TRADEMARK ASSIGNMENT COVER SHEET

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SUBMISSION TYPE:	RESUBMISSION
NATURE OF CONVEYANCE:	COURT ORDER
RESUBMIT DOCUMENT ID:	900604805

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
Wine And Canvas Ip Holdings LLC		02/21/2019	Limited Liability Company: INDIANA

RECEIVING PARTY DATA

Name:	WNC Investments LLC
Street Address:	224 W Sunset Drive
City:	South Padre Island
State/Country:	TEXAS
Postal Code:	78597
Entity Type:	Limited Liability Company: TEXAS

PROPERTY NUMBERS Total: 1

Property Type	Number	Word Mark
Serial Number:	85292588	WINE AND CANVAS

CORRESPONDENCE DATA

Fax Number:

Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.

Phone: 6192615393
Email: christophermuylle@gmail.com
Correspondent Name: Christopher Muylle
Address Line 1: 224 W Sunset Drive
Address Line 4: South Padre Island, TEXAS 78597

NAME OF SUBMITTER:	Christopher M Muylle
SIGNATURE:	/Christopher M Muylle/
DATE SIGNED:	03/30/2021

Total Attachments: 29
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STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION COUNTY SUPERIOR COURT

CAUSE NO. 49D05-1608-CC-27561

CHRISTOPHER MUYLLE,

Plaintiff,

v.

WINE AND CANVAS DEVELOPMENT, LLC,

Defendant.

FILED

FEB 21 2019 (129)

Myla A. Eldridge
CLERK

ORDER ON MOTION FOR TURNOVER

Christopher Muylle owns a foreign judgment domesticated in this Court against Wine and Canvas Development, LLC ("WNC"). This foreign judgment was entered by the U.S. District Court for the Southern District of Indiana following a November 2014 jury trial in which WNC was found liable for abuse of process. As a result of the jury verdict and subsequent motions for fees, WNC has been ordered to pay Muylle $462,780.43. To date, WNC has paid nothing on this judgment.

On May 15, 2018, Muylle filed in this Court a Motion for Turnover of Trademarks (and for Any Funds Received as Royalties Since the Purported Transfer) ("Turnover Motion"). By this motion, Muylle asks the Court to order turnover of the WINE AND CANVAS trademark. WNC applied for and received this trademark from the U.S. Patent and Trademark Office. While the trademark was pending approval, WNC apparently entered into a contract to transfer the trademark to Wine and Canvas IP Holdings, LLC ("IP Holdings"). (Exs. 7 & 8 to

Turnover Motion). Muylle contends (1) that this was a fraudulent transfer and (2) that IP Holdings is the alter ego of WNC and of the individual judgment debtors, Mr. Anthony Scott and Mrs. Tamara McCracken Scott. Mr. and Mrs. Scott control both WNC and IP Holdings and have been the recipients of the profits earned by both entities.

After the filing of the Turnover Motion, WNC filed a response on May 30 and Muylle filed his reply on June 29. On October 19, 2018, the Court held an evidentiary hearing during which Muylle offered and the Court admitted Exhibits 1-23, 25-30 ("Binder 1"), and four deposition transcripts with 23 deposition exhibits ("Binder 2"). WNC presented no evidence at the hearing but orally identified certain depositions and exhibits which were submitted after the hearing and the Court has admitted into evidence. Following the hearing, WNC also filed with the Court Exhibits U, Y, BB and DD that were not identified at the hearing. (See WNC's *Restated Designation of Evidence Following October 19, 2018, Hearing on Christopher Muylle's Motion for Turnover of Trademarks*). Notwithstanding WNC's belated identification and filing, the Court now admits these exhibits as evidence for purposes of the pending motion.

I. Alter Ego

"As a general rule, shareholders are not personally liable for the acts of a corporation, and a corporation is not liable for the acts of related corporations. However, courts may invoke the equitable doctrine of piercing the corporate veil in

order to 'protect innocent third parties from fraud or injustice.'" *Reed v. Reid*, 980 N.E.2d 277, 301 (Ind. 2012), *citing Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994). "When a corporation is functioning as an alter ego or a mere instrumentality of an individual or another corporation, it may be appropriate to disregard the corporate form and pierce the veil. 'The propriety of piercing the corporate veil is highly dependent on the equities of the situation, and the inquiry tends to be highly fact-driven.'" *Id.* (citations omitted).

"'[T]he burden is on the party seeking to pierce the corporate veil to prove that the corporate form was so ignored, controlled or manipulated that it was merely the instrumentality of another and that the misuse of the corporate form would constitute a fraud or promote injustice.'" *Id.* (citations omitted). "'While no one talismanic fact will justify with impunity piercing the corporate veil, a careful review of the entire relationship between various corporate entities, their directors and officers may reveal that such an equitable action is warranted.'" *Id.* (citations omitted).

"When determining whether a shareholder is liable for corporate acts, [a court's] considerations may include: (1) undercapitalization of the corporation, (2) the absence of corporate records, (3) fraudulent representations by corporation shareholders or directors, (4) use of the corporation to promote fraud, injustice, or illegal activities, (5) payment by the corporation of individual obligations, (6) commingling of assets and affairs, (7) failure to observe required corporate

formalities, and (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form." *Id.* at 301, *citing Aronson*, 644 N.E.2d at 867.

"In addition, when 'a plaintiff seeks to pierce the corporate veil in order to hold one corporation liable for another closely related corporation's debt, the eight *Aronson* factors are not exclusive.'" *Id.* at 301-302, *citing Oliver v. Pinnacle Homes, Inc.*, 769 N.E.2d 1188, 1192 (Ind. Ct. App. 2002), *trans. denied.* "Additional factors to be considered include whether: '(1) similar corporate names were used; (2) the corporations shared common principal corporate officers, directors, and employees; (3) the business purposes of the [organizations] were similar; and (4) the corporations were located in the same offices and used the same telephone numbers and business cards.'" *Id.* at 302.

"Further, a court may disregard the separateness of affiliated corporate entities when they are not operated separately, but rather are managed as 'one enterprise through their interrelationship to cause illegality, fraud, or injustice or to permit one economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.' These 'single business enterprise' corporations may be identified by characteristics such as 'the intermingling of business transactions, functions, property, employees, funds, records, and corporate names in dealing with the public.'" *Id.*

There is evidence before the Court of many of these factors indicating that IP Holdings is the alter ego of WNC.

1. **Similar names and business purpose; same officer/manager, ownership, and location**

The names Wine and Canvas Development, LLC and Wine and Canvas IP Holdings, LLC are obviously similar. Their business purpose was similar in that they both involved group painting classes, which also offered alcoholic beverages as part of the experience. (Binder 1, Ex. 22, ¶ 8). WNC initially owned the trademark "Wine and Canvas," which it licensed to various other locations or licensees. (*See id.* at ¶¶ 7 and 8). However, pursuant to a document signed twice by Anthony Scott, first as Manager for WNC and then as Manager for IP Holdings, WNC purportedly transferred the trademark to IP Holdings who then licensed the right to use the mark back to WNC. (Binder 1, Exs. 7 and 8; see also, Binder 1, Ex. 23A, p. 8, explaining that IP Holdings "oversees the locations around the country, the licensees around the country;" (Binder 2, Ex. 1 p. 232, line 24-p. 233, line 9, explaining that at first, WNC owned everything, but then it only owned the Indianapolis licensee location).

Anthony Scott served as the President and sole manager for both WNC and IP Holdings (Binder 1, Ex. 2, Answer 5 and Ex. 3A, p. 4; Binder 2, Ex. 1, p. 13, lines 14-19), and Tamara McCracken Scott was the Art Director for IP Holdings and helped manage WNC's Indianapolis location. (Binder 1, Ex. 23A, p. 41). In addition, both entities were purportedly owned by Donald McCracken (Mrs. Scott's father) and then after his death by Kathy McCracken (Mrs. Scott's mother) (Binder 1, Ex.

23A p. 7). Although the successive titular owners of both entities, it appears that Mr. and Mrs. McCracken never invested any money in either entity, never managed or otherwise exercised control of either entity, never played a significant role in the development of either entity, and never received profits from either entity. (See Ex. Y, Dep. of Tamara McCracken Scott, p. 21, lines 19-23, testifying that her father has not put any dollars in the business; Ex. X, Dep. of Donald McCracken, p. 34, line 10, testifying that he doesn't "run the day-to-day business"; p. 43, lines 6-21, testifying that Tamara is the primary person that runs that business and that Tony Scott is the president and that he doesn't know how they divide their responsibilities; p. 53, lines 13-15, testifying that he has not received any distributions from the business; p. 54, line 25-p. 55, line 4, testifying that he didn't list any income from Wine & Canvas Development, LLC in his 2012 tax return; p. 142, lines 20-21, stating that "they run the company. I keep telling you that...."; Binder 1, Ex. 23A, p. 49, describing how IP Holdings was earning between $20,000 and $60,000 per month from all the licensees but there were no distributions or profits).

The entities shared the same office, website and had similar email addresses. (Binder 2, Ex. 15, WNC lists principal office as "3969 East 82nd Street", Binder 2, Ex. 16, IP Holdings lists principal office as the same; Binder 2, Ex. 17, p. 28, lines 21-25, identifying the corporate office for Wine & Canvas as "the northside studio" on "East 82nd"; Binder 1, Ex. 23A, pp. 8-9, Mr. Scott explaining that the website

wineandcanvas.com was used by both WNC and IP Holdings; Binder 2, Ex. 18, p. 38, lines 4-16 and Binder 2, Ex. 20). Furthermore, while IP Holdings and WNC shared the same location, there was no apportionment of rent between the two. (Binder 2, Ex. 1, p. 234, lines 13-23).

2. Payment of the Scotts' individual obligations

The record shows many thousands of dollars of payments by both entities of the individual obligations of Mr. and Mrs. Scott. For example, various documents and testimony show that both IP Holdings and WNC made monthly payments for the lease on the Scotts' residential condo, the loan on their recreational yacht, and several luxury vehicles. (*See e.g.*, Binder 1, Exs. 14, 15, 16, 17, 18). In fact, Mr. Scott admitted that his wife owns a Bentley which has a monthly loan payment of $1,975 that was initially paid by WNC because "the cars were being paid for by the company" (Binder 2, Ex. 1, p. 54, line 20-p. 57, line 5), xxxbut "IP Holdings is paying for the cars right now." (*Id.*, p. 57, line 11). In addition to the Bentley, IP Holdings pays for a lease on a Cadillac Escalade, but Mr. Scott has "no idea" if the Cadillac is leased by the company or by Tamara individually. (*Id.*, p. 74, line 22-p. 75, line 6). Mr. Scott also admitted that from January 2016 (around the time WNC filed bankruptcy) through June 2018, IP Holdings paid the rent for the condo where he and Mrs. Scott lived. (*Id.*, p. 25, line 14-p. 26, line 2).

With respect to the yacht, Mr. Scott admitted that as manager of WNC, he co-signed a promissory note for a loan on the yacht and that now "IP Holdings actually

pays for it because...It is now the guarantor on it because Wine and Canvas Development closed and so Wine and Canvas IP Holdings took over the—became the guarantor at that point, and since we cannot pay it, IP Holdings is a guarantor so it is forced to pay." (*Id.*, p. 39, lines 10-15). When asked whether IP Holdings received any benefits from taking on liability for the yacht loan, he responded: "No." (*Id.*, p. 50, line 24-p. 51, line 5). He also admitted that WNC had been making payments on the yacht before IP Holdings began making them. (*Id.*, p. 47, 5-11). He testified that he and Mrs. Scott have used it recreationally (*Id.*, p. 53, line 2-p. 54, line 2) and he now uses it as his personal residence in Alabama (*Id.*, p. 54, lines 14-19). (*See also* Binder 1, Ex. 23A, pp. 34-35, indicating a 72-foot yacht was purchased in the name of "Boat and Breakfast Charters," which is a company owned by Mrs. Scott and does not do any business, but the yacht is something the Scotts use for pleasure).

3. Commingling of assets between the entities

The record also shows extensive commingling of the assets and affairs of the two purportedly separate entities of WNC and IP Holdings. As discussed above, when WNC filed bankruptcy and could no longer make the $3,500 monthly payment on the loan it had guaranteed for the Scotts' yacht, the Scotts simply made IP Holdings the new guarantor and caused it to make the payments instead.

As another example of commingling, in 2013, Mrs. Scott testified that the Wine and Canvas business, including the Indianapolis operation and the royalties

from the licensees, was making approximately $50,000 per month after expenses. (Binder 1, Ex. 6). In reporting the company's net income, she did not distinguish between WNC (which purportedly only operated the Indianapolis location) and IP Holdings, LLC (which purportedly owned the trademark and received royalties from the various licensees/other locations).

Furthermore, according to Mr. Scott, monthly royalty payments from licensees were initially made to WNC but then started going to IP Holdings, LLC at some point. Mr. Scott, the manager of both entities, has "no idea" how long payments were made to WNC and he doesn't know why the payments to it stopped. (Binder 2, Ex. 1, p. 85, line 13-p. 86, line 6). Bank records of WNC confirm that royalty payments were made to it even after the purported transfer date of January 1, 2012. (See Binder 2, Ex. 23, showing multiple electronic deposits, including from "WNC of Fort Wayne LLC" and "WNC of San Diego LLC". See also Binder 2, Ex. 18, p. 6, line 21 and p. 49, lines 5-24, in which Melissa Pickell, the employee who "took care of royalties", testified that she didn't know what those deposits would be other than payments of royalties by licensees; Binder 2, Ex. 1, pp. 86-88 in which Mr. Scott acknowledged that these bank records were for a WNC account).[1]

[1] In his recent pro supp deposition, Mr. Scott also testified that, while the bank statements at issue say, "AVA Ventures LLC DBA Wine and Canvas," Ava Ventures changed its name to Wine and Canvas Development LLC. (Binder 2, Ex. 1, p. 91, lines 7-25).

In addition, the entities shared employees. In January 2016, at the time of a pro supp hearing in federal court, Mr. Scott testified that he made he made $5,000 a month, which was paid by Scott Staffing, which is a "management company that manages the employees for...Wine & Canvas Development and employees for IP Holdings." (Binder 1, Ex. 23A, p. 3-4). According to Mr. Scott, all employees of WNC and IP Holdings became employees of Scott Staffing (*Id.*, p. 11), a company located at his home and which had no assets (*Id.*, p. 12). He is the President and manager of IP Holdings and makes no income from it, but his income from Scott Staffing comes from both WNC and IP Holdings. (*Id.*, p. 15-16). While he was initially a W-2 employee of WNC, he then became a W-2 employee of Scott Staffing around April 2015. (*Id.*, p. 10). But he continued to be paid the same amount as before. (*Id.*, p. 11). Tellingly, he testified that to pay the employees, they simply transfer money from one company to another company, and then they pay their employees out of it and they "transfer it over from whatever." (*Id.*, p. 13).

Similarly, in 2016, Mrs. Scott testified that she was earning "about $15,000 a month" through Scott Staffing and was previously paid by WNC. (*Id.*, pp. 40-41). She had been earning $15,000 a month for about a year and had made about $10,000 a month before that. (*Id.*, p. 40). Her salary was set by her and her father, Mr. McCracken. (*Id.*, p. 41). At the time of her testimony in 2016, she was a W-2 employee of Scott Staffing but had previously been a W-2 employee of WNC. (*Id.*, p. 42). However, she worked as both "the Art Director for IP Holdings" and managing

the Indianapolis location. (*Id.*, p. 41). In other words, while she was doing work for both WNC and IP Holdings, the money to pay her salary apparently came from WNC and Scott Staffing. (*Id.*, p. 42).

In addition, Zachary Wogtech, Wine and Canvas Vice President of Operations, whose job was "entirely facilitating the new licensees", understood that his employer was "Wine & Canvas Development." (Binder, 2, Ex. 17, p. 8, lines 6-8 and p. 11, lines 11-13). But IP Holdings, LLC was the entity who purportedly owned the trademark and was earning royalties from the licensees. Furthermore, Melissa Pickell worked for Wine and Canvas from July 2012 until October 2017 (Binder 2, Ex. 18, p. 3, lines 20-24) and had the title of Business Development Specialist (*Id.*, p. 6, lines 2-6), and her duties included giving information to people interested in opening a new location/licensee, training new owners/licensees, taking care of royalties, and giving advice regarding marketing. (*Id.*, p. 6, lines 9-25). Ms. Pickell indicated that the entity that employed her was "Wine & Canvas IP Holdings." (*Id.*, p. 9, lines 7-25). Yet payroll records from Paychex indicate that she, like Mr. Wogtech (and the Scotts), was paid by Wine & Canvas Development, LLC. (Binder 2, Ex. 19). Ms. Pickell had no idea why a report generated by Paychex as a list of employees of Wine & Canvas Development listed her if she worked for Wine & Canvas IP Holdings. (Binder 2, Ex. 18, p. 32, lines 6-12).

As further evidence of intermingling, the bankruptcy schedules for WNC show several intercompany transactions, including the purported trademark

transfer on 1/1/12 [or 1/1/15] and a claim by IP Holdings against WNC for unpaid royalties of $250,000. (Binder 1, Ex. 4, p. 11). However, the agreement purportedly transferring the trademark from WNC to IP Holdings, states that WNC had the right to use the trademark royalty-free for 20 years. (Binder 1, Ex. 7, p. 2). WNC's bankruptcy schedule also lists a "loan" from Scott Staffing to WNC for $350,000. Mr. Scott later testified that no such debt was actually owed. The Trustee called this a "glaring error" on the schedules, particularly in light of the fact that Mr. Scott, who as the manager of WNC, signed the schedules under penalty of perjury, while also being the owner and manager of Scott Staffing. (Binder 1, Ex. 4 p. 10, and Ex. 5 ¶ 5). *See Cont'l Cas. v. Symons*, 817 F.3d 979, 994 (7th Cir 2016) (observing that extensive intercompany loans and other transactions was evidence of intermingling).

4. Failure to observe corporate formalities/keep corporate records

The record also shows that the Wine and Canvas entities failed to observe corporate formalities or keep corporate records. For example, Zachary Wogtech, who worked as the Vice President of Operations for "Wine & Canvas Development" from August 2013 until summer of 2016, (Binder 2, Ex. 17, p. 4, lines 12-16 and p. 5, lines 2-11), testified that the "only records that [he] ever saw was a royalty report that was generated...by Tony or Tamara or Melissa." (*Id.*, p. 32, line 20-p. 33, line 4). Mrs. Scott testified that nobody had ever prepared a balance sheet, an income statement, or a profit and loss statement. (Binder 1, Ex. 23A, p. 50). Similarly, Mr.

Scott testified he didn't know whether either WNC or IP Holdings had any balance sheets, or any earnings statements/income statements. (Binder 2, Ex. 1, p. 135, line 16-p. 136, line 12). Mr. Scott testified that he did not know whether WNC had ever filed a tax return, and he didn't think that IP Holdings had ever filed one. (*Id.*, p. 136, lines 13-18). Mrs. Scott didn't think IP Holdings had a bookkeeper and when asked who keeps the financial records, she said they were "looking at having the taxes done, so somebody will." (Binder 1, Ex. 23A, p. 49). Mr. Scott repeatedly refused to answer questions regarding the records of IP Holdings "on the advice of counsel." (Binder 2, Ex. 1, p. 81, lines 21-25; p. 100, lines 15-20).

5. Fraudulent representations by the Scotts concerning the business

As noted above, one of the *Aronson* factors is fraudulent representations. The evidence of record indicates that Mr. and Mrs. Scott have repeatedly made misrepresentations about the Wine and Canvas business. First, they have repeatedly represented themselves as owners of the Wine and Canvas operation, while they contend that the actual owners are Mrs. Scott's parents. As one example, in an application for personal liability umbrella insurance, Mr. and Mrs. Scott identified themselves as "Self Employed Business Owner—Wine and Canvas." (Binder 1, Ex. 29). When asked why she had listed herself as a business owner on three documents even though she didn't own the business, Mrs. Scott responded, "Probably to get credit." (Binder 2, Ex. 1, p. 249, lines 1-7). In addition, as discussed above, Mr. Scott made misrepresentations in the bankruptcy schedules when he

indicated that WNC owed Scott Staffing $350,000, when there was no such debt owed to his company, and that WNC owed $250,000 to IP Holdings for "unpaid royalties" when WNC was never obliged to pay royalties to IP Holdings.

Furthermore, as discussed below, Wine and Canvas (or its agents) made a misrepresentation to the federal district court as to the "exclusive owner" of the Wine and Canvas trademark. (*See* Ex. 3 to Defendant's Response, p. 11, in which the district court observed that Wine and Canvas Development "affirmatively misrepresented the ownership of the Mark").

6. One entity/enterprise

When Ms. Pickell was asked about the business for which she worked in the position of Business Development Specialist, she testified, "They always just went by 'Wine & Canvas'" and that she "always just referred to them as 'Wine & Canvas'" and that in her dealings with licensees, they also referred to the business simply as "Wine & Canvas." (Binder 2, Ex. 18, p. 10, lines 1-15). To Ms. Pickell's knowledge (who kept records of royalty payments), nothing changed as of January 1, 2015 with respect to royalties and dealing with licensees. (*Id.*, p. 60, lines 10-25). Also, she was not aware of any purported transfer of the trademark or any rights associated with the trademark until she left in October 2017. (*Id.*, p. 61, pp. 1-11).

In addition, as further evidence that the business was operating as one enterprise, invoices from Davis & Sarbinoff for the underlying trademark/abuse of process litigation in 2011-2014 identify the client as "Wine & Canvas." There is no

apparent breakdown as to whether the legal services should be charged to any specific entity or individual. (Binder 2, Ex. 9).

Finally, after years of litigation, a jury trial, and an appeal, the Seventh Circuit described the "Wine & Canvas business" as if it was one entity operating various locations. In affirming the judgment for Muylle, the Seventh Circuit stated, "Wine & Canvas is a business that specializes in hosting events colloquially known as 'painting nights.'...Wine & Canvas operated locations in Indianapolis, Bloomington, and Oklahoma City." *Wine & Canvas Dev., LLC v. Muylle*, 868 F.3d 537 (7th Cir. 2017).

7. Mr. and Mrs. Scott's control of the business

The evidence shows that Mr. and Mrs. Scott, in fact, controlled the Wine and Canvas business. According to Mr. Wogtech, Mr. and Mrs. Scott were "absolutely" the people running and controlling the business. (Binder 2, Ex. 17, p. 21, line 24-p. 25, line 1). While he reported to Mr. Scott, he said Mrs. Scott "certainly was my boss as well," and "if she told me to jump I asked how high." (*Id.*, p. 15, line 25-p. 16, line 5). Similarly, as a salaried employee, Melissa Pickell's "understanding was Tony and Tamara were the main owners, they ran the company." (Binder 2, Ex. 18, p. 11, lines11-14). According to her, Mr. Scott was "president of Wine & Canvas in general," and Mrs. Scott was "the art director for the entire operation." (*Id.*, p. 12, lines 6-15). After Donald McCracken (Mrs. Scott's father and the putative owner of IP Holdings, LLC) passed away, his wife became the putative owner. Ms. Pickell,

however, noticed no difference or change in the operations of Wine & Canvas.. (*Id.*, p. 73, lines 3-8). According to Mr. Scott, although Kathy McCracken (Mrs. Scott's mother) now owns the business, she "does not run it" and "has never run it." (Binder 2, Ex. 1, p. 98, lines 6-10). She has no authority to write a check from its bank account; only Mr. and Mrs. Scott have such authority. (Binder 2, Ex. 1, p. 178, lines 10-19).

With respect to control over the payment of royalties, during the time Ms. Pickell worked there (from 2012 to 2017), "licensees would send electronic payments to Tony, Tony's bank account." (Binder 2, Ex. 18, p. 46, line 21-p. 47, line 5). And Tony Scott was "the one who provided oversight with respect to the money," and she believed Tamara Scott also got email notifications of royalty payments. (*Id.*, p. 47, lines 13-17).

Moreover, the Scotts control over the business and its funds is evidenced by their ability to have the Wine & Canvas business, whether WNC or IP Holdings had the money, make payments for their personal expenses, as discussed above.

8. Use of the entity to promote fraud and injustice

Finally, the single "Wine and Canvas" enterprise that is run by Mr. and Mrs. Scott, falsely and abusively asserted infringement of the "Wine and Canvas" trademark, causing the abuse of process and damages for which Mr. Muylle has a judgment. *See Wine & Canvas Dev., LLC v. Muylle*, 868 F.3d 534 (7th Cir. 2017) (affirming judgment for Muylle against WNC for abuse of process).

In light of all the circumstances described above, the Court concludes that it would be unjust to allow the Scotts and WNC to use IP Holdings' purported ownership of the trademark as a means to escape accountability for the abuse of process, while Mr. Muylle remains uncompensated for the damages caused by them, as determined by the jury in the underlying federal case. This is especially so where the abusive litigation was prosecuted by WNC to allegedly protect the very trademark that is at issue here, which the Scotts and WNC now claim is owned by IP Holdings.

II. Fraudulent Transfer

Muylle asserts fraudulent transfer as an alternative legal basis for its Turnover Motion. The statute that governs this alleged fraudulent transfer is Indiana Code § 32-18-2-14 which, as recently amended, provides:

> (a) A transfer made or an obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.
>
> (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

(1) the debtor retained possession or control of the property transferred after the transfer;
(2) the transfer or obligation was disclosed or concealed;
(3) before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;
(4) the transfer was of substantially all the debtor's assets;
(5) the debtor absconded;
(6) the debtor removed or concealed assets;
(7) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(8) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; and
(9) the transfer occurred shortly before or shortly after a substantial debt was incurred.

Prior to the amendment spelling out the factors in Subsection (b), Indiana courts considered similar factors known as the "badges of fraud" to determine whether a transfer was made with intent to defraud a creditor, and the existence of several of these badges may warrant an inference of fraudulent intent. *Cont. Cas. Co. v. Symons*, 817 F.3d 979, 988 (Ind. Ct. App. 2016). These "badges" include:

> (1) the transfer of property by a debtor during the pendency of a suit; (2) a transfer of property that renders the debtor insolvent or greatly reduces his estate; (3) a series of contemporaneous transactions which strip a debtor of all property available for execution; (4) secret or hurried transactions not in the usual mode of doing business; (5) any transaction conducted in a manner differing from customary methods; (6) a transaction whereby the debtor retains benefits over the transferred property; (7) little or no consideration in return for the transfer; and (8) a transfer of property between family members.

Id. at 988, *fn. 1, citing Otte v. Otte*, 655 N.E.2d 76, 81 (Ind. Ct. App. 1995).

Several factors indicating intent to defraud are shown here. First, it is undisputed that the transfer of the trademark from WNC to IP Holdings was during

the pendency of the underlying lawsuit between WNC and Mr. Muylle. According to the records of the United States Patent and Trademark Office, the assignment of the trademark at issue here had an execution date of January 1, 2015[2] and was recorded on April 30, 2016. (See Binder 1, Ex. 13). In November 2014, the jury found in favor of Mr. Muylle on his claims for abuse of process. (Ex. E, p. 3). As stated in the Domestication and Notice of Filing Foreign Judgment, the federal district court entered judgment against WNC on May 1, 2015 and later entered orders as to additional fees and costs. (See also, Ex. E, p. 3). Thus, the recorded "execution date" of the transfer (January 1, 2015) was after the jury verdict but before final judgment.

Second, it is also undisputed that the transfer of the trademark was between related entities (to the extent that they were even separate entities at all). As discussed above, WNC and IP Holdings had the same owners, the same manager, the same people running them and the same location (the northside Indianapolis location).

Third, the trademark was transferred for little consideration in proportion to its claimed value. The evidence reflects that the Wine and Canvas mark was transferred to a related entity for only $100 (Binder 1, Ex. 7), despite the repeated

[2]Even if the date of the transfer is considered to be January 1, 2012, that was still during the pendency of the underlying lawsuit, which was filed on November 29, 2011, as stated in the "Intellectual Property Agreement" purporting to transfer the mark (See Binder 1, Ex. 7, p. 1).

representations made by WNC in the underlying suit that its trademark was "*highly valuable*" and "*considered famous.*" (Binder 1, Exs. 19-22, ¶¶ 13, 14, 15 WNC's Proposed Findings of Fact). It should be noted that these claims as to the trademark's fame and high value were set forth in WNC's original complaint, dated November 28, 2011. (See 1:11-cv-01598, Dkt. 1-1, p. 4, ¶¶ 14, 15). Also, WNC's conduct in filing a trademark infringement claim and litigating it for several years through a four-day jury trial indicates that it believed the mark to be much more valuable than $100. Mrs. Scott testified in 2013 that the business was earning approximately $50,000 a month after expenses. (Binder 1, Ex. 6).

Fourth, the transfer of the trademark by WNC greatly reduced the value of its assets such that it became unable to pay its debts. In fact, after the effective date of the transfer of the "highly valuable" and "famous" trademark, WNC filed bankruptcy, indicating that its assets totaled $56,500, while total unsecured claims against it allegedly totaled over $1.3 million. (Binder 2, Ex. 7, pp. 8, 12).

Fifth, the evidence shows that WNC retained benefits of the trademark even after the transaction. WNC continued to use the trademark without payment of royalties to IP Holdings. (Binder 2, Ex. 18, p. 14, line 16-p. 15, line 3, and p. 29, line 25-p. 30, line 8, Melissa Beckner's testimony that Indianapolis location didn't pay royalties during the time of her employment). In addition, after January 1, 2012 (the date of the transaction), WNC continued to receive payments for royalties even though the agreement purported to give IP Holdings "the exclusive right to license

the mark and to generate income therefrom" beyond that date. (See Binder 1, Ex. 7, p. 2 and Binder 2, Ex. 23, showing multiple electronic deposits from Los Angeles, Fort Wayne, San Diego; see infra at p. 8).[3] Moreover, as mentioned above, the evidence shows that when WNC was no longer able to make the payments on Tamara's yacht for which it had guaranteed a loan, IP Holdings stepped in to make the payments and guarantee the loan, presumably with income earned from its royalties since that was its primary source of revenues.

Finally, the transfer was both secret and unusual. Notwithstanding years of discovery and pretrial motion practice in a trademark infringement case initiated by WNC, there was no mention to Muylle or to the federal court by WNC or the Scotts that on January 1, 2012, Mr. Scott had executed a document purporting to transfer the trademark. In fact, the purported transfer was not disclosed to Mr. Muylle or the federal court until a creditor's meeting in the bankruptcy on March 7, 2016. (Motion for Turnover, ¶ 13). The transfer was not recorded with the U.S. Patent and Trademark Office until April 30, 2016, and that recording listed an execution date of January 1, 2015. (Binder 1, Ex. 13).

The document purporting to transfer the trademark was also highly unusual. Indeed, it speaks in terms that are internally contradictory. (See Binder 1, Ex. 7).

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[3] In his recent pro supp deposition, Mr. Scott also testified that, while the bank statements at issue say, "AVA Ventures LLC DBA Wine and Canvas," Ava Ventures changed its name to Wine and Canvas Development LLC. (Binder 2, Ex. 1, p. 91, lines 7-25).

Paragraph 1 begins: "Transferor [WNC] hereby agrees and does transfer all of its rights, title and interest in and to the Intellectual Property [the "WINE AND CANVAS" trademark] as of the Effective Date [Jan. 1, 2012] to Transferee [IP Holdings]...." This straightforward transfer language, with a clear effective date, is followed by a contradictory proviso stating: "provided, however, that ownership of the Mark shall not vest in Transferee until the occurrence of any of the following (whichever shall occur first) ..." What follows are six potential events including "the trial on the merits in the Litigation [the federal lawsuit]" and "a written document executed by both Transferor and Transferee subsequent to date hereof transferring ownership of the Mark by Transferor to Transferee." Having apparently executed a transfer with the initial language, then taken away with the proviso, the document then adds another proviso: "provided, however, that in the interim, Transferee [IP Holdings] shall have and is hereby granted an irrevocable and exclusive license to use the Mark as it deems fit in its sole discretion, including, without limitation, the exclusive right to license the Mark and to generate income therefore." In other words, the document purports to give IP Holdings "in the interim" all of the elements and benefits of ownership while withholding the label.

The contradictory language of the document led to contradictory sworn testimony by Mr. Scott and contradictory statements by WNC's counsel in court. Mr. Scott testified during the 2014 federal court trial in Indiana: "It is Wine & Canvas Development that actually owns that mark." However, shortly before the

November 2014 trial, he signed an affidavit that was submitted in a Florida court stating that IP Holdings was the "exclusive owner of multiple marks" including "WINE AND CANVAS." (Binder 1, Ex. 10).

WNC's counsel was similarly misleading when he addressed the issue of ownership during the 2014 Indiana federal court trial. Without disclosing the January 1, 2012 Intellectual Property Agreement that he had drafted, he told the Court: "Wine & Canvas Development is the owner of the mark. An assignment of trademark is actually a procedural tool used in the United States Patent and Trademark Office, where you file an actual assignment of mark that officially changes the ownership of it. There is no evidence of an assignment here." (Binder 1, Ex. 12). Then, in proposed findings of fact submitted to the district court in March 2015, the same WNC counsel, represented that WNC was the exclusive owner of the trademark at all relevant times. (Binder 1, Exs. 20-22, p. 2 ¶ 7). Collectively, this evidence indicates that the purported transfer of the Wine and Canvas mark from WNC to IP Holdings was made with an intent to defraud creditors of WNC including Mr. Muylle.

In addition, the transfer is also voidable under Subsection (a)(2), because WNC did not receive reasonably equivalent value for the transfer and at the time of the transfer in early 2015, WNC reasonably should have believed that it would soon incur debts beyond its ability to pay as the debts became due. At that time, although the federal district court had not yet issued a final judgment, a jury had

already entered a verdict against WNC for abuse of process in the amount of $81,000. (See Domestication and Notice of Filing Foreign Judgment dated August 3, 2016). Later in 2015, the district court entered final judgment for that amount and then entered additional orders that it pay Muylle $175,882.68 and $1,661.30 for additional attorney's fees and costs. (See Verified Motion for Proceedings Supplemental, ¶ 1).[4] But after the adverse verdict was entered against it, WNC had transferred its most valuable asset and now claims inability to pay Mr. Muylle's judgment.

III. Res judicata and collateral estoppel

WNC has argued that Muylle's motion for turnover should be denied based on res judicata or collateral estoppel. While Mr. Muylle previously filed a similar turnover motion in proceedings supplemental in federal court (Ex. 1 to Defendant's response to turnover motion), the federal court held no hearing on the motion and expressly qualified the denial as "*without prejudice.*" (Ex. E, p. 19). A ruling "without prejudice" is not a final decision "on the merits." *Zaremba v. Nevarez*, 898 N.E.2d 459, 463 (Ind. Ct. App. 2008) ("Because Cause No. 629 was dismissed without prejudice, it was not a judgment on the merits.")

[4] On September 24, 2018, the district court ordered WNC to pay an additional $208,455.23 to Muylle pursuant to Mulle's Supplemental Petition Under the Lanham Act for fees and costs incurred from December 1, 2014 through October 31, 2017 (Dkt. 662), bringing the total amount owed by WNC to $462,780.43.

In order for a claim to be precluded under the doctrine of res judicata, the following four elements must be met: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Minix v. Canarecci*, 956 N.E.2d 62, 67 (Ind. Ct. App. 2011).

Similarly, collateral estoppel (also called issue preclusion) bars subsequent re-litigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former lawsuit and the same fact or issue is presented in a subsequent suit. There are three requirements for the doctrine of collateral estoppel to apply: (1) a final judgment on the merits in a court of competent jurisdiction; (2) identity of the issues; and (3) the party to be estopped was a party or the privity of a party in the prior action. *Nat'l Wine Spirits, Inc. v. Ernst Young, LLP*, 976 N.E.2d 699, 704 (Ind. 2012). Here, there was no "judgment" at all with respect to the prior turnover motion, much less a final one. Thus, the federal district court's denial of the motion "without prejudice" has no preclusive effect here.

In addition, the federal court's ruling on the prior turnover motion should be given little or no weight because this Court has the benefit of material evidence that was not presented to the federal court. In connection with the federal court motion,

Muylle submitted only two exhibits, referred to two previously filed exhibits, and requested a hearing in the event the court found more evidence to be needed. (See Ex. 1 to Defendant's Response to turnover motion). The federal court held no hearing; choosing instead to make a ruling without prejudice on a limited record. There is substantial additional evidence before this Court which leads to a different result.

IV. Jurisdiction

WNC contends that this Court lacks jurisdiction to address this motion, arguing that there needs to be a new claim involving IP Holdings. (Ex. 2 to WNC's Response to Motion for Turnover, p. 3). The Seventh Circuit, however, has held that a trial court has jurisdiction to address such a motion in proceedings supplemental, including motions that assert equitable alter ego theories. *See Dexia Credit Local v. Rogan*, 629 F.3d 612, 623 (7th Cir. 2010) (rejecting children's claim that the court did not have authority to adjudicate their personal property rights in supplemental proceedings, explaining that the argument was that they held property that belonged to the debtor). As the Seventh Circuit explained, "A district court may inquire as to whether third parties hold assets of the judgment debtor, and once it is discovered that a third party holds such assets, the court may order the third party 'to deliver up those assets to satisfy the judgment.'" *Id.* That is what the district court did in *Dexia* and that is what Muylle asks this Court to do here. *See also Rose v. Mercantile Nat'l Bank of Hammond*, 868 N.E.2d 772, 776 (Ind. 2007) (observing that judgment creditors "commonly invoke proceedings

supplemental to bring fraudulent transfer actions" and explaining that the only effect of a judgment in such a case is to "subject the property to execution as though it were still in the name of the grantor.") This procedure was also recognized as proper and appropriate by the federal district in its proceedings supplemental. (Ex. 3, to WNC's Response, p. 8, fn. 5: (construing "Muylle's motion to be part of proceedings supplemental in this case, by which a judgment creditor can obtain property belonging to a judgment debtor—in the debtor's own hands or in the hands of a non-party—in satisfaction of a judgment, *without the necessity for a separate suit.*")(emphasis added).

In addition, counsel for WNC has argued that IP Holdings has not been named as a party to these proceedings and needs to be. However, IP Holdings has had both notice and an opportunity to be heard. First, its resident agent and counsel is Mr. P. Adam Davis, the same lawyer who represents WNC in this matter and who represented both WNC and IP Holdings in the federal proceedings supplemental. As resident agent for IP Holdings, Mr. Davis was served with a subpoena for a Rule 30(B)(6) deposition of IP Holdings in this case, but nobody appeared. Indeed, Mr. Davis represented to this Court at the evidentiary hearing that he represents IP Holdings generally but not in this specific matter. Moreover, the evidence shows that Mr. Davis had represented IP Holdings in the prior federal court proceedings supplemental, including filing a response to Muylle's prior motion for turnover in which he asserted rights on behalf of IP Holdings. And Mr. Davis

attached that prior response as an exhibit to his response to the pending motion in this case. (See Ex. 2 to Defendant's Response to Motion for Turnover).

Second, it is undisputed that Mr. Scott is the President and manager of both WNC and IP Holdings. As a judgment debtor and a party to these proceedings, Mr. Scott was notified of these proceedings supplemental, including the Motion for Turnover. In fact, Mr. Scott was deposed by Mr. Muylle's counsel on September 4, 2018 and testified that he is still the manager of IP Holdings and that there is nobody else managing that entity. (Binder 2, Ex. 1 p. 10, lines 15-22). And at that deposition, the turnover motion was specifically referred to and discussed after Mr. Davis repeatedly instructed Mr. Scott, "Don't answer any question about IP Holdings." (Binder 2, Ex. 1, p. 75, lines 11-p. 81, line 25). (*See id.* at p. 76, lines, 1-6, stating, "Just so that our record is clear, we have pending in the current proceeding a Motion for Turnover, which alleges that based on alter ego and fraudulent transfer and successor liability IP Holdings will be responsible for the obligations of Wine and Canvas Development…"). Under these particular facts, IP Holdings unquestionably had actual notice of these proceedings and an opportunity to assert its interests and did in fact do so.

IT IS THEREFORE ORDERED THAT:

The purported transfer of the Wine and Canvas trademark from Wine and Canvas Development, LLC to Wine and Canvas IP Holdings, LLC shall be avoided to the extent necessary to satisfy Mr. Muylle's judgment; and

Mr. Muylle may levy execution on the trademark or its proceeds, including any royalties received by Wine and Canvas IP Holdings, LLC from the licensees.

SO ORDERED this 15th day of February, 2018.

Burnett Caudill, Magistrate Judge
Marion County Superior Court No. 5

Distribution to all counsel of record via the Court's e-filing system.