Nos. 16-6221, -6225, -6226, and -6227

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELIZABETH A. OSBORN; LINDA G. HOLT; JUDITH E. PREWITT; CYNTHIA L. ROEDER,

Plaintiffs-Appellees,

v.

JOHN M. GRIFFIN; ESTATE OF DENNIS B. GRIFFIN; DENNIS B. GRIFFIN REVOCABLE TRUST – 2012,

Defendants-Appellants,

and

MARTOM PROPERTIES, LLC,

Defendant-Appellant.

On Appeals from United States District Court for the Eastern District of Kentucky, Nos. 2:11-cv-00089-WOB-REW and 2:13-cv-00032-WOB-REW

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FOR JOHN M. GRIFFIN

Pursuant to 6th Cir. R. 26.1, John M. Griffin makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

Dated: November 29, 2016

s/ Gregory G. Garre
Gregory G. Garre

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FOR THE ESTATE OF DENNIS B. GRIFFIN

Pursuant to 6th Cir. R. 26.1, the Estate of Dennis B. Griffin makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

Dated: November 29, 2016

s/ Gregory G. Garre
Gregory G. Garre

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FOR THE DENNIS B. GRIFFIN REVOCABLE TRUST – 2012

Pursuant to 6th Cir. R. 26.1, the Dennis B. Griffin Revocable Trust – 2012 makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

Dated: November 29, 2016

s/ Gregory G. Garre
Gregory G. Garre

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST FOR MARTOM PROPERTIES, LLC

Pursuant to 6th Cir. R. 26.1, Martom Properties LLC makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

Dated: November 29, 2016

s/ Joseph M. Callow, Jr.
Joseph M. Callow, Jr.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This appeal involves a challenge to a $584 million judgment and presents several complex questions of federal, Kentucky, and Ohio law. Oral argument would be of material assistance to this Court in resolving this appeal, and this Court has already directed that, following briefing, the case "shall . . . be assigned to an oral argument calendar as soon as practicable." ECF No. 40-1 at 3.

JURISDICTIONAL STATEMENT

These four appeals arise from two cases consolidated in the district court. The district court asserted jurisdiction over the first suit, *Osborn v. Griffin*, No. 2:11-cv-00089, under 28 U.S.C. §§ 1331 and 1332. It asserted jurisdiction over the second suit, *Holt v. Griffin*, No. 2:13-cv-00032, under 28 U.S.C. §§ 1331 and 1367. As explained below, the district court in fact lacked jurisdiction over both cases under the "probate exception." *See* Part I.A, *infra*.

The district court entered a final judgment on April 26, 2016. Judgment, RE863, PageID 35203-07. On May 24, 2016, Defendants timely filed a motion for a new trial or amended judgment under Federal Rules of Civil Procedure 52 and 59. Defs.' Mot. for Am. Judgment, RE1059, PageID 36864-91. The district court denied that motion on July 26, 2016. Order on New Trial Motion, RE1131, PageID 37712-18. On August 2, 2016, Defendants timely appealed to this Court. *See* Notices of Appeal, RE1139-1142, PageID 37736-43.

On August 22, 2016, this Court consolidated the four appeals. ECF No. 14-1. The Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in allowing this case to proceed, either because: (a) the court lacked subject-matter jurisdiction over Plaintiffs' state-law claims, or (b) Plaintiffs' claims are time-barred under Kentucky law.

2. Whether the district court erred in imposing liability, either because: (a) Plaintiffs' claims are precluded by the prior litigation and settlement of the same claims, (b) the individual Defendants did not breach any fiduciary duty owed to Plaintiffs as a matter of law, or (c) Martom Properties cannot be held liable for any breach by the other Defendants.

3. Whether the district court erred in entering its $584 million award, either because: (a) the court failed to hold Plaintiffs to their burden on remedy, (b) the "disgorgement" award is grossly inflated and tainted by internal inconsistencies, or (c) the prejudgment interest award is unduly punitive and excessive.

4. Whether the district court erred in denying Defendants a jury trial.

PRELIMINARY STATEMENT

This appeal involves a challenge to one of the largest judgments ever entered by a court in the Commonwealth of Kentucky. The underlying litigation stems from a decades-old fight among the surviving siblings of John L. and Rosellen Griffin over how their parents intended their sizeable assets to be distributed in probate after their death. That family feud was previously litigated to settlement in 1993. Then the fight was renewed, in this litigation, after the company established by John L. Griffin in 1943, and later managed by his sons (including two of the Defendants here), was sold for a remarkable $840 million in 2010.

The Griffin siblings vigorously dispute who did what to whom and what their parents intended. But this appeal is not about relitigating facts; it is about correcting a series of cascading legal errors that produced the $584 million judgment on appeal. Unavoidably given the complex history of this litigation and the magnitude of the judgment below, this appeal presents a number of issues. But in essence, the district court committed four overarching errors:

- First, the district court improperly exercised jurisdiction over a family dispute about probated assets that belonged (if anywhere) in state court, and that is patently time-barred anyway because it is based on decades-old events.

- Second, the district court improperly found the individual Defendants liable for breaching fiduciary duties that, as a matter of law, did not exist or were not violated, and held Martom Properties liable for a breach of fiduciary duty committed (if at all) only by *other* Defendants—not Martom.

- Third, the district court improperly entered a grossly inflated, $584 million award purportedly "disgorging" hundreds of millions of dollars in profits that Defendants never even received or retained in the first place.

- And fourth, the district court improperly decided every last issue on its own in this highly contentious suit for money damages, even though Defendants repeatedly invoked their constitutional right to a jury.

As we explain below, each of those errors warrants reversal.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

John L. and Rosellen Griffin had twelve children. Joint Stipulations ¶¶ 2, 3, RE748, PageID 30751. Plaintiffs are four of the five daughters: Elizabeth Osborn ("Osborn" or "Betsy"), as well as Linda Holt, Judith Prewitt, and Cynthia Roeder (the "*Holt* Plaintiffs"). *Id.* ¶ 3. Defendants are the two oldest sons—Dennis B. Griffin (now deceased)[1] and John M. Griffin ("Griffy")—and a company ("Martom Properties" or "Martom") owned by two of the other sons (Martin and Thomas Griffin) and five of the Griffin grandchildren. *Id.* ¶ 15, PageID 30752-53. Janet Means, the other surviving Griffin daughter, declined to participate as a plaintiff and, at trial, testified in support of Defendants. *See infra* at 15, 45.

Betsy and her three sisters filed two separate lawsuits alleging that Defendants breached their fiduciary duties when handling Rosellen Griffin's estate and John L. Griffin's trust and estate. Specifically, they challenge: (1) the 1985 sale of Griffin Industries stock from Rosellen Griffin's estate (approximately $106.9 million of the judgment); (2) the 1986 sale of Griffin Industries stock from John L. Griffin's trust ($427.5 million); (3) the 1995 sale of Craig Protein stock from John L. Griffin's estate ($41.4 million); and (4) the 1995 sale of real property from John L. Griffin's trust and estate to Martom Properties ($7.8 million).

[1] Following his death, Dennis's estate and trust were substituted as Defendants. Order Substituting Dennis Griffin Estate, RE709, PageID 30074.

For the purposes of this appeal, the relevant events are as follows.

A. Griffin Industries

John L. Griffin founded Griffin Industries—a "rendering" company that made useful products out of meat-processing waste—in 1943. Joint Stipulations ¶ 1, RE748, PageID 30751. Growing up, all of the children worked in the business after school and during the summer. Findings of Fact ¶ 5, RE856, PageID 35077. As adults, several of the brothers—including Dennis and Griffy—continued to work for the company. From the 1960s until the company was sold in 2010, Dennis and Griffy served in management roles, including terms as President and CEO, respectively. Defs.' MTD, RE30, PageID 460. Their brother Robert also served as President and CEO. *Id.* The sisters, however, no longer worked for the company at all as adults, and never served in management. MSJ Op., RE590, PageID 27443; Findings of Fact ¶¶ 12-13, RE856, PageID 35071-72, 35080-81.

While their parents were alive, the siblings' relative stock ownership in Griffin Industries—approved by the company's Board of Directors[2]—reflected their respective involvement in the company. In the early 1970s, the four brothers who worked at the company were each allowed by the Board of Directors to buy

[2] The company's bylaws included express limits on the transferability of shares, which gave the company the right of first refusal to buy shares (and thereby block transfers), even if John L. or Rosellen Griffin wanted to transfer them to family members by sale or bequest. *See, e.g.*, DTX403, App.319-22 (RE859, PageID 35188; RE828, PageID 34102).

$1 million worth of stock from the company. *See* Robert A. Griffin Deposition Tr. (11:6-12:1), RE410-12.[3] By contrast, the sisters (who no longer worked at the company) were not allowed to purchase stock. Instead, they held only the 1% stake in the company that their parents had gifted to all of their children. Joint Stipulations ¶ 19, RE748, PageID 30753.

By 1985, Dennis and Griffy each owned nearly six times as much Griffin Industries stock as any of their sisters. Findings of Fact ¶¶ 24-26, RE856, PageID 35083-84. Plaintiffs have not disputed that this lopsided stock distribution among the siblings—which tracked the siblings' involvement with the company—reflected their parents' wishes, while they were still alive. *Id.*

Under the leadership of Dennis and Griffy, Griffin Industries grew rapidly, with earnings multiplying from about $25.5 million in 2000 to more than $171 million in 2008. DTX406, App.275; DTX407, App.277 (RE859, PageID 35188). This growth stemmed largely from a strategic decision to transition the business from red meat into poultry, which capitalized on the tremendous growth of the poultry industry between 1995 and 2005. R. Griffin Testimony (60:8-23, 68:24-70:14, 73:16-24), RE828, PageID 34056-58, 34061, 34048. In 2010, Griffin Industries was acquired by Darling International in a deal that valued the company

[3] Sealed entry, RE410-12, pages 11-12.

at more than $840 million. Findings of Fact ¶ 164, RE856, PageID 35131; J. Griffin Testimony (5:18-20), RE821, PageID 33481.

Everyone in the family benefited from that sale. But, of course, the benefits were proportionate to the amount of shares that each family member held which, in turn, depended on stock sales and gifts that took place decades earlier.

B. Rosellen Griffin's 1985 Death And The Disposition Of Her Estate

By the 1980s, Dennis and Griffy had served in senior positions at Griffin Industries, including as president, for more than a decade. In 1983, John L. Griffin suffered a major stroke that left him physically disabled and unable to speak; after a lengthy hospitalization, he returned home and eventually learned to communicate, but he never returned to active work. Findings of Fact ¶ 21, RE856, PageID 35082-83. Although Plaintiffs have at times suggested in this litigation that the stroke rendered John L. Griffin *mentally* incompetent as well, the district court pointedly avoided any such finding, and many of Plaintiffs' claims in fact depend on their father being competent after his stroke. *See infra* at 61-63.

In August 1985, Rosellen Griffin passed away. *Id.* ¶ 24, PageID 35083. Rosellen's will left her shares in Griffin Industries (about 14% of the outstanding company stock) to her husband or, if he predeceased her or disclaimed his interest, to a trust held by First National Bank of Cincinnati for the benefit of her husband and children. *Id.* ¶ 10, PageID 35079. At that time, John L. Griffin himself owned

53% of the company stock. *See id.* ¶ 32, RE856, PageID 35085. Although Rosellen's will named John L. Griffin as executor of her estate, because of the physical disabilities he still suffered as a result of his stroke, the Kentucky probate court appointed Dennis and Griffy to serve as executors instead. *Id.* ¶¶ 21, 30-31, PageID 35082-85.

On November 29, 1985, Dennis and Griffy met with their siblings at the Drawbridge Inn in Fort Mitchell, Kentucky, to discuss what to do with the Griffin Industries stock in the wake of their mother's death. Joint Stipulations ¶ 21, RE748, Page ID 30754. Their parents' lawyer from the Thompson Hine firm also attended. Findings of Fact ¶¶ 38, 76, RE856, PageID 35087, 35100. The parties dispute what was said, but the district court found that Dennis explained that their parents' wills were a "mess," in part because they had been premised on the assumption that John L. Griffin would predecease Rosellen; that they needed to redistribute the assets for financial and estate reasons; and that their parents intended the Griffin Industries stock to go to the sons, consistent with their management role in the company. *Id.* ¶ 39, PageID 35087.

The family was divided, both on how to proceed and on what their parents intended. The next day, Cynthia Roeder's husband complained to Cynthia and Betsy that they were being "screwed" by their brothers. *Id.* ¶ 50, PageID 35089. Yet, none of the sisters consulted counsel or secured a copy of their mother's

publicly available estate documents at the time. Plaintiffs testified that, a week later, the family met again and had another heated discussion over the plan. *Id.* ¶ 51, PageID 35090. The parties dispute what was said at that meeting as well. But one sister testified that, when Betsy and her husband questioned the plan, "Dennis became agitated, smacked his fist, and said, 'If you don't go along with it, we're going to buy you out right here, right now.'" *Id.* (quoting testimony).

The *Holt* Plaintiffs also testified that when two of them subsequently went to Dennis's office to ask about their mother's will, he initially handed them a copy of the will but then "yanked it out of [Linda's] hand" and told her "he was taking care of it." Findings of Fact ¶ 62, RE856, PageID 35094. They also claimed that when they asked about the will on a separate occasion, "Dennis threw a copy [of the will] across the table and became very angry," so they left "without picking up the will." *Id.* ¶ 62, PageID 35094-95. Although Rosellen's will was publicly available in Kentucky probate court and Betsy later secured a copy of the will, none of the *Holt* Plaintiffs sought a copy until after Griffin Industries was sold for more than $840 million in 2010. *Id.* ¶¶ 68-69, PageID 35097-98.

After these meetings, John L. Griffin transferred his Griffin Industries stock to his existing revocable trust, which—just as Dennis and Griffy had explained it would—then sold 4% of the company stock directly to trusts held for his 23 grandchildren, including Plaintiffs' children. Joint Stipulations ¶ 23, RE748,

PageID 30754; Findings of Fact ¶ 35, RE856, PageID 35086. The *Holt* Plaintiffs approved that sale of Griffin Industries stock to their children's trusts. Findings of Fact ¶ 57, RE 856, PageID 35093. John L. Griffin's trust then sold the remainder of his company stock (48.98%) to the four sons serving in management roles, including Dennis and Griffy. *Id.* ¶ 58. John L. Griffin later explicitly confirmed that he intended to make these transfers. *See infra* at 13, 45-48.

Rosellen's estate, meanwhile, was administered by a Kentucky probate court. Joint Stipulations ¶ 6, RE748, PageID 30751. As discussed during the family meetings, Rosellen's estate sold her Griffin Industries stock to all six Griffin sons. *Id.* ¶¶ 22-23, PageID 30754. That sale was made possible by John L. Griffin's disclaimer of the stock (to which he was otherwise entitled under Rosellen's will), and the Board's waiver of Griffin Industries' right to repurchase the shares. Findings of Fact ¶¶ 36, 55, RE856, PageID 35086, 35092-93; JTX14, App.316 (RE859, PageID 35183) (John L. Griffin Disclaimer of Griffin Stock). The publicly available probate file in Kentucky court disclosed the sale of Rosellen's stock to the sons, and notice of the estate settlement was published in June 1990. Findings of Fact ¶ 66, RE856, PageID 35096.

The *Holt* Plaintiffs admit that, without these transactions, Rosellen Griffin's daughters would have received nothing in connection with her shares of Griffin Industries stock, which would instead have passed under her will to her husband.

Joint Stipulations ¶ 20, RE748, PageID 30753; DTX5, App.240 (RE859, PageID 35188); J. Prewitt Testimony (92:18-93:21), RE813, PageID 33071-72; E. Osborn Testimony (50:14-51:15), RE814, PageID 33139-40; J. Chilton Testimony (103:22-25), RE821, PageID 33579. By virtue of John L. Griffin's disclaimer and the purchase by her sons, however, the daughters each received $261,000. Joint Stipulations ¶ 29, RE 748, PageID 30755; JTX15, App.317 (RE859, PageID 35183) (John L. Griffin Disclaimer of 62% share of Rosellen's Estate).

C. The 1990 Lawsuit And 1993 Court-Approved Settlement

Betsy objected to the sale. She told her sisters that, in her view, "they were entitled to stock from [Rosellen's] estate and . . . sent them copies of [Rosellen's] will." Findings of Fact ¶ 69, RE856, PageID 35097-98. She also filed exceptions in Rosellen's Kentucky probate proceedings, which the court rejected because her interest in the estate was purely derivative (as a beneficiary of her mother's trust) and the bank trustee itself declined to press any exceptions. *Id.* ¶ 71, PageID 35098. Then, in December 1990, she filed an action in Kentucky federal court against Griffy, Dennis, Griffin Industries, the bank trustee of Rosellen's trust, and the attorneys and law firm that had handled Rosellen's estate. *Id.* ¶ 76, PageID 35100. Later, John L. Griffin himself was added as a defendant. *See, e.g.*, DTX56, App.249 (RE859, PageID 35186).

The 1990 suit was assigned to Judge William O. Bertelsman, the same judge who later oversaw this litigation. Betsy asserted claims as an individual, as a beneficiary of Rosellen's trust, and as a shareholder of Griffin Industries on behalf of other Griffin Industries shareholders—namely, the *Holt* Plaintiffs and other family members. *See* 1990 Osborn Compl., RE430-21, PageID 19839; *see also* Findings of Fact ¶¶ 76-77, RE856, PageID 35100; DTX49, App.246-48 (RE859, PageID 35186). She alleged that Dennis and Griffy breached their fiduciary duties in their administration of Rosellen's estate and sale of Griffin Industries stock. *See* 1990 Osborn Compl., RE430-21, PageID 19851-54, 19863-66.

The *Holt* Plaintiffs (as derivative plaintiffs in the case) were in contact with Betsy's counsel, as well as counsel for Dennis and Griffy. *See* Findings of Fact ¶ 73, RE856, PageID 35099-100. While the adequacy of Betsy's representation of her sisters was disputed at the time, after briefing and argument the district court allowed Betsy to continue to represent her siblings in the action. 1992 Mem. Op., *Osborn v. Griffin*, E.D. Ky. No. 90-209, RE591-4, PageID 27677.

After nearly three years of litigation, the parties reached a settlement. Findings of Fact ¶¶ 106-08, RE856, PageID 35111-12. Betsy agreed to release all of her claims—known and unknown—involving the 1985-86 transactions in exchange for 1,390 shares of Griffin Industries stock for herself, 196 shares for each of her children, and $104,000. *Id.* ¶ 106, PageID 35111. The derivative

plaintiffs (including the *Holt* Plaintiffs) agreed to release "any and all claims . . . of any kind or nature whatsoever which any of the Griffin Siblings may have had or may now have, regardless of whether known or unknown," against Dennis and Griffy, in exchange for $10,000 each. 1993 Settlement Agreement, RE838-1, PageID 34626-27. Each of the *Holt* Plaintiffs personally signed the settlement agreement. Findings of Fact ¶ 109, RE856, PageID 35112.

Because of the derivative claim, the district court held a fairness hearing on the terms of the settlement. *Id.* ¶ 113, PageID 35113-14. After confirming that the settlement terms were acceptable, the court approved the settlement and entered judgment dismissing the derivative claim with prejudice. *Id.* ¶ 116, PageID 35115.

D. John L. Griffin's 1995 Death And The Disposition Of His Estate

In April 1995, John L. Griffin passed away. *Id.* ¶ 126, PageID 35119. Dennis and Griffy served as executors of his estate. *Id.* ¶ 130, PageID 35120.

Before his death, John L. Griffin had specifically amended his will and trust to confirm that: (1) he approved of the 1986 sale of Griffin Industries stock to his sons, and (2) his intention was to provide for his five daughters by distributing his estate and trust property exclusively to them (and not his sons). *Id.* (citing sixth codicil to will); *id.* ¶ 94 (citing fourth amendment to trust). The codicil to his will was filed with the Kentucky probate court, and because of the earlier sale, his

Griffin Industries stock was not distributed through probate. *Id.* ¶ 93, PageID 35106.

When he died, John L. Griffin owned two other groups of assets that are also at issue in this case: (1) a minority stake (1,000 shares) in a company called Craig Protein Division, Inc., a Georgia rendering company that Griffin Industries had purchased in 1981, *id.* ¶¶ 9, 127, PageID 35078-79, 35119; and (2) title to five real estate properties used by Griffin Industries, two of which he held personally and three of which were held by his trust, *id.* ¶ 127, PageID 35119. Dennis and Griffy had all of these assets appraised by independent, third-party appraisers. The Craig Protein shares were appraised at $665,000, and the five properties were appraised at $1,402,200. *Id.* ¶¶ 129, 134, PageID 35120, 35122.

In May 1995, Martin and Thomas Griffin purchased the Craig Protein shares from their father's estate for their appraised value. *Id.* ¶ 130, PageID 35120. Two months later, Martom Properties—a company managed by Martin and Thomas and owned by them along with several Griffin grandchildren, in 2% and 98% shares, respectively—purchased the five properties at their appraised value. *Id.* ¶ 135, PageID 35122. Neither Dennis nor Griffy (nor their children) ever had a financial interest in Martom. *See id.* Each of the sales was recorded, and information about the transactions was publicly available. *Id.* ¶ 140, PageID 35124.

John L. Griffin's estate was publicly probated by a Kentucky court. *Id.* ¶ 151, PageID 35127. All of the proceeds from the sales of Craig Protein stock, the five properties sold to Martom, and other property were paid to John L. Griffin's estate and trust. *Id.* ¶ 142, PageID 35125. Pursuant to John L. Griffin's will and trust, Plaintiffs and their sister, Janet Means, each received more than $1.9 million. *Id.* ¶ 157, PageID 35129-30. Dennis and Griffy received nothing. Janet testified that this is exactly what her father intended: for his sons "to have" and "run the company," and for "the girls [including Janet]. . . to have [a] million dollars." J. Means Testimony (108:7-15), RE823, PageID 33741.

II. PROCEDURAL HISTORY

A. 2011 And 2013 Complaints

In 2011, just months after Griffin Industries was sold for $840 million and nearly two decades after her 1990 lawsuit was settled with the district court's approval, Betsy, an Illinois resident, filed suit in a Kentucky federal court against her brothers—again. This time, she challenged the sale of Craig Protein stock and the sale of real properties to Martom from John L. Griffin's trust and probated estate sixteen years earlier—in 1995. Findings of Fact ¶ 169, RE856, PageID 35133. Apparently, Betsy recognized that she could not re-challenge the same stock transfers that she had challenged in her 1990 lawsuit.

In 2013, the *Holt* Plaintiffs filed a separate action in the same court. But unlike Betsy, the *Holt* Plaintiffs did not limit their claims to the 1995 sales of Craig Protein stock and Martom properties; the *Holt* Plaintiffs also sought to re-litigate the 1985-86 sales of Griffin Industries stock that were the subject of the prior litigation and, indeed, their complaint tracked Betsy's 1990 complaint. *Holt* Compl., *Holt* RE1, PageID 1-47; *see id.* ¶¶ 45-49, 153-57, PageID 12-16, 39-40; 1990 Osborn Compl. ¶¶ 18-24, 37-43, RE430-21, PageID 19844-46, 19851-53.

Plaintiffs alleged various state-law claims under Kentucky law, including breach of fiduciary duty. *See Osborn* Third Am. Compl., RE 373, PageID 9422-56; *Holt* Compl., *Holt* RE1, PageID 1-47. Unlike Betsy, the *Holt* Plaintiffs could not sue in diversity because they, like Defendants, are all Kentucky residents. *Holt* Compl. ¶¶ 5-12, PageID 3-5. Accordingly, they asserted a federal RICO claim (over which the district court exercised federal-question jurisdiction) and asked the court to assume supplemental jurisdiction over their state-law claims. Findings of Fact ¶ 171, RE856, PageID 35134. Among other things, Plaintiffs sought "compensatory damages," *Holt* Compl., *Holt* RE1, PageID 46; *Osborn* Third Am. Compl., RE373, PageID 9454, and "conveyance" of the Martom properties, *Holt* Compl., *Holt* RE1, PageID 46. The two cases were consolidated for all purposes.

B. Dispositive Motions

As the case proceeded, the district court issued a series of rulings on

dispositive motions that resolved several of the issues now on appeal.

First, the district court denied Defendants' motion to dismiss for lack of subject-matter jurisdiction under the "probate exception." Defs.' Renewed MTD, RE592, PageID 27682-87. In defending against that motion, Plaintiffs abandoned their original request for "conveyance" of the probated properties and insisted that this case was "[j]ust [about] money damages." *See* Oral Argument Tr. (21:10-22:14), RE618, PageID 28089-90; *see also* Osborn Opp. to Renewed MTD, RE603, PageID 27934; Holt Pls.' Remedy Notice, RE613, PageID 28043. Relying on the representation that Plaintiffs sought only "money damages," the district court denied the motion. Nov. 2014 Order, RE612, PageID 28040-41 & n.1.

Second, the district court denied Defendants' motion arguing that the 1990 lawsuit and 1993 settlement precluded the *Holt* Plaintiffs from pursuing their duplicative claims based on the 1985-86 sales of Griffin Industries stock. Without citing any new evidence, the court simply declared that Betsy, on second thought (twenty years later), was *not* an adequate representative of the *Holt* Plaintiffs in that litigation after all. MSJ Op., RE590, PageID 27458-61. In addition, the court declared the 1993 settlement agreement the *Holt* Plaintiffs had each signed "voidable" on the ground that Defendants breached a fiduciary duty that they supposedly owed to their sisters—their adversaries in the litigation—*as to the*

litigation itself. *See* Findings of Fact ¶¶ 196-204, RE856, PageID 35144-48.[4]

Third, the district court denied Defendants' motion to dismiss Plaintiffs' breach-of-fiduciary-duty claims as time-barred. The court agreed that Plaintiffs' RICO and other state-law claims were time-barred because Plaintiffs *should have known* of those claims shortly after they accrued. Mem. Op., RE590, PageID 27478-85. For the breach-of-fiduciary-duty claims, however, the court held that the five-year limitations period and ten-year statute of repose were tolled until Plaintiffs had *actual* knowledge of the claims, and that Plaintiffs had timely filed their claims after gaining such knowledge. *Id.*, PageID 57451-54.

Fourth, the district court simply granted summary judgment for Plaintiffs on the issue of whether Dennis and Griffy breached fiduciary duties owed to Plaintiffs. MSJ Op., RE590, PageID 27456, 27468.

C. Pre-Trial Rulings

The district court initially set the case for a jury trial—as Defendants had requested—after recognizing that Plaintiffs were "seeking money." Oral Argument Tr. (13:14-19), RE618, PageID 28081; *see also* Final Pretrial Conference Order, RE617, PageID 28061. As the trial date grew closer, however, the court stated that "[t]he jury won't understand anything about executors,

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[4] Although the district court declared the settlement "voidable," it declined to actually *void* the agreement—meaning that Plaintiffs were allowed to keep the proceeds of the settlement and re-litigate this case.

trustees, fiduciary duties, all of this," and "will do something bizarre." 2015 Status Conference Tr., RE743, Page ID30636. Then, the court (1) dismissed Plaintiffs' state-law claims except what it called the "equitable claim for breach of fiduciary duty[] seeking the equitable remedy of disgorgement," Aug. 2015 Order, RE759, PageID 31252, and (2) declared that the breach-of-fiduciary-duty "claim and its subsidiary issues, including the statute of limitations and tolling thereof, are for the Court." *Id.*

The district court also rejected Defendants' motion to exclude the testimony of Plaintiffs' sole damages expert, John E. Chilton, under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Order Denying Chilton Testimony, RE774, PageID 32294. Defendants had made a number of challenges to the reliability of Chilton's analysis, pointing out several basic flaws in his methodology. In rejecting Defendants' motion, however, the court indicated that (in its view) the purpose of a *Daubert* hearing is simply to test the "qualifications" of the witness, rather than the reliability of his analysis. *Daubert* Hearing Tr. (47:2-49:6, 58:13-19), RE783, PageID 32491-93, 32502. So the court allowed Chilton's testimony in full.

D. Trial And Post-Trial Order

The district court held a bench trial on Defendants' affirmative defenses and remedies. In March 2016, the district court entered findings of fact and

conclusions of law rejecting each defense and adopting wholesale Chilton's remedy analysis. Findings of Fact ¶¶ 262-66, RE856, PageID 35168-69. All told, the court awarded Plaintiffs a total of $584 million, which included some $250 million in prejudgment interest imposed at the maximum rate under Kentucky law (8%), compounded. *Osborn* Judgment, RE863, Page ID 35204-05; *Holt* Judgment, *Holt* RE149, PageID 1665-66.

The district court subsequently denied Defendants' post-judgment motion. Order on New Trial Motion, RE1131, PageID 37718. Defendants appealed.

SUMMARY OF ARGUMENT

For several reasons, the district court's judgment should be reversed.

I. This litigation should not have been allowed to proceed in the first place.

A. The probate exception to federal jurisdiction reserves to state courts "the probate or annulment of a will and the administration of a decedent's estate." *Marshall v. Marshall*, 547 U.S. 293, 311 (2006). At heart, that is what these cases are about. Plaintiffs have challenged the administration of their parents' estates, arguing that Dennis and Griffy breached fiduciary duties in distributing assets that were probated by the Kentucky courts. The district court held that Plaintiffs had skirted the probate exception by asking for money damages equivalent to the value of the property at issue, rather than the property itself. But this Court has rejected that very reasoning as a way to salvage federal jurisdiction. *See Wisecarver v.*

Moore, 489 F.3d 747 (6th Cir. 2007). The *Holt* Plaintiffs' challenge to the sale of John L. Griffin's stock also falls squarely within the probate exception, because those claims can succeed only by annulling a provision of John L. Griffin's will—a task that the probate exception reserves exclusively to state courts.

B. Plaintiffs' decades-old claims are also barred by Kentucky's five-year statute of limitations and ten-year statute of repose. The district court (correctly) found that Plaintiffs' federal RICO and other state-law claims were time-barred because Plaintiffs should have known of them long before they filed suit. But the district court saved the breach-of-fiduciary-duty claims on the ground that the Kentucky tolling statute required *actual* knowledge of claims based on the existence of a confidential relationship. That was a legal error: Kentucky's highest court has squarely held that a due-diligence standard applies for tolling, even if the claim is based on a confidential relationship. *Adams v. Ison*, 249 S.W.2d 791, 793 (Ky. 1952). Under that controlling precedent, Plaintiffs' breach-of-fiduciary-duty claims are as time-barred as their other claims.

II. The district court's liability determinations are also fatally flawed.

A. The *Holt* Plaintiffs' claims based on 1985-86 Griffin Industries stock sales, which represent more than $500 million of the judgment, are precluded by the 1990 litigation challenging the exact same transactions. The district court's sudden revelation—based on the same evidence it heard decades earlier—that

Betsy Osborn was *not* an adequate representative for her sisters is unfounded. Moreover, the sisters are separately bound by the 1993 settlement of that suit that each of them personally signed. The district court's decision to declare that court-approved settlement "voidable" on the ground that the *defendants* in the suit somehow owed a fiduciary duty to their *adversaries* as to the conduct of the litigation and its settlement is irreconcilable with Kentucky law.

B. The district court's determination—on summary judgment—that Defendants breached their fiduciary duties was likewise flawed. *First*, the district court erred as a matter of law in holding that Dennis and Griffy owed fiduciary duties to their sisters in their role as trustees of John L. Griffin's revocable trust and, in any event, identified no basis to override John L. Griffin's own express confirmation of the stock sales at issue to his sons. *Second*, because the *Holt* Plaintiffs were not beneficiaries of their *mother's estate* either, as a matter of law they lacked standing to challenge the administration of that estate and, in any event, Kentucky law authorized Dennis and Griffy to sell the stock rather than offer an in-kind distribution to the sisters first. And *third*, there was at least a triable issue on whether Dennis and Griffy breached any fiduciary duty owed to Plaintiffs as to the Craig Protein and Martom transactions.

C. The claims against Martom fail as a matter of law as well. Martom cannot be liable for any breach of fiduciary duty to Plaintiffs because it is

undisputed that Martom did not *owe* any such duty to Plaintiffs. The district court erred in holding that such a duty could be created by simply imputing Dennis and Griffy's knowledge to Martom—a separate entity in which Dennis and Griffy held no interest. Moreover, because Plaintiffs waited so long to file suit, their claims concerning the Martom properties are separately barred by the fact that Martom had acquired ownership of those properties under the doctrine of adverse possession, defeating any claim to the benefits of rightful ownership.

III. The $584 million award is also tainted as a matter of law.

A. At the outset, the district court failed to hold Plaintiffs to their burden to prove the amounts to which they were entitled. First, the court erred by admitting expert testimony (Chilton's) that was riddled with errors and, thus, fundamentally unreliable. Next, the court improperly excused the glaring flaws, omissions, and inconsistencies in Chilton's remedy analysis by faulting *Defendants* for not putting on an expert of their own. Instead of holding Plaintiffs to *their* burden, the court improperly shifted the burden to Defendants and then simply adopted Chilton's fundamentally flawed analysis wholesale.

B. No matter what burden is applied, the district court's award cannot stand because it is grossly inflated. For example, because it refused to factor in Griffin Industries' legal tax status as an S-corporation, the district court allowed Plaintiffs to recover hundreds of millions of dollars in shareholder distributions that

Plaintiffs never would have retained if they had owned the stock all along. The court also refused to correct the blatant internal inconsistencies in Plaintiffs' expert's analysis. And the court even forced Defendants to "disgorge" millions of dollars in distributions that had gone directly to *Plaintiffs' own children*. The only principle that explains Chilton's remedy analysis—which the district court adopted in full—is that he sought to manufacture the biggest number possible. That is neither an equitable nor a lawful basis to calculate an award.

C. The district court multiplied its errors by awarding $275 million in prejudgment interest at the maximum statutory rate, granting Plaintiffs a gigantic windfall and rewarding them for waiting decades to file claims they indisputably should have known about far sooner. As a matter of right, Plaintiffs were not entitled to prejudgment interest because their fact-intensive breach-of-fiduciary-duty claims are the antithesis of liquidated. And as a matter of discretion, the court's maxed-out interest award cannot stand because it is unduly punitive.

IV. In addition to all that, the district court violated Defendants' constitutional rights by denying them a jury trial. In holding onto the case despite the probate exception, the district court specifically found that Plaintiffs sought "monetary damages"—the hallmark of *legal* relief triggering a jury trial right. Yet in later denying Defendants a jury trial, the court stated that Plaintiffs were simply seeking "disgorgement"—which it believed was always an equitable remedy. As

both the Supreme Court and this Court have held, however, the distinction between legal and equitable claims depends on the *nature of relief sought*, not the label a party assigns to it. Here, the relief sought and awarded is obviously money—buckets of it—in the form of *in personam* judgments. That is classic legal relief.

In short, any way you slice it, the judgment cannot stand.

STANDARD OF REVIEW

This Court reviews questions of law—including the applicability of the probate exception, the standard for tolling the limitations period, and the availability of a jury trial—de novo. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 586 (6th Cir. 2015). It likewise reviews the district court's grant of partial summary judgment (here, on the question of breach of fiduciary duty) de novo, "limit[ing its] review to the record before the district court at the time it made its decision." *Finn v. Warren Cty.*, 768 F.3d 441, 448 (6th Cir. 2014). It reviews the admissibility of expert testimony for abuse of discretion, and factual findings for clear error. *See Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 176 (6th Cir. 2009); *Smith*, 788 F.3d at 585-86.

ARGUMENT

The district court made its position clear. In denying Defendants' post-trial motion, the court stated that, in its view, Defendants were guilty of "pervasive breaches of fiduciary duties" and those breaches "taint and override the numerous

defenses raised by Defendants." Order on New Trial Motion, RE1131, PageID 37717. Defendants disagree that they breached any fiduciary duties owed to Plaintiffs. But even if there were breaches, that would not excuse the *legal* errors that the district court committed. Those legal errors are the subject of this appeal.

I. THE DISTRICT COURT ERRED IN ALLOWING THIS LITIGATION TO PROCEED

To begin with, this case, about decades-old events and assets subject to probate, never should have been allowed to proceed in a federal court, if any court.

A. The District Court Lacked Subject-Matter Jurisdiction

The fact that this dispute centers around assets subject to probate not only makes it different from the cases this Court typically sees, it puts the dispute off limits. The longstanding "probate exception" to federal jurisdiction reserves to state courts "the probate or annulment of a will and the administration of a decedent's estate." *Marshall v. Marshall*, 547 U.S. 293, 311 (2006); *see Markham v. Allen*, 326 U.S. 490, 494 (1946) ("[T]he equity jurisdiction conferred by the Judiciary Act of 1789 . . . did not extend to probate matters."). The district court's adjudication of this case contravened that basic limitation on federal jurisdiction.

Plaintiffs' claims directly target the disposition of property in the probated estates of John L. and Rosellen Griffin. It is undisputed that the state court had jurisdiction over the probate of the Griffin Industries stock in Rosellen Griffin's estate between 1985-90, and the real properties and Craig Protein stock held by

John L. Griffin's estate between 1995-98. *See* Findings of Fact ¶¶ 151-58, 66, RE856, PageID 35096, 35127-30. Plaintiffs' suit asks the federal court to re-dispose of those assets by holding that the Griffin Industries stock should have been distributed in-kind equally between all the Griffin children, and that the Craig Protein stock and real properties should have been distributed in-kind to Plaintiffs.

But this Court's decision in *Wisecarver v. Moore*, 489 F.3d 747 (6th Cir. 2007), establishes that a federal court lacks the authority to do just that. Like this case, *Wisecarver*—decided a year after *Marshall*—involved breach-of-fiduciary-duty claims targeting assets previously probated in a Kentucky court. This Court held that the probate exception prohibits a district court from "dispos[ing] of property in a manner inconsistent with the state probate court's distribution of the assets." *Id.* at 751. Importantly, the Court held that the probate exception applies (1) even if the probate proceedings are no longer pending, *id.*; and (2) even if the plaintiffs seek only "money damages equal to the amount of the probate disbursement," *id.* at 750 n.1. As the Court explained, granting such claims "would be tantamount to setting aside the will." *Id.*

Wisecarver establishes that the district court lacked jurisdiction over Plaintiffs' state-law claims concerning the administration of their parents' estates. In holding that the probate exception did not apply, the district court emphasized the fact that Plaintiffs had brought "*in personam* claims" for "money damages," as

if that resolved the question. Nov. 2014 Order, RE612, PageID 28040. In fact, the *Holt* Plaintiffs initially sought the assets themselves (*see supra* at 16). But in any event, *Wisecarver* teaches that a plaintiff cannot evade the probate exception by seeking damages in the amount of the assets instead of the assets themselves. 489 F.3d at 750 n.1. Whether Plaintiffs seek the specific probated property (as they originally did), or damages equal to the value of that property (as they later claimed), the result is the same: the probate exception applies.

Plaintiffs' claims challenging the 1986 sales of Griffin Industries stock while John L. Griffin was still alive are also barred by the probate exception. That is because John L. Griffin's will not only explicitly approved those sales, but explained that the disposition of assets in his estate (to his daughters only) was based on the validity of the earlier stock transfers. *See supra* at 13-14. In probating John L. Griffin's will, the Kentucky probate court gave effect to that express directive. Findings of Fact ¶¶ 151-60, RE856, PageID 35127-30. But in ruling for Plaintiffs below, the district court declared that directive invalid. *See id.* ¶¶ 249-51, PageID 35165-66. Because the probate exception divests federal courts of the authority to commit that act—*i.e.*, the "annulment of a will"—the district court lacked jurisdiction over that claim, too. *Marshall*, 547 U.S. at 311-12.

It is unfortunate that the district court invested so much time and resources in adjudicating claims over which it lacked jurisdiction. But there is no "adverse

possession" principle of acquiring federal jurisdiction. Federal jurisdiction is no more proper today than it was when the case was brought.[5]

B. Plaintiffs' Decades-Old Claims Are Time-Barred

Plaintiffs' claims are also time-barred. Indeed, the claims are predicated on events that occurred *decades* ago. It is indisputable that Plaintiffs *should* have known about them within the five-year limitations period under Ky. Rev. Stat. Ann. § 413.120. But the district court nevertheless allowed this case to proceed on the premise that the statute of limitations was tolled under Ky. Rev. Stat. Ann. § 413.190(2) until Plaintiffs *actually* knew of their claims. That was error.

1. *It Is Indisputable That Plaintiffs Should Have Known Of Their Claims More Than A Decade Before They Filed Suit*

This case involves a heated dispute over what exactly happened during the administration of the Griffin parents' estates some twenty to thirty years ago. That fact-finding process was made especially difficult (and unreliable) by the loss of records, the dimming of memories, and the unavailability of crucial witnesses in the intervening decades. During the 1990 litigation, for example, John L. Griffin was an active participant, being added as a defendant and providing a sworn

[5] Because the three real properties sold from John L. Griffin's trust to Martom did not pass through probate and were not addressed in John L. Griffin's will, they are not subject to the probate exception. But as explained below, those claims are time-barred and fail on the merits in any event.

affidavit attesting to his intent to sell his stock to his sons. By the time of this litigation, he had been deceased for more than 15 years.

Despite the passage of time, at least one thing is undeniable: Plaintiffs *should* have known of their claims long before they actually brought them. *See* MSJ Op., RE590, PageID 27482. Indeed, the district court itself recognized as much. Before trial, the court dismissed Plaintiffs' federal RICO claims—which were predicated on the same events as their breach-of-fiduciary-duty claims—as time-barred, holding that Plaintiffs were not entitled to tolling of the limitations period because they had failed to "exercise reasonable diligence." *Id.*, PageID 27481-82; Aug. 2015 Order, RE759, PageID 31250-51.

With respect to the *Holt* Plaintiffs' claims concerning the 1985-86 stock transactions, the district court found it "undisputed that, by the early 1990s, the *Holt* [P]laintiffs were aware that Betsy [Osborn] had filed a lawsuit against Dennis and Griffy," and also "undisputed that [P]laintiffs easily could have obtained Betsy's complaint." MSJ Op., RE590, PageID 27482. That complaint described in detail the same 1985-86 transactions that the *Holt* Plaintiffs subsequently described in their 2013 complaint—more than 20 years later. *See* 1990 Osborn Compl. ¶¶ 18-29, RE430-21, PageID 19844-48.

The district court likewise found that Plaintiffs should have known of their claims concerning the sales of the Craig Protein stock and Martom properties. The

court held that Betsy's RICO claims were time-barred because she "failed to exercise due diligence in obtaining information that was available and which would have alerted her to the transactions." MSJ Op., RE590, PageID 27484-85. The *Holt* Plaintiffs, too, were sent documents identifying the property in their father's estate and trust, and were on notice that the assets at issue had been sold (rather than distributed in-kind) because they received only cash distributions. *See* DTX123, App.269-72 (RE859, PageID 35180) (Dec. 1, 1997 Accounting).

The district court's finding that Plaintiffs *should* have known of the existence of these other claims not only is unassailable in light of the evidence, but is law of the case because Plaintiffs have not cross-appealed the dismissal of those claims. *See Bennett v. Krakowski*, 671 F.3d 553, 558 (6th Cir. 2011).

2. *As A Matter Of Law, The Time For Filing Runs From When A Plaintiff Should Have Known Of Her Claims*

Because Plaintiffs' breach-of-fiduciary-duty claims involved the same operative facts, it follows that Plaintiffs *should* have known of those claims, too, well before they filed suit. But the district court held that, under Kentucky law, a breach-of-fiduciary-duty claim is tolled until the plaintiff has *actual* knowledge of the claim. *See* Findings of Fact ¶¶ 208-15, RE856, PageID 35149-52. On that basis, the court allowed Plaintiffs to pursue their breach-of-fiduciary-duty claims well over a decade after they should have known of them, and long after the

applicable five-year statute of limitations and even ten-year statute of repose had run on those claims. *See* Ky. Rev. Stat. Ann. § 413.120; *id.* § 413.130(3).

That was error. Under Kentucky law, "statutes of limitations should not be lightly evaded." *Munday v. Mayfair Diagnostic Lab.*, 831 S.W.2d 912, 914 (Ky. 1992). To benefit from the statutory tolling provision that Plaintiffs invoked here, Ky. Rev. Stat. Ann. § 413.190(2), Kentucky law required them to establish that they had no reason to know of their claims during the entire tolling period. *See, e.g.*, *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 575 (Ky. 2009) ("[T]he limitations period began . . . when [the plaintiff] should have discovered his cause of action by reasonable diligence."); *Southeastern Ky. Baptist Hosp., Inc. v. Gaylor*, 756 S.W.2d 467, 469 (Ky. 1988) ("Once the statute of limitations is raised, the burden falls on the complainant to prove such facts as would toll the statute . . . .").

Instead of applying the "should have known" standard, the district court held that the existence of "a fiduciary or other confidential relationship" changes the standard. MSJ Op., RE590, PageID 27453. According to the court, when such a relationship exists, the statute of limitations is tolled until the plaintiff has *actual* knowledge of the existence of the claims—no matter how obvious the claims were or how unreasonable the plaintiff was in failing to discover them. That understanding of Kentucky law is incorrect. Nothing in the text of

Section 413.190(2)[6] imposes any actual-knowledge requirement, and the case law compels application of the "should have known" standard.

Courts have long recognized that the "should have known" standard applies to breach-of-fiduciary-duty claims. The leading treatise states that "[i]t is well settled that . . . as between beneficiary and trustee, the Statute of Limitations runs from the date when the beneficiary knows *or should by the use of ordinary care have known* of a breach . . . by the trustee." George Gleason Bogert & George Taylor Bogert, *Handbook of the Law of Trusts* § 170, at 642 (5th ed. 1973) (emphasis added); *see also* George Gleason Bogert et al., *The Law of Trusts & Trustees* § 951 (electronic update Sept. 2016) ("If the trustee violates one or more of his obligations to the beneficiary, . . . any relevant Statute of Limitations will apply from the date when the beneficiary knew of the breach . . . or by the exercise of reasonable skill and diligence could have learned of it." (footnote omitted)).

In *Adams v. Ison*, 249 S.W.2d 791 (Ky. 1952), Kentucky's highest court confirmed that this "should have known" standard governs the tolling inquiry for

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[6] Section 413.190(2) provides:

> When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not.

breach-of-fiduciary-duty claims under Kentucky law, just as it does elsewhere.[7] The case involved the application of tolling under Section 413.190(2) to claims by a patient against his physician. Describing the fiduciary duty at issue, the court observed that "[t]he relationship of a patient to his physician is by its very nature one of the most intimate," obligating the physician "to act with the utmost good faith" toward his patients and "to speak fairly and truthfully" to them. *Id.* at 793-94. Yet, notwithstanding that "most intimate" relationship and duty, the court held that "where the physician by concealing the facts of liability, delayed or prevented suit," "[t]hen the statute begins to run only when the fraud or concealment is revealed or the facts discovered *or should have been discovered by the exercise of reasonable diligence by the injured patient*." *Id.* at 793 (emphasis added). The court then remanded the case for a trial on whether the claims were time-barred under the "should have known" standard. *Id.* at 794.

This Court itself has recognized that the "should have known" standard applies equally to breach-of-fiduciary-duty claims brought under Kentucky law. In *Ham v. Sterling Emergency Services of the Midwest, Inc.*, the Court held that a party "is not obstructed or misled under [Section 413.190(2)] if the exercise of reasonable diligence would allow him to pursue his claim." 575 F. App'x 610, 614

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[7] Until 1976, the Kentucky Court of Appeals was the Commonwealth's highest court. *See Woodword v. Commonwealth*, 949 S.W.2d 599, 600-01 (Ky. 1997).

(6th Cir. 2014). As this Court emphasized, that is true even where the defendant's supposedly obstructive conduct is "remain[ing] silent when *the duty to speak or disclose* is imposed by law." *Id.* (citation and internal quotation marks omitted). In *Salmon v. Old National Bank*, the Western District of Kentucky reached the same conclusion in applying Kentucky law to breach-of-fiduciary-duty claims. No. 4:08-CV-00116-JHM, 2012 WL 4213643, at *12 (W.D. Ky. Sept. 19, 2012).

In holding otherwise, the district court relied on *Munday* and *Boone v. Gonzalez*, 550 S.W.2d 571 (Ky. Ct. App. 1977). *See* MSJ Op., RE590, PageID 27453 & n.12. That was error. *Munday* held only that, when a fiduciary duty exists, a failure to speak can by itself constitute fraudulent concealment under Section 413.190(2). It did not address, let alone overrule, *Adams*' holding that a "should have known" standard triggers the running of the limitations period when such concealment is shown. *Boone*, meanwhile, was a court of appeals decision that could not possibly override the Kentucky high court's decision in *Adams*, and indeed did not even acknowledge *Adams*' holding that a "should have known" standard applies. *Boone*'s discussion of the "due diligence" standard, moreover, is *dicta*, 550 S.W.2d at 574, because the court held that the claims presented *were* barred by the statute of limitations.

To our knowledge, the district court's decision in this case is the first time any court applying Kentucky law has allowed a breach-of-fiduciary-duty claim to

proceed after both the statutes of limitations *and* repose had run when the plaintiffs should have known of their claims decades earlier. Once the district court's legal error is corrected and the "should have known" standard is applied, Plaintiffs' breach-of-fiduciary-duty claims are undeniably time-barred.

3. *Tolling Is Unavailable To Save The Martom Claims*

Plaintiffs' claims against Martom are untimely for another reason. Section 413.190(2)'s tolling rule applies on a defendant-by-defendant basis, and "shall not prevent the limitation from operating in favor of any other person" who did not personally obstruct prosecution of the plaintiff's claim. Because "Martom never stood in a fiduciary capacity as to plaintiffs," Martom MTD Order, RE790, PageID 32571, its mere *silence* as to those claims cannot constitute concealment under the statute in the first place, *see Munday*, 831 S.W.2d at 915, and no *affirmative* act of concealment was ever alleged. Thus, at a minimum, Plaintiffs' claims against Martom—which are based on events far outside the five-year limitations period and ten-year statute of repose—are time-barred.

If the Court agrees that Plaintiffs' claims are time-barred, it need not read any further. The judgment must be reversed and the cases dismissed.

II. THE DISTRICT COURT ERRED IN FINDING LIABILITY

Even putting aside these threshold defects, the district court erred as a matter of law in finding Defendants liable.

A. The 1990 Suit And 1993 Court Settlement Preclude The *Holt* Plaintiffs' Claims Related To Griffin Industries Stock

1. *The 1990 Litigation Triggers Claim Preclusion*

Prior litigation among the same parties over the same claims is a classic red flag. That is because, under longstanding claim preclusion (or res judicata) principles, "when a court of competent jurisdiction enters a final judgment on the merits in an action, the parties and their privies are barred from relitigating in a subsequent action matters that were actually raised or might have been raised in the prior action." *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981). "Claim preclusion applies 'not only to the precise legal theory presented in the previous litigation, but to *all legal theories and claims* arising out of the same operative nucleus of fact.'" *Adams v. Southern Farm Bureau Life Ins. Co.*, 493 F.3d 1276, 1289 (11th Cir. 2007) (emphasis added) (citation omitted); *see Pram Nguyen ex rel. U.S. v. City of Cleveland*, 534 F. App'x 445, 451 (6th Cir. 2013).

No one disputes that Betsy Osborn is precluded from re-litigating the same claims she brought and settled in the prior litigation. The *Holt* Plaintiffs—as shareholders in Griffin Industries—were also parties to that 1990 suit, and their claims in this litigation unquestionably arise out of the "same operative nucleus of fact." Indeed, the allegations in the *Holt* Plaintiffs' 2013 complaint concerning the Griffin Industries stock closely track the pertinent allegations in the 1990 complaint. *Compare Holt* Compl. ¶¶ 45-49, 153-57, *Holt* RE1, PageID 12-16, 39-

40, *with* 1990 Compl. ¶¶ 18-24, 37-43, RE430-21, PageID 19844-46, 19851-53. Under settled claim preclusion principles, the 1990 litigation thus barred the *Holt* Plaintiffs from pursuing essentially the same claims here.

The district court did not dispute any of these basic points. Instead, the court refused to give the prior litigation between the parties preclusive effect on the ground that the *Holt* Plaintiffs purportedly lacked effective representation in the earlier suit—an argument that not even the *Holt* Plaintiffs advanced below. *See* MSJ Op., RE590, PageID 27459. That reasoning—representing a complete about-face by the same court twenty years later without identifying any new evidence or changed circumstances warranting a flip—should be rejected.

During the 1990 litigation, the parties affirmatively disputed whether Betsy was an adequate representative of the Griffin Industries shareholders on whose behalf she had pressed derivative claims, including the *Holt* Plaintiffs. The issue was briefed by both sides, and the same district judge that decided this case *rejected* the argument that Betsy was not an adequate representative for her sisters. MTD Op., *Osborn v. Griffin*, E.D. Ky. No. 90-209, RE591-4, PageID 27677. Ultimately, after holding a fairness hearing on the parties' settlement, the court entered a final order approving the settlement and dismissing the claims with prejudice. *See* Settlement Order, RE430-25, PageID 19881-82.

That order is entitled to preclusive effect. In addition, because the *Holt* Plaintiffs had an opportunity to object to the adequacy of representation in the earlier suit, they are "collaterally estopped from now asserting that the legal representation was not adequate." *Laskey v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 638 F.2d 954, 957 (6th Cir. 1981).

That should have been it. But instead the district court reopened, and reversed, its 20-year-old adequacy finding, stating that it was *now* convinced "from the record of the 1990 case" that Betsy did not adequately represent her sisters. MSJ Op., RE590, PageID 24460. What changed? Nothing. The statements to which the court pointed were the *same statements* made to the *same court* 20 years earlier—and part of the *same record* on which the court had concluded that the representation was adequate and the settlement fair in 1993. *Id.*, PageID 24660-61. The district court's flip makes a mockery of longstanding preclusion rules.[8]

2. *The 1993 Settlement Agreement Is Enforceable*

Even if claim preclusion did not attach to the 1990 suit, the 1993 settlement would *itself* bar the *Holt* Plaintiffs from relitigating the 1985-86 transfers of Griffin Industries stock. Each of the *Holt* Plaintiffs personally signed the settlement agreement. Findings of Fact ¶¶ 108-09, RE856, PageID 35112. And, precisely

[8] If something *had* changed or if new evidence *had been* discovered, the *Holt* Plaintiffs might have asked the district court to reopen its 1993 judgment under Federal Rule of Civil Procedure 60(b). But Plaintiffs made no attempt to do so.

because the parties sought finality, the settlement agreement—at the insistence of John L. Griffin, a defendant in the 1990 suit—expressly released any and all claims that the siblings might have had against each other at the time. *See* 1993 Settlement Agreement, RE838-1, PageID 34626-27, 34629; DTX57 (7:12-21), App.265 (RE859, PageID 35181) (statement of Philip Taliaferro, attorney for John L. Griffin, that "[t]his agreement must—for my client to agree to it, must settle all claims, known or unknown at this point . . . . I don't want anybody to be back in here on something in the past. It has to be done for all . . . .").

That, again, should have been the end of the matter: How could the same parties litigate claims they had each *personally* released? Yet, invoking a provision of the Restatement (Second) of Contracts, the district court simply declared the court-approved settlement agreement and release "voidable." Findings of Fact ¶ 204, RE856, PageID 35147-48. According to the court, the agreement was "voidable" because Dennis and Griffy (defendants in the 1990 suit) owed their sisters (plaintiffs in the 1990 suit) a fiduciary duty "in relation to the 1993 settlement agreement," *id.* ¶ 197, PageID 35144-45, which they purportedly breached by not advising the *Holt* Plaintiffs of the full strength of the sisters' claims *against them*. *See id.* ¶¶ 202-04, RE856, PageID 35147-48.

The district court pointed to an amalgam of factors in finding this fiduciary duty, ranging from the fact that the parties were siblings to the fact that Dennis and

Griffy were managing their "parents' affairs." *See id.* ¶ 197, PageID 35144-45 (listing factors). But the court overlooked the elephant in the room: the sisters and brothers were *adverse parties in litigation*, in which the brothers were accused of mistreating and misleading the sisters about the assets at issue.

To establish a fiduciary relationship under Kentucky law, a plaintiff must show that her reliance is reasonably grounded in the objective realities of the situation; subjective reliance is not enough. *See Ballard v. 1400 Willow Council of Co-Owners, Inc.*, 430 S.W.3d 229, 242 (Ky. 2013); *see also Crestwood Farm Bloodstock v. Everest Stables, Inc.*, 751 F.3d 434, 442 (6th Cir. 2014). Relying on an adverse party in litigation to protect one's own interests in the litigation itself is objectively unreasonable, especially when the adversary is already accused of acting contrary to the purported beneficiary's own interests, as Defendants were here. *See Tocco v. Richman Greer Prof'l Ass'n*, 553 F. App'x 473, 475 (6th Cir. 2013) (plaintiff cannot reasonably rely on statements by defendant or his counsel where "plaintiff's interests are adverse to those of a defendant and his counsel") (applying Michigan law); *see also James v. Chase Manhattan Bank*, 173 F. Supp. 2d 544, 550 (N.D. Miss. 2001) ("This Court is unaware of any authority, . . . anywhere in the country, which suggests that an attorney owes a duty, fiduciary or otherwise, to the adverse party in a case he is litigating.").

Conversely, it is equally well-settled that parties have no duty to act against their own interests in negotiating a settlement to ongoing litigation. *See Heckler & Koch, Inc. v. German Sport Guns GmbH*, 976 F. Supp. 2d 1020, 1033-34 (S.D. Ind. 2013); *cf. Sealey v. Johanson*, No. 3:15CV137-DPJ-FKB, 2016 WL 1273882, at *7 (S.D. Miss. Mar. 29, 2016); *James*, 173 F. Supp. 2d at 550; *Employers Mut. Cas. Co. v. Heidelberg, P.A.*, No. 3:10-CV-00616-CWR-LRA, 2011 WL 4478976, at *2 (S.D. Miss. Sept. 26, 2011). In other words, a party to litigation may negotiate a settlement that serves his *own* interests, without fearing liability for breach of fiduciary duty for not advancing his *opponent's* interests.

None of the cases the district court cited is to the contrary. *See* Findings of Fact ¶¶ 201-02, RE856, PageID 35146-47 (citing cases). In each case, the release at issue had been signed *before* litigation commenced, at a time when the party signing the release reasonably believed, without further inquiry, that the ostensible fiduciary was acting in the beneficiary's best interests. Here, however, litigation had been ongoing for years, the parties' adversity was concrete, the suit itself charged Defendants with breaching a fiduciary duty, and the *Holt* Plaintiffs' supposed choice to place complete confidence in their brothers without making any inquiry of their own was objectively unreasonable.

The district court erred as a matter of law in imputing a fiduciary duty among adverse parties in litigation as to the litigation itself. Without that duty, the

court had no basis to declare the 1993 settlement "voidable" so that the *Holt* Plaintiffs could re-litigate the very claims they released two decades ago.

B. Defendants Did Not Breach Any Fiduciary Duties

Separate and apart from the preclusive effect of the prior litigation and settlement, the district court erred as a matter of law in finding liability.

1. *Dennis And Griffy Did Not Breach Any Fiduciary Duties Owed To Plaintiffs In Connection With The Sale Of John L. Griffin's Stock*

For two independent reasons, the district court erred in holding that Dennis and Griffy breached a fiduciary duty to Plaintiffs in executing the 1986 sale of their father's Griffin Industries stock from his revocable trust.

First, the district court's finding of liability depends on a fiduciary duty that, under applicable state law, simply did not exist. That alone defeats this claim.

In its summary judgment opinion, the district court explained why it believed Dennis and Griffy had breached fiduciary duties owed to their sisters as to the sale of their *mother's* Griffin Industries stock. *See* MSJ Op., RE590, PageID 27456. But in neither its summary judgment decision nor any other order did the district court ever explain how Dennis and Griffy could have violated a fiduciary duty to their sisters in connection with the 1986 sale of *John L. Griffin's* company stock. And for good reason: the only person to whom Dennis and Griffy could have owed a fiduciary duty in connection with that sale is John L. Griffin himself,

since he was the only beneficiary of his revocable trust until his death nearly a decade later. The governing state law makes clear that Dennis and Griffy owed no fiduciary duty to their sisters as to this sale.

John L. Griffin's trust was governed by Ohio law, *see* JTX3 ¶ 17, App.295 (RE859, PageID 35183), and under Ohio law, a trustee of a revocable trust owes fiduciary duties *exclusively* to the settlor of that trust. *See Lewis v. Star Bank, N.A., Butler Cty.*, 630 N.E.2d 418, 420-21 (Ohio Ct. App. 1993); *see also* Ohio Rev. Code Ann. § 5806.3(A) ("During the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of the settlor, and the duties of the trustee . . . are owed exclusively to the settlor.").[9] Accordingly, under Ohio law, it is settled that parties who become beneficiaries of a revocable trust upon the settlor's death cannot sue the trustee for breaches of fiduciary duty that allegedly took place before the settlor's death. *See Lewis*, 630 N.E.2d at 421 & n.2.

The fact that Ohio law does not recognize any fiduciary duty in these circumstances compels a finding of no liability on Plaintiffs' breach-of-fiduciary-duty claim as to the 1986 sale of Griffin Industries stock from the trust.

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[9] Section 5806.3(A) was adopted in 2006, but—as cases like *Lewis* show—it simply codified the pre-existing common law. *See also Puhl v. U.S. Bank, N.A.*, 34 N.E.3d 530, 535-36 (Ohio Ct. App. 2015) (applying same exclusive duty rule to conduct pre- and post-dating Section 5806.3(A)).

Second, and in any event, even if a fiduciary duty somehow existed, Dennis and Griffy could not have breached it by simply carrying out their father's wishes about his own property. At trial, there was abundant evidence that John L. Griffin wanted his sons to control, and thus have a controlling stake in, Griffin Industries. That evidence included not only testimony from the sons, but also objective documentary evidence and testimony from Janet Means, a non-party sister who would have shared equally in the *Holt* Plaintiffs' claims had she joined their suit. She testified that, in "the conversations I had with my father, he was very clear as to what he wanted his daughters to have, and it was always a million dollars. He was so proud of that. And we had one percent. He wanted the boys to have the company, run the company, and the girls were going to have the million dollars." J. Means Testimony (108:7-110:1), RE823, PageID 33741-43.

The district court discounted all of that evidence for one reason: Because John L. Griffin's estate plan gave his daughters equal shares of the estate *after* his death, the district court thought it unimaginable that he would have wanted to sell his sons his company stock for fair value *before* his death. Findings of Fact ¶¶ 15-17, RE856, PageID 35081-82. But that reasoning cannot stand because John L. Griffin's will confirms that this is *exactly* what he intended: It stated that he "approve[d]" the sale of Griffin Industries stock to his sons, and that he wanted to provide for his daughters, and them alone, through his estate. DTX47, App.244-45

(RE859, PageID 35186) (Sixth Codicil; Fourth Amendment to 1967 Trust Agreement); *see also id.*, App.243 (Affidavit of John L. Griffin) ("I want my sons to have the company now and my daughters to have cash when I die.").

John L. Griffin was entitled to dispose of his assets, including his company stock, as *he* saw fit. In hindsight, the different way in which he provided for his children (stock for his sons who managed the company, and cash for his daughters who did not) may look unequal. But that is only because of the company's explosive growth many years later, growing in value from $22 million in 1986 to more than $840 million in 2010. *See* PTX82, App.223 (RE859, PageID 35184). Had the company bottomed out instead of thrived under Dennis and Griffy's leadership, there is little chance the sisters would have complained about this distribution.

In refusing to give effect to John L. Griffin's expressed wishes, the district court initially suggested that he was mentally incompetent to execute the codicil approving the sales. *See* Findings of Fact ¶ 92, RE856, PageID 35105-06. But after Defendants challenged that apparent finding in their post-judgment motion, the district court stated that it had "made no finding regarding Father's competency." Order on New Trial Motion, RE1131, PageID 37716. Instead of a factual finding of incompetency, the district court wrote, its decision rested on a

legal holding that John L. Griffin "did not have the degree of knowledge of the material facts necessary for ratification" of the transactions. *Id.*, PageID 37717.

Yet the district court's effort to clean up one reversible error just created another. "Ratification" describes the process by which a principal can approve the actions of an agent who acted without authorization from the principal. *See Kindred Nursing Ctrs. Ltd. P'ship v. Leffew*, 398 S.W.3d 463, 467 (Ky. Ct. App. 2013); Restatement (Third) of Agency § 4.01(1) (2006). In order for a principal's ratification to be valid, the principal need only have knowledge of the "material facts involved in the original act." Restatement (Third) of Agency § 4.06 (2006).

Clearly John L. Griffin had the material facts—his life experience—necessary to know how he wished to allocate his own assets among his own children. The unrebutted documentary evidence also showed that John L. Griffin had knowledge of the material facts concerning his sale of Griffin Industries stock to his sons, in particular. Indeed, in 1991, John L. Griffin's attorney reviewed the details of the earlier sale with him, and John L. Griffin made clear that it was "his intention for the boys to own all of the stock of the company, except for what he had already given to others, and for the girls to have all of his other assets." DTX44, App.241 (RE859, PageID 35187). The district court offered no support

for its contrary conclusion, nor did it even identify *which* material facts it thought John L. Griffin was somehow missing.[10]

Accordingly, the district court's "ratification" theory provides no basis for finding a breach of fiduciary duty as to these assets either.

2. *Dennis And Griffy Did Not Breach Any Fiduciary Duties Owed To Plaintiffs In Connection With Their Mother's Estate*

The district court also erred as a matter of law in holding that Dennis and Griffy breached a fiduciary duty owed to their sisters as to their *mother's* estate. Dennis and Griffy did not owe their sisters any fiduciary duty here, either, because the sisters were not beneficiaries of their mother's estate. The only beneficiaries of Rosellen's estate were her husband (to whom all the Griffin Industries stock was to pass) and her trust (which was to receive the residue of her estate). *See* Holt MSJ Response, RE484[11]; Defs.' MSJ Reply, RE528, PageID 25751.

The *Holt* Plaintiffs nevertheless argued that, because they were beneficiaries of their mother's *trust*, they were indirectly affected when their mother's trust received cash rather than Griffin Industries stock from the estate. But that is beside the point. Under settled trust law, trust beneficiaries "have no standing . . . to

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[10] In addition, the knowledge of John L. Griffin's attorneys (including both his estate planning attorney and the separate attorney who represented him in Betsy's derivative suit) is properly attributed to him for ratification purposes. *See* Restatement (Second) of Agency § 91 cmt. c (1958).

[11] Sealed entry, RE484, page 9.

recover any part of [an interest] . . . devised to trustees," because the trustees—not the beneficiaries—"would be the ones to sue to recover it." *Forester v. Werner*, 191 S.W. 884, 885 (Ky. 1917); *see Lovell v. Nelson*, 29 Ky. (6 J.J. Marsh) 247, 247 (Ky. 1831); Restatement (Second) of Trusts § 281 (2012). It was the third-party trustee (successor to First National Bank of Cincinnati), in other words, that had the authority to determine whether the trust had been harmed by receiving the (low-risk) cash proceeds from the sale of stock instead of receiving the (more risky) minority share in Griffin Industries.

Indeed, applying that same rule, the Kentucky probate court refused to allow Betsy (who stood in the same position as the *Holt* Plaintiffs) to challenge the sale of stock from her mother's estate, holding that only her father (the beneficiary of the estate) or the trustee (the contingent beneficiary) were in a position to do so. Findings of Fact ¶ 71, RE856, PageID 35098; *see* DTX5, App.239 (RE859, PageID 35188). There was no basis for any different conclusion here.

The district court attempted to gloss over this fatal defect by stating—in a footnote—that a "claim for breach of fiduciary duty . . . lies" against Dennis and Griffy in their capacities as co-executors. MSJ Op., RE590, PageID 27455 n.13; *see also* Findings of Fact ¶ 194, RE856, PageID 35143 (reaffirming summary judgment decision without further explanation). But that is no answer. Even if a claim for breach of fiduciary duty "lay" in the abstract against Dennis and Griffy,

the question was whether the *Holt* Plaintiffs as beneficiaries of the trust were the proper parties to bring such a claim. Under controlling state law, they were not.

Furthermore, even if Dennis and Griffy somehow owed a fiduciary duty to the *Holt* Plaintiffs in connection with the sale of Rosellen's stock, they could not have breached that duty by selling the stock at its appraised price, rather than distributing it in-kind to their mother's trust (as Plaintiffs claim they should have). Kentucky law authorizes an executor to sell estate assets, including securities, unless "distribution in kind has been demanded prior to the sale by the . . . beneficiary entitled to such distribution in kind." Ky. Rev. Stat. Ann. § 395.200(3); *see id.* § 395.200. It is undisputed that neither Plaintiffs nor the bank trustee ever demanded an in-kind distribution of the stock—and, if they had, the Board could have exercised its buy-back option instead. *See supra* at 5 n.2. Therefore, Kentucky law permitted Defendants, acting as executors of Rosellen's estate, to sell her Griffin Industries shares and distribute the resulting proceeds.

3. *Dennis And Griffy Did Not Breach Any Fiduciary Duties Owed To Plaintiffs In Connection With The Sale Of The Craig Protein Stock And Martom Properties*

The district court committed a more conventional error when it held that Dennis and Griffy breached a fiduciary duty by selling the Craig Protein stock to Martin and Thomas Griffin and real properties to Martom: it decided a genuine issue of disputed fact on summary judgment. *See* MSJ Op., RE590, PageID

27468. The court simply declared that "no reasonable factfinder could conclude that Dennis and Griffy fulfilled their fiduciary duties with respect to these transactions." *Id.*, PageID 27471. But there was ample evidence that at least created a triable issue on whether Defendants acted against their sisters' interests.

For example, as to the Craig Protein stock, expert testimony established that "[a] sale of illiquid assets for fair market value paid in cash is typically a better result for beneficiaries than receiving small numbers of shares in an enterprise that they do not control." Berry Verified Expert Rep., RE382-2, PageID 9792. In addition, as to the Martom properties, expert testimony established that liquidating real property bequeathed to multiple beneficiaries and distributing the resulting cash often will serve the beneficiaries' interests better than distributing in-kind fractional interests in the property. *See id.*, PageID 9791-92. That is especially true where, as here, the beneficiaries are estranged, making joint management of distributed property a particularly thorny endeavor.

This testimony, and other evidence in the record, at least created a genuine factual dispute on whether Defendants acted against their sisters' best interests in disposing of the Craig Protein stock and Martom properties, thus precluding summary judgment for Plaintiffs on this claim. *See, e.g.*, *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 806 (6th Cir. 2000) (reversing district court's grant of summary judgment where expert testimony created a triable issue of fact).

C. Martom Cannot Be Held Liable For The Misdeeds Of Others

The district court's judgment imposing liability against Martom must be set aside for additional, independent reasons as well. To state the obvious: A claim for breach of fiduciary duty may only be pursued against someone who actually owes a fiduciary duty to the plaintiff in the first place. *See, e.g.*, *Ballard*, 430 S.W.3d at 242. Here, it is undisputed that Martom did not owe Plaintiffs any fiduciary duty. *See supra* at 36. That should have been the end of the road for the Martom claims.

The district court reasoned that Martom could be liable as long as it had "notice of the breach" by others. *See* Martom MTD Order, RE790, PageID 32571-73. Yet, Plaintiffs introduced no evidence that Martom—or its owners or agents—had such knowledge. So the district court had to go further, and simply *impute* notice to Martom, on the ground that "Dennis and Griffy controlled Martom through their positions at Griffin Industries." Findings of Fact ¶ 238, RE856, PageID 35160-61. But Dennis and Griffy did not work for Martom, a separate company, and did not own any interest in it. Even if they still somehow "controlled" it, there is no basis for imputing a principal's knowledge to its agent. While the law generally "imputes notice received by an agent to a principal," there is "no support for [the] position that the reverse is true." *Knox-Tenn Rental Co. v. Home Ins. Co.*, 2 F.3d 678, 682 (6th Cir. 1993).

Moreover, any claims that Plaintiffs *might* have had against Martom are now barred by the doctrine of adverse possession, as a result of the fact that they waited so long to bring suit. Because Martom purchased the properties at issue in 1995 and has openly owned them ever since, it acquired title to the properties through adverse possession for the entire period of possession. *See* Findings of Fact ¶ 140, RE856, PageID 35124; *Lyle v. Holman*, 238 S.W.2d 157, 159 (Ky. 1951). To get around that, the district court pointed to the fact that Plaintiffs were seeking *profits* from the properties, rather than the *properties* themselves. Findings of Fact ¶¶ 239-40, RE856, PageID 35161. But adverse possession is also a defense to claims for rents or other damages that may have accrued during the period of adverse possession. *See Counce v. Yount-Lee Oil Co.*, 87 F.2d 572, 575 (5th Cir. 1937); *Breuer v. Covert*, 614 P.2d 1169, 1172-73 (Or. 1980). So the district court's reasoning fails.

III. THE DISTRICT COURT ERRED IN ENTERING ITS $584 MILLION AWARD

Even putting aside all the legal errors that led the district court to find liability, the district court's $584 million remedy award cannot stand.

A. The District Court Failed To Hold Plaintiffs To Their Burden To Prove Their Entitlement To Any Remedy

As a threshold matter, the district court failed in two overarching respects to hold Plaintiffs to their burden of proving the amount they were owed. Initially, the

court failed to serve its gatekeeping role under *Daubert*. Plaintiffs' entire case on remedy—and the district court's entire award—was based on the testimony of one person, accountant John E. Chilton. Chilton's testimony should have been excluded at the outset under Federal Rule of Evidence 702 and *Daubert*, because (as explained in Part III.B, *infra*) his methodology is fundamentally unreliable. *See* Defs.' Mot. to Exclude Chilton Testimony, RE669-2, PageID 28929; *Daubert* Hearing Tr. (4:13-46:16), RE783, PageID 32448-90.

Testing the reliability of an expert's analysis is the touchstone of the *Daubert* inquiry. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *see also, e.g., Nilavar v. Mercy Health System-Western Ohio*, 244 F. App'x 690, 699 (6th Cir. 2007). Yet, while Defendants showed the many ways in which Chilton's methodology was fundamentally flawed, in considering Defendants' *Daubert* challenge the district court focused solely on Chilton's *qualifications* as a general matter. Thus, when Defendants' counsel observed that he was not "debating [Chilton's] qualifications as an accountant," the district court rejoined, "[w]ell, that's what a *Daubert* hearing is for . . . ." *Daubert* Hearing Tr. (47:24-48:5, 58:13-17), RE783, PageID 32491-92, 32502. That was error.

The district court compounded its failure to perform a proper *Daubert* analysis by failing to test Plaintiffs' case—and Chilton's testimony—under the proper burden of proof at trial. *See Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 152

(3d Cir. 1999) (an expert can be sufficiently reliable to satisfy *Daubert* but still "not be so persuasive as to meet a party's burden of proof or even necessarily its burden of production"). Instead of holding Plaintiffs to their burden when it came to the obvious flaws in Chilton's analysis (discussed below), the district court faulted *Defendants* for "offer[ing] no expert testimony of their own from which the Court could consider adjustments to Chilton's figures." Findings of Fact ¶ 267, RE856, PageID 35169; *see also id.* ¶ 253, PageID 35166 ("Defendants did not present any expert testimony as to remedies."); Order on New Trial Motion, RE1131, PageID 37714-15 ("If defendants found fault with Chilton's analysis, they should have called their own expert.").

That too was error. A defendant is not required to offer an expert where, as here, the plaintiff's case fails on its own terms. *See United States v. United Techs. Corp.*, 782 F.3d 718, 733 (6th Cir. 2015) (expert testimony insufficient to support the $657 million award after a bench trial, even though defendant had not presented its own damages expert); *Prestole Corp. v. Tinnerman Prods., Inc.*, 271 F.2d 146, 158 (6th Cir. 1959). The district court's failure to hold Plaintiffs to their burden on remedy infected its entire analysis and, at a minimum, requires a new trial.

B. The District Court's Award Is Grossly Inflated

In any event, the district court's award is the product of numerous methodological errors that grossly—and unlawfully—inflated the remedy.

1. *The Award Fails To Account At All For The Fact That Griffin Industries Was An S-Corporation*

Chilton committed a massive error by refusing to account—at all—for Griffin Industries' legal status as an S-corporation. *See* 26 U.S.C. § 1361(a)(1); J. Chilton Testimony (127:17-19), RE821, PageID 33603. By ignoring this legal status, Chilton's analysis forced Dennis and Griffy to disgorge nearly $300 million in "profits" that went to the IRS, not Defendants, and made Plaintiffs hundreds of millions of dollars better off than they would have been had they owned the stock all along (and had to pay the company's taxes as well).

Unlike a typical corporation that pays income tax directly to the government, an S-corporation's earnings are taxed at the *shareholder* level. Blair Testimony (63:19-64:22), RE823, PageID 33696-97. An S-corporation calculates its total income in a given tax year, allocates that income among its shareholders, and reports that allocation on K-1 forms to shareholders and the IRS. Shareholders (not the corporation) then pay taxes on that allocated corporate income. Chilton admitted as much. *Daubert* Hearing Tr. (40:7-42:23), RE783, PageID 32484-86.

The evidence showed that, as with the typical S-corporation, the distributions to Griffin Industries shareholders generally were intended to be just

enough to cover the shareholders' tax obligations for their allocated corporate income. *See* Blair Testimony (66:7-13), RE823, PageID 33699 ("Almost always, [the cash distributed] was the amount necessary to cover those tax obligations."); *see also* James S. Eustice et al., *Federal Income Taxation of S Corporations* ¶ 6.08 (5th ed. 2015); 1 Boris I. Bittker et al., *Federal Income Taxation of Corporations and Shareholders: Forms*, Form 6.11(d) § 2(4) (4th ed. 2006) (describing standard distribution practice for S-corporations). Because such distributions are passed on to the IRS in payment of taxes on the allocated corporate income, they result in no net increase of the S-corporation shareholders' wealth.

Chilton admitted that this "money went to taxes." *Daubert* Hearing Tr. (42:9-11), RE783, PageID 32486; *id.* ("It has to, that's right." (Chilton)). Yet, he did not even attempt to determine any shareholder's tax liability (*id.* (43:5-10), PageID 32487) and, instead, included every last dollar of distributions that Griffin Industries made to its shareholders during the relevant period in his remedy figure, treating the tax distributions as pure *profit* to the shareholders, and thereby inflating the figure he arrived at by nearly $300 million. That $300 million, unlike the distributions on which it was ostensibly based, goes directly into Plaintiffs' pockets without any obligation to pay the taxes on Griffin Industries' income they would have owed had they actually owned the stock when the distributions were made. In short, Chilton's analysis results in a massive windfall to Plaintiffs.

Chilton defended this methodology on the ground that any money Plaintiffs receive "in the future as a result of this lawsuit . . . will have a tax impact" because Plaintiffs will pay taxes *on the judgment*. *Id.* (41:16-21), PageID 32485. That meant, he said, that this case presented "an apples-[to]-apples situation" in which it was appropriate to "deal[] with both amounts on a pretax basis." *Id.* (41:16-21), PageID 32485. The district court agreed, holding—before trial—that because "the taxes will be sorted out by who gets what as of this year," the court "would not make any attempt to figure out everybody's taxes [in past years]." *Id.* (45:10-11, 45:15-22), PageID 32489. But this is not "an apples-to-apples situation" at all, because the original taxes were based on *all* of Griffin Industries' income, not just (as Plaintiffs' taxes will be) the amount of the distributions themselves.

The difference between a true "apples-to-apples situation" and this case can be illustrated by two hypotheticals. In the first, A and B buy a block of lottery tickets and agree to split the winnings. One of the tickets hits for $100,000, but A lies about the ticket number and pockets the jackpot. A pays taxes on the $100,000 at the highest individual rate (say 35%), and keeps the rest ($65,000). B later finds out, sues A for his share of the winnings ($50,000), and secures a $50,000 judgment. B will have to pay taxes on the $50,000 judgment at 35%, leaving him with $32,500—the same after-tax amount he would have had if A had split the ticket with him in the first place. A, meanwhile, pays the $50,000 judgment

(leaving him with $15,000 of the $65,000 he originally retained), then takes a $50,000 deduction on that year's taxes and gets a $17,500 rebate—leaving him with $32,500. Both parties end up exactly where they would have been after taxes had there been no misconduct in the first place—apples to apples.

In the second hypothetical, A is a shareholder in "S-Corp." Over ten years, A's share of S-Corp's allocated income is $285,700, and A receives $100,000 in distributions from S-Corp to cover taxes (at a 35% rate) on that allocated income. A pays the $100,000 to the IRS to cover A's share of the taxes on *S-Corp's profits* in the year they are received. B later sues A claiming that he was in fact a co-equal shareholder in S-Corp, and wins. B is entitled to half of A's *equity* in S-Corp, but not half of the distributions ($50,000) that went to A. That is because if B were awarded the $50,000 paid in distributions, his individual rate would be applied to just the $50,000, and he could thus keep $32,500. That would make B $32,500 better off than he would have been had he owned the stock all along and been required to use the distributions to pay taxes on S-Corp's income (rather than just the distributions). It would also impose a penalty on A, who would not only have turned over all $100,000 of the distributions to the IRS, but would also have paid $50,000 to B. Hardly apples to apples.

Chilton's failure to account for Griffin Industries' S-corporation status skewed his analysis by *hundreds of millions of dollars.* Yet, instead of faulting

Chilton's methodology, the district court blamed *Defendants* for not introducing evidence showing the particular amounts they paid in taxes decades ago. *See* Findings of Fact ¶ 248, RE856, PageID 35164-65. That, too, was error.

First, Defendants *did* introduce evidence establishing that, as with the typical S-corporation, distributions were made to cover taxes on Griffin Industries' income. *See supra* at 56-57. That evidence established that Chilton's methodology entitling Plaintiffs to an award in the amount of *every single dollar* they would have been paid in distributions—hundreds of millions—was grossly unreliable. And because it was *Plaintiffs'* burden to produce evidence establishing the gain from the shares in question, *see* Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i (online 2016), the failure to introduce reliable evidence of that gain meant that the failure of proof was *Plaintiffs*'. Only by improperly shifting the burden to Defendants could the district court justify its award.

Second, the district court improperly faulted Defendants for not introducing evidence of the *precise* amount of taxes paid by Griffin Industries' shareholders over 30 years. But when Defendants raised the issue of taxes before trial, the district court had cut off the argument by stating that, because the taxes will be "sorted out" in the wash (Chilton's theory), the court "would not make any attempt to figure out everybody's taxes. . . . I'm holding that now." *Daubert* Hearing Tr.

(45:10-22), RE783, PageID 32489. Given that definitive pre-trial ruling, Defendants cannot be faulted for not introducing evidence at trial that the district court had already stated was irrelevant, in its view. *See* Fed. R. Evid. 103(b).

2. *The Award Is Based On Inconsistent Assumptions*

Chilton's analysis also embraced inconsistent assumptions, rendering his methodology unreliable as a matter of law. Some of his figures relied on one state of affairs, while others relied on another—the only commonality being that they maximized Plaintiffs' recovery. Defs.' Mot. for Am. Findings, RE1059, PageID 36875-77; Findings of Fact ¶ 254, RE856, PageID 35166.

For example, for the Griffin Industries stock, Chilton ignored the Fourth Amendment and Sixth Codicil of John L. Griffin's trust and will (which approved the earlier sale of stock to the sons and called for the remaining assets to be divided among the five daughters) and instead assumed that John L. Griffin's original 1985 will remained in place (which would have distributed the estate assets among all eleven living children). *See* Defs.' Mot. to Exclude Chilton Testimony, RE669-2, PageID 29168. But for the Craig Protein stock and Martom real estate, Chilton did exactly the opposite: He ignored John L. Griffin's original will and assumed that the Fourth Amendment and Sixth Codicil were in force, flipping the ratios so that Plaintiffs were each entitled to *one-fifth*—rather than one-eleventh—shares.

Chilton Expert Rep. (Craig Protein), RE669-3, PageID 29191; Chilton Expert Rep. (Craig Protein), RE669-4, PageID 29210.

The district court adopted Chilton's explanation that "the[] divisions were based on the estate plans in effect at the time of the transactions in question." Order on New Trial Motion, RE1131, PageID 37714. With respect, that makes no sense. The change in distribution from all eleven children to just the five daughters came in the Sixth Codicil to John L. Griffin's will and Fourth Amendment to his trust—provisions that the court annulled in order to find that John L. Griffin did not intend to sell his stock to his sons during his lifetime. *See* Findings of Fact ¶ 249, RE856, PageID 35165; *supra* at 28. That annulment was error. But Plaintiffs cannot have it both ways: either the Sixth Codicil and Fourth Amendment are given effect (in which case a one-fifth ratio applies, but the 1986 sale of company stock is valid), or they are not (in which case a one-eleventh ratio applies).

That is not the only inconsistency. Chilton also assumed that the changes to John L. Griffin's estate plan after 1985 were invalid, yet included in his calculation Griffin Industries stock distributions from 1986-1994—while John L. Griffin was still alive. J. Chilton Testimony (101:17-102:12, 103:22-104:15), RE821, PageID 33577-90. If Chilton was using the estate plan that *would* have been in effect without Defendants' allegedly wrongful conduct (*i.e.*, without the post-1985

changes), none of the Griffin Industries stock would have passed to the *Holt* Plaintiffs until John L. Griffin died a decade later. *See* Findings of Fact ¶¶ 27-28, RE856, PageID 35084. Thus, consistency required Chilton (and the court) to remove the distributions from 1986 through 1994 from the judgment.

Once again, however, the district court's response to the unanswerable flaws in Chilton's methodology was not to find his analysis unreliable, or even to recalculate the award without these inconsistencies, but instead to simply blame *Defendants* for not putting on their own expert. *Id.* ¶ 267, PageID 35169; Order on New Trial Motion, RE1131, PageID 37714-15. As discussed, that was error.

3. *The Award "Disgorges" Third-Party Profits*

It gets worse. More than one-third of the Griffin Industries stock distributions that Chilton factored into his analysis had gone not to Defendants (the purported target of the *dis*gorgement award), but to *other* Griffin children and grandchildren. Defs.' Mot. for Am. Findings, RE1059, PageID 36878. Indeed, more than $40 million of the award was based on distributions that went directly to *Plaintiffs' own children*. Pls.' Post-Trial Reply Br., RE837, PageID 34597 n.11. Defendants also did not receive any of the purported "profits" from the Craig Protein stock or Martom real estate, which Chilton factored into his haphazard remedy analysis as well. *Id.* Kentucky's highest court long ago held that plaintiffs are not entitled to the disgorgement of profits any greater than those actually

received *by the defendants*. *See Edwards v. Lee's Adm'r*, 96 S.W.2d 1028, 1032 (Ky. 1936). Accordingly, the district court's acceptance of these errors in Chilton's analysis, representing tens of millions of dollars, also cannot stand.

C. The Prejudgment Interest Award Is Unduly Punitive

The district court literally multiplied its errors in accepting Chilton's remedy analysis by adding a staggering $275.4 million in prejudgment interest—essentially *doubling* the size of the already inflated award. That is contrary to law, unduly punitive, and should be set aside.

Initially, the district court justified awarding prejudgment interest by holding that Plaintiffs' claims were "liquidated," which triggered prejudgment interest at the maximum rate of 8% *as a matter of right*. Findings of Fact ¶¶ 259-65, RE856, PageID 35167-68. But that was wrong as a matter of law. Plaintiffs' fact-dependent, breach-of-fiduciary-duty claims are the epitome of claims that are neither certain nor fixed by agreement or law before the purported violation—the test for whether a claim is liquidated under Kentucky law. *See Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991); *Travelers Prop. Cas. Co. of Am. v. Hillerich & Bradsby Co.*, 598 F.3d 257, 276 (6th Cir. 2010).

When Defendants pointed that error out in their post-trial motion, the district court simply declared that it would have awarded prejudgment interest anyway. Order on New Trial Motion, RE1131, PageID 37715-16. But once again, the

district court's attempt to dodge one error just led it to another. An equitable award of prejudgment interest on *un*liquidated claims is rare under Kentucky law. *Ventas, Inc. v. HCP, Inc.*, No. 3:07-CV-238-H, 2009 WL 3855638, at *9 (W.D. Ky. Nov. 16, 2009), *rev'd in part on other grounds*, 647 F.3d 291 (6th Cir. 2011). Moreover, prejudgment interest cannot be punitive. *See Hale v. Life Ins. Co.*, 795 F.2d 22, 25 (6th Cir. 1986). The magnitude of the award here—based on the maximum possible rate (8%), and compounded over 30 years—is plainly punitive.

In seeking to cloak its prejudgment interest award in "equitable" garb, the district court ignored the significant difference between the prejudgment interest rate on liquidated claims (a *mandatory* rate of 8%) and unliquidated claims (no mandatory rate). *See Poundstone v. Patriot Coal Co.*, 485 F.3d 891, 903 (6th Cir. 2007). Having abandoned its determination that the claims were liquidated, the district court should have reconsidered whether the maximum 8% rate should apply. Indeed, at trial, the court itself noted that applying a lower interest rate would "more" closely "reflect[] an average of interest rates over [the past 30] years." Sept. 18, 2015 Tr. (79:1-18), RE821, PageID 33555. Moreover, under Kentucky law, the "default" rule is simple, not compounded, interest. *Travelers*, 598 F.3d at 275. Yet, in announcing its purportedly "equitable" award of prejudgment interest, the district court failed even to address Defendants' arguments that using the 8% rate, and calculating 30 years of interest on a

compounded basis, was *in*equitable. *See* Defs.' Mot. for Am. Findings, RE1059, Page ID 36882-83.

Accordingly, even if the district court's award could otherwise survive, its punitive prejudgment interest award—which would, *by itself*, be one of the largest judgments ever awarded in Kentucky—should be set aside or reduced.

IV. THE DISTRICT COURT ERRED IN REFUSING A JURY TRIAL

On top of all this, the district court denied Defendants their Seventh Amendment right to have a jury of their peers, rather than a federal judge, resolve the contested factual issues in this highly charged case. *See* U.S. Const. amend. VII. The importance of the district court's decision to assume the role of both judge *and* jury is underscored by the district court's commentary in its decision on appropriate "gender roles" in what it seemed to deride as a patriarchal family. Findings of Fact, RE856, PageID 35071-72. Whether or not those apparent slights were fair, Defendants were entitled to have a jury hear the evidence and draw its own conclusions.

A defendant is entitled to a jury trial if the *relief* that the plaintiff seeks is legal in nature. *See Deringer v. Columbia Transp. Div., Oglebay Norton Co.*, 866 F.2d 859, 862 (6th Cir. 1989) (In determining whether a claim is legal or equitable, this Court focuses on "the nature of the relief sought."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (same). "[M]oney damages," of course, are "the

paradigm of legal relief," *Central States, Se. & Sw. Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954, 960 (6th Cir. 2014), triggering a defendant's Seventh Amendment right to a jury trial.

"[M]oney damages" are precisely what Plaintiffs repeatedly claimed they were seeking when they brought this case. Oral Argument Tr. (19:21-21:16), RE618, PageID 28087-89; Holt Pls.' Remedy Notice, RE613, PageID 28043-44; Osborn Opp. to Mot. for Certification, RE621, PageID 28113 n.2. The district court relied on those representations in holding that the probate exception to subject-matter jurisdiction did not apply because, in its view, "claims against defendants *for money damages* do not implicate the matters reserved to the province of state probate courts." Nov. 2014 Order, RE612, PageID 28040-41 & n.3 (emphasis added). That should have left no question about the nature of the relief sought.

Yet, when it came to Defendants' jury trial right, the district court recharacterized the relief Plaintiffs were seeking as the "equitable remedy of disgorgement." Aug. 2015 Order, RE759, PageID 31252. The district court did not explain its about-face, and simply relabeling money damages as "disgorgement" cannot deprive Defendants of their right to a jury. *Cf. Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477-78 (1962) ("[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the

pleadings."). The focus is still on the *nature* of the relief sought. And, while it is true that disgorgement is a species of restitution, it is equally true that "not all relief falling under the rubric of restitution is available in equity." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002).

As the Supreme Court has explained, "for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. By contrast, in actions where "the plaintiff 'could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovery of money to pay for some benefit the defendant had received from him,'" the plaintiff's right is properly characterized as a "right to restitution *at law*." *Id.* at 213 (citation omitted).

Plaintiffs' claims fall into the second category. In the district court's own words: Plaintiffs did not seek to trace particular property, but sought "*in personam*" relief in the form of "money damages." Nov. 2014 Order, RE612, PageID 28040. And Plaintiffs did not limit themselves to funds in Defendants' possession. To the contrary, the *in personam* money damages they sought (and were granted) from Dennis and Griffy were based in part on the value of Griffin Industries stock sold directly from their mother's estate and father's trust and estate to third parties. This is "the paradigm of legal relief." *Central States, Se. & Sw.*

Areas Health & Welfare Fund, 756 F.3d at 960. Defendants were therefore entitled to a jury trial on Plaintiffs' breach-of-fiduciary-duty claims.

Even if Plaintiffs' request for "*in personam* money damages" could somehow be deemed equitable, Defendants were at least entitled to have a jury decide their *legal* statute-of-limitations defense—including whether Plaintiffs had actual notice of the claims (as the district court erroneously held was required here). *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959); *see Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 572 (3d Cir. 1976) ("[T]he statute of limitations in the federal courts is a traditional legal defense."). Indeed, even the district court recognized that this was a "*legal* . . . defense[]." Aug. 2015 Order, RE759, PageID 31250 (emphasis added). Defendants were entitled to a jury trial on that "legal defense," just as they would be on a "legal claim."

In refusing a jury trial on even this "legal defense," the district court observed (correctly) that, "*[w]here the predominant issues in a suit are triable to a jury* . . . federal law looks with disfavor upon fragmenting a portion of the case for trial to the court," Aug. 2015 Order, RE759, PageID 31251 (first alteration added) (quoting *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 31 (6th Cir. 1979)), but then reasoned that "[t]he converse would also be true: Where the predominant issues are triable to the court, a portion of the case—such as the limitations issue—should not be fragmented and submitted to a jury," *id.*, PageID 31251-52. That reasoning

is dead wrong. The constitutional right to a jury trial on legal issues—including defenses—does not yield to a "predominance" analysis of this sort.[12]

In the end, the district court's refusal to convene a jury—both on Plaintiffs' *in personam* money damages claims and on Defendants' legal, statute-of-limitations defense—may have had more to do with its personal views about how a jury would handle this case than anything else. As noted, during a pre-trial conference, the court candidly observed that, in its view, "this thing would be a nightmare to try before a jury" because the "jury won't understand anything about executors, trustees, fiduciary duties, all of this," and "will do something bizarre . . . ." 2015 Status Conference Tr. (10:11-21), RE743, PageID 30636. But of course, a court's views of the capacity of lay persons cannot trump the Seventh Amendment.

[12] The district court also invoked Kentucky law in holding that the statute-of-limitations defense was for "the court." Aug. 2015 Order, RE759, PageID 31251 (citing *Commonwealth v. Hasken*, 265 S.W.3d 215, 226 (Ky. Ct. App. 2007)). But "the right to a jury trial in the federal courts is . . . determined as a matter of federal law," including whether a "state-created claim [is] legal or equitable." *Simler v. Conner*, 372 U.S. 221, 222 (1963); *see Goodman*, 534 F.2d at 572.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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November 29, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Sixth Circuit Rule 32(b)(1), this brief contains 17,018 words. Defendants simultaneously have filed a motion seeking leave to file a single overlength brief for all of the Defendants in these four consolidated appeals. As explained in that motion, this single brief is well below the more than 40,000 words to which Defendants would be entitled if they had filed separate briefs.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I, Gregory G. Garre, hereby certify that I have this 29th day of November, 2016, electronically filed the foregoing Brief for Appellants with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system, which will send notice to all registered CM/ECF users.

s/ Gregory G. Garre
Gregory G. Garre

ADDENDUM PURSUANT TO SIXTH CIRCUIT RULE 30(g)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Appellants have designated the following docket entries:

I. *Osborn v. Griffin*, No. 2:11-cv-00089 (E.D. Ky.)

RE#	Description	Page ID# Range
1	Complaint (Apr. 27, 2011)	1-12
26	First Amended Complaint (Aug. 29, 2011)	251-272
30	Defendants' Motion to Dismiss and Memorandum in Support, with Exhibits A-C (Sept. 16, 2011)	458-555

II. *Holt v. Griffin*, No. 2:13-cv-00032 (E.D. Ky.)

RE#	Description	Page ID# Range
1	Complaint (Mar. 8, 2013)	1-47
149	Judgment (Apr. 26, 2016)	1665-1670

III. Nos. 2:11-cv-00089 (Lead), 2:13-cv-00032 (Consolidated)

RE#	Description	Page ID# Range
207	Order consolidating Case Nos. 2:11-cv-00089 (Lead) and 2:13-cv-00032 (June 26, 2013)	4559-4562
359	Order consolidating Case Nos. 2:11-cv-00089 (Lead) and 2:13-cv-00032 (Nov. 27, 2013)	9333-9341
373	Osborn Third Amended Complaint (Dec. 9, 2013)	9422-9457

RE#	Description	Page ID# Range
382-2	Opinion letter from Turney Berry to J. Callow regarding certain fiduciary actions involving the Estate of John L. Griffin and Trust, with Exhibits A-C—filed Dec. 20, 2013 as attachment to Rule 26(a)(2)(B) Disclosures of Dennis B. Griffin, John M. Griffin, Robert A. Griffin and Martom Properties, LLC, RE382, PageID 9786-9787	9780-9818
410-12	SEALED Robert A. Griffin Deposition Transcript —FILED UNDER SEAL	--
430-21	Verified Complaint filed by Elizabeth Osborn in U.S. District Court in the Eastern District of Kentucky, No. 90-209 (Dec. 7, 1990)—filed Jan. 24, 2014 as Exhibit 17 to Declaration of Thomas F. Hankinson in Support of Defendants' Motions for Summary Judgment, RE430, PageID 19141-19161	19836-19870
430-25	Agreed Order Dismissing Derivative Claims as Settled (Sept. 24, 1993)—filed Jan. 24, 2014 as Exhibit 21 to Declaration of Thomas F. Hankinson in Support of Defendants' Motions for Summary Judgment, RE430, PageID 19141-19161	19880-19883
484	SEALED RESPONSE by Linda G. Holt, Judith E. Prewitt, Cynthia L. Roeder regarding Protective Order, Motion for Partial Summary Judgment by Dennis B. Griffin, John M. Griffin, Robert A. Griffin, Martom Properties, LLC ECF Filing of Prior Paper Motion for Summary Judgment On All Claims Regarding 1985-1986 Griffin Industries Stock Transactions (Feb. 18, 2014) —FILED UNDER SEAL	--

RE#	Description	Page ID# Range
528	Reply in Support of Defendants' Motion for Summary Judgment on all Plaintiffs' Claims with Respect to the Griffin Industries Stock Transactions in 1985-1986 (Mar. 7, 2014)	25749-25762
590	Memorandum Opinion and Order on motions for summary judgment, to dismiss, to disregard deposition testimony of Dennis B. Griffin, and objections to Magistrate Judge orders (Sept. 29, 2014), *Osborn v. Griffin*, 50 F. Supp. 3d 772, 796 (E.D. Ky. 2014)	27407-27489
591-4	Memorandum Opinion on motions to dismiss and summary judgment dated Aug. 27, 1992—filed Oct. 10, 2014 as Exhibit D to Defendants' Motion for Partial Reconsideration of the Court's September 29, 2014 Memorandum Opinion and Order, RE591, PageID 27490-27491	27661-27677
592	Defendants' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction (Oct. 10, 2014)	27680-27687
603	Response of Plaintiff Elizabeth Osborn in Opposition to Defendants' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction (Nov. 3, 2014)	27931-27940
612	Status Conference Order (Nov. 14, 2014)	28039-28042
613	Holt Plaintiffs' Notice Regarding Requested Remedy (Nov. 24, 2014)	28043-28044

RE#	Description	Page ID# Range
617	Final Pretrial Conference Order (Dec. 2, 2014)	28061-28068
618	Transcript of Oral Argument regarding motions to reconsider held Nov. 13, 2014	28069-28095
621	Response to Plaintiff Elizabeth A. Osborn in Opposition to Defendants' Motion for Certification to File an Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) (Dec. 22, 2014)	28112-28117
669-2	Exhibit B: Expert Witness Report of John E. Chilton *In the Matter of Holt v. Griffin* regarding Griffin Industries, Inc. Shares (Jan. 16, 2015)	29160-29185
669-3	Exhibit C: Expert Witness Report of John E. Chilton *In the Matter of Osborn v. Griffin* regarding Craig Protein Division, Inc. (Jan. 16, 2015)	29186-29204
669-4	Exhibit D: Expert Witness Report of John E. Chilton *In the Matter of Osborn v. Griffin* regarding Martom Properties, LLC (Jan. 16, 2015)	29205-29237
709	Order substituting Estate of Dennis Griffin for Dennis Griffin as defendant (June 6, 2015)	30073-30075
743	Transcript of Telephonic Status Conference Before William O. Bertelsman, United States District Court Judge held April 13, 2015 (filed July 21, 2015)	30627-30642
748	Joint Stipulations regarding facts (July 27, 2015)	30750-30758
759	Order dismissing claims and bench trial (Aug. 4, 2015)	31250-31254
774	Order denying Defendants' Motion to Exclude Testimony of John E. Chilton (Aug. 17, 2015)	32293-32294

RE#	Description	Page ID# Range
783	Transcript of Daubert Hearing held Aug. 17, 2015 (Aug. 25, 2015)	32445-32505
790	Order denying Martom's motion to dismiss and granting motion to amend complaint (Sept. 3, 2015)	32570-32574
813	Transcript of Trial Day 2 held September 15, 2015	32980-33089
814	Transcript of Trial Day 3 held September 16, 2015	33090-33293
821	Transcript of Trial Day 5 held September 18, 2015	33477-33615
823	Transcript of Trial Day 6 held September 21, 2015	33634-33828
828	Transcript of Trial Day 8 held September 23, 2015	33989-34107
837	Reply Brief in Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Dec. 8, 2015)	34519-34603
838-1	Settlement Agreement and Release as of September 10, 1993—filed Sept. 17, 2015 at Exhibit A to Defendants' Motion to Enforce the September 10, 1993 Settlement Agreement, RE838, PageID 34613-34622	34623-34631
856	Findings of Fact, Conclusions of Law, and Other (Mar. 21, 2016)	35070-35172
859	Amended Exhibit and Witness List	35180-35188
863	Judgment (Apr. 26, 2016)	35203-35208

RE#	Description	Page ID# Range
1059	Defendants' Expedited Motion for Amended or Additional Findings, Amended Judgment, and/or a New Trial (May 24, 2016)	36864-36893
1131	Memorandum Opinion and Order on expedited motion for amended findings, judgment and/or new trial	37712-37718
1139	Notice of Appeal from Final Judgment entered Apr. 26, 2016 and orders and rules in support thereof, filed by Dennis B. Griffin Revocable Trust – 2012, Estate of Dennis B. Griffin, John M. Griffin (Aug. 2, 2016)	37736-37737
1140	Notice of Appeal from Final Judgment entered Apr. 26, 2016 and orders and rules in support thereof, filed by Martom Properties, LLC (Aug. 2, 2016)	37728-37739
1141	Notice of Appeal from Final Judgment entered May 3, 2016, filed by Dennis B. Griffin Revocable Trust – 2012, Estate of Dennis B. Griffin, John M. Griffin (Aug. 2, 2016)	37740-37741
1142	Notice of Appeal from Final Judgment entered May 3, 2016, filed by Martom Properties, LLC (Aug. 2, 2016)	37742-37743

CONSTITUTIONAL AND STATUTORY ADDENDUM PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 28(f)

ADDENDUM TABLE OF CONTENTS

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Ky. Rev. Stat. Ann. § 413.120

413.120 Actions to be brought within five years.

The following actions shall be commenced within five (5) years after the cause of action accrued:

(1) An action upon a contract not in writing, express or implied.

(2) An action upon a liability created by statute, when no other time is fixed by the statute creating the liability.

(3) An action for a penalty or forfeiture when no time is fixed by the statute prescribing it.

(4) An action for trespass on real or personal property.

(5) An action for the profits of or damages for withholding real or personal property.

(6) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

(7) An action upon a bill of exchange, check, draft or order, or any endorsement thereof, or upon a promissory note, placed upon the footing of a bill of exchange.

(8) An action to enforce the liability of a steamboat or other vessel.

(9) An action upon a merchant's account for goods sold and delivered, or any article charged in such store account.

(10) An action upon an account concerning the trade of merchandise, between merchant and merchant or their agents.

(11) An action for relief or damages on the ground of fraud or mistake.

(12) An action to enforce the liability of bail.

(13) An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.

Ky. Rev. Stat. Ann. § 413.130(3)

413.130 When certain actions in KRS 413.120 accrue.

* * *

(3) In an action for relief or damages for fraud or mistake, referred to in subsection (11) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten (10) years after the time of making the contract or the perpetration of the fraud.

Ky. Rev. Stat. Ann. § 413.190(2)

413.190 Result of absence from the state or obstruction of action under KRS 413.090 to 413.160.

* * *

(2) When a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not.