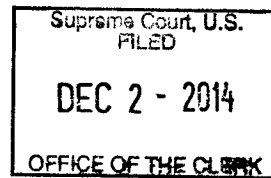


14-665

No. \_\_\_\_\_



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**In the Supreme Court of the United States**

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TED GATZAROS AND MARY GATZAROS,  
*Petitioners,*

v.

THE SAULT STE. MARIE TRIBE OF CHIPPEWA  
INDIANS, *et al.*,  
*Respondents.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Majority Opinion of the United States Court of Appeals for the Sixth Circuit conflicts with the decisions of this Supreme Court and other Circuit Courts of Appeals, thereby changing the well-established rules of contract construction which require specific contract provisions govern over general provisions to resolve disputes caused by two conflicting contract provisions?
2. Whether the Majority Opinion is in direct conflict with the decisions of this Supreme Court, other Circuit Courts of Appeals and the fundamental rules of contract construction which require the application of extrinsic evidence when there is an ambiguity caused by conflicting contractual language?
3. Whether the Majority Opinion, in upholding the judicial rewriting of paragraph 8 of the Guaranty, is in direct conflict with the decisions of this Supreme Court and the other Circuit Courts of Appeals which have held the courts must give effect to contracts as written by the parties, and cannot rewrite them?
4. Whether the Majority's failure to find the Respondents waived their contract defenses contradicts established case law in the other Circuit Courts of Appeals that a guaranty is a contract which must be enforced as written?
5. Whether the Majority's Opinion conflicts with the well-settled standard for reviewing a Motion to Dismiss under Fed.Civ. R. 12(b)(6) when it failed to view the facts in the light most favorable to the Petitioners or accept their well-pled allegations?

**PARTIES**

1. Ted Gatzaros, Plaintiff and Petitioner;
2. Maria Gatzaros, Plaintiff and Petitioner;
3. Sault Ste. Marie Tribe of Chippewa Indians,  
Defendant and Respondent;
4. The Kewadin Casino Gaming Authority, Defendant  
and Respondent.

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## PETITION FOR A WRIT OF CERTIORARI

Ted Gatzaros, deceased, and Maria Gatzaros respectfully petition for a Writ Certiorari for this Supreme Court to review the August 1, 2014 Opinion of the United States Court of Appeals for the Sixth Circuit Opinion. See App. A; pp. 1-24.

## OPINIONS BELOW

The July 9, 2013 Opinion and Order (1) Granting the Defendants' Motion to Dismiss for Failure to State a Claim and (2) Denying Motion to Hold Plaintiffs' in Contempt of Court of the United States District Court for the Eastern District of Michigan. See App. B; pp. 25-63. The Opinion and Order is reported at *In re Greektown Holdings, LLC et. al. Debtor(s), Ted Gatzaros and Maria Gatzaros v. Sault Ste. Marie Tribe of Chippewa Indians, and the Kewadin Casino Gaming Authority*, 2013 WL 3456976 (2013).

The August 1, 2014 Opinion of the United States Court of Appeals for the Sixth Circuit Opinion (split decision) is reported at *Gatzaros et al. v. Sault Ste. Marie Tribe of Chippewa Indians, et al.*, 575 Fed.Appx. 549 (2014). See App. A; pp. 1-24.

The September 5, 2014 Opinion of the United States Court of Appeals for the Sixth Circuit Opinion which denied Petitioner's Motion for Rehearing En Banc, or in the alternative Rehearing. See App. C; pp. 64-65. This Opinion has not been reported.

## JURISDICTION

On November 14, 2012, Petitioners filed suit against the Respondents, the Sault Ste. Marie Tribe of

Chippewa Indians (“Tribe”) and the Kewadin Casinos Gaming Authority (“Authority”), in the Wayne County Circuit Court in Detroit, Michigan (Case No. 12-15185). The Petitioners sought declaratory relief concerning their rights under the Guaranty to modify the Funding Obligations so they were no longer subject to limitations which prevent repayment of the debt. The Petitioners also claimed the Respondents had waived all of their contractual defenses. On December 14, 2012, Respondents removed the action to the United States District Court for the Eastern District of Michigan pursuant to 28 U.S.C. § 1334. Removal was necessary as the underlying action was related to a bankruptcy action that was pending in the United States Bankruptcy Court for the Eastern District of Michigan (Case No. 08-53104). Thus, the District Court had original jurisdiction under 28 U.S.C. § 1334. On February 22, 2013, District Court Judge Paul D. Borman entered an Order withdrawing the reference of this action, in its entirety, from the Bankruptcy Court.

On July 9, 2013, United States District Court Judge Borman issued an Opinion and Order (1) Granting the Defendants’ Motion to Dismiss for Failure to State a Claim and (2) Denying Motion to Hold Plaintiffs in Contempt of Court of the United States District Court for the Eastern District of Michigan. See App. B; pp. 25-63. The Petitioners then appealed the District Court’s Opinion and Order to the United States Court of Appeals for the Sixth Circuit. On August 1, 2014, the Court of Appeals issued its Opinion, which was a split decision affirming the District Court’s Opinion and Order. See App. A; pp. 1-24. The Petitioner then sought rehearing En Banc, or in the alternative panel rehearing. The September 5, 2014 Opinion of the

United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion for Rehearing En Banc, or in the alternative panel rehearing. See App. C; pp. 64-65.

This United States Supreme Court has jurisdiction to review the Opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1).

## **STATEMENT OF THE CASE**

### **A. Facts Giving Rise To This Case.**

On July 28, 2000, the Petitioners had their membership interests in Monroe Partners, LLC (Monroe) redeemed pursuant to separate Amended and Restated Limited Liability Company Redemption Agreements ("Redemption Agreements"). See App. D; pp. 66-132. Monroe was the owner of 50% of Greektown Casino, LLC, which held an ownership interest in the casino located in Detroit, Michigan. The value of Petitioners' membership interest at the time of the redemption was \$132,500,000.00. Simultaneously with the redemption, Monroe transferred the redeemed interest to Kewadin Greektown Casino, LLC ("Kewadin") pursuant to an Amended and Restated Limited Liability Subscription Agreement ("Subscription Agreement") in exchange for the amount due to the Petitioners ("Subscription Amount"). See App. E; pp. 133-179. Under the Subscription Agreement, all sums due to Monroe from Kewadin for the Subscription Amount would be paid directly to the Petitioners as intended third party beneficiaries. Simultaneously with the execution of the above Agreements, the Respondents, the Tribe and Authority, executed a Guaranty Agreement to Fund Subscription Agreement ("Guaranty") to which the Petitioners were

intended third party beneficiaries. See App. F; pp. 180-197. Under the Guaranty, the Respondents were obligated to fund the Subscription Amount, upon Kewadin's default in paying the Petitioners the Subscription Amount. The Subscription Amount is the underlying debt owed by Kewadin as obligor.

Paragraph 2 of the Guaranty, entitled "Funding Obligations" set forth the Respondents' duty to fund the Subscription Amount subject to the limitation terms set forth in the Guaranty. However, Section 8, entitled "Waivers" specifically, clearly and unambiguously stated the Petitioners had the right to modify any of the terms of the Funding Obligations. See App. F; pp.187-188. Paragraph 2 is expressly entitled "Funding Obligations" and that Paragraph contains all of the terms to which the Respondents' Funding Obligations are subject. One of the terms contained within Paragraph 2 states Respondents' Funding Obligations are subject to limitations. Paragraph 8 authorized Petitioners to modify, without notice, any of the terms within the Paragraph 2 Funding Obligations. Therefore, Petitioners had the right to remove, by modification, the limitation terms set forth within the Paragraph 2 Funding Obligations.

According to the Respondents, Paragraph 8 is in direct contradiction with the later and general provision in Paragraph 10 which provided that no modifications to the Guaranty could occur without the Respondents' consent. See App. F; pp. 188-89. The Waivers also stated the Respondents had unconditionally and irrevocably waived each and every defense under the principles of guaranty and



suretyship which would impair their obligations under the Guaranty. See App. F; pp. 187-188.

The Paragraph 8 Waivers contained no language which authorized the Petitioners to modify, without notice, the “underlying debt” or its defined term, the “Subscription Amount”. See App. F; pp. 180-197. There is no language in the Guaranty which defined the Funding Obligations as the underlying debt. *Id.* The Funding Obligations are separately defined in Paragraph 2 of the Guaranty as terms of the Respondents’ duty to “fund” the Subscription Amount, subject to limitations. See App. F; p. 182. Kewadin, as obligor, is the party that had the duty to pay the underlying debt. Kewadin’s duty, unlike that of the Respondents’ Funding Obligations, is not a duty to fund nor is it subject to limitations. Therefore, the underlying debt (Subscription Amount) and the Funding Obligations are separately defined terms and obligations which are not interchangeable.

On May 29, 2008, both Kewadin and Monroe filed for Chapter 11 bankruptcy protections. However, the Petitioners are still owed in excess of \$74 million. Upon this default, the Respondents became obligated to repay the debt under the Guaranty. However, due to the limitations to which the Respondents’ Funding Obligations were subject, the Respondents did not repay any sums due. On October 18, 2012, Petitioners exercised their rights under the Waivers provision of the Guaranty, and modified the Funding Obligations, without notice to the Respondents, so the Funding Obligations were no longer subject to the limitations that precluded repayment of the debt. See App. G; pp. 198-199.

### **B. Wayne County Circuit Court Proceedings.**

On November 14, 2012, Petitioners filed suit against the Respondents in Wayne County Circuit Court in Detroit, Michigan (Case No. 12-15185). In their Complaint, the Petitioners sought declaratory relief concerning their rights under the Guaranty to modify the Funding Obligations so they were no longer subject to limitations which prevent repayment of the debt. Petitioners also sought a finding that the Respondents waived all of their contract defenses under the Guaranty. However, on December 14, 2012, Respondents removed the action to the United States District Court for the Eastern District of Michigan as the underlying action was related to a bankruptcy that was pending in the United States Bankruptcy Court for the Eastern District of Michigan.

### **C. District Court Proceedings.**

On February 22, 2013, District Court Judge Paul D. Borman entered an Order withdrawing the reference of this action, in its entirety, from the Bankruptcy Court. On February 6, 2013, Petitioners filed a First Amended Complaint for Declaratory Relief. On March 4, 2013, Respondents filed their Motion to Dismiss for Failure to State a Claim and Motion to Hold Gatzaros Plaintiffs in Contempt of Court for Violating Court Order. On July 9, 2013, United States District Court Judge Borman issued an Opinion and Order (1) Granting the Defendants' Motion to Dismiss for Failure to State a Claim and (2) Denying Motion to Hold Plaintiffs' in Contempt of Court of the United States District Court for the Eastern District of Michigan. See App. B; pp. 25-63.

### **D. Appellate Court Proceedings.**

The Petitioners then appealed the District Court's Opinion and Order to the United States Court of Appeals for the Sixth Circuit. On August 1, 2014, the Court of Appeals issued its Opinion, which was a split decision, affirming the District Court's Opinion and Order. See App. A; pp. 1-24. The Petitioner then sought rehearing En Banc, or in the alternative, a panel rehearing. On September 5, 2014, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Motion for Rehearing En Banc, or in the alternative Rehearing. See App. C; pp. 64-65.

### **REASONS FOR GRANTING THE WRIT**

#### **I. Review Is Warranted Because the Majority Opinion Conflicts with the Well-Established Rules of Contract Construction of this Supreme Court and Other Circuits, Concerning the Resolution of Conflicts Between Specific and General Contract Provisions, Which Require the Specific Language to Govern.**

On August 1, 2014, in a split opinion, a Majority Panel of the Sixth Circuit issued an Opinion holding that the Petitioners attempted modification of the Guaranty's Funding Obligations, to eliminate its subject limitations terms which prevented repayment of the debt, must fail because the modification was not approved by the Respondents as generally set forth in Paragraph 10 of the Guaranty. See App. A; pp. 7-8. However, Paragraph 8, "Waivers", clearly and specifically authorized the Petitioners to modify, without notice, the terms of the Funding Obligations.

Within Paragraph 2 Funding Obligations are limitation terms which have prevented repayment of the debt. See App. F; pp. 187-188. Under Paragraph 8, Petitioners had the right to modify and remove these limitation terms as they are within the Funding Obligations set forth in Paragraph 2.

It is clear Paragraph 8 is a specific provision which concerns the right to modify the terms of the Funding Obligations solely, while Paragraph 10 is a general provision which concerns modifications of any terms of the entire Guaranty. By enforcing the general provision over the specific provision, the Majority's Opinion is in direct conflict with the well-established rules of contract construction of this Supreme Court and other Circuit Courts of Appeals, including the Sixth Circuit. These other Courts have overwhelmingly ruled specific contract provisions govern over general ones when there is a conflict between the two. This Court must grant this Writ of Certiorari as the Majority's Opinion changes the fundamental rules of contract construction and will inhibit other courts from seeking and enforcing the parties' contractual intent when faced with two conflicting contract provisions.

The Majority Opinion conflicts with the holding of this Supreme Court in *Smoot v. United States*, 237 U.S. 38, 42; 50 Ct. Cl. 404, 25 S.Ct. 540, 59 L.Ed. 829 (1915). In *Smoot*, this Supreme Court held in a contract dispute, specific marks prevail over generic ones. *Id.* Further, the Majority's Opinion conflicts with earlier decisions of the Sixth Circuit which have held the familiar rules governing the construction of contracts require, where there are general and specific provisions

relating to the same thing, the specific provisions control. *S. Sur. Co. v. Town of Greeneville*, 261 F. 929 (6th Cir. 1920). *Freeland v. Freeland*, 110 F.2d 966, 968 (6th Cir. 1940). The Majority Opinion also conflicts with the Sixth Circuit's own precedent where it held the first of two conflicting clauses or provisions in a contract controls. *Cent. Jersey Dodge Truck Ctr., Inc. v. Sightseer Corp.*, 608 F.2d 1106, 1110 (6th Cir. 1979). Therefore, since Paragraph 8 comes before its conflicting Paragraph 10, the Sixth Circuit's own precedent requires the enforcement of the earlier Paragraph 8 which authorized Petitioners to modify the Funding Obligations without notice.

Further, in contrast to this Sixth Circuit Panel, the First Circuit Court of Appeals has held it is a well-known precept for the interpretation of contracts that specific provisions in a contract trump the general provisions. *Puerto Rico Tel. Co. v. SprintCom, Inc.*, 662 F.3d 74, 96 (1st Cir. 2011). The Second Circuit Court of Appeals has held "specific language in a contract will prevail over general language where there is an inconsistency between two provisions." *Paneccasio v. Unisource Worldwide, Inc.*, 532 F.3d 101, 111 (2d Cir. 2008); *Karmely v. Wertheimer*, 737 F.3d 197, 203 (2d Cir. 2013). The Fifth Circuit declared a specific contractual provision prevails over a general provision. *In re Davis Offshore, L.P.*, 644 F.3d 259, 266 (5th Cir. 2011). The Seventh Circuit has held specific provisions in a contract govern over more general provisions. *Auto Club Ins. Ass'n v. States Sentry Ins.*, 683 F.3d 889, 891 (8th Cir. 2012). The Eleventh Circuit has also held that, in the face of any inconsistency between a general provision and specific provisions, the specific provisions

prevail. *Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1295 (11th Cir. 2013).

It is clear from these numerous rulings it is fundamental to the rules of contract construction, when there is a conflict between the two, the specific provision prevails over a general provision. The Majority Opinion directly conflicts with this well-established rule. In this case, the Paragraph 8 specifically authorized the Petitioners to modify the terms of the Funding Obligations without notice to the Respondents. Therefore, the Majority erred when it enforced the general Paragraph 10 language which prohibited modifications of the Guaranty without the Respondents' consent. The Majority refused and/or failed to apply the well-established rule of contract construction which requires the enforcement of specific provisions over general ones. This Majority ruling prohibited the Petitioners from engaging in a modification authorized by the Guaranty and thereby prevented them from collecting in excess of \$74 million which remains due and owing.

The negative implications of the Majority's Opinion upon the general rules of contract construction are widespread. The Majority Opinion will prevent courts from seeking the contractual intent of the parties which is set forth in specific language. Based upon the Majority Opinion, courts can apply general terms over specific terms thereby ignoring language which is crystal clear on a specific topic. In violation of the freedom of contract, courts can now impose their own beliefs for contractual obligations by ignoring the parties' intent as set forth in specific, rather than general language. In order to resolve the conflict

between the Majority and the numerous decisions of this Court and other Circuits, this Court must grant this Writ of Certiorari. In order to protect the well-established rules of contract construction, the intent of the parties and the freedom of contract, justice requires this Court to grant this Writ of Certiorari.

**II. Review Is Warranted as the Majority's Decision Is in Direct Conflict with Decisions of this Supreme Court, Other Numerous Circuit Courts and the Fundamental Rules of Contract Construction Which Requires the Use of Extrinsic Evidence When There Is an Ambiguity Caused by Conflicting Contract Language.**

It must be noted it is the Petitioners' position the Guaranty is not ambiguous and Paragraph 8 should have been enforced as written as it relates both to their right to modify the terms of the Funding Obligations as well as the enforcement of the waiver of Respondents' contractual defenses. The Dissent to the Majority Opinion contends the Petitioners have presented plausible interpretations of Paragraph 8 on these issues based upon the language which is in direct conflict of the interpretation of the Respondents. See App. A; pp. 18, 20. Controlling case law of this Supreme Court, the other Circuit Courts of Appeals, the Dissent, as well as the fundamental principles of contract interpretation, holds where there exists two contradictory interpretations of contractual language, there exists an ambiguity which must be resolved by the application of extrinsic evidence to determine the parties' contractual intentions. See App. A; p. 20. The

Majority's Opinion, in upholding the District Court's dismissal of the Petitioners' Complaint, is in direct contradiction to the well-established law as it fails to find the parties' contractual intent, using extrinsic evidence, in light of the ambiguity created by the Petitioners' plausible explanation of Paragraph 8. See App. A; pp. 23-24 This Supreme Court must grant this Writ of Certiorari as the Majority Opinion has set a precedent for other courts to impose their own meaning of contracts. When faced with ambiguities, the Majority Opinion will be a basis for other courts to refuse to look for the actual intent of the parties from extrinsic evidence.

This United States Supreme Court's prior opinions are in conflict with the Majority as it has held, if a contract be ambiguous in its terms, parol evidence, such as would be competent to remove an ambiguity in other written contracts, may be resorted to for the purpose of explaining its meaning. *N. Assur. Co. of London v. Grand View Bldg. Ass'n*, 183 U.S. 308, 331, 22 S. Ct. 133, 141, 46 L. Ed. 213 (1902); *Am. Propeller & Mfg. Co. v. United States*, 300 U.S. 475, 479-80, 57 S. Ct. 521, 523, 81 L. Ed. 751 (1937). Even the Sixth Circuit conflicts with the Majority as it has previously held when a court determines that a contract provision is ambiguous, then it "may use traditional methods of contract interpretation to resolve the ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence." *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir. 1996). Further, the Second Circuit has held when the obligations are not clearly stated—when they are ambiguous—the parol evidence rule does not prevent the introduction of extrinsic evidence to aid in



interpretation of the contract. *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). The Seventh Circuit's Opinion is also in conflict with the Majority as it has held if the contract is ambiguous, as a matter of law, then extrinsic and parol evidence is admissible to explain the terms of the ambiguous contract. *Sunstream Jet Exp., Inc. v. Int'l Air Serv. Co.*, 734 F.2d 1258, 1266 (7th Cir. 1984). The Eighth Circuit has also held where a contract is ambiguous, use of extrinsic evidence for interpretation is proper; the resolution of the ambiguity is a question of fact to be determined by a jury. *Fitch v. Doke*, 532 F.2d 115, 117 (8th Cir. 1976); *Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984).

In this case, Paragraph 8 clearly states Petitioners have the right to modify the terms of the Funding Obligations without notice to the Respondents. The Respondents countered that Paragraph 8 can only be interpreted to mean Petitioners only had the right to modify the "underlying debt", rather than the Funding Obligations without notice. The Majority accepted the Respondents' position. See App. A; pp. 16-18. However, the Dissent stated Paragraphs 8 and 10 are inherently contradictory as one authorizes modifications without notice and the other does not. See App. A; p. 15. The Dissent states the District Court and the Majority improperly concluded the intent of the parties was unambiguous in that Paragraph 10 prohibited modifications of the Guaranty. See App. A; pp. 12-24. The Dissent stated the District Court and the Majority cannot simply ignore portions of a contract to avoid an ambiguity. See App. A; p. 15. Further, the Dissent points out that since the Petitioners' interpretation of the modification provisions is plausible, the proper way

to resolve the ambiguity between the two conflicting provisions is to order a remand of the case and give the parties an opportunity to establish their intentions through extrinsic evidence. See App. A; p. 20. Concerning the modification terms set forth in Paragraph 8, the Dissent, not the Majority, is consistent with the fundamental rules of contract interpretation, as accepted by this Supreme Court and the other Circuits, which require the resolution of a contract ambiguity through the application of extrinsic evidence.

Paragraph 8 also states the Respondents waived each and every defense of any nature under the principles of guaranty and suretyship. The Petitioners contend this language constitutes a broad waiver of defenses which included a waiver of the very contract defenses used by Respondents to obtain the dismissal of this case. On the other hand, the Respondents claim the waiver did not include contract defenses, but only those defenses set forth in the *Restatement Third of Guaranty and Suretyship*. See App. A; p. 11. In contrast, the Dissent declared:

However, this is not the only plausible interpretation of the “Waivers” provision. Instead, when this Court examines the provision in its entirety, rather than disassociating the second paragraph from the first, it appears that the first paragraph of the provision provides a broad waiver of numerous rights and the second paragraph expands, rather than constricts, those rights. What this paragraph of the “Waivers” provision does or does not do is inescapably linked to the language contained in the first

paragraph. It is problematic to elevate one of these readings over the other, especially since the meaning of “Funding Obligations” in relation to the parties’ rights under the Guaranty is so unclear. Because there is more than a single plausible interpretation of the Guaranty’s “Waivers” provision, extrinsic evidence would seem to be required in order to divine the intent of the parties as to their rights and responsibilities under the contract. Obviously, this conclusion is contrary to the approach followed by the majority opinion, which affirms the district court’s ruling on Defendants’ motion to dismiss without the benefit of extrinsic evidence.

Because the language of the Guaranty is ambiguous, I would reverse the decision of the district court granting Defendants’ motion to dismiss and remand the case to allow for presentation of extrinsic evidence. The pursuit of clarity would greatly benefit by so doing. See App. A; pp. 23-24.

It is evident the Dissent is consistent with, while the Majority contradicts, the numerous decisions of this Supreme Court, the Sixth Circuit and other Circuit Courts of Appeals which require the introduction of extrinsic evidence to remedy any ambiguities in a contract. Fundamental contract law, as supported by the decisions of numerous Courts, including this Supreme Court, requires these ambiguities be resolved by the remand of this case for trial and the introduction of extrinsic evidence to determine the parties’

contractual intentions as to the modification and waiver of defenses issues.

This United States Supreme Court has held “it is the appropriate function of courts of justice to enforce contracts according to the lawful intent and understanding of the parties.” *Bronson v. Rodes*, 74 U.S. 229, 245, 19 L. Ed. 141 (1868). This Court must grant this Writ of Certiorari because the Majority’s Opinion, fails to apply the fundamental rules of contract construction of using extrinsic evidence to resolve ambiguities, and fails to find the lawful intent and understanding of the contracting parties. Justice requires a resolution of the conflict between the Majority Opinion and the principles established by this Supreme Court and other Circuits. There cannot be a basis for other courts to rely upon to avoid their responsibilities to find the parties’ intent, in the face of ambiguities, through the use of extrinsic evidence.

**III. Review Is Warranted as the Majority Opinion Is in Direct Conflict with the Decisions of this Supreme Court and Other Circuit Courts of Appeals Which Have Held Courts Cannot Rewrite Contracts for the Parties.**

It is a fundamental axiom of this United States Supreme Court, the other Circuit Courts of Appeals, and the accepted rules of contract construction, that a court cannot rewrite the contract for the parties. The Majority’s Opinion directly contradicts this axiom as it affirmed the District Court’s rewriting of Paragraph 8 so that the Petitioners no longer had the right to modify the Funding Obligations so they were no longer subject to limitation terms that prevented repayment.

The Majority wrongfully held, without any evidence, Paragraph 8 was “largely lifted from a standard Michigan UCC form”. See App. A; pp. 7-9. The standard UCC form allows for the modification of the terms of the “underlying debt” without notice to the guarantors. Thus, the Majority rewrote Paragraph 8 to say Petitioners had the right to modify the “underlying debt” (not the Funding Obligations) without notice to the Respondents. See App. A; pp. 7-9. The Dissent held it “was not clear from the language of the Guaranty that the parties themselves intended to embrace the district court and majority’s interpretation”. See App. A; p. 19. After declaring the Petitioners have offered a plausible explanation of the disputed language of the Guaranty, the Dissent stated:

The district court and majority may not resolve the lack of clarity of the language of paragraph 2 and the contradiction between paragraphs 8 and 10 **by reading new meaning into a contract that plausibly reflects the parties’ intent**. Rather, the proper way to resolve the ambiguity in this contract is to remand the case and give the parties an opportunity to establish their intent through extrinsic evidence. See App. A; p. 20. (Emphasis added).

Contrary to accepted law and contract principles, the Majority rewrote Paragraph 8 by removing the words “Funding Obligations” and replacing them with the words “underlying debt”. The Majority’s actions wrongfully prevented Petitioners from eliminating the limitation terms from the Funding Obligations which prohibited repayment of the debt. Under the Guaranty, the Respondents’ Funding Obligations and

Kewadin's underlying debt (Subscription Amount) are separately defined terms which are not interchangeable. The Majority's Opinion is in direct contradiction with the holdings of this Supreme Court in *Gavinzel v. Crump*, 89 U.S. 308, 319, 22 L. Ed. 783 (1874) in which it declared the "court cannot import words into the contract"... which would make it materially different in a vital particular from what it now is". Even the Sixth Circuit has previously held a court is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties in the terms of their written contract. *Savedoff v. Access Grp., Inc.*, 524 F.3d 754 (6th Cir. 2008). The Majority Opinion contradicts the law of the First Circuit which has held "[p]arties generally are bound by the terms of an agreement freely and openly entered into, and courts cannot make better agreements than the parties themselves have entered into or rewrite contracts merely because they might operate harshly or inequitably." *Schaefer v. Indymac Mortgage Servs.*, 731 F.3d 98, 107 (1st Cir. 2013).

The Second Circuit makes it clear a "court may not imply a term based solely on its personal notions of fairness for the 'ascertainment of the intention of the parties is paramount.'" *In re World Trade Ctr. Disaster Site Litig.*, 754 F.3d 114, 123 (2d Cir. 2014). The Seventh Circuit also disagrees with the majority as it has held "[i]t is the court's job to respect the terms of the contract and not manufacture additional terms that are missing." *Abraham v. Washington Grp. Int'l, Inc.*, 766 F.3d 735, 740 (7th Cir. 2014). The Eight Circuit has also held the court is bound to enforce its terms as they are written, as it is improper for a court to "substitute a different meaning for that which the

parties clearly intended and embodied in unambiguous terms.” *Christoffersen v. Yellow Book USA*, 536 F.3d 947, 949 (8th Cir. 2008).

It is evident the fundamental law of contract construction, as supported by this Supreme Court and the other Circuits, requires the courts to enforce contracts as written according to the intent of the parties. This law provides courts are precluded from rewriting contracts for the parties by adding or changing terms to meet the courts’ expectation of fairness and equity. As the Dissent points out,

...an equally plausible view of view is that paragraph 8 was an important, bargained-for-right to unilaterally modify the Funding Obligations. The contracts in this case involve involved large deals and large amounts of money, and the Guaranty was meant to protect Plaintiffs’ assets. See App. A; p. 19.

By wrongfully holding the Funding Obligations actually means the underlying debt, the Majority interfered with this important and bargained for right to modify the Funding Obligations. The Majority wrongfully upheld the District Court’s unilateral change in the language of Paragraph 8 to prevent such a modification based upon its own notions of fairness.

This Writ of Certiorari must be granted as the Majority Opinion is a wrongful change to the fundamental and well established law that precludes courts from rewriting contracts. To allow the Majority Opinion to stand would shake the very foundations of contract law and principles to its core. The Writ must be granted as the Majority Opinion is a wrongful

change in this well-protected law which requires courts to determine the parties' intentions rather than changing contracts to meet their own expectations of equity. In essence, the Majority Opinion abrogates the freedom of contract which every citizen of the United States enjoys. There can be no such freedom to contract when the parties' intentions, as written, can be destroyed by the stroke of a court's pen. This Writ must be granted to prevent the Majority's Opinion from being used as a basis to usurp contractual freedoms.

**IV. The Majority's Failure to Find the Respondents Waived Their Contract Defenses Contradicts Established Case Law of Other Circuits That a Guaranty Is a Contract Which Must Be Enforced as Written by the Parties.**

Paragraph 8 is entitled "Waivers" as the Respondents expressly and unambiguously waived **each and every defense under the principles of guaranty and suretyship**. Paragraph 8 is clearly a broad waiver of defenses provision rather than a limited one. Under established law, this Guaranty is considered a contract which must be enforced by the Courts as written giving effect to each word and phrase as intended by the Parties. Contrary to the law of the various Courts of Appeals, the Majority ignored the contractual nature of the Guaranty and failed to interpret it based upon the broad waiver language provided. Although the Guaranty never contained any such language, the Majority held the waiver was limited to only those contained in the *Restatement Third of Guaranty and Suretyship*. See App. A; pp. 10-11. The *Restatement* does not include the very contract



defenses raised by the Respondents to obtain the dismissal of the Petitioners' Complaint.

The Writ of Certiorari must be granted as the Majority's Opinion is a change to guaranty law and now prevents a guaranty from being construed as a contract. The Majority Opinion wrongfully prevents the enforcement of all of the words and phrases provided in the guaranty. The Majority's Opinion wrongfully assails the freedom of contract and now requires such guaranty contracts to be enforced as the courts see fit rather than as intended by the parties.

The broad Waivers, in Paragraph 8, stated that the Respondents waived each and every defense under the principles of guaranty and suretyship. The word "principle" is defined as a

fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin of others. *Black's Law Dictionary, Sixth Edition.*, p. 1193.

Therefore, this broad waiver of defenses included the rules which furnish the very basis and origin of guaranties. Under established law, contract law is the basis and origin of guaranties. The Second Circuit held a "guaranty" is a contract of secondary liability. *Terwilliger v. Terwilliger*, 206 F.3d 240 (2d Cir. 2000). The Fifth Circuit has held a "guaranty is, of course, a form of contract". *Westlake Petrochemicals, L.L.C. v. United Polychem, Inc.*, 688 F.3d 232, 245 (5th Cir. 2012).

The Eight Circuit has held a guaranty is “a contract by which the guarantor promises to make payment if the principal debtor defaults.” *Three River Telco v. TSFL Holding Corp.*, 300 F.3d 924, 926 (8th Cir. 2002).

Even the Dissent agreed the Guaranty was a contract as follows:

As explained above, the Guaranty is construed as a contract, and Michigan contract interpretation principles apply. Therefore, at the motion to dismiss stage, this Court must determine whether the ordinary and plain meaning of the Guaranty is clear and unambiguous such that only one interpretation of this waiver language is plausible. This Court interprets the contract as a whole, as it is necessary to consider all of the provisions of a contract in order to determine the meaning of any particular part as well as the meaning of the whole document. See App. A; p. 22.

Thus, it is clear that contract law is a main principle of a guaranty which then must be included in any interpretation of the breadth of the Paragraph 8's waiver of defenses.

The parties and drafters of this Guaranty expressly stated the waivers included “each and every” defenses under the “principles” of a guaranty. One of the accepted principles of a guaranty is that a guaranty is a contract. Therefore, each and every defense to a contract is included in the waiver, such as the Respondents’ alleged defense Paragraph 8 conflicts with Paragraph 10, and Paragraph 10 controls therefore Petitioners do not have the right to modify

the funding obligations without notice. The Guaranty contains no language which declares *Restatement Third of Guaranty and Suretyship* governs which defenses have been waived. As stated above, the Majority cannot rewrite contracts and add terms for which they do not contain. The Majority's Opinion directly conflicts with established case law which precludes it from adding language to Paragraph 8 which limits the waiver of defenses to only those defenses included in the *Restatement Third of Guaranty and Suretyship*. The Majority was required by well-established contract law and principles to enforce the words as written, including the words "each and every" and "principles" to give effect to a broad waiver of defenses.

In determining the parties' contractual intent, effect must be given to the words and terms of the contract. *Abraham v. Washington Grp. Int'l, Inc.*, 766 F.3d 735, 740 (7th Cir. 2014). In construing waiver of defense language in the Guaranty, including the effect of the words "each", "every" and "principles", this Supreme Court has held contracts are construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense. *U.S. Fid. & Guar. Co. v. Guenther*, 281 U.S. 34, 37, 50 S. Ct. 165, 166, 74 L. Ed. 683 (1930). The Circuits agree the cannons of contract construction require the courts to give effect to each and every word according to their plain meaning. *In re Johns-Manville Corp.*, 759 F.3d 206, 214 (2d Cir. 2014); *Druco Restaurants, Inc. v. Steak N Shake Enterprises, Inc.*, 765 F.3d 776, 782 (7th Cir. 2014); *Cellport Sys., Inc. v. Peiker Acoustic GMBH & Co. KG*, 762 F.3d 1016, 1024 (10th Cir. 2014). By law the Majority was

required to give effect to the words “each”, “every” and “principles” in Paragraph 8, according to their plain and ordinary meanings, to determine which of the Respondents’ defenses had been waived. It is evident the Majority, in conflict with existing well-established law, failed to do so.

The words “each” and “every” are, by their plain and ordinary meaning, expansive words which require the “fullest” possible, and “all that can be” must be considered. *Webster’s New World College Dictionary*, at 446, 493. As set forth above, the word “principle” refers, by its plain and ordinary meaning, to the “ultimate source” or “origin” of something. *Id.* at 1141. By law, the ultimate source, or origin, of a guaranty, is a contract. Thus, by applying contract construction principles of enforcing each and every word, according to their plain and ordinary meaning, each and every contract defense, to the fullest extent possible, was waived by the Respondents under the Paragraph 8. It is clear the Majority violated the well-established rules of contract construction, as set forth by this Supreme Court and the other Circuit Courts of Appeals, when it refused to enforce each and every word in Paragraph 8 which required Respondents to waive each and every contract defense, including the contract defense that Paragraph 10 was enforceable over Paragraph 8 to prevent Petitioners’ modification, without notice, of the Funding Obligations.

The freedom of contract is essential to liberty in the United States. This Supreme Court, and the other Circuit Courts, have proactively protected the freedom of contract by requiring courts to enforce contracts as written and giving effect to each word according to

their plain and ordinary meaning. In order to protect the freedom of contract, this Supreme Court must grant this Writ of Certiorari. The Majority Opinion abhors such freedom as it seeks to impose its own vision of a contract, by ignoring words or by failing to give them effect. If not reversed, the Majority's Opinion can be used as a basis by other courts to abrogate parties' freedom of contract and their contractual intent. Justice therefore requires the granting of this Writ of Certiorari.

**V. The Majority Conflicts with the Well-Settled Standard for Reviewing a Motion to Dismiss, under Fed. R. Civ. P. 12(b)(6), When it Failed to View the Facts in a Light Most Favorable to the Petitioners or Accept Their Well-Pled Allegations as True.**

Petitioners' Complaint for Declaratory Relief was dismissed by the District Court by Respondents' Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6). It is fundamental to this Court Rule the courts considering such a motion view the factual allegations most favorable to the plaintiff and accept the well-pled allegations as true. The Petitioners alleged in their Amended Complaint Paragraph 8 of the Guaranty, by its own language, gave them the right to amend the Funding Obligations without notice. The Petitioners also alleged the Paragraph 8 waiver of defenses, by its very language, required the Respondents to waive each and every contract defense they had. In direct contravention to the laws of this Supreme Court, and the Circuits concerning Fed.R.Civ.P. 12(b)(6), neither the District Court nor the Majority viewed factual allegations most favorable to the Petitioners nor did

they consider the Petitioners' allegations as true. As the factual allegations were based upon actual language in the Guaranty, there was at least an ambiguity which should have caused the Majority to find the intentions of the parties through the use of extrinsic evidence. This Supreme Court should grant this Writ of Certiorari as the Majority Opinion has essentially rewritten the established rules concerning a Motion to Dismiss thereby precluding plaintiffs' well-plead and supported complaints from receiving fair consideration from courts.

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Even this United States Supreme Court has held a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) must be viewed in the light most favorable to the plaintiff and all the well-pleaded allegations of the complaint must be accepted as true. *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Even another panel of the Sixth Circuit has held "[w]e accept all the Plaintiffs' factual allegations as true and construe the complaint in the light most favorable to the Plaintiffs." *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 716 (6th Cir. 2005).

Other Circuits have similarly have held in ruling on motion to dismiss pursuant to Rule 12(b)(6), the district court accepts all well-pled facts as true, viewing them in the light most favorable to the plaintiff. *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 204 (5th Cir. 2007). *Williams v. Meese*, 926

F.2d 994, 997 (10th Cir. 1991). *Smith v. Laughlin*, 5 F.3d 547 (10th Cir. 1993). Further, the reviewing court must also “resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff.” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993).

It is clear Petitioners’ allegations concerning the modification and waiver of defenses were well pled as they were consistent with the actual language of Paragraph 8. Even the Dissent stated there was more than one plausible interpretation of Paragraph 8 as to the modification and waiver of defense terms. See App. A; p. 23. The Majority held the Petitioners actually “misconstrue the meaning of the waiver language” found in Paragraph 8. See App. A; p. 7. By using such dismissive language, it is clear the Majority failed to accept the Petitioners’ allegations as true, or view the facts most favorable to the Petitioners, especially when the plain and ordinary meaning of the language actually supported the Petitioners’ positions. It required the Majority changing and ignoring clear contractual language for it to find Petitioners had no right to modify the Funding Obligations or rely upon a waiver of contractual defenses. Such action by the Majority runs contrary to the well-accepted standard for determining a Motion to Dismiss under Rule 12(b)(6). Even the Dissent recognized, in the face of two conflicting interpretations of Paragraph 8, the proper resolution required remand to allow for the presentation of extrinsic evidence to resolve such an ambiguity, rather than the dismissal of the case. See App. A; pp. 23-24.

The Majority's change of the long-accepted standard, for determining such a Motion to Dismiss, has created prejudice to future plaintiffs whose well-pled allegations will be ignored in favor of a court's determination as to what the correct and fair facts should be. Thus, in order to protect plaintiffs from the partiality of courts, and to protect the established Rule 12(b)(6) standard of review, this Court must grant this Writ of Certiorari.

### CONCLUSION

For the reasons stated above, Petitioners respectfully request their Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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