79 million overpayment, or a repayment by the Trust to Winget for the taxes he erroneously paid on the Trust's behalf

> (perhaps with its own tax consequences). **All of this is merely to demonstrate, or emphasize, how very far we have ranged from ordinary trust law.**

Ex D, 7/1/22 Sixth Circuit Opinion, Dissent, pp. 32-33 (emphasis added).

The administration complications flowing from the Sixth Circuit's majority opinion are not hypothetical. Guidance is needed from this Court now on the administration effect of this ruling, including the fiduciary rights and obligations of: (1) Larry as Settlor; (2) the Trustee with respect to the administration of the Trust res as to the ten beneficiaries of the Trust; and (3) the beneficiaries' interests in the Trust res. Some specific questions on these issues are as follows:

1. What limitations are there on Larry's powers as Trustee beyond revoking the Trust? The Sixth Circuit has ruled that Larry cannot revoke the entire Trust as of 2003 but ended its analysis there, but guidance is needed by Larry and his successor as Trustee to meet their fiduciary obligations under the Michigan Trust Code and under the IRS gift tax provisions. The Trust Instrument at Article 16 otherwise gave Larry extensive control over the Trust's assets. **Ex A**, Trust Instrument at Article 16.

2. Whether Larry has a duty to communicate with and account to the qualified trust beneficiaries. And if yes, does this obligation begin as of the Sixth Circuit's July 2022 Opinion or apply retroactively to 2003 when the

Sixth Circuit deemed the Trust to become irrevocable by operation of law? MCL 700.7814(2) (detailing all the various initial duties a trustee has to qualified trust beneficiaries after a trust becomes irrevocable by its terms).

3. Confirmation that Larry remains a Trust beneficiary holding the equitable interest in the Trust's assets and the Trustee holds only legal title.

4. Larry's personal debt to Chase is paid in full. If Larry owes other creditors at his death, is the Trust subject to these creditors like a typical revocable Trust? MCL 700.7506(1)(b), (c); MCL 700.7605-.7615 (provisions creating an obligation of the trustee of a trust to pay claims against, or oversee the claims payment process of, a deceased settlor with a power to revoke a trust).

REQUEST FOR RELIEF

WHEREFORE, Larry Winget as Settlor and Trustee of the Trust respectfully requests the Court:

1. Provide the Trustee and Settlor instruction of important administration issues in light of the Sixth Circuit's 2022 ruling retroactively replacing (effective as of 2003) Larry's revocable will substitute Trust with an irrevocable Trust, including the fiduciary rights and obligations of: (1) Larry as Settlor; (2) the Trustee with respect to the administration of the Trust res as to the ten beneficiaries of the Trust; and (3) the beneficiaries' interests in the Trust res.

2. Subject to the Charging Orders, enter an Order nullifying the LLC contributions Larry made to the Trust when Larry believed it remained revocable from 2003 until the Sixth Circuit's 2022 opinion making the Trust irrevocable so that the assets belong to Larry, by reforming or modifying the Trust, declaring that Larry did not make effective gifts of the LLC interests to the Trust, and/or imposing a constructive trust over the LLC interests for the benefit of Larry individually.

Dated: October 20, 2022

/s/_____
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