No. 18-

IN THE

Supreme Court of the United States

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a tax court in applying fraudulent transfer principles for imposing transferee liability with respect to a taxpayer must utilize the fraudulent transfer law in the state where the taxpayer lived, or whether the tax court is free to apply fraudulent transfer law from any state in which the tax court may arbitrarily choose. Likewise, whether, after properly planning his affairs to minimize his overall federal income tax liability, and in light of the tax court and Ninth Circuit applying the wrong body of law, a taxpayer may be liable pursuant to I.R.C. § 6901 of the Internal Revenue Code for, *inter alia,* the conduct of third parties who purchased the taxpayer's business when the taxpayer had no involvement with, or actual knowledge of, the wrongful conduct of the third party and where that third party's conduct occurred months after the transaction closed.

PARTIES TO THE PROCEEDINGS

The Petitioner is Michael A. Tricarichi, Transferee. The Respondent is the Commissioner of Internal Revenue.

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One of the opinions of the court of appeals is unpublished, but available at 752 Fed. Appx. 455. (App 1a-11a). The other opinion is a memorandum of the court of appeals (App. 12a-14a) and is reported at 908 F.3d 588. The memorandum findings of fact and opinion and supplemental memorandum opinion of the tax court (App. 32a-95a; 17a-31a) are reported at T.C. Memo 2015-201 and 2016-132 respectively and are available on Lexis at 2015 Tax Ct. Memo LEXIS 2010 (U.S. T.C. Oct. 14, 2015) and 2016 Tax Ct. Memo LEXIS 131 (U.S. T.C. July 18, 2016) respectively. A decision by the tax court was entered on July 29, 2016 (App. 15a-16a).

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2018. A petition for panel rehearing was denied on January 7, 2019. App. 96a. On March 22, 2019, Justice Kagan extended the time within which to file a petition for writ of certiorari to and including June 6, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case concerns whether Petitioner Michael A. Tricarichi ("Petitioner") properly and legally planned a transaction to minimize his overall federal income tax liability and, in determining whether such tax planning was proper, whether the tax court and Ninth Circuit applied the proper law in determining that Petitioner was liable for the conduct of unrelated third-party purchasers

months after the sale of Petitioner's stock in Westside Celular, Inc. ("Westside").

In 2012, the Commissioner of Internal Revenue sought to hold Petitioner responsible as a transferee pursuant to I.R.C. § 6901 of the Internal Revenue Code of 1986, as amended ("I.R.C.") for an estimated $15.1 million in taxes that were not paid by the purchaser of Petitioner's Westside stock. The tax court ruled in Commissioner's favor and held that Petitioner was liable as a transferee. App. 15a-16a, 95a. The court of appeals had jurisdiction pursuant to 26 U.S.C. § 7482(a)(1). In relying upon *Slone v. Commissioner*, 810 F.3d. 599, 604-606 (9th Cir. 2015) ("*Slone I*") and *Slone v. Commissioner*, 896 F.3d. 1083, 1086 (9th Cir. 2018) ("*Slone II*"), and further referencing the two separate and independent federal and state law prongs under *Commissioner v. Stern*, 357 U.S. 39 (1958), the Ninth Circuit affirmed the tax court in a memorandum and held that a recast of Petitioner's sale of stock in Westside resulted in a "transfer" pursuant to Ohio fraudulent transfer law which, in turn, triggered transferee liability pursuant to I.R.C. § 6901. The tax court further held, and the Ninth Circuit affirmed, that Petitioner was liable as a result of actions taken by the purchaser of the Westside stock, including the borrowing of money under a loan, even though Petitioner had no involvement in, or actual knowledge of, the post-closing actions taken by the buyer. Likewise, the tax court held, and the Ninth Circuit affirmed, that a loan procured by the buyer, with no involvement by the Petitioner, and the speed at which such loan was repaid by the buyer, could be used as proof in an action against Petitioner even though Petitioner had no ability to affect the speed of such repayment. Lastly, the tax court held, and the

Ninth Circuit affirmed that, in determining whether there was transferee liability pursuant to I.R.C. § 6901, it was unnecessary to use the controlling state's fraudulent transfer statute (*i.e.,* Ohio), but rather "any" state's uniform fraudulent transfer statute, such as Arizona, could be used.

Westside Cellular

- Westside was incorporated in Ohio on March 4, 1988. (ER259 ¶ 2).

- In 2003, Westside received a large cash distribution as the settlement for a lawsuit which had been brought by Westside against one of its suppliers ten years prior. (ER197 lines 10-19).

- While considering options for the future of Westside, Petitioner was approached to sell Westside by MidCoast Credit Corp. ("MidCoast") and Fortrend International LLC ("Fortrend"), companies that Petitioner understood to be in the debt collection business. (ER25-26; ER265 ¶ 36; ER199 line 21 to ER200 line 8; ER187 line 20 to ER188 line 10).

- To evaluate the competing proposals, Petitioner retained the Ohio law firm of Hahn Loeser & Parks LLP ("Hahn Loeser"), which had represented Westside before an administrative agency in its protracted dispute with various wholesale providers. (ER4-25; ER264 ¶ 32).

- Petitioner also retained the nationally known accounting firm of PricewaterhouseCoopers LLP ("PwC") to advise Petitioner on the federal income tax consequences of the stock purchase proposals. (ER27; ER266 ¶ 43).

- Because it offered a greater purchase price for his stock, Petitioner ultimately decided to pursue the offer made by Fortrend to maximize the return on his investment in what would be a fully taxable stock sale. (ER27; ER265 ¶¶ 38; 41).

- Over the course of several months, Petitioner's advisors vetted Fortrend's stock purchase offer and negotiated it to closure in a Stock Purchase Agreement dated September 9, 2003. (ER41).

- Nob Hill, Inc. ("Nob Hill"), an affiliate of Fortrend, was the acquisition vehicle which ultimately purchased Petitioner's Westside stock. (ER41; ER267 ¶ 52).

Fortrend's Distressed Debt Strategy

- During the vetting process, Petitioner and his advisors became aware that the pricing of Fortrend's offer was based, in part, on Fortrend's belief that it could reduce Westside's contingent income tax liability (thereby increasing the value of the company) by implementing a distressed debt strategy to produce tax deductions which would offset the income arising from the wholesale provider settlements. (ER42-43; ER117 line 20 to ER120 line 15).

- This strategy was consistent with Petitioner's understanding that Fortrend was in the debt collection business. (ER199 line 21 to ER200 line 8; ER171 line 20 to ER172 line 4; ER187 line 20 to ER188 line 10).

- At the time, Fortrend's distressed debt strategy was only a hypothetical; it was not made part of, or in any way referenced in, the Stock Purchase Agreement and, whether it was implemented, the buyer was contractually obligated to "satisfy fully" any Westside income tax liability. (ER35; ER426 §5.2(a)).

- The distressed debt strategy was not actually implemented by Fortrend until almost two months after the stock sale closed when, on November 6, 2003, an affiliate of Fortrend purported to contribute high basis, low value debt to Westside. (ER43; ER395).

- Petitioner had no involvement whatsoever in Westside after the sale nor did Petitioner have any actual knowledge of the details of the distressed debt transaction employed by Westside. App. 75a. (ER387).

- Early in the following year, the new owners of Westside caused the company to file its 2003 corporate income tax return reporting a bad debt deduction arising from the contributed debt. (ER43; ER387 line 15).

- This reporting, and the later disallowance of the bad debt deduction by the Internal Revenue Service ("IRS"), gave rise to the tax liability of Westside, which the government now seeks to collect from Petitioner. (ER44-45; ER279 ¶ 110; ER281-82 ¶¶ 118-19, 120-21; ER358-67).

- PwC, Petitioner's tax advisor, evaluated Fortrend's distressed debt strategy at a conceptual level and concluded that the strategy was neither illegal nor improper. (ER266 ¶¶ 45-47; ER501-05; ER119 line 5 to ER120 line 15).

- PwC also determined that there was no issue of transferee liability for Petitioner pursuant to I.R.C. § 6901 and that Petitioner should proceed with the stock sale. App. 43a. (ER504; ER169 line 20 to ER170 line 9; ER145 line 25 to ER146 line 8; ER117 line 20 to ER131 line 5).

- Hahn Loeser similarly determined that Fortrend's stock purchase offer should be negotiated to closure, with terms included in the Stock Purchase Agreement that would help to ensure that Petitioner was paid for his stock and that the purchaser would honor its contractual obligation to "satisfy fully" any Westside income tax liability. (ER173 line 24 to ER175 line 3; ER464 § 5.2(a)).

Third Party Financing for the Stock Purchase

- Petitioner and his advisors were aware of, and relied upon, the condition that the stock purchase would, in large part, be financed by a loan to the

buyer from Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. (“Rabobank”), a global financial institution. (ER38; ER161 lines 4-8).

- To implement the transaction, Nob Hill obtained a 30-day, approximate $29 million variable rate loan from Rabobank and obtained a $5 million demand loan from Moffatt International (“Moffat”). (ER440-49; ER496-99).

- On September 9, 2003, $29,900,000 in Rabobank loan proceeds and $5,000,000 in Moffatt loan proceeds were credited to Nob Hill’s Rabobank account. (ER272 ¶ 71; ER272-73 ¶ 73).

- Neither Westside nor Petitioner were a party to the loan agreements between or among Nob Hill, Rabobank, and Moffatt. (ER440-49; ER496-99).

Closing the Stock Sale

- On September 9, 2003, the stock purchase price was transferred from Nob Hill’s account at Rabobank to Petitioner’s account and, at that moment, Petitioner lost all interest in and control of Westside. (ER275 ¶ 86; ER400).

- Petitioner reported receipt of the purchase price on his 2003 income tax return, paying more than $5 million in income tax on the resulting long-term capital gain. (ER46; ER288 ¶ 163; ER369 line 54; ER376 line 8).

- As a result, Petitioner was paid for his stock with Rabobank and Moffatt loan proceeds that were unencumbered by a security interest in Westside's assets. (ER271-72 ¶ 70; ER232-33; ER277 ¶¶ 97, 98).

- Petitioner had no involvement or impact in any aspect of the loan or its speed of repayment, both of which, according to the tax court, formed the basis of Petitioner's transferee liability. App. 50a-53a; 70a-73a.

Post-Closing Events

- Immediately after the closing, and again with no involvement of Petitioner, the purchaser [of the Westside stock] repaid the Moffat and Rabobank loans. App. 53a-54a.

- Thereafter, on November 6, 2003, nearly two months after the stock sale closed, the purchaser caused Westside to engage in a distressed debt transaction previously contemplated by Fortrend. (ER43; ER395).

- Westside's new owners then determined that, without the actual knowledge or involvement of Petitioner, the transaction gave rise to a write-off of "high basis/low value" debt that the new owners had caused to be contributed to Westside; the resulting bad debt deduction was reported on Westside's 2003 federal income tax return. App. 54a-57a. (ER387 line 15).

- The IRS later examined Westside's income tax return, disallowed the bad debt deduction, and assessed against Westside the tax, interest, and penalties which the IRS now seeks to collect from Petitioner pursuant to I.R.C. § 6901. (ER45; ER358-67).

Procedural History

- On September 21, 2012, Petitioner filed a petition in tax court challenging the IRS's notice of transferee liability. (ER41-57).

- After trial, the tax court issued a memorandum opinion in March, 2015 in favor of the IRS, holding that under both Ohio and federal law, in substance, Petitioner received Westside's cash rather than any third party loan proceeds, subjecting Petitioner to transferee liability pursuant to I.R.C. § 6901. App. 32a-95a (ER19-87).

- After further proceedings and issuance of a supplemental memorandum opinion addressing the computation of interest, a final decision was entered by the tax court on July 29, 2016. App.15a-16a.

- In a summary memorandum, with no analysis or rationale of Petitioner's claims or arguments, the Ninth Circuit affirmed the decision of the tax court in November, 2018 in a memorandum, and denied Petitioner's petition for panel rehearing on January 7, 2019. App 12a-14a, 96a.

REASONS FOR GRANTING THE PETITION

This case raises fundamental and important issues of law: (1) whether both the tax court and the Ninth Circuit under *Stern* – the landmark Supreme Court case which promulgated a two-part federal and state law test – used the proper law in applying the facts to the law; (2) whether a taxpayer can plan a transaction to properly minimize his federal income tax liability; and (3) whether one person can be held liable for the conduct of another when the first party had no ability to impact any wrongful conduct and where such alleged wrongful conduct occurred after the relationship between the parties had ended.

This case is of vital importance to the business community in the United States. It is sometimes the case that, in a corporate merger or acquisition, the acquiring company is worth less than the seller. It is equally common that a purchaser assumes debt to accomplish such a transaction. It is commonplace that the purchaser sells part of the acquired business after the acquisition. In that case, the purchaser may use the proceeds from the sale to decrease or extinguish the debt which the buyer has assumed. The decision in this case by the tax court, and subsequent affirmance by the Ninth Circuit, will have a chilling effect on such acquisitions. There is essentially no finality to a sale because a seller can always be held accountable for the actions of a buyer, regardless of the time that passes subsequent to the transaction, and without regard to whether the seller has any ability to control the actions of the buyer.

A. The tax court and the Ninth Circuit applied the wrong body of law by holding that constructive fraud principles did not require actual fraud as required under applicable Ohio law. This court should grant this petition to determine whether, in a tax case, the tax court and Ninth Circuit must apply the proper state law.

1. The Ninth Circuit failed to state the legal basis for its affirmance of the tax court's finding under the state law prong of the two-part *Stern* test.

I.R.C. § 6901 does not impose substantive tax liability on a transferee but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. *Commissioner v. Stern*, 357 U.S. 39, 42 (1958). To take advantage of this procedure, the Commissioner must establish an independent basis under applicable state law for holding the transferee liable for the transferor's debts. I.R.C. § 6901; *Commissioner v. Stern*, 357 U.S. at 45.

As stated *infra*, the Ninth Circuit memorandum opinion here is notable for its lack of specificity or rationale relating to the affirmance of the tax court's conclusion that Petitioner was liable to the Commissioner pursuant to I.R.C. § 6901 and, more specifically, under the Ohio Uniform Fraudulent Transfer Act ("OUFTA"). On this particular issue, the memorandum opinion is entirely limited to the following statement:

> "Under the state-law prong, the tax court properly determined that Westside's cash

> was 'transferred' to Tricarichi under Ohio UFTA." *See* Ohio Rev. Code Ann § 1336.01(L) (defining "transfer" as "every direct or indirect … method of disposing of or parting with an asset")."

App. 14a.

This sparse holding by the Ninth Circuit fails to articulate (i) the principles pursuant to Ohio law that were relied upon by the tax court in its determination that Petitioner was liable under OUFTA, or (ii) any legal basis for the tax court's determination that Petitioner was liable under OUFTA. Under these circumstances, Petitioner is entitled to assume that the Ninth Circuit adopted the tax court's legal analysis relating to Petitioner's liability under OUFTA. Since the determination of liability under OUFTA is a question of law, the tax court's finding on the OUFTA issue is subject to *de novo* review by the Ninth Circuit. *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 183 (2d Cir. 2013). The tax court's determination of legal issues relating to Petitioner's liability under OUFTA is entitled to no deference.

2. The Ninth Circuit's decisions in *Sloan I* and *Sloan II* are not determinative of Petitioner's liability under OUFTA.

The only cases cited in the Ninth Circuit's memorandum opinion under OUFTA and relating to the substantive issue of Petitioner's liability for Westside's tax liabilities are *Slone I* and *Slone II*. App. 14a. However, these cases are of marginal relevance for the second prong of this Court's two-part test under *Stern* (*i.e.*, state law issues)

because *Slone I* and *Slone II* were decided by the Ninth Circuit under Arizona law, rather than Ohio law. In relying heavily and exclusively on the two *Slone* cases, the Ninth Circuit completely overlooked material distinctions between Ohio law and Arizona law – particularly on the issue of when distinct transactions may be collapsed and treated as a single transaction for purposes of determining fraudulent transfer liability.

In addition, the basis for the Ninth Circuit's decision in *Slone II* was fundamentally different from the tax court's basis for its conclusion in this case that Petitioner had liability under OUFTA. In *Slone II*, the Commissioner argued that the petitioners were liable under Arizona law on a substance over form theory – that the Court "… should look to the substance of the transactional scheme to see that Berlinetta was merely the entity through which Slone Broadcasting passed its liquidating distributions to Petitioners." 896 F.3d at 1087. The Ninth Circuit, in *Slone II*, agreed that the holding by the tax court erroneously "… viewed itself as being bound by the form of the transactions rather than looking to their substance." *Id.*

In contrast, the tax court in this case specifically declined to address the substance over form theory of liability under OUFTA. (ER59; 62). Rather, the tax court determined that Petitioner had liability under OUFTA for two reasons: (i) because the loans from Rabobank and Moffat that produced the funds to acquire Petitioner's Westside shares were "shams," and (ii) because the stock sale transaction would be recharacterized under Ohio law as a *de facto* liquidation of Westside. App. 68a-73a, 81a-83a. The substance over form analysis utilized in *Slone II* was not addressed by the tax court in this case.

Thus, the Ninth Circuit in affirming the tax court decision, relied almost exclusively on both *Slone* cases, which solely applied Arizona law.

3. Both the Ninth Circuit and the tax court misapprehended Ohio law pertaining to the collapsing doctrine.

The tax court's decision, affirmed by the Ninth Circuit, was predicated upon its finding that it was required to collapse the various transactions between or among Petitioner, Westside, Nob Hill, and the lenders that funded the acquisition of the Westside stock, into a single transaction because Petitioner had "constructive knowledge" of Fortrend's entire fraudulent scheme. In rejecting Petitioner's argument that he was not aware of Fortrend's plan as a whole to avoid Westside's taxes, the tax court opined as follows:

> "If this is true, it is irrelevant. Finding that a person had constructive knowledge does not require that he has actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he 'should have known' about the tax-avoidance scheme."

App. 75a.

The tax court's embrace of this constructive knowledge test was based upon various decisions applying the substantive law of a state or states other than Ohio. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 636 (2d Cir. 1995) (applying New York law); *Diebold Foundation,*

Inc. v. Comm'r, 736 F.3d 172, 186 (2d Cir. 2013) (holding under New York law that multiple transactions could be collapsed if the ultimate transferee had "actual or constructive knowledge of the entire scheme"); *Salus Mundi Foundation v. Comm'r*, 776 F.3d 1010, 1020 (9th Cir. 2014) (adopting the *Diebold* rationale that under New York law, collapsing was proper where the transferee had constructive knowledge of a tax avoidance scheme).

Further, the tax court failed to cite a single Ohio case which permitted the collapsing of multiple transactions into a single transaction based solely upon constructive knowledge. On the contrary, the tax court acknowledged that "… Ohio courts have not addressed this precise scenario. …" App. 73a. Nevertheless, in the absence of supporting Ohio authority, the tax court adopted the constructive knowledge test expressed in " … judicial interpretations of fraudulent transfer provisions similar to Ohio's … ." *Id.*

In reaching its legal conclusion that collapsing was required because Petitioner had constructive knowledge of Fortrend's tax avoidance scheme, the tax court misapprehended Ohio law as clearly and squarely discussed in *Premier Therapy, LLC v. Childs*, 2016 Ohio 7934, 2016 Ohio App. LEXIS 4813 (Ohio Ct. App. 2016). The holding in *Premier Therapy* that "[m]ultiple transactions designed to perpetuate a fraud can be considered a single transaction," is properly and solely limited to cases involving actual rather than constructive fraud. This is clear from the court's citation to *Masonic Health Care, Inc. v. Finley*, 892 N.E.2d 942 (Ohio Ct.App. 2008), a case that involved actual fraud, and its citation to *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859 (Ohio

1998), which held that the acts of a co-conspirator can be attributed to each participant in the conspiracy. *Premier Therapy* itself involved a determination of liability under both the OUFTA and a "dependent civil conspiracy claim" that was based on a finding of malicious intent. *Premier Therapy*, 2016 Ohio App. Lexis 4813, at *57; *see also Williams*, 700 N.E.2d at 868 (providing the elements of a civil conspiracy claim under Ohio law); *Cont'l Cas. Co. v. Symons*, 817 F.3d 979, 989, 992-93 (7th Cir. 2016) (upholding application of substance over form principles under Indiana fraudulent transfer law where the trial court concluded that assets were transferred with actual intent to hinder, delay or defraud).

The tax court acknowledged, and the Ninth Circuit affirmed, that collapsing the various transactions in this case into a single transaction was a necessary prerequisite for establishing Petitioner's liability under OUFTA. App. 81a, 83a. By declaring that Petitioner's lack of actual knowledge of Fortrend's alleged entire tax avoidance plan or scheme was "irrelevant" and imposing liability based solely upon Petitioner's purported constructive knowledge (*i.e.*, he should have known), the tax court clearly misapplied substantive Ohio law in deciding the state law prong of the two-part *Stern* test for imposing transferee liability pursuant to I.R.C. § 6901. App. 75a.

B. The tax court and the Ninth Circuit have denied Petitioner his right to properly plan his affairs in order to minimize his federal income tax liability.

In the landmark case of *Gregory v. Helvering*, 293 U.S. 465 (1935), this Court held that:

> "[i]t is quite true that if a reorganization in reality was effected within the meaning of subdivision (B), the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. *United States v. Isham*, 84 U.S. (17 Wall.) 496, 506 (1873); *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395, 396, 50 S.Ct. 169, 74 L.Ed. 504; *Jones v. Helvering*, 63 App.D.C. 204, 71 F.(2d) 214, 217."

Id. at 469. (Emphasis added).

The tax court and Ninth Circuit have now clearly stated that, in fact, Petitioner had no legal right to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits. *Id*. This position explicitly runs counter to this Court's decision in *Gregory v. Helvering*.

Here, Petitioner had a clear "non-tax" purpose for completing the transaction. The tax court itself found such fact to be true, but then completely ignored its own finding by stating that the transaction "was entered into solely to evade Westside's federal and Ohio tax liabilities." App. 92a-93a. If the Ninth Circuit had actually performed a proper *de novo* review, it would have addressed the tax court's failure to consider the legal precedent cited above and the proper application of the facts to such law. Precedent states that even assuming *arguendo* that Petitioner did not have a non-tax motive for the transaction (which is clearly rebutted by the tax

court's own statement), the fact is that such a motive is entirely permissible and not grounds to therefore impose transferee liability, as was done here.

In applying economic substance principles, it is the subjective purpose of the taxpayer against whom those principles are being applied that should be the focus of the inquiry. *See, e.g.*, *Reddam v. Commissioner*, 755 F.3d 1051, 1057-58 (9th Cir. 2014) ("[T]he Ninth Circuit generally applies a two-prong inquiry addressing . . . the *subjective motivation of the taxpayer* (whether the taxpayer had a non-tax business purpose for the transaction).") (emphasis added). While it is not disputed that taxes were taken into account *by Fortrend* in setting the price it offered for the Westside stock, from Petitioner's perspective, acceptance of that offer resulted in a fully taxable economic return of greater than $34 million. Accordingly, because Petitioner paid more than $5 million in tax, it cannot be seriously argued that Petitioner "intended to do anything other than acquire tax deductions." *Sacks v. Commissioner,* 69 F.3d 982, 987 (9th Cir. 1995). Completely independent of any tax considerations, Petitioner intended to make a $34 million return on his investment, consistent with his overall federal income tax planning.

In examining the characteristics of Petitioner's non-tax business purpose for selling his Westside stock, the fact that a lower economic return (and, in turn, lower tax liability on the stock sale) might have been realized had Petitioner, rather than selling his stock to Fortrend, chosen to use Westside as a vehicle for making other investments, does nothing to negate the overriding purpose of realizing a non-tax economic return. As this Court has held, choosing between different forms for a

transaction in order to maximize the after-tax economic return does not eliminate the underlying business purpose for the transaction. *Frank Lyon Co. v. United States*, 435 U.S. 561, 579 (1978) (noting that because "the tax laws affect the shape of nearly every business transaction," the fact that favorable tax consequences were taken into account does not negate the business purpose for a transaction); *Coltec v. United States*, 454 F.3d 1340, 1357 (Fed. Cir. 2006) ("[T]here is a material difference between structuring a real transaction in a particular way to provide a tax benefit (which is legitimate) and creating a transaction, without a business purpose, in order to create a tax benefit (which is illegitimate).").

Further, in its conclusory analysis of the federal prong of the two-part test under *Stern,* for purposes of I.R.C. § 6901, the tax court not only failed to give proper recognition to Petitioner's non-tax business purpose for selling his stock, but also the tax court summarily and erroneously concluded that "the transaction by which Nob Hill 'purchased' Westside stock … had no economic substance … ." App. 92a. In making the objective inquiry under the economic substance test, "the question is whether a reasonable investor would enter into [the] transaction for its possible investment gains." *Reddam,* 755 F.3d at 1060. Neither the tax court nor the Ninth Circuit ever addressed this question. This issue was clearly raised in briefing to both the tax court and the Ninth Circuit.

The importance of this issue cannot be overstated. In *Frank Lyon*, this Court held that:

> "[W]here, as here, there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation of rights and duties effectuated by the parties."

435 U.S. at 583-84.

Applying objective economic substance principles in a context similar to this case, the Ninth Circuit reversed the district court in *Peter Pan Seafoods, Inc. v. United States*, 417 F.2d 670 (9th Cir. 1969) and held that the acquisition by a new company (Ajax) of debt issued by a corporation (New Harris) should not, in substance, be treated as the corporation acquiring its own debt in a taxable transaction. In doing so, the Ninth Circuit noted that "[w]e accept the [district court's] findings of fact, but we hold that the court drew improper legal conclusions from them." *Id.* at 672.

Ajax was established as a new company to acquire New Harris's debt primarily to avoid the income tax that would otherwise have been due if New Harris had purchased it directly. *Id.* at 672. Ajax was established by the president of New Harris for this tax avoidance purpose and over 85 percent of Ajax's stock was owned by the president and other New Harris shareholders. *Id.* at 671-72. The New Harris debt was, in large part, acquired with proceeds from a third party loan that Ajax pledged the soon-to-be-acquired debt to secure. *Id.* at 671. Ajax's lender was also

assured that New Harris would prepay the debt promptly after Ajax purchased it and that Ajax would use those funds to repay the loan. *Id.* at 672. Notwithstanding the primary tax motive for the transaction, the fact that financing was to be secured by the New Harris debt, and assurances from New Harris that the debt would promptly be repaid with corporate funds, the Court held that that transaction had independent economic significance and should be recognized for tax purposes. *Id.* at 672-73. Irrespective of common control over the companies, the role of Ajax and a third party lender distinguished the facts in *Peter Pan* from cases where the form of a transaction was disregarded. *Id.* at 673-74 (distinguishing *Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945), *United States v. General Geophysical Co.*, 296 F.2d 86 (5th Cir. 1961) and *Lynch v. United States,* 192 F.2d 718 (9th Cir. 1951) and holding that a transaction entered into for tax purposes will be regarded when it "was not done by the taxpayer, but by others, both in form and in substance").

The facts in this case follow those in *Peter Pan* although here – unlike Ajax – Nob Hill had no relationship to or with Petitioner and was in no way controlled by Petitioner. In this case, more than $34 million in cash changed hands between at least three unrelated parties in a transaction which generated more than $5 million in federal tax liability for Petitioner. As in *Peter Pan*, the involvement of unrelated third parties – including Rabobank – and the insertion of third-party loan proceeds gives the stock sale independent economic substance, requiring that it be recognized for federal income tax purposes. As in *Peter Pan*, the fact that Rabobank had a springing interest in the purchased stock and was given assurances (by Nob Hill, not Petitioner) that its loan would

be quickly repaid does nothing to change the analysis. As in *Frank Lyon*, Rabobank had a "'real and substantial risk' such that 'should anything go awry'" with Fortrend's post-closing plan to use Westside's assets to cover Nob Hill's obligation on its note, Rabobank's capital and assets were exposed. *Sacks*, 69 F.3d at 987 (quoting *Frank Lyon*, 435 U.S. at 580).[1] Although the terms of the stock sale were, in part, formed by Fortrend's tax considerations, as in *Peter Pan* where the transaction was chosen "because of the tax that would be incurred," the stock sale here "was not done by the taxpayer, but by others, in form and in substance," and it is properly regarded as a genuine multi-party transaction encouraged by business realities and not shaped solely by tax-avoidance features. *Peter Pan*, 417 F.2d at 674.

Moreover, in contrast to the economic substance cases where courts disregard a transaction by applying a "pre-tax profit" test to measure "whether a reasonable investor would enter into [the] transaction for its possible investment gains," *Reddam*, 755 F.3d at 1060, it cannot be disputed that regardless of how the transaction was planned and irrespective of Fortrend's tax-motivated pricing considerations, the stock sale would necessarily have generated a multi-million dollar gain for Petitioner, wholly independent of any tax considerations.

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1. The fact that Rabobank's exposure may have been limited and that it did not expect to lose money is beside the point and lines up with *Frank Lyon*. 435 U.S. at 577; *see also S&M Plumbing Co. v. Comm'r*, 55 T.C. 702 (1971) (refusing to recast a transaction as something other than a joint venture notwithstanding a minimum guaranteed profit), *acq.*, 1971-2 C.B.3; *Hunt v. Comm'r*, T.C. Memo 1990-248 (refusing to recharacterize a partnership as a sham notwithstanding the fact that a return was guaranteed by other partners).

Finally, structuring the transaction as a stock sale was far from a meaningless gesture. To the contrary, it had the effect of transferring meaningful rights and responsibilities from Petitioner to Nob Hill under Ohio law,[2] and – at the insistence and direction of the new owners – creating a "springing" security interest in favor of Rabobank. *Kraft Foods Co. v. Comm'r*, 232 F.2d 118, 128 (2d Cir. 1956) ("Since the acts were real and the taxable entities cannot be characterized as sham entities, the transactions should not be disregarded merely because the transaction was entered into in response to a change in the governing tax law"); *Rosenfeld v. Comm'r*, 706 F.2d 1277, 1281 (2d Cir. 1983) ("[W]e believe our inquiry should focus on whether there has been a change in the economic interests of the parties. If their legal rights and beneficial interests have changed, there is no basis for labeling a transaction a 'sham' and ignoring it for tax purposes.").

This Court should take this case to address whether a taxpayer may take actions to properly reduce his federal income taxes and whether the conduct of third parties, without involvement from or actual knowledge by a Taxpayer, can act to eliminate the tax minimization principles found by this Court in *Gregory v. Helvering*, 293 U.S. 465, 55 S.Ct. 266 (1935) and its progeny.

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2. *See, e.g.*, Ohio Rev. Code § 1701.08 (payment for shares and liability of shareholders).

C. The tax court, with the Ninth Circuit affirming, imposed liability on Petitioner for the actions of unrelated third-party purchasers based on a finding that the purchaser obtained a "sham" loan from Rabobank evidenced by the speed with which the purchaser repaid Rabobank. The Court should grant this petition to determine whether a litigant is responsible for the conduct of a third party over which he had no control.

The tax court committed clear error with respect to its factual findings that Petitioner was subject to the purchaser's "sham" loan where Petitioner was in no way a party to the loan. App. 70a-73a. Here, Petitioner could not have anticipated being asked to answer for the conduct of others who entered into a loan without Petitioner's involvement or consent. Petitioner had no ability to defend the conduct of those entities. Thus, the legal constraints detailed above prevent the imposition of penalties for the conduct of others.

The tax court and Ninth Circuit necessarily found that Petitioner was liable as a transferee even though: (1) Petitioner was not a party to the loan disallowed by the IRS, and (2) the speed of repayment for the loan was a factor in Petitioner's tax court ruling even though Petitioner could not impact the speed. In the stock sale as planned, Petitioner received funds borrowed by Nob Hill from Rabobank and John Moffatt. In this case, however, there was no relationship whatsoever between or among Petitioner and Nob Hill, Rabobank, and Moffatt and any conduct between or among those third parties in entering into "sham loan" arrangements cannot, under Ohio law, be held against Petitioner. While Ohio law may allow a court

to look through the form to the substance of a transaction that a *party* entered into, a sham determination made with respect to a transaction between unrelated third parties who are not before the court cannot be held against a litigant who was not a party to the sham.

Here, Petitioner was not a party to, or in any way related to, a party to the Rabobank and Moffatt loans which the tax court found to be shams. App. 70a-73a. Accordingly, there is no Ohio law which supports applying the third-party sham loan finding against Petitioner in order to hold Petitioner liable for Westside's tax debt. Thus, even accepting the lower courts' conclusion that the arrangements between or among Nob Hill, Rabobank, and Moffatt were shams, that conclusion cannot be used to deem that the stock sale gave rise to a voidable Ohio law "transfer."[3]

In fact, in addition to the "loan," the entire transaction at issue here, as it related to Petitioner, occurred in September 2003, after which date Petitioner had no involvement whatsoever in Westside or the preparation of its tax returns and no actual knowledge of what was ultimately contained therein.

Between the September closing and the end of the tax year, the purchaser began purchasing "bad debt." Petitioner had no involvement or actual knowledge of those purchases.

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3. The record is devoid of any evidence that the IRS pursued the parties to the sham loans to recover Westside's unpaid tax, notwithstanding the stipulated fact that they collectively received $34,900,000 in Westside cash.

It was not until after the purchaser filed Westside's 2003 income tax return in April 2004 and such tax return was audited by the IRS that the IRS disallowed the "bad debt" as a deduction to offset Westside's 2003 income. Ultimately, it was determined that the purchaser had engaged in fraud in connection with such purchases.

Here, however, the tax court, with the Ninth Circuit affirming, admits that Petitioner had no actual knowledge of those purchases and was not involved therein, yet the tax court assumed that Petitioner was complicit in such fraud. App. 75a, 80a-83a. Neither the tax court nor the Ninth Circuit has cited any evidence which supports the tax court's finding that Petitioner himself engaged in fraud under applicable Ohio law.

Finding that Petitioner engaged in fraud without any evidence and on facts showing that the fraud occurred after the Petitioner was no longer in control of Westside is clear error. Otherwise, there would be no situation in which a seller of a business could ever be free from liability, because it would always be the case that later conduct by the purchaser could occur and, by necessity, that conduct would be outside the ambit of control by the selling party.

CONCLUSION

The petition for writ of certiorari should be granted to ensure that: (i) the correct body of law is applied (*i.e.*, Ohio and not Arizona) under the Supreme Court's two-part test in *Commissioner v. Stern* when interpreting I.R.C. § 6901; (ii) that proper tax planning and tax minimization efforts of a taxpayer are respected; and (iii) that a taxpayer cannot be held accountable for the actions of unrelated third-party purchasers months after a legitimate business transaction has closed.

June 6, 2019

Respectively submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-73418

Tax Ct. No. 23630-12

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from a Decision of the
United States Tax Court

February 7, 2018, Argued
and Submitted

Pasadena, California
November 13, 2018, Filed

Before: William A. Fletcher, Carlos T. Bea,[*]
and John B. Owens, Circuit Judges.

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[*] Judge Bea was drawn to replace Judge Reinhardt on the panel following his death. Ninth Circuit General Order 3.2h. Judge Bea has read the briefs, reviewed the record, and listened to oral argument.

Opinion by Judge Owens.

SUMMARY**

Tax

The panel affirmed the Tax Court's decision on a petition challenging a notice of transferee liability to a sole shareholder regarding unpaid corporate taxes.

Taxpayer was the sole shareholder of West Side Cellular, Inc. After West Side received a $65 million litigation settlement that exposed it to significant tax liabilities, taxpayer sold his stock in West Side. After the sale, the Internal Revenue Service was unable to collect corporate taxes from West Side. The IRS then issued a notice of transferee liability to taxpayer for the unpaid taxes.

The Tax Court concluded that taxpayer is liable for the "pre-notice interest" component of West Side's tax liability, which amounted to over $13 million. The panel held that the Tax Court properly concluded that because the value of assets transferred from West Side to taxpayer was more than West Side's total federal tax liability, the federal Internal Revenue Code determines pre-notice interest (*see* 26 U.S.C. § 6601), and there is no need to consult state law regarding such interest.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In a concurrently filed memorandum disposition, the panel affirmed the Tax Court's conclusion that taxpayer is liable for West Side's unpaid taxes under 26 U.S.C. § 6901 and the Ohio Uniform Fraudulent Transfer Act.

OPINION

OWENS, Circuit Judge:

Taxpayer Michael A. Tricarichi appeals from the tax court's decision on his petition challenging a notice of transferee liability regarding West Side Cellular, Inc.'s ("West Side") unpaid taxes. We have jurisdiction under 26 U.S.C. § 7482. In this opinion, we affirm the tax court's conclusion that Tricarichi is liable for the "pre-notice interest" component of West Side's tax liability. Specifically, we hold that because Tricarichi received transferred assets worth *more* than West Side's total federal tax liability, the federal Internal Revenue Code determines pre-notice interest, and the availability of interest under state law is irrelevant.

I. BACKGROUND

Tricarichi was the sole shareholder of West Side. In 2003, West Side received a $65 million litigation settlement that exposed it to significant tax liabilities. Tricarichi then sold his stock in West Side and received about $35.2 million through a so-called "Midco" tax-shelter transaction. Following the sale, West Side failed to pay its corporate taxes for 2003 and the IRS was unable to collect from West Side.

In June 2012, the IRS issued a notice of transferee liability to Tricarichi, seeking to collect West Side's unpaid taxes from Tricarichi as a "transferee" of about $35.2 million of West Side's assets. Tricarichi then filed a petition in tax court, challenging the IRS's notice of transferee liability. After a bench trial, the tax court ruled in the IRS's favor, holding that Tricarichi was liable as a transferee for the full amount of West Side's 2003 tax deficiency and associated penalties and interest, totaling about $35.1 million.

In a concurrently filed memorandum disposition, we affirmed the tax court's conclusion that Tricarichi is liable for West Side's unpaid taxes under 26 U.S.C. § 6901 and the Ohio Uniform Fraudulent Transfer Act ("UFTA"). Specifically, we agreed with the tax court that, under *Commissioner v. Stern*, 357 U.S. 39, 78 S. Ct. 1047, 2 L. Ed. 2d 1126, 1958-2 C.B. 937 (1958), Tricarichi was a "transferee" of West Side's assets. *See Slone v. Comm'r*, 810 F.3d 599, 604-05 (9th Cir. 2015) (*Slone I*) (setting forth two-pronged *Stern* test); *see also Slone v. Comm'r*, 896 F.3d 1083, 1086 (9th Cir. 2018) (*Slone II*) (applying *Stern* test). Here, we affirm the tax court's conclusion that Tricarichi is also liable for the pre-notice interest component of West Side's tax liability.

II. DISCUSSION

A. Standard of Review

Because the parties dispute only the legal question of whether federal or state law determines pre-notice

interest, we decide de novo whether Tricarichi is liable for such interest. *See Hongsermeier v. Comm'r*, 621 F.3d 890, 899 (9th Cir. 2010).

B. Pre-Notice Interest

The parties dispute whether Tricarichi is liable for pre-notice interest, meaning interest that accrued on West Side's 2003 tax liability between the date its tax was due to be paid (March 15, 2004) and the date the IRS issued Tricarichi a notice of transferee liability (June 25, 2012). The Commissioner argues that the federal Internal Revenue Code—specifically 26 U.S.C. § 6601—controls whether Tricarichi is liable for pre-notice interest. If the Commissioner is correct, Tricarichi owes more than $13 million in pre-notice interest.[1] In contrast, Tricarichi contends that state law (here, Ohio law) determines any liability for pre-notice interest, and that under state law, he owes $0 in pre-notice interest. The tax court agreed with the Commissioner and ordered that Tricarichi pay pre-notice interest of nearly $13.9 million.

For over half a century, tax courts have generally held

1. Section 6601 provides that, generally, "[i]f any amount of tax imposed by this title . . . is not paid on or before the last date prescribed for payment, interest on such amount at [the federally set rate] shall be paid for the period from such last date to the date paid." 26 U.S.C. § 6601(a). Tricarichi does not question the accuracy of the Commissioner's $13.9 million calculation if federal law applies. Tricarichi also agrees that he is liable for "post-notice interest," i.e., the interest that accrued on West Side's tax liability under § 6601 after the IRS issued the notice of transferee liability.

that whether federal or state law determines the right to and amount of pre-notice interest depends on whether the value of assets received by the transferee exceeds the total federal tax liability owed by the transferor, including statutory penalties and interest. *See, e.g.*, *Estate of Stein v. Comm'r*, 37 T.C. 945, 961 (1962); *Lowy v. Comm'r*, 35 T.C. 393, 395-97 (1960); *see also* 14A *Mertens Law of Federal Income Taxation* § 53:41 (August 2018). Where, as here, a transferee has received assets worth *more* than the transferor's total federal tax liability, pre-notice interest is determined under the federal Internal Revenue Code and there is no need to consult state law regarding interest.[2] *See Lowy*, 35 T.C. at 397. But, where a transferee has received assets worth *less* than the transferor's total federal tax liability, the IRS's recovery is limited to the value of the assets transferred, and the IRS can then look to state law to attempt to recover any interest in excess of that amount from the transferee. *See Estate of Stein*, 37 T.C. at 961.

In *Lowy*, the tax court explained the rationale for this distinction. *See* 35 T.C. at 395-97. Under the Supreme Court's decision in *Stern*, "the existence and extent of transferee liability should be determined by State law." *Id.* at 396. However, as the tax court explained, the federal Internal Revenue Code creates the right to and determines the "quantum" of the IRS's underlying

2. It is undisputed that Tricarichi received from West Side a transfer of assets worth *more* than West Side's total federal tax liability. He received a transfer of $35.2 million, and West Side's total tax liability was $35.1 million (including pre-notice interest of $13.9 million).

claim that it is seeking to enforce against the transferee, including the statutory interest accrued upon the tax deficiency. *Id.* at 395-96. Therefore, where the assets transferred "are *more* than ample to discharge the full Federal liability of the transferor (including interest)," it is unnecessary "to look to State law for the creation of any right to interest" to satisfy the IRS's claim. *Id.* at 397 (emphasis added). On the other hand, "where the amount of the transferred assets is *less* than the amount of the [IRS's] claim," to make the IRS whole, under state law the IRS "may have a further right to collect interest from the transferee, based upon the wrongful use of those assets by the transferee prior to payment" of the transferor's tax liability. *Id.* at 395, 397 (emphasis added); *see also Estate of Stein*, 37 T.C. at 961 (further explaining rationale for distinction).

In our only decision related to this issue, we followed this line of tax court cases, holding that "[w]here transferee liability is found to exist but the transferred assets are insufficient to satisfy the transferor's total tax liability, a transferee's liability for interest is controlled by state law." *Edelson v. Comm'r*, 829 F.2d 828, 834 (9th Cir. 1987) (citing *Estate of Stein*, 37 T.C. at 961). However, we have not yet addressed the situation presented in *Lowy* and the instant case, where the transferee received assets worth *more* than the transferor's total federal tax liability.

The First Circuit recently followed the reasoning of *Lowy* and *Estate of Stein* to derive the "simple" rule that "[t]he IRS may recover from [the transferee] all amounts [the transferor] owes to the IRS (including section 6601

interest accruing on [the transferor's] tax debt), up to the limit of the amount transferred to [the transferee], with any recovery of prejudgment interest above the amount transferred to be determined in accord with [state] law." *Schussel v. Werfel*, 758 F.3d 82, 92-93 (1st Cir. 2014). In so holding, the First Circuit explained that "it is helpful to distinguish between interest accrued on the tax obligation of the taxpayer-transferor, and interest accrued on the transferred funds recovered from the transferee by a creditor." *Id.* at 88-89. "Federal interest on a tax obligation accrues automatically . . . [and] is simply a part of the debt owed by the taxpayer-transferor to the IRS, *see* § 6601(e), all of which may usually be collected from a fraudulent transferee to the extent of the amount fraudulently transferred." *Id.* at 89 (citing *Lowy*, 35 T.C. at 394). As a result, there is no need to consult state law where the value of the transferred assets is *more* than the transferor's total tax liability. "[F]or example, if the taxpayer owes $100 in taxes, upon which $30 in interest accrues, and the taxpayer then fraudulently transfers $150 to a transferee, the IRS can certainly recover a judgment of no less than $130 against the transferee." *Id.* "Therefore, where the assets in the hands of the transferee [are] 'more than ample to discharge the full Federal liability of the transferor (including interest),' there [is] no need to resort to state-law interest principles to make the IRS whole."[3] *Id.* at 92 (quoting *Lowy*, 35 T.C. at 397).

3. In the particular facts of *Schussel*, "the IRS would not be made whole by recovering the funds transferred to [the transferee] because [the transferor's] debt, including penalties and interest, was larger than the amount transferred." 758 F.3d at 92. As such, the First Circuit remanded to the tax court to apply the proper

We agree with the First Circuit's reasoning in *Schussel* and the tax court's decision in *Lowy*, and hold that because the value of assets transferred from West Side to Tricarichi is *more* than West Side's total federal tax liability, the federal Internal Revenue Code determines Tricarichi's pre-notice interest liability, and there is no need to consult state law regarding such interest.

Despite acknowledging the above case law, Tricarichi argues that the pre-notice interest here must be determined under Ohio law, which purportedly would immunize him from liability for any pre-notice interest. Emphasizing the Supreme Court's holding that "the existence and *extent* of [transferee] liability should be determined by state law," *Stern*, 357 U.S. at 45 (emphasis added), Tricarichi contends that state law should determine pre-notice interest because it affects the "extent" of transferee liability.

However, contrary to Tricarichi's contention, our decision here is consistent with *Stern*. Under *Stern*, the Ohio UFTA determines the "existence and extent" of Tricarichi's transferee liability. 357 U.S. at 45. In turn, the Ohio UFTA generally limits the extent of the IRS's recovery, like any other creditor's, to "the value of the asset transferred . . . or the amount necessary to satisfy the claim of the creditor or agency, whichever is less." Ohio Rev. Code Ann. § 1336.08(B)(1). But, it is the federal Internal Revenue Code—not state law—that determines

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standard—i.e., the "simple rule" stated previously—"with any prejudgment interest assessed above the amount transferred calculated at the Massachusetts rate." *Id.* at 94.

the amount of the IRS's underlying "claim," which includes the tax deficiency, applicable penalties, and statutory interest. *See Lowy*, 35 T.C. at 395-97. Because "the value of the asset[s] transferred" from West Side to Tricarichi is *more* than "the amount necessary to satisfy the [IRS's] claim," Ohio law allows the IRS to recover the full extent of its claim for West Side's tax liability, including pre-notice interest accrued on the tax deficiency as determined under federal law.[4] Ohio Rev. Code Ann. § 1336.08(B)(1). Notably, the above decisions we join today all post-date *Stern* and did not adopt Tricarichi's contention that using federal law to determine pre-notice interest always conflicts with *Stern*. *See, e.g.*, *Schussel*, 758 F.3d at 92 (noting that its holding "is consistent with *Stern*'s mandate"); *Estate of Stein*, 37 T.C. at 961 (relying on *Stern*); *Lowy*, 35 T.C. at 395-97 (relying on *Stern*).

III. CONCLUSION

In sum, the tax court properly held that because Tricarichi received transferred assets worth *more* than West Side's total federal tax liability, the federal Internal

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4. In contrast, if Tricarichi had received assets worth *less* than the amount of the IRS's claim, then the extent of the IRS's recovery under Ohio Rev. Code Ann. § 1336.08(B)(1) would have been limited to the value of the assets transferred, and the IRS would have to look to other provisions of Ohio law to attempt to recover any interest in excess of that amount. Such interest would not be federal pre-notice interest under the Internal Revenue Code, but rather whatever interest is available under state law, such as pre-judgment interest or interest allowed as a matter of equity. *See, e.g.*, Ohio Rev. Code Ann. § 1336.08(B)(2) (providing that the amount of judgment may be "subject to adjustment as the equities may require").

Revenue Code determines pre-notice interest, and the availability of interest under state law is irrelevant. Accordingly, the tax court properly ordered that Tricarichi was liable for pre-notice interest of almost $13.9 million.

AFFIRMED.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED NOVEMBER 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-73418
Tax Ct. No. 23630-12

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from a Decision of the United States Tax Court

February 7, 2018, Argued and Submitted
Pasadena, California
November 13, 2018, Filed

MEMORANDUM[*]

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: W. FLETCHER, BEA,[**] and OWENS, Circuit Judges.

Taxpayer Michael A. Tricarichi appeals from the tax court's decision on his petition challenging a notice of transferee liability regarding West Side Cellular, Inc.'s ("West Side") unpaid taxes. Specifically, Tricarichi challenges the tax court's conclusion that he is liable for West Side's unpaid taxes under 26 U.S.C. § 6901 and the Ohio Uniform Fraudulent Transfer Act ("UFTA").[1] We have jurisdiction under 26 U.S.C. § 7482. We review the tax court's conclusions of law de novo and its factual findings for clear error. *Hongsermeier v. Comm'r*, 621 F.3d 890, 899 (9th Cir. 2010). As the parties are familiar with the facts, we do not recount them here. We affirm.

Contrary to Tricarichi's contentions, the tax court did not clearly err in its factual findings regarding the structure and timing of the stock sale. *See Shea Homes, Inc. & Subsidiaries v. Comm'r*, 834 F.3d 1061, 1067 (9th Cir. 2016) (stating that when reviewing the tax court's underlying factual determinations for clear error, this court may reverse only if it finds that "the [t]ax [c]ourt's conclusion was '(1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in

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** Judge Bea was drawn to replace Judge Reinhardt on the panel following his death. Ninth Circuit General Order 3.2h. Judge Bea has read the briefs, reviewed the record, and listened to oral argument.

1. We resolve Tricarichi's challenge to the tax court's conclusion that Tricarichi is also liable for the "pre-notice interest" component of West Side's tax liability in a concurrently filed opinion.

the record" (citation omitted)). There is sufficient support in the record for the tax court's characterization of the transaction.

The tax court properly held that Tricarichi is liable for West Side's unpaid taxes under § 6901 and the Ohio UFTA. *See Slone v. Comm'r*, 810 F.3d 599, 604 (9th Cir. 2015) (*Slone I*) (setting forth two-pronged *Stern* test). Under the state-law prong, the tax court properly determined that West Side's cash was "transferred" to Tricarichi under the Ohio UFTA. *See* Ohio Rev. Code Ann. § 1336.01(L) (defining "transfer" as "every direct or indirect . . . method of disposing of or parting with an asset"). And, under the federal-law prong, the tax court properly determined, looking through the form of the stock sale to consider its substance, that it lacked a non-tax business purpose or any economic substance other than the creation of tax benefits. *See Slone I*, 810 F.3d at 605-06; *see also Slone v. Comm'r*, 896 F.3d 1083, 1086 (9th Cir. 2018) (*Slone II*).

AFFIRMED.

APPENDIX C — DECISION OF THE UNITED STATES TAX COURT, DATED JULY 29, 2016

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 23630-12

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Served: July 29, 2016

DECISION

On October 14, 2015, the Court filed its Memorandum Opinion (T.C. Memo. 2015-201), which stated at the end thereof that "Decision will be entered under Rule 155." On October 21, 2015, we directed the parties to file computations for entry of decision under Rule 155.

Respondent filed his computations on February 18, 2016, and petitioner filed his computations on February 22, 2016. The parties agree that, under the Court's opinion, petitioner is liable as West Side's transferee for tax and penalties in the aggregate amount of $21,199,347, and that petitioner is liable for interest on that amount from

June 25, 2012 (the date the notice of liability was mailed to him) to the date on which such liability is paid in full. The only disagreement between the parties' computations, albeit a very large one, concerns petitioner's liability for "transferor" or "pre-notice" interest, that is, interest that accrued on West Side's tax liabilities prior to the date on which the notice of liability was mailed to petitioner.

On July 18, 2016, the Court filed its Supplemental Memorandum Opinion (T.C. Memo. 2016-132). This opinion addressed petitioner's liability for pre-notice interest and resolved this issue in respondent's favor, stating at the end thereof that "Decision will be entered in accordance with respondent's computation." In consideration of the foregoing, it is

ORDERED and DECIDED that there is a liability in the aggregate amount of $21,199,347.00, plus pre-notice interest of $13,887,089.76, due from petitioner as transferee of assets of West Side Cellular, Inc., transferor, for unpaid income tax and additions to tax pursuant to I.R.C. §§ 6651(a)(1) and 6662, for the 2003 taxable year; and that interest, as provided by I.R.C. § 6601, will accrue on $35,086,436.76 (the liability of the transferee) from June 25, 2012, to the date such liability is paid.

Entered: July 29, 2016

/s/ Albert G. Lauber
Judge

APPENDIX D — SUPPLEMENTAL MEMORANDUM OPINION OF THE UNITED STATES TAX COURT, FILED JULY 18, 2016

UNITED STATES TAX COURT

Docket No. 23630-12.

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent**

July 18, 2016, Filed

SUPPLEMENTAL MEMORANDUM OPINION

LAUBER, *Judge*: In our prior opinion, we found that petitioner is a transferee of West Side Cellular, Inc. (West Side), under the Ohio Uniform Fraudulent Transfer Act and section 6901.[1] We accordingly held that petitioner

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[*] This opinion supplements our prior opinion, *Tricarichi v. Commissioner*, T.C. Memo. 2015-201.

1. Unless otherwise noted, all statutory references are to the Internal Revenue Code as in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar.

is liable "for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith." *Tricarichi v. Commissioner*, T.C. Memo. 2015-201, at *68. Although the notice of liability issued by the Internal Revenue Service (IRS or respondent) determined that petitioner's liability included "interest as provided by law," we noted that the parties in their briefs "h[ad] not addressed the proper computation of interest." *Id.* at *29 n.7. We accordingly directed that decision would be entered under Rule 155. *Id.* at *69.

The parties have submitted competing Rule 155 computations. They agree that, under the Court's prior opinion, petitioner is liable for West Side's 2003 income tax deficiency, in the amount of $15,186,570, and for the section 6662 penalties assessed against West Side, in the aggregate amount of $6,012,777. They also agree that, under the Court's prior opinion, petitioner is liable, in an amount to be determined, for "post-notice interest"--that is, interest that has accrued on West Side's liability under section 6601 since June 25, 2012, the date on which the IRS issued the notice of liability to petitioner.

The parties disagree, however, on whether petitioner is liable for "pre-notice interest," that is, interest that accrued on West Side's liability between March 15, 2004, when its 2003 corporate income tax return was due to be filed and its tax was due to be paid, and June 25, 2012. Respondent contends that petitioner's liability for pre-notice interest must be determined under Federal law and computed under section 6601; respondent has calculated this amount as $13,887,090. Petitioner contends that his

liability (if any) for pre-notice interest must be determined under State law and that, under Ohio judicial decisions interpreting that State's rules governing pre-judgment interest, his liability for pre-notice interest is zero. We agree with respondent and will enter decision accordingly.

Background

Petitioner owned 100% of West Side's stock. On September 9, 2003, in a "Midco" transaction engineered by Fortrend International, Inc., he received $35,199,372 in exchange for his West Side shares. Petitioner resided in Ohio when the Midco transaction was consummated. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

West Side's corporate income tax return for 2003 was due to be filed on March 15, 2004. Following an examination of that return, the IRS issued to West Side a notice of deficiency determining a deficiency of $15,186,570 and penalties under section 6662 in the aggregate amount of $6,012,777. After West Side failed to petition this Court, the IRS in July 2009 assessed against West Side the deficiency and penalties determined in the notice of deficiency, plus accrued interest.

Finding West Side bereft of assets, the IRS performed a transferee liability examination of petitioner. On June 25, 2012, the IRS mailed petitioner a Letter 902-T, Notice of Liability, determining that he is liable for West Side's unpaid 2003 deficiency and assessed penalties "plus

interest as provided by law." In our prior opinion we upheld that determination and directed the parties to file computations for entry of decision under Rule 155. We subsequently directed them to file, and they did file, supplemental memoranda addressing petitioner's liability vel non for pre-notice interest.

Discussion

Interest in transferee liability cases is calculated for two separate periods--the pre-notice period and the post-notice period--and under certain circumstances it may be calculated at different rates. The post-notice interest period begins on the date when the notice of liability is issued and ends on the date when the liability is fully paid. *See Patterson v. Sims*, 281 F.2d 577, 580 (5th Cir. 1960). Interest accruing during this period is determined under sections 6601 and 6621. Because the parties agree that petitioner would be liable for post-notice interest under the Court's prior opinion, we need not discuss that subject further.

Pre-notice interest presents additional questions. Depending on the value of the assets received by the transferee and the aggregate tax liability owed by the transferor, the calculation of pre-notice interest may involve Federal and/or State law. These variables may also affect the rate at which interest is calculated and the date on which interest begins to accrue. Most State laws refer to the interest that may accrue during this period as "pre-judgment interest." We will use the term "pre-judgment interest" to refer to interest that may accrue under State law during the pre-notice period.

Our first comprehensive discussion of these issues appeared in *Lowy v. Commissioner*, 35 T.C. 393 (1960). In that case the corporate transferor's liability for tax and penalties was $186,748, and the taxpayer, its sole stockholder, received as transferee corporate assets worth more than $1 million. *Id.* at 394. We held that where (as there) the value of the assets distributed to the transferee substantially exceeded the transferor's aggregate liability for deficiencies, penalties, and interest, the transferee's liability for interest is governed by, and must be computed in accordance with, the Internal Revenue Code. *Id.* at 397.

Speaking for the Court, Judge Raum recognized that, under *Commissioner v. Stern*, 357 U.S. 39, 78 S. Ct. 1047, 2 L. Ed. 2d 1126, 1958-2 C.B. 937 (1958), "the liability of the transferee as such must arise under applicable State law." *Lowy v. Commissioner*, 35 T.C. at 395; *see id.* at 396 (noting that State law determines "the existence and extent of transferee liability"). He continued:

> [B]ut the quantum of the creditor's right--i.e., the amount of tax due, the additions to tax for negligence or fraud, and the amount of interest applicable thereto--must, of necessity, be determined in accordance with the Federal statute. Certainly, it is the Internal Revenue Code and not New York law which fixes the amount of deficiency in tax. And it is similarly the Internal Revenue Code, rather than State law, which spells out the right of the Government to the so-called penalties and interest. These amounts in the aggregate constitute the claim of the United States against the taxpayer-

> transferor and they similarly measure the claim against the transferred assets. [*Id.* at 395.]

The taxpayer in *Lowy* cited earlier cases in which courts had applied State law to calculate pre-judgment interest; he urged that, under New York law, "he * * * [was] not liable for any interest" before the date on which the notice of liability was mailed to him. *Id.* at 394, 396. Judge Raum distinguished those cases as involving "a situation where the amount of the transferred assets * * * [wa]s less than the amount of the creditor's claim." In those cases, he explained, the courts properly considered the availability of pre-judgment interest "in order to make the creditor whole." *Id.* at 395. He noted that pre-judgment interest by its very nature

> can arise only under State law, and must comply in every respect with applicable State law not only as to rate, but also as to the starting point. Thus, if the transferred assets herein had been equal to only $100,000, substantially less than the amount of the basic deficiencies, they would plainly have been insufficient to satisfy the Government's claim. However, in such circumstances, the transferee would have had the use of the transferred assets over a period of time, and it is quite possible that he would be liable, under State law, for interest, not on the Government's claim against the transferor, but on the amount of the transferred assets, measured from a point of time that would be not earlier than the date of transfer. [*Ibid.*]

Surveying cases dating back to *Cappellini v. Commissioner*, 16 B.T.A. 802 (1929), we concluded in *Lowy* that "the quantum of the underlying claim that the * * * [IRS] is seeking to enforce against the transferee must be determined by the law which created that claim," namely, the Internal Revenue Code. 35 T.C. at 396. Because the transferor's liability for tax, penalties, and interest is determined by the Federal statute, we deemed it "wholly inappropriate * * * , where the transferred assets are more than ample to discharge the full Federal liability of the transferor (including interest), to look to State law for the creation of any right to interest." *Id.* at 397. On the other hand, "where the transferred assets are insufficient" to satisfy the IRS' claim against the transferor, "the creditor may have a further right to collect interest from the transferee, based upon the wrongful use of those assets by the transferee prior to payment." *Ibid.* "The latter right is one that is founded on State law, and it is only in such circumstances that it becomes appropriate to investigate State law to determine the rate of interest, [and] the date from which it runs." *Ibid.*

We employed the same analysis two years later in *Estate of Stein v. Commissioner*, 37 T.C. 945 (1962). In that case the transferee had received assets with a value less than the transferors' aggregate liabilities for tax, penalties, and interest. We held that where (as there) "a transferee receives assets insufficient to satisfy the transferor's tax liabilities, determination of the existence, starting date, and rate of interest upon retention of those assets prior to demand therefor is controlled by State law." *Id.* at 961 (fn. ref. omitted). The distinction between

that case and *Lowy* , we explained, hinged on the nature of the interest being charged.

> In cases where the transferred assets exceed the total liability of the transferor, the interest being charged is upon the deficiency, and is therefore a right created by the Internal Revenue Code. However, where, as here, the transferred assets are insufficient to pay the transferor's total liability, interest is not assessed against the deficiencies because the transferee's liability * * * is limited to the amount actually transferred to him. Interest may be charged against the transferee only for the use of the transferred assets, and since this involves the extent of transferee liability, it is determined by State law. [*Ibid.* (citing *Commissioner v. Stern*, 357 U.S. 39, 78 S. Ct. 1047, 2 L. Ed. 2d 1126, 1958-2 C.B. 937).]

During the ensuing 50 years, the analysis set forth in *Lowy* and *Estate of Stein* has been employed consistently both by this Court and by the Courts of Appeals that have considered the question. In *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014), *aff'g in part, rev'g in part, and remanding* T.C. Memo. 2013-32, the transferee had received assets worth $8.9 million, whereas the transferor's total Federal tax liability exceeded $13.6 million: roughly $2.8 million of tax, $2.1 million of penalties, and $8.7 million of pre-notice interest. *Id.* at 87. The First Circuit explicitly adopted the reasoning set forth in this Court's precedents. *See id.* at 89, 92 ("We therefore accept the IRS's invitation to follow *Lowy* and *Estate of Stein*[.]").

Describing the rule derived from this Court's precedents as a "simple" one, 758 F.3d at 92, the court of appeals offered an example to illustrate the principle for which *Lowy* stands: "[I]f the taxpayer owes $100 in taxes, upon which $30 in interest accrues, and the taxpayer then fraudulently transfers $150 to a transferee, the IRS can certainly recover a judgment of no less than $130 against the transferee." *Id.* at 89 & n.12 (citing *Lowy*, 35 T.C. at 394). The First Circuit accordingly held:

> The IRS may recover from * * * [the transferee] all amounts * * * [the transferor] owes to the IRS (including section 6601 interest accruing on * * * [the transferor's] tax debt), up to the limit of the amount transferred to * * * [the transferee], with any recovery of prejudgment interest *above the amount transferred* to be determined in accordance with Massachusetts law. [*Schussel*, 758 F.3d at 92-93; emphasis added.]

The First Circuit in *Schussel* thus held the transferee liable for pre-notice interest, computed in accordance with Federal law, in the amount of approximately $4 million. That is the amount by which the assets the transferee received (roughly $8.9 million) exceeded the transferor's liability for tax and penalties (approximately $4.9 million). In remanding the case to our Court, the First Circuit disagreed with the IRS only in holding, consistently with *Estate of Stein*, that Massachusetts law, rather than Federal law, governed the transferee's liability for pre-judgment interest above and beyond the value of the assets the transferee received. *See Schussel*, 758 F.3d at 92-93.

Other appellate authority is consistent with *Schussel*. In *United States v. Holmes*, 727 F.3d 1230 (10th Cir. 2013), the court found that the issue of pre-notice interest was not properly preserved for appeal. However, it stated in dictum that the District Court had supplied an appropriate "nutshell explanation" of the governing principles:

> It appears to be fairly well established that where the value of the assets transferred exceeds the transferor's total tax liability, including penalties and interest, the transferee is liable for the entire amount of the deficiency and the amount of interest is prescribed by [F]ederal law * * * . If the transferee receives less than the transferor's tax liability, state law determines the calculation of interest. [*Id.* at 1236 n.6].

In *Edelson v. Commissioner*, 829 F.2d 828 (9th Cir. 1987), *aff'g* T.C. Memo. 1986-223, the transferee received assets with a value less than the transferor's total Federal tax liability. Citing *Estate of Stein* with approval, the Ninth Circuit ruled: "Where transferee liability is found to exist but the transferred assets are insufficient to satisfy the transferor's total tax liability, a transferee's liability for interest is controlled by state law." *Id.* at 834.[2]

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2. Absent stipulation to the contrary, appeal of the instant case would lie to the Ninth Circuit. *See* sec. 7482(b)(2). Although the Ninth Circuit in *Edelson* explicitly followed *Estate of Stein*, that court does not appear to have addressed the fact pattern presented by *Lowy*, *Schussel*, and the instant case, where the transferee receives assets with a value exceeding the transferor's

We addressed this subject recently in *Shockley v. Commissioner*, T.C. Memo. 2016-8. Reviewing the relevant case law, including *Lowy* and *Estate of Stein*, we summarized the applicable legal principles as follows:

> If the transferee received assets in excess of the transferor's liability, then the [pre-notice interest] period would run from the date that the transferor's tax payment was due up to the date the notice of liability was issued, and interest would * * * be determined under Federal law. * * * If, as in these cases, the transferee received assets less than the creditor's claim against the transferor, then * * * [pre-judgment] interest, including its applicable rate, is determined under State law. * * *

Id. at *7-*8; *accord, e.g., Stansbury v. Commissioner*, 104 T.C. 486, 491-493 (1995) (applying State law to compute pre-judgment interest where transferor's tax debt exceeded value of transferred assets), *aff'd*, 102 F.3d 1088

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liability for tax and penalties, such that the transferred assets are available to discharge at least part (if not all) of the Government's claim for interest. However, in a recent transferee liability case, *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010 (9th Cir. 2014), *rev'g and remanding* T.C. Memo. 2012-61, the Ninth Circuit stated: "As a general rule, the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Id.* at 1019 (quoting *Beecher v. Commissioner*, 481 F.3d 717, 720 (9th Cir. 2007), *aff'g* T.C. Memo. 2004-99). We believe that the Ninth Circuit would likely follow the First Circuit's holding in *Schussel* on the fact pattern presented here.

(10th Cir. 1996); *Rubenstein v. Commissioner*, T.C. Memo. 2010-274, 100 T.C.M. (CCH) 542, 542-543 & n.3 (same); *Upchurch v. Commissioner*, T.C. Memo. 2010-169, 100 T.C.M. (CCH) 85, 90-91 (applying Federal law to compute pre-notice interest where value of transferred assets exceeded transferor's tax debt); *Borg v. Commissioner*, T.C. Memo. 1987-596, 54 T.C.M. (CCH) 1243, 1248-1249 (same).

In the instant case West Side's total Federal tax liability for 2003, including tax, penalties, and pre-notice interest computed thereon, is $35,086,437 (that is, $15,186,570 of tax + $6,012,777 of penalties + $13,887,090 of pre-notice interest as determined by respondent). In our prior opinion we found that petitioner received, as West Side's transferee, cash and cash equivalents with an aggregate value of $35,199,372. *See Tricarichi*, at *58. Because petitioner received assets with a value in excess of West Side's total Federal tax liability (including pre-notice interest), his liability for pre-notice interest is determined by Federal law.

Section 6621 specifies the interest rate(s) governing the computation of pre-notice interest. Under Federal law, the starting date for computing pre-notice interest is March 15, 2004, the date on which West Side's 2003 income tax return was due to be filed and tax payment was due, and the ending date is June 25, 2012, when the notice of liability was mailed. *See Bos Lines, Inc., v. Commissioner*, 354 F.2d 830, 839 (8th Cir. 1965), *aff'g* T.C. Memo. 1965-71; *Estate of Stein*, 37 T.C. at 961; *Lowy*, 35 T.C. at 394-395; *Shockley*, at *7. Respondent determined

that petitioner's liability for pre-notice interest, computed using these parameters, is $13,887,090. Petitioner has raised no question about the accuracy of this calculation, and we find no error in it.

Petitioner does not dispute that the law governing pre-notice interest has evolved in the manner described above. However, emphasizing the Supreme Court's ruling in *Stern* that State law controls "the existence and extent" of transferee liability, 357 U.S. at 45, petitioner contends that pre-notice interest should be determined under State law because it goes to "the extent" of such liability. Asserting that the First Circuit's *Schussel* opinion "highlights the continued uncertainty regarding computation of pre-notice [interest]," petitioner urges that the *Lowy* line of cases "should be revisited" in order to ensure adherence to the Supreme Court's mandate concerning the proper role of State law.

We do not find these arguments persuasive. The Supreme Court issued its opinion in *Stern* almost 60 years ago, and the principal cases discussed above all post-date *Stern*. In developing the law concerning pre-notice interest, the courts have been fully conscious of, and properly faithful to, the Supreme Court's mandate. Far from manifesting uncertainty, the law that has evolved since *Lowy* appears quite stable and clear. *Schussel* is hardly a poster child for uncertainty: The IRS there urged that *Lowy* and *Estate of Stein* provided the critical guide-posts, and the First Circuit explicitly followed the reasoning of both cases. We have no reason to suspect that the Ninth Circuit, to which this case would be appealable

absent stipulation to the contrary, *see* sec. 7482(b)(2), would take a different stance, *see supra* p. 11 and note 2.

Contrary to petitioner's view, the logic of these cases is sound and fully consistent with *Stern*. The transferor's total Federal tax liability includes the tax deficiency, applicable penalties, and statutory interest computed thereon; all three components are necessarily determined under the Internal Revenue Code. The Government may recover the full amount of this liability from a transferee, but its recovery is capped at the value of the assets that the transferee actually received. If the transferee received assets with a value exceeding the transferor's total Federal tax liability, the Government's claim can be satisfied in full from the transferred assets. There is thus no need to consult State law.

On the other hand, if the transferee has received assets with a value less than the transferor's total Federal tax liability, the Government's claim will not be fully satisfied. The question then arises whether, as an equitable matter, the Government should be entitled to pre-judgment interest to compensate it for the transferee's wrongful possession and use of the funds during the interim period. A claim for pre-judgment interest is not created by the Internal Revenue Code, but by State law. State law thus necessarily governs "the existence and extent" of the creditor's right (if any) to pre-judgment interest. *Stern*, 357 U.S. at 45.

In short, the courts have consulted State law to ascertain whether the Government may recover from

the transferee, in the form of pre-judgment interest, an amount *larger* than the value of the assets the transferee received. Petitioner has cited, and our own research has discovered, no case in which a court has invoked State law governing pre-judgment interest as a basis for reducing the Government's recovery to an amount *smaller* than the value of the assets the transferee received. That is what petitioner seeks to do here, and there is simply no precedent for it.[3]

To implement the foregoing,

Decision will be entered in accordance with respondent's computation.

3. In contending that Ohio law would immunize him from liability for pre-judgment interest, petitioner relies chiefly on *Millstone Dev. Ltd. v. Berry*, No. 03AP-531, 2004-Ohio-1215, 2004 WL 503926 (Ohio Ct. App. Mar. 16, 2004) (holding that the interest provisions of Ohio Rev. Code sec. 1343.03 do not apply with respect to a judgment granting a lien). Respondent disputes petitioner's interpretation of Ohio law. Given our disposition, we need not resolve this State law question.

APPENDIX E — MEMORANDUM FINDINGS OF FACT AND OPINION OF THE UNITED STATES TAX COURT, FILED OCTOBER 14, 2015

UNITED STATES TAX COURT

Docket No. 23630-12

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

October 14, 2015, Filed

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, *Judge*: In a notice of liability, the Internal Revenue Service (IRS or respondent) determined that petitioner is liable for $21,199,347 plus interest as a transferee of the assets of West Side Cellular, Inc. (West Side). Petitioner was the sole shareholder of West Side, a C corporation, until he sold his shares to an affiliate of Fortrend International LLC (Fortrend) in September 2003. The type of transaction in which he sold his shares is commonly called an "intermediary company" or "Midco" transaction. The underlying tax liabilities of West Side

include a tax deficiency of $15,186,570 and penalties of $6,012,777 for 2003.

Midco transactions, a type of tax shelter, were widely promoted during the late 1990s and early 2000s. MidCoast Credit Corp. (MidCoast), which plays a supporting role in this case, and Fortrend, which plays the principal role, were leading promoters of Midco transactions. Both have been involved in numerous transactions previously considered by this Court.[1] In Notice 2001-16, 2001-1 C.B. 730, clarified by Notice 2008-111, 2008-51 I.R.B. 1299, the IRS listed Midco transactions as "reportable transactions" for Federal income tax purposes.

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1. For Fortrend, see *Slone v. Commissioner*, T.C. Memo 2012-57, *vacated and remanded,* 810 F.3d 599, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315 (9th Cir. Aug. 28, 2015); *Salus Mundi Found. v. Commissioner*, T.C. Memo. 2012-61, *rev'd and remanded*, 776 F.3d 1010 (9th Cir. 2014); *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo 2011-298, *rev'd and remanded*, 712 F.3d 597 (1st Cir. 2013); *Diebold v. Commissioner*, T.C. Memo 2010-238, *vacated and remanded sub nom. Diebold Found., Inc. v. Commissioner*, 736 F.3d 172 (2d Cir. 2013). For MidCoast, see *Stuart v. Commissioner*, 2015 U.S. Tax Ct. LEXIS 14,144 T.C. 235 (Apr. 1, 2015); *Cullifer v. Commissioner*, T.C. Memo 2014-208; *Hawk v. Commissioner*, T.C. Memo 2012-259; *Feldman v. Commissioner*, T.C. Memo 2011-297, *aff'd*, 779 F.3d 448 (7th Cir. 2015); *Starnes v. Commissioner*, T.C. Memo 2011-63, *aff'd*, 680 F.3d 417 (4th Cir. 2012); *Griffin v. Commissioner*, T.C. Memo 2011-61. Samyak Veera, a principal of MidCoast, has been indicted for his role in promoting these arrangements. *United States v. Veera*, No. 12-444 (E.D. Pa. Oct. 1, 2013) (superseding indictment alleging Veera's involvement in MidCoast schemes to evade taxes by using fraudulent losses to eliminate target's gains).

Although Midco transactions took various forms, they shared several key features, well summarized by the Court of Appeals for the Second Circuit in *Diebold Found. Inc. v. Commissioner*, 736 F.3d 172, 175-176 (2d Cir. 2013), *vacating and remanding* T.C. Memo. 2010-238. These transactions were chiefly promoted to shareholders of closely held C corporations that had large built-in gains. These shareholders, while happy about the gains, were typically unhappy about the tax consequences. They faced the prospect of paying two levels of income tax on these gains: the usual corporate-level tax, followed by a share-holder-level tax when the gains were distributed to them as dividends or liqui-dating distributions. And this problem could not be avoided by selling the shares. Any rational buyer would normally insist on a discount to the purchase price equal to the built-in tax liability that he would be acquiring.

Promoters of Midco transactions offered a purported solution to this problem. An "intermediary company" affiliated with the promoter--typically, a shell company, often organized offshore--would buy the shares of the target company. The target's cash would transit through the "intermediary company" to the selling shareholders. After acquiring the target's embedded tax liability, the "intermediary company" would plan to engage in a tax-motivated transaction that would offset the target's realized gains and eliminate the corporate-level tax. The promoter and the target's shareholders would agree to split the dollar value of the corporate tax thus avoided. The promoter would keep as its fee a negotiated percentage of the avoided corporate tax. The target's shareholders

would keep the balance of the avoided corporate tax as a premium above the target's true net asset value (i.e., assets net of accrued tax liability).

In due course the IRS would audit the Midco, disallow the fictional losses, and assess the corporate-level tax. But "[i]n many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek payment from other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid." *Id.* at 176.

In a nutshell, that is what happened here. Petitioner engaged in a Midco transaction with a Fortrend shell company; the shell company merged into West Side and engaged in a sham transaction to eliminate West Side's corporate tax; the IRS disallowed those fictional losses and assessed the corporate-level tax against West Side; but West Side, as was planned all along, is judgment proof. The IRS accordingly seeks to collect West Side's tax from petitioner as the transferee of West Side's cash. We hold that petitioner is liable for West Side's tax under the Ohio Uniform Fraudulent Transfer Act and that the IRS may collect West Side's tax liabilities in full from petitioner under section 6901(a)(1)[2] as a direct or indirect transferee of West Side. We accordingly rule for respondent on all issues.

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2. Unless otherwise noted, all statutory references are to the Internal Revenue Code as in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all dollar amounts to the nearest dollar.

FINDINGS OF FACT

The parties filed stipulations of facts with accompanying exhibits that are incorporated by this reference. At the time the Midco transactions were executed, petitioner resided in Ohio. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

Petitioner graduated from Case Western Reserve University and embarked on a career in the cellular telephone (cell phone) business. He incorporated West Side in 1988 as a C corporation. Petitioner was the president and sole shareholder of West Side, and he and his wife, Barbara Tricarichi, served as its directors.

Although petitioner had no formal tax training, he displayed familiarity with tax concepts. At trial he spoke easily about C corporations and S corporations, corporate tax rates, and other tax matters. He explained that he organized West Side as a C corporation because he thought it might ultimately have more shareholders than an S corporation would be permitted to have.

In 1991 petitioner approached Verizon and other major cellular service providers with a proposal that West Side would become a reseller of cell phone services. From 1991 through 2003 West Side engaged in various telecommunications activities in Ohio, including the resale of cell phone services. West Side had a retail presence in Ohio, customer and vendor relationships, goodwill, know-how, a workforce in place, trade names, and other tangible

and intangible assets. At its peak West Side had about 15,000 subscribers throughout Ohio.

Beginning in 1991, West Side purchased network access from the major cellular service providers in order to serve its customers. Petitioner soon came to believe that certain of these providers were discriminating against West Side. In 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP (Hahn Loeser), to file a complaint with the Public Utilities Commission of Ohio (PUCO) against certain of these providers, alleging anticompetitive trade practices. The PUCO lawsuit was a "bet the company" matter for petitioner, and he took a hand-son role in the lengthy litigation that ensued. Hahn Loeser lawyers described him as a constant presence at the firm throughout this period.

The PUCO ruled in West Side's favor on the liability issue and the Ohio Supreme Court affirmed that decision. In early 2003 West Side returned to the Court of Common Pleas to commence the damages phase of the litigation. Not long thereafter a settlement was reached, pursuant to which West Side ultimately received, during April and May 2003, total settlement proceeds of $65,050,141. In exchange West Side was required to terminate its business as a retail provider of cell phone service and to end all service to its customers as of June 10, 2003.

Petitioner's "Tax Problem"

Anticipating a large settlement, petitioner began to regret his decision, 15 years earlier, to organize West Side

as a C corporation. He asked Jeffrey Folkman, a Hahn Loeser tax partner, to investigate how to "maximize whatever after-tax proceeds were available" from the anticipated settlement. Petitioner's goal was to "pay less tax than what the straight up, you know, 35% or whatever the corporate tax rate was" and avoid the two-level tax on the settlement proceeds.

Mr. Folkman had experience with MidCoast and thought it might help solve petitioner's problem. He arranged a meeting on February 19, 2003, with petitioner and MidCoast representatives. In preparation for this meeting, Hahn Loeser attorneys devoted five days of research and discussion to the "sham transaction" doctrine, "reportable transactions," and Notice 2001-16. Their billing records describe Notice 2001-16 as addressing (among other things) a transaction involving a "shareholder who wants to sell stock of a target" and "an intermediary corporation." At the February 19 meeting, MidCoast's representatives explained to petitioner that it was in the "debt collection business" and that, as part of its business model, it purchased companies that "had large tax obligations."

Shortly after the meeting with MidCoast, petitioner's brother, James Tricarichi (James), introduced him to Fortrend. On February 24, 2003, petitioner received a letter from Fortrend; he subsequently had several conference calls and at least one face-to-face meeting with Fortrend representatives. Petitioner understood that Fortrend and MidCoast were both involved with "distressed debt receivables" and had basically the

same business model. Fortrend told petitioner that it would purchase his West Side stock and would offset the taxable gain with losses, thereby eliminating West Side's corporate income tax liability.

MidCoast and Fortrend each expressed interest in acquiring petitioner's West Side stock, and each made an offer proposing essentially the same transactional structure. An intermediary company would borrow money to purchase the stock. The cash held by West Side would be used immediately to repay the loan. The cash petitioner received from the intermediary company would substantially exceed West Side's net asset value. The intermediary company would receive a fee equal to a negotiated percentage of West Side's tax liabilities. And after the sale closed, the intermediary company, after merging into West Side, would use bad debt deductions to eliminate those tax liabilities.

Because petitioner regarded MidCoast and Fortrend as competitors, he began negotiating with both in the hope of stirring up a bidding war. James arranged further conference calls with both companies. Rather than compete, MidCoast secretly agreed with Fortrend to step away from the transaction in exchange for a fee of $1,180,000 (ultimately paid by West Side on September 14, 2003). MidCoast's final offer was adjusted to make it seem unattractive, and petitioner therefore chose to pursue discussions with Fortrend in order to "maximize" his profits.

Bringing in PricewaterhouseCoopers

James recommended that petitioner retain PricewaterhouseCoopers (PwC) to advise him about the proposed stock sale. Acting as a conduit between petitioner and PwC, James sent a letter dated April 8, 2003, to PwC partner Richard Stovsky. This letter requested advice concerning a stock sale to MidCoast or Fortrend and a fallback strategy to mitigate petitioner's tax liability if the stock sale did not occur. PwC sent petitioner a draft engagement letter on April 10, 2003.

By this time petitioner had had extensive discussions with Mr. Folkman about Notice 2001-16, and the risk that the contemplated stock sale would give rise to a "reportable transaction." Upon receipt of PwC's draft engagement letter, petitioner reacted negatively to the following sentence: "You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed." Petitioner struck this sentence from the engagement letter, initialed the change, and sent the draft back to PwC.[3]

Petitioner testified that he struck this sentence from the draft engagement letter because he wanted to ensure that PwC would thoroughly investigate all relevant issues. The Court did not find this testimony credible. Mr. Stovsky's draft engagement letter stated that PwC

3. Petitioner's effort to strike this language from the engagement letter was ultimately unsuccessful. Mr. Stovsky insisted on retaining this language and, after further negotiations, petitioner acquiesced.

would investigate the relevant issues; the sentence about "reportable transactions" was included as a matter of PwC's due diligence to ensure that the client disclosed all relevant facts to it. The Court finds that petitioner struck this sentence from the draft engagement letter because he wanted to keep the paper trail free, to the maximum extent possible, of any references to "reportable transactions."

Working with tax professionals from several PwC offices, Mr. Stovsky prepared an internal memorandum addressing the proposed sale of West Side stock to Fortrend or MidCoast. This memorandum was revised multiple times as the negotiations evolved, and various drafts were discussed with petitioner and his advisers. The first draft of the memorandum, dated April 13, 2003, stated the following assumptions about the proposed transaction:

- [Buyer will] borrow $36,000,000 and purchase 100% of the Westside shares outstanding from * * * [petitioner]. * * *

- [Buyer will] contribute to Westside * * * high basis/low fair market value property (the assumption is that these are delinquent receivables).

- Westside is now in the business of purchasing "distressed/chargedoff" credit card debt * * * at pennies on the dollar and collecting on this debt.

- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purchases is apparently difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [the buyer] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock).

- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by * * * [the buyer]. The deduction offsets the taxable income created within Westside upon the receipt of the $65,000,000 from the legal verdict.

- Westside, now a charged off debt business, utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected.

- The suggested result, from a federal tax perspective, is as follows:

  - [Petitioner] recognizes long-term capital gain upon the sale of his shares in Westside * * *.

  - Westside offsets the taxable income from the legal verdict with the write off of high basis property.

The memorandum notes that petitioner planned to move from Ohio to a State without an income tax so that there would be no State tax on his gains.

PwC understood that Notice 2001-16 applied to Midco transactions described therein and to "substantially similar" transactions. Marginal notes on the memorandum also suggest PwC's understanding that the term "substantially similar" was to be broadly construed. But PwC concluded that "a position can be taken" that the stock sale would not be a reportable transaction. This was because "[a] typical 'Midco' transaction [has] 3 parties (this transaction only has 2), and a typical 'Midco' transaction results in an asset basis step up and the associated amortization deductions going forward (this transaction does not have these characteristics)."

The memorandum concluded that the proposed transaction was not without risk. It noted a particularly high level of risk in the "high basis/low value" debt receivable strategy that the buyer proposed to eliminate West Side's tax liabilities. PwC characterized this as a "very aggressive tax-motivated" strategy and indicated that the IRS would likely challenge the deductibility of the bad debt loss expected to be reported by West Side after the stock sale. Pointedly absent from the memorandum is any indication that PwC believed this strategy was "more likely than not" to be successful. Regardless, the memorandum suggested that "this is not * * * [petitioner's] concern" since the result would be a corporate tax liability and not petitioner's liability. The memorandum noted that PwC had provided no formal written advice to petitioner but had discussed its conclusions orally with him.

Formation of LXV

Petitioner's representatives communicated with Fortrend after meeting with PwC. During these conversations Fortrend made clear that it did not want to acquire West Side's accounts receivable or any of its other operating assets. Rather, Fortrend wanted all operating assets stripped out of West Side before the closing so that West Side would be left with nothing but cash and tax liabilities.

In order to meet Fortrend's requirements, petitioner and three West Side employees formed LXV Group, LLC (LXV), an Ohio limited liability company, on May 2, 2003, to acquire West Side's operating assets. Each contributed $25,000 for his respective 25% interest in LXV. As mandated by the PUCO settlement agreement, West Side had to discontinue providing cell phone service to its customers by June 10, 2003. On June 11, 2003, LXV purchased all of West Side's operating assets, namely, its goodwill and its "revenue producing wireless customer base, accounts receivable, Trade names, Trade marks, chattels, fixtures, software and equipment" used in the operation of West Side's business.

The purchase price that LXV paid for these assets was $100,044. That amount was substantially less than the sum of West Side's net physical assets and accounts receivable ($74,564 + $166,940 = $241,504) as stated on West Side's balance sheet.[4] The parties to this transaction

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4. West Side's balance sheet at the relevant time listed $302,357 in assets (less $227,793 in accumulated depreciation) and

thus appear to have attached a value of zero to West Side's wireless customer base, trade marks, and trade names. Mr. Stovsky voiced concern that if fair market value were not paid for these assets, petitioner might face risk because of "the transferee liability issue." Despite this warning, petitioner did not obtain a valuation of the assets thus transferred.

Petitioner testified that his motivation for this sale was to "continue to service West Side's customers." The Court did not find this testimony credible. The parties' placement of zero value on West Side's intangible assets, including its wireless customer base, trade name, and trade marks, belies any intention to serve those customers in the future. Indeed, it is not clear how LXV could continue to serve West Side's cell phone customers because West Side's principals, who were also LXV's principals, were barred after June 10, 2003, from conducting any form of cell phone business. The Court finds as a fact that petitioner arranged the sale of West Side's operating assets to LXV in order to comply with Fortrend's requirement that West Side have nothing left in it except tax liabilities and cash.

Negotiation of the Stock Purchase Agreement

The parties adopted as their working assumption that West Side's accrued tax liability resulting from the $65 million PUCO settlement would not be paid. Since West

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accounts receivable of $50,936 and $116,004. The assets consisted of computers, software, furniture/fixtures, office equipment, shop equipment, and leasehold improvements. LXV did not assume any of the liabilities reflected on West Side's balance sheet.

Side at closing was to have only cash and tax liabilities, and since cash has a readily ascertainable value, the major item for negotiation was how to carve up the corporate tax liability thus avoided. The parties referred to this exercise as determining the "Fortrend premium." Petitioner actively participated in the negotiation of this point. Neither Hahn Loeser nor PwC participated in the negotiation of the stock purchase price or the "Fortrend premium."

The trial record sheds little light on the early stages of the negotiations, when MidCoast was still involved. During later stages of the negotiations, the dollar amount of the "Fortrend premium" varied, but each iteration of the agreement contained the same formulaic calculation. Fortrend would pay petitioner the amount of cash remaining in West Side at the closing, less 31.875% of West Side's total Federal and State tax liability for 2003. In other words, the "Fortrend premium" equaled 31.875% of West Side's accrued 2003 tax liability. This left petitioner with a premium, above and beyond West Side's closing net asset value, equal to 68.125% of its accrued 2003 tax liability.

At two points in his testimony, petitioner stated that he did not understand the "Fortrend premium" to have any correlation to West Side's tax liabilities. The Court did not find this testimony credible. Petitioner testified that he participated in negotiating Fortrend's fee, and numerous spreadsheets prepared by his brother explicitly state that Fortrend's fee was to equal 31.875% of West Side's accrued tax liabilities for 2003. Confronted with

this evidence, petitioner became visibly uncomfortable. The Court finds as a fact that petitioner knew at all times that the "Fortrend premium" would be computed as a negotiated percentage of West Side's 2003 corporate tax liability.

In preparation for the stock sale, Millennium Recovery Fund, LLC (Millennium), a Fortrend affiliate incorporated in the Cayman Islands, created Nob Hill, Inc. (Nob Hill), a shell company also incorporated in the Cayman Islands. Nob Hill was to be the "intermediary company" that would purchase the West Side stock. John McNabola was the sole officer of Millennium and Nob Hill.

The Hahn Loeser lawyers negotiated with Fortrend the technical details of the stock purchase agreement. Nob Hill provided covenants aimed at mitigating the risk that the transaction would be characterized as a "liquidation" of West Side. Nob Hill represented that West Side would remain in existence for at least five years after the closing, would "at all times be engaged in an active trade or business," and would "maintain a net worth of no less than $1 million" during this five-year period. (None of these representations was substantially honored.)

Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side] attributable to income earned during the [2003] tax year." The agreement did not specify how Nob Hill would "cause" West Side to satisfy its 2003 tax liabilities

or explain the strategy it would use to offset West Side's gain from the $65 million PUCO settlement. Nob Hill agreed to indemnify petitioner in the event of liability arising from breach of its representation to "satisfy fully" West Side's 2003 tax liability. Petitioner's expert, Wayne Purcell, admitted that "there can be problems" enforcing warranties and covenants against offshore entities like Nob Hill that have no assets in the United States.

Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Instead, the parties negotiated a statement that Nob Hill "has no intention" of causing West Side to engage in a listed transaction.

Petitioner Accepts Fortrend's Offer

A letter of intent dated July 22, 2003, set forth the terms on which Nob Hill proposed to acquire petitioner's stock. It stated a tentative purchase price of $34.9 million, subject to fine-tuning based on West Side's final cash position. The letter indicated that West Side would deposit $50,000 in escrow to cover fees should the transaction fail to close.

After the transfer of West Side's operating assets to LXV, West Side's balance sheet reflected total assets of $40,577,151, including $39,949,373 in cash, a $577,778 loan receivable from petitioner, and the $50,000 receivable from the escrow agent. West Side's aggregate 2003 tax

liabilities were estimated to be $16,853,379. West Side's net asset value as of late July--that is, its assets minus its accrued tax liability--was thus $23,723,772. Nob Hill offered to pay petitioner $34.9 million for his stock--$11.2 million more than West Side was worth--in exchange for a fee (the "Fortrend premium") comfortably in excess of $5 million. Petitioner decided to accept this offer.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with making sure he gets paid. Mr. Purcell agreed, however, that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Hahn Loeser's bankruptcy lawyers advised that petitioner needed to assure himself that Nob Hill and Fortrend would live up to their postclosing obligations. And Mr. Purcell agreed that "due diligence did require * * * [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liability. Petitioner was evasive when asked how he expected Fortrend to pull off this feat; he testified as to his belief that Fortrend "had some sort of tax reduction process" that would somehow "use bad debt to reduce tax liability." PwC specifically declined to provide assurance that Fortrend's bad debt strategy was "more likely than not" to succeed.

Preparation for the Closing

The stock purchase transaction was carefully structured to ensure that Fortrend and its affiliates made no real outlay of cash. Fortrend planned to borrow the entire $34.9 million tentative purchase price: $5 million from Moffatt International (Moffatt), a Fortrend affiliate, and $29.9 million from Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. (Rabobank), a Dutch bank.[5] West Side's cash would be used to repay these loans immediately, so that the nominal lenders bore no risk.

The financing process began on August 13, 2003, when Fortrend mailed Chris Kortlandt of Rabobank, requesting a $29.9 million short-term loan. Two weeks later, Mr. Kortlandt requested internal approval of this loan, with Nob Hill as the nominal borrower. Mr. Kortlandt understood that West Side would be required to have cash in excess of $29.9 million on deposit with Rabobank when the stock purchase closed. He therefore considered the risk of nonpayment of the loan to be essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on collateral: R-1 (cash)." Rabobank

5. The $29.9 million loan was provided through a Rabobank subsidiary, Utrecht-America Finance Co. For simplicity, we will refer to these entities collectively as Rabobank. Rabobank frequently partnered with Fortrend in executing Midco deals. It has been involved in numerous transactions previously considered by this Court. *See, e.g., Salus Mundi Found.*, T.C. Memo. 2012-61; *Slone*, T.C. Memo. 2012-57; *Frank Sawyer Trust of May 1992*, T.C. Memo. 2011-298; *Diebold*, T.C. Memo. 2010-238; *LR Dev. Co. LLC v. Commissioner*, T.C. Memo. 2010-203.

uses the R-1 risk rating to denote a loan that is fully cash collateralized.

On August 21, 2003, petitioner received instructions to open at Rabobank an account for West Side with account number ending in 1577, to which West Side's cash would eventually be transferred. To receive the cash proceeds from the stock sale, petitioner opened an individual Rabobank account with account number ending in 1595. To shuttle cash at the closing, Nob Hill opened a Rabobank account with account number ending in 1568.

In connection with the Rabobank financing, Mr. McNabola planned to execute two sets of documents at the closing. He would sign the first set on behalf of Nob Hill as its president. He would sign the second set on behalf of West Side as its postclosing president-to-be.

The Nob Hill documents to be executed by Mr. McNabola included a promissory note for $29.9 million, a security agreement, and a pledge agreement. Pursuant to the security agreement, Nob Hill granted Rabobank a first priority security interest in West Side's Rabobank account to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, Nob Hill granted Rabobank a first priority security interest in the West Side stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation.

The West Side documents to be executed by Mr. McNabola included security and guaranty agreements in favor of Rabobank and a "control agreement." West

Side unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and the security agreement granted Rabobank a first priority security interest in the West Side Rabobank account. The "control agreement" gave Rabobank control over West Side's account--including all "cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto"--to ensure that West Side did not default on its commitments.

As petitioner's UCC expert, Barkley Clark, correctly noted, Mr. McNabola as Nob Hill's president could not grant Rabobank a perfected security interest in West Side's assets until Nob Hill acquired West Side's stock. And Mr. McNabola as West Side's president could not grant Rabobank a perfected security interest in West Side's assets until he became West Side's president. At the closing, however, all of these documents were to become effective simultaneously with the funding of the Rabobank loan, the payment of the stock purchase price, and the resignation of West Side's former officers and directors. These agreements effectively gave Rabobank a "springing lien" on West Side's cash at the moment it funded the loan. For all practical purposes, therefore, the Rabobank loan was fully collateralized with the cash in West Side's Rabobank account, consistently with the R-1 risk rating that Rabobank assigned to that loan.

The Closing

The closing was scheduled for September 9, 2003. The final stock purchase price was to be $34,621,594 in cash

plus a $577,778 check payable to petitioner to zero out his shareholder loan. On September 8, Fortrend deposited the $5 million "loan proceeds" from Moffatt into Nob Hill's Rabobank account. Also on September 8, petitioner deposited West Side's $39,949,373 ending cash balance into West Side's Rabobank account. The funds in these accounts earned overnight interest of $135 and $1,076, respectively.

On September 9, 2003, the following events occurred. Nob Hill's Rabobank account was credited with the $29.9 million Rabobank loan proceeds and $35 million in cash from West Side's Rabobank account. From this account, Nob Hill transferred $34,621,594 into petitioner's Rabobank account; transferred $29.9 million to repay the Rabobank loan (which bore no interest); transferred $5 million to repay the Moffatt loan (which bore no interest); transferred $150,000 to cover Rabobank's fees; and transferred $150,000 to West Side's Rabobank account. Petitioner immediately withdrew the entire balance of his Rabobank account and deposited it into a personal account at Pershing Bank. When the dust settled at the end of the day, petitioner's Rabobank account had a balance of zero; petitioner's Pershing Bank account had a balance of $34,621,594; West Side's Rabobank account had a balance of $5,100,450; and Nob Hill's Rabobank account had a balance of $78,541.

The next day, Nob Hill merged into West Side with West Side surviving. The $5,100,450 remaining in West Side's Rabobank account and the $78,541 remaining in Nob Hill's Rabobank account were later transferred into

a West Side account at the Business Bank of California. West Side eventually transferred $4,766,000 out of that account to Fortrend affiliates and various promoters, including MidCoast, which on September 14, 2003, received the promised $1,180,000 for stepping away from the transaction. By late 2004, West Side's bank accounts had been drained of funds and were closed.

The Bad Debt Strategy

The background of Fortrend's strategy for eliminating West Side's 2003 tax liability begins in 2001. On March 7, 2001, United Finance Co. Ltd. (United Finance) purportedly contributed a portfolio of charged-off Japanese debt (Japanese debt portfolio) to Millennium in exchange for Millennium class B shares. (Millennium eventually became Nob Hill's, and then West Side's, parent.) The Japanese debt portfolio was valued at $137,109. Two days later, United Finance sold the Millennium class B shares it had just acquired to Barka Limited, another Cayman Islands entity, for $137,000. Although Millennium had acquired the Japanese debt portfolio with property worth only $137,000, it claimed that its tax basis in that Portfolio was $314,704,037 as of June 30, 2003.

On November 6, 2003, Millennium contributed to West Side a subset of the Japanese debt portfolio, consisting of two defaulted loans (Aoyama loans). The Aoyama loans had a purported tax basis of $43,323,069. Between November 6 and December 31, 2003, West Side wrote off the Aoyama loans as worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003, West Side claimed a bad debt deduction of $42,480,622 on account of that writeoff.

There is no evidence that West Side conducted meaningful business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed “debt collection” business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Although Nob Hill had represented that West Side would “maintain a net worth of no less than $1 million” during the five-year period following the closing, West Side did not do so. The following table shows West Side’s asset balances as reported to the IRS:

Tax year	Asset balance as of 12/31
2003	$1,829,395
2004	313,300
2005	1,171,609
2006	942,589
2007	-0-

Petitioner offered no evidence to show that the actual value of West Side’s assets corresponded to these reported amounts. Given Fortrend’s track record, we do not take these reported amounts at face value.

West Side’s Tax Returns and IRS Audit

West Side’s Form 1120 for 2003 described it as incorporated in the Cayman Islands, doing business in Ireland, and having its address in Las Vegas, Nevada. It described its parent, Millennium, as incorporated in

the Cayman Islands and doing business in Ireland. West Side reported for 2003 total income of $66,116,708 and total deductions of $67,840,521. The deductions included salaries and wages of $8,315,605, other deductions of $16,542,448, and bad debt losses of $42,480,622.

On January 9, 2006, West Side filed Form 1120X, Amended U.S. Corporation Income Tax Return, for 2003. Apart from correcting minor errors and listing a new address in Reno, Nevada, the amended return did not differ materially from the original. Both returns were prepared using the accrual method of accounting. The IRS examined West Side's 2003 return. During the examination, the IRS was unable to find any assets or current sources of income for West Side; a March 28, 2008, memorandum details the steps the IRS took in search thereof. At the conclusion of the audit, the IRS disallowed the $42,480,622 bad debt deduction and $1,651,752 of the deduction claimed for legal and professional fees, on the ground that these fees were incurred in connection with a transaction entered into solely for tax avoidance.

West Side's authorized representative executed successive Forms 872, Consent to Extend the Time to Assess Tax, that extended to December 31, 2009, the time for assessing West Side's 2003 tax liability. On February 25, 2009, the IRS mailed a timely notice of deficiency to West Side determining a deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively. West Side did not petition this Court and, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of deficiency, plus accrued

interest. On April 5, 2011, West Side's corporate charter was canceled by the Ohio secretary of state.

Notice of Transferee Liability

Petitioner and Barbara Tricarichi jointly filed Form 1040, U.S. Individual Income Tax Return, for 2003 showing a Nevada address. This return reported a tax liability of $5,303,886, resulting chiefly from gain on the sale of petitioner's West Side stock. On Schedule D, Capital Gains and Losses, petitioner reported the proceeds from this sale as $35,199,357, reflecting both the cash he received and the $577,778 check, resulting in a long-term capital gain of $35,170,793.

The IRS did not audit petitioner's Form 1040, but it did open a transferee-liability examination concerning West Side's 2003 tax liabilities. Upon completion of that examination, the IRS sent petitioner a Letter 902-T, Notice of Liability. This notice of liability was timely mailed to petitioner on June 25, 2012.[6] The notice determined that

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6. In his petition, petitioner challenged the timeliness of the notice of liability. The Commissioner generally must assess transferee liability within one year after expiration of the period of limitations on the transferor, but the applicable period of limitations may be extended by agreement. *See* sec. 6901(c) and (d). Petitioner executed successive Forms 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, extending to June 30, 2012, the time for assessing transferee liability against him, and the notice of liability was timely issued on June 25, 2012. Petitioner abandoned in his posttrial briefs any challenge to the timeliness of the notice of liability, and that argument is thus deemed conceded.

petitioner is liable as transferee for the following liabilities of West Side:

Deficiency	Penalty *sec. 6662(a), (d)*	Penalty *sec. 6662(h)*
$15,186,570	$61,851	$5,950,926

Petitioner timely petitioned this Court for review of the notice of liability.[7]

OPINION

I. Legal Standard and Burden of Proof

Petitioner resided in Nevada when he filed his petition. The parties have stipulated that any appeal of this case will lie to the U.S. Court of Appeals for the Ninth Circuit. *See* sec. 7482(b)(1)(A); *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). That Court has held that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Popov v. Commissioner*, 246 F.3d 1190, 1195 (9th Cir. 2001)

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7. In addition to the amounts listed in the notice of liability, petitioner proposed as a finding of fact (to which respondent did not object) that respondent determined "assessed interest" of $8,475,655 as well as "accrued interest and penalties" of $12,362,425. In their posttrial briefs the parties have not addressed the proper computation of interest or the existence of penalties other than those determined by respondent under section 6662(a), (d), and (h). We will accordingly enter decision in this case under Rule 155.

(quoting *Unger v. Commissioner*, 936 F.2d 1316, 1320, 290 U.S. App. D.C. 259 (D.C. Cir. 1991) , *aff'g* T.C. Memo. 1990-15), *aff'g in part, rev'g in part and remanding* T.C. Memo. 1998-374.

Under section 6901, the Commissioner may proceed against a transferee of property to assess and collect Federal income tax, penalties, and interest owed by a transferor. Respondent contends that petitioner, as transferee, is liable for the unpaid 2003 Federal tax liabilities of West Side. Petitioner contends that Nob Hill purchased his stock moments before it received West Side's cash; that Rabobank and Moffat were the source of the cash used to purchase his stock; and that he thus received no "transfer" from West Side that could make him liable as its "transferee."

Section 6901 does not impose substantive liability on the transferee but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. *Commissioner v. Stern*, 357 U.S. 39, 42, 78 S. Ct. 1047, 2 L. Ed. 2d 1126, 1958-2 C.B. 937 (1958). To take advantage of this procedure, the Commissioner must establish an independent basis under applicable State law for holding the transferee liable for the transferor's debts. Sec. 6901(a); *Commissioner v. Stern*, 357 U.S. at 45; *Hagaman v. Commissioner*, 100 T.C. 180, 183 (1993). State law thus determines the transferee's substantive liability. *Ginsberg v. Commissioner*, 305 F.2d 664, 667 (2d Cir. 1962), *aff'g* 35 T.C. 1148 (1961). In this respect, section 6901 places the Commissioner in "precisely the same position as that of ordinary creditors under state law." *Starnes*

v. Commissioner, 680 F.3d 417, 429 (4th Cir. 2012), *aff'g* T.C. Memo. 2011-63. The parties agree that the State law applicable here is that of Ohio, where petitioner resided, West Side did business, and the principal transactions occurred. *See Commissioner v. Stern*, 357 U.S. at 45; *Estate of Miller v. Commissioner*, 42 T.C. 593, 598 (1964).

Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. *See Diebold Found., Inc.*, 736 F.3d at 183-184; *Starnes*, 680 F.3d at 427; *Swords Trust v. Commissioner*, 142 T.C. 317, 336 (2014).

The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a). Under normal burden-of-proof rules, therefore, petitioner has the burden of proving that West Side is not liable for the $21,199,347 of tax and penalties that the IRS assessed against it for 2003. Rule 142(a)(1), (d); *Welch v. Helvering*, 290 U.S. 111, 115, 54 S. Ct. 8, 78 L. Ed. 212, 1933-2 C.B. 112 (1933); *see United States v. Williams*, 514 U.S. 527, 539, 115 S. Ct. 1611, 131 L. Ed. 2d 608 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); *L. V. Castle Inv. Group, Inc. v. Commissioner*, 465 F.3d 1243, 1248 (11th Cir. 2006).

The burden of proof on factual issues may be shifted to the Commissioner if the taxpayer introduces "credible evidence" with respect thereto and satisfies other requirements. Sec. 7491(a)(1) and (2). Petitioner asked that we shift to respondent the burden of proof with respect to West Side's 2003 tax liability. We decline this request. Petitioner introduced no "credible evidence" concerning the $42,480,622 bad debt deduction that generated West Side's 2003 deficiency. In any event, it does not matter who bears the burden of proof because the preponderance of the evidence favors respondent's position as to all material facts.[8]

II. West Side's 2003 Federal Tax Liability

In the notice of deficiency to West Side, the IRS disallowed a deduction of $1,651,752 for legal and professional fees and a deduction of $42,480,622 for bad debts. The notice also determined an accuracy-related penalty of $61,851 and a penalty of $5,950,926 for a "gross valuation misstatement" under section 6662(h).

The deduction for legal and professional fees was disallowed on the ground that these fees were incurred in connection with a tax-avoidance transaction. We conclude below that the transaction by which Nob Hill acquired

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8. Whether the burden has shifted matters only in the case of an evidentiary tie. *See Polack v. Commissioner*, 366 F.3d 608, 613 (8th Cir. 2004), *aff'g* T.C. Memo. 2002-145. In this case, we discerned no evidentiary tie on any material issue of fact. *See Payne v. Commissioner*, T.C. Memo 2003-90, 85 T.C.M. (CCH) 1073, 1077 (2003).

petitioner's West Side stock was indeed entered into for the sole purpose of tax avoidance. Petitioner provided no evidence to establish that any of the disallowed professional fees were incurred in connection with some other, legitimate, transaction. Petitioner has thus failed to carry his burden of proving that any portion of these fees constituted deductible business expenses of West Side under section 162. *See Agro Science Co. v. Commissioner*, 934 F.2d 573, 576 (5th Cir. 1991), *aff'g* T.C. Memo. 1989-687; *Simon v. Commissioner*, 830 F.2d 499, 500-501 (3d Cir. 1987), *aff'g* T.C. Memo. 1986-156; *Cullifer v. Commissioner*, T.C. Memo. 2014-208, at *45.

West Side's claimed $42,480,622 bad debt loss was based on the assertion that the two Aoyama loans had a tax basis of $43,323,069. That assertion is preposterous because those loans were a subset of a larger portfolio of loans that had a tax basis of approximately $137,000. Petitioner introduced no credible evidence to substantiate the basis claimed.[9]

9. Petitioner argues that a memorandum solicited by Millennium from the Seyfarth Shaw law firm was sufficient to substantiate the bad-debt deduction. We give no weight to that memorandum. It was based on assumed facts provided by Mr. McNabola; those assumed facts are contradicted by the record evidence in this case; and the memorandum explicitly states that no one but Millennium can rely upon it. Seyfarth Shaw gained notoriety for issuing bogus tax-shelter opinions, and this document seems par for the course. *See, e.g., Kenna Trading, LLC v. Commissioner*, 143 T.C. 322 (2014), *aff'd*, 728 F.3d 676 (7th Cir. 2013); *Superior Trading, LLC v. Commissioner*, 137 T.C. 70 (2011); *Rogers v. Commissioner*, T.C. Memo 2014-141; *Rogers v. Commissioner*, T.C. Memo 2011-277, *aff'd*, 728 F.3d 673 (7th Cir.

Petitioner does not seriously dispute West Side's liability for the $61,851 accuracy-related penalty.[10] For returns filed on or before August 17, 2006, a "gross valuation misstatement" exists where the basis claimed equals or exceeds 400% of the correct amount. Sec. 6662(h)(2); sec. 1.6662-5(e)(2), Income Tax Regs. Claiming a tax basis of $43,323,069 for the Aoyama loans, which had an actual basis of substantially less than $137,000, is unquestionably a "gross valuation misstatement." Apart from challenging the deficiency on which the penalty is based, petitioner introduced no evidence to show that respondent's calculation of a section 6662(h) penalty of $5,950,926 was incorrect. Petitioner has thus failed to prove that respondent erred in determining against West Side for 2003 a tax deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively.

III. Petitioner's Liability as Transferee of West Side

Section 6901 permits the Commissioner to assess tax liability against a person who is "the transferee of assets of a taxpayer who owes income tax." *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010, 1017 (9th Cir. 2014), *rev'g and remanding* T.C. Memo. 2012-61. To

2013); *Sterling Trading, LLC v. United States*, 553 F. Supp. 2d 1152 (C.D. Cal. 2008).

10. Petitioner disputes his liability for the penalties principally on the ground that the penalties for which West Side is liable cannot be collected from him as its transferee. We address this argument *infra* pp. 61-63.

impose that liability on a transferee, a court must first determine whether "the party [is] substantively liable for the transferor's unpaid taxes under state law," and next determine whether that party is a "transferee" within the meaning of section 6901. *Slone v. Commissioner*, 810 F.3d 599, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315, at *2 (9th Cir. Aug. 28, 2015) *vacating and remanding* T.C. Memo. 2012-57; *see Commissioner v. Stern*, 357 U.S. at 44-45. The two prongs of this inquiry are independent of one another. *See Feldman v. Commissioner*, 779 F.3d 448, 458 (7th Cir. 2015), *aff'g* T.C. Memo. 2011-297; *Salus Mundi Found.*, 776 F.3d at 1012; *Diebold Found., Inc.*, 736 F.3d at 185; *Frank Sawyer Trust of May 1992 v. Commissioner*, 712 F.3d 597, 605 (1st Cir. 2013), *aff'g* T.C. Memo. 2011-298; *Starnes*, 680 F.3d at 429.

A. Petitioner's Substantive Liability Under Ohio Law

In deciding matters of State law, we are generally guided by the decisions of the State's highest court. If there is no relevant precedent from the State's highest court, but there is relevant precedent from an intermediate appellate court, "the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007); *see Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967) (Federal court should apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); *Swords*

Trust, 142 T.C. at 342; *Estate of Young v. Commissioner*, 110 T.C. 297, 300, 302 (1998). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir. 1982) (quoting *Benante v. Allstate Ins. Co.*, 477 F.2d 553, 554 (5th Cir. 1973)).

In 1990 Ohio enacted the Uniform Fraudulent Transfer Act of 1984 (UFTA) as chapter 1336 of its Commercial Transactions Code. *See* Ohio Rev. Code secs. 1336.01 to 1336.12 (hereafter OUFTA; all references to the OUFTA are to the version in effect during 2003). Forty-three States and the District of Columbia have adopted the UFTA in whole or in part. The version of the UFTA that Ohio adopted corresponds almost verbatim to the uniform law.

When interpreting Ohio statutes derived from uniform or model laws, the Ohio Supreme Court has regularly consulted opinions from sister State courts interpreting parallel provisions of their own statutes. *See Stein v. Brown*, 18 Ohio St. 3d 305, 18 Ohio B. 352, 480 N.E.2d 1121 (Ohio 1985) (discussing other States' treatment of the Uniform Fraudulent Conveyance Act (UFCA), the UFTA's predecessor); *Ohio Ins. Guar. Ass'n v. Simpson*, 1 Ohio App. 3d 112, 1 Ohio B. 418, 439 N.E.2d 1257 (Ohio Ct. App. 1981) (noting relevance of opinions from courts of other States when interpreting model or uniform laws).[11]

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11. Ohio Supreme Court opinions considering the treatment of uniform acts by courts of other States include *Al Minor & Assocs. v. Martin*, 117 Ohio St. 3d 58, 2008 Ohio 292, 881 N.E.2d

Federal Courts of Appeals for five different Circuits, examining Midco transactions similar to that here, have recently issued opinions interpreting state laws that substantially incorporate the UFTA or its predecessor. *See supra* p. 2 and note 1. We believe that the Ohio Supreme Court would give proper regard to these decisions, and to the State court precedents on which they are based, when interpreting parallel provisions of the OUFTA.

The Ohio Supreme Court has emphasized that the OUFTA is a remedial statute that should be liberally construed to protect creditors. *See Wagner v. Galipo*, 50 Ohio St. 3d 194, 553 N.E.2d 610, 613 (Ohio 1990); *Locafrance United States Corp. v. Interstate Distrib. Servs., Inc.*, 6 Ohio St. 3d 198, 6 Ohio B. 252, 451 N.E.2d 1222, 1225 (Ohio 1983) (interpreting the OUFTA's predecessor). The OUFTA defines "transfer" very broadly to include "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset." OUFTA sec. 1336.01(L). Respondent argues that petitioner is a liable as a "transferee" of West Side's cash under four distinct sections of the Ohio statute. *See id.* secs. 1336.04(A)(1) and (2), 1336.05(A) and (B). The first

850 (Ohio 2008) (Uniform Trade Secrets Act); *Cruz v. Cumba-Ortiz*, 116 Ohio St. 3d 279, 2007 Ohio 6440, 878 N.E.2d 620 (Ohio 2007) (Uniform Interstate Support Act and Uniform Reciprocal Enforcement of Support Act); *Erie Ins. Grp. v. Fisher*, 15 Ohio St. 3d 380, 15 Ohio B. 497, 474 N.E.2d 320 (Ohio 1984) (Uniform Declaratory Judgments Act); *Levi v. Levi*, 170 Ohio St. 533, 166 N.E.2d 744 (Ohio 1960) (Uniform Reciprocal Enforcement of Support Act).

of these is an actual fraud provision; the latter three are constructive fraud provisions.

OUFTA section 1336.04(A)(1), the actual fraud provision, applies in the case of any creditor regardless of whether his “claim * * * arose before or after the transfer was made.” A transfer is fraudulent under this provision if the debtor made the transfer “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” The statute sets forth 11 nonexclusive “badges of fraud” that may give rise to an inference of actual fraudulent intent. *See id.* sec. 1336.04(B).

Two of the constructive fraud provisions apply in the case of a creditor “whose claim arose before the transfer was made.” *Id.* secs. 1336.05(A) and (B). Section 1336.05(A), the provision most relevant here, provides that “[a] transfer made * * * by a debtor is fraudulent as to [such] a creditor” if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor “was insolvent at that time or * * * became insolvent as a result of the transfer.” This provision applies regardless of a transferor’s or transferee’s actual intent. *See Sease v. John Smith Grain Co.*, 17 Ohio App. 3d 223, 17 Ohio B. 489, 479 N.E.2d 284, 287 (Ohio Ct. App. 1984) (holding that with respect to the OUFTA’s predecessor, “[n]either the intent of the debtor nor the knowledge of the transferee need be proven”); *Nelson v. Walnut Inv. Partners, L.P.*, 2011 U.S. Dist. LEXIS 75534 (S.D. Ohio 2011) (same).

The third constructive fraud provision applies whether the creditor's claim arose "before or after the transfer was made." OUFTA sec. 1336.04(A). "A transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer "without receiving a reasonably equivalent value in exchange" and either: (1) "[t]he debtor was engaged * * * [in a] transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (2) "[t]he debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." *Ibid.* This provision likewise applies regardless of the debtor's intent or transferee's actual knowledge. If the stated conditions of any constructive fraud provision are met, "the transfer is fraudulent as a matter of law." *See Sease*, 479 N.E.2d at 288.

1. Petitioner's Status Under Ohio Law as a "Transferee"

Under all four OUFTA provisions, a "transfer" of some kind must have been made from West Side as tax debtor to petitioner as transferee. This issue is the focus of the parties' dispute and its resolution affects analysis of the other OUFTA tests. We may thus conveniently discuss it first.

Petitioner insists that he was not literally a transferee of West Side's cash. According to petitioner, the cash he got came from Nob Hill, and the sources of that cash were the "loans" from Rabobank and Moffat. Nob Hill supposedly did not get West Side's cash, which it used to

repay those "loans," until later that same day. For this reason, petitioner contends that he received no West Side assets that could subject him to liability as a fraudulent transferee under Ohio law.

Respondent contends that Ohio law would treat petitioner in substance as the transferee of West Side's cash. We agree with respondent for at least two reasons, each of which constitutes an alternative ground for sustaining his position. First, the "loans" from Rabobank and Moffat were shams, and West Side was the true source of the cash petitioner received. Second, the stock sale transaction would be recharacterized under Ohio law as a de facto liquidation of West Side, with petitioner receiving in exchange for his stock a $35.2 million liquidating distribution.[12]

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12. Respondent advances the "economic substance" and "substance over form" doctrines as additional theories to support his position, contending that the Ohio courts would disregard the form of the Midco transaction because it was not a true multiparty transaction, had no business purpose, and was engineered for the sole purpose of avoiding West Side's Federal and Ohio tax liabilities. The Ohio courts have recognized and employed both doctrines. *See, e.g., First Banc Grp., Inc. v. Lindley*, 68 Ohio St. 2d 81, 428 N.E.2d 427, 428 (Ohio 1981) (affirming decision of Ohio Board of Tax Appeals and agreeing that "[t]o hold otherwise would allow form to control over substance"); *Bloomingdale v. Stein*, 42 Ohio St. 168 (Ohio 1884) (concluding in fraudulent transfer case that equity "look[s] through the form to the substance of the transaction"); *Macior v. Limbach*, 86 Ohio App. 3d 204, 620 N.E.2d 227, 229 (Ohio Ct. App. 1993) (citing *Humana, Inc. v. Commissioner*, 881 F.2d 247, 255 (6th Cir. 1989), *aff'g in part, rev'g* in part 88 T.C. 197 (1987)) (employing Federal "economic

a. Sham Loans

In order to "finance" the purchase of West Side's stock from petitioner, Nob Hill "borrowed" $29.9 million from Rabobank and $5 million from Moffatt, a For-trend affiliate. Ohio courts have consistently allowed finders of fact, in appropriate circumstances, to disregard transactions as shams. *See, e.g., Rowe v. Standard Drug Co.*, 132 Ohio St. 629, 9 N.E.2d 609, 613 (Ohio 1937) ("Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship."); *Selanders v. Selanders*, 2009-Ohio-2303, 2009 WL 1365226, at *11 (Ohio Ct. App. 2009) (affirming the trial court's decision and agreeing that "the entire transaction was quite possibly nothing more than a sham"); *Galley v. Galley*, 1994 Ohio App. LEXIS 2105, 1994 WL 191431, at *5 (Ohio Ct. App. 1994) ("When that reason for the transfer of property * * * is disregarded as a sham, the * * * [finder of fact] could well conclude that the transfer was a fraudulent transfer[.]");

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substance" doctrine). The "business purpose" petitioner now alleges for the Midco transaction--to generate greater after-tax profit for West Side's sole shareholder-- is not cognizable under these two doctrines because it is simply a corollary of the tax-avoidance scheme. And the facts we find to support respondent's position on the "sham loan" and "de facto liquidation" theories also show that the Midco transaction lacked economic substance. In view of our disposition, however, we need not address these alternative theories as an independent justification for respondent's submission that petitioner is liable as a transferee under Ohio law.

Phillips v. Phillips, 1994 Ohio App. LEXIS 2023, 1994 WL 179950 (Ohio Ct. App. 1994). We believe that an Ohio court would disregard as shams the "loans" purportedly extended by Rabobank and Moffat.

The Rabobank "loan" should be disregarded as a sham for at least three reasons. First, this "loan" was extended and repaid the same business day, literally moments after Nob Hill received the alleged loan proceeds. The essence of a loan is an extension of credit. It is obvious that the parties to this transaction did not desire to receive from Rabobank, and that Nob Hill did not in fact receive, a true extension of credit.

Second, the "loan" by its terms did not bear interest. Instead, Rabobank received a "fee" of $150,000. This fee cannot represent interest: Since the "loan" was outstanding for less than a day, this fee would translate to annual interest of $54,750,000, almost twice the magnitude of the "loan." What Rabobank received was not interest on a loan but a fee for facilitating a tax shelter transaction. Rabobank was presumably able to charge such an outlandish fee because (1) from its vantage point, it was incurring reputational or business risks by accommodating a questionable transaction and (2) from petitioner's vantage point, the fee was being paid by the U.S. Treasury and not by him.

Third, the Rabobank "loan" was fully collateralized by the cash in West Side's Rabobank account. Nob Hill's credit application described the risk rating on this loan as "N/A, or based on collateral." ("N/A" presumably means "not

applicable.") Rabobank gave the loan an R-1 risk rating, which denotes a loan that is fully cash collateralized. The documents executed at the closing gave Rabobank control over West Side's Rabobank account and a "springing lien" on West Side's cash the moment it funded the loan. Cash is fungible, and the consideration used to pay petitioner for his stock came in substance from West Side.

For essentially the same reasons, the $5 million "loan" extended by Moffat must also be disregarded as a sham. Like the Rabobank loan, it bore no interest; instead, Fortrend received a $5 million fee for assembling the entire tax shelter package. This "loan" did not represent a true extension of credit. It was simply an overnight shuffling of funds between two Fortrend entities designed to facilitate a tax-avoidance transaction.

We conclude that an Ohio court would apply the sham transaction doctrine to these loans, and we find that both loans were in fact shams. The totality of the circumstances shows that the nominal lenders provided these funds, not as bona fide extenders of credit, but simply as accommodation parties recruited by Fortrend to conceal the true nature of what was happening. What actually happened is that Rabobank electronically transferred cash from West Side's Rabobank account through Nob Hill's Rabobank account into petitioner's Rabobank account; the "loans" were utterly unnecessary and had no purpose except obfuscation. Since both loans were shams, Rabobank's transfer of funds from West Side's account into petitioner's account constituted a "direct or indirect * * * method of disposing of or parting with an asset." *See* OUFTA sec.

1336.01(L). Petitioner was thus was a “transferee” of West Side under Ohio law.

b. De Facto Liquidation of West Side

Respondent alternatively contends that the transfers among West Side, Nob Hill, and petitioner should be collapsed and recharacterized under Ohio law as a partial or complete liquidation of West Side, with petitioner receiving in exchange for his shares a $35.2 million liquidating distribution ($34.6 million of cash plus a check for $577,778). Although the Ohio courts have not addressed this precise scenario, judicial interpretations of fraudulent transfer provisions similar to Ohio’s establish that such transactions may be “collapsed” if the ultimate transferee had constructive knowledge that the debtor’s debts would not be paid.

The Court of Appeals for the Ninth Circuit recently addressed the application of New York’s fraudulent transfer provisions to a Midco transaction resembling that here. It concluded that multiple transfers could be collapsed under State law if the conduct of the ultimate transferees “show[ed] that they had constructive knowledge of the fraudulent scheme.” *Salus Mundi Found.*, 776 F.3d at 1020. Addressing the application of New York law to that same Midco transaction in *Diebold Found., Inc.*, the Court of Appeals for the Second Circuit held that multiparty transactions can be collapsed where the debtor’s property is “reconveyed * * * for less than fair consideration” and the ultimate transferee had “constructive knowledge of the entire scheme.” 736 F.3d at 186.

The Court of Appeals for the Fourth Circuit, addressing the application of North Carolina's UFTA provisions to another Midco transaction, similarly ruled that multiple transfers can be collapsed if the ultimate transferee has constructive knowledge that the debtor's tax liabilities will not be paid. If the ultimate transferees are on "inquiry notice" and fail to conduct a sufficiently diligent investigation, "they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." *Starnes*, 680 F.3d at 434.

The Ohio courts have regularly consulted and followed the decisions of sister courts when interpreting the provisions of model laws, including the OUFTA's predecessor. *See supra* pp. 36-37 and note 11. The North Carolina UFTA provisions governing constructive fraud are substantially identical to Ohio's, and New York's fraudulent transfer provisions are similar in material respects. We conclude that the Ohio Supreme Court, if confronted with this question, would find persuasive and would follow these three Federal decisions and the state court precedents on which they are based. The transfers at issue here may thus be collapsed under the OUFTA if petitioner had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid.[13]

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13. Petitioner argues that Ohio law does not permit transactions to be collapsed, citing *Official Comm. of Unsecured Creditors of Grand Eagle Cos. v. Asea Brown Boveri, Inc.*, 313 B.R. 219, 230 (N.D. Ohio 2004) (declining to collapse a leveraged buyout where there was "no evidence of knowledge on the part of the Lenders that the acquisition would harm future creditors").

Petitioner argues that he was not aware of Fortrend's "plan as a whole" to avoid West Side's income taxes. If this is true, it is irrelevant. Finding that a person had constructive knowledge does not require that he have actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 636 (2d Cir. 1995).

Constructive knowledge also includes "inquiry knowledge." "Inquiry knowledge" exists where the transferee was "aware of circumstances that should have led * * * [him] to inquire further into the circumstances of the transaction, but * * * [he] failed to make such inquiry." *HBE Leasing Corp.*, 48 F.3d at 636. Some cases define constructive knowledge as the knowledge that ordinary diligence would have elicited, while other cases require more active avoidance of the truth. *Diebold Found., Inc.*, 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioner had "constructive knowledge" under either standard.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with ensuring that he gets paid. But he agreed that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Specifically, echoing the contemporaneous advice of Hahn

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This case is inapposite because petitioner had at least constructive knowledge that Fortrend's tax-avoidance scheme would harm two creditors, the United States and Ohio.

Loeser's bankruptcy lawyers, Mr. Purcell testified that "due diligence did require [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liabilities. Petitioner and his advisers were clearly suspicious about Fortrend's scheme. But instead of digging deeper, they engaged in willful blindness and actively avoided learning the truth.

Petitioner and his advisers knew that the transaction Fortrend was proposing was likely a "reportable" or "listed transaction." Before meeting with Fortrend, Hahn Loeser lawyers spent several days researching Notice 2001-16, "reportable transactions," "sham transactions," and transactions involving "an intermediary corporation." PwC insisted on including in its engagement letter a requirement that petitioner advise it if he determined "that any matter covered by this Agreement is a reportable transaction." Petitioner attempted to strike this sentence from the engagement letter, evidencing his active avoidance of learning the truth. PwC advised petitioner orally that "a position can be taken" that the proposed stock sale would not be a reportable transaction. In tax-speak, this translates to a low level of confidence

on PwC's part.[14] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Any reasonably diligent person would infer from this refusal that a "listed transaction" was very likely what Fortrend, a tax shelter promoter, had in mind.

Though alerted by these warning signs, petitioner and his advisers failed to conduct a diligent inquiry into the "high basis/low value" debt strategy that Fortrend proposed for eliminating West Side's tax liabilities. PwC had advised that this appeared to be "a very aggressive tax-motivated strategy" that was "subject to IRS challenge." PwC specifically declined to give "more likely than not" assurance on this point. Petitioner turned his back on this red flag. He testified that Fortrend's tax-elimination strategy was of no concern to him because "that was their business."

Mr. Purcell testified that petitioner could not have sought an opinion from PwC concerning Fortrend's bad debt strategy because, as of the closing date, Fortrend had put no specific high-basis/low-value plan on the table.

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14. Under regulations in effect during 2003, "[a] position * * * [was] considered to have a realistic possibility of being sustained on its merits" if a well-informed tax professional would conclude that it had "approximately a one in three, or greater, likelihood of being sustained on its merits." Sec. 1.6694-2(b)(1), Income Tax Regs. Stating that "a position can be taken" suggests a lower level of confidence than this. Virtually any position "can be taken."

The Court did not find this testimony persuasive. If ordinary diligence required petitioner and his advisers to investigate Fortrend's plan, as Mr. Purcell admitted, ordinary diligence required them to dig more deeply into what Fortrend's bad-debt strategy was. Fortrend obviously had to know, as of September 9, 2003, how it envisioned eliminating a $16.9 million corporate tax liability in fewer than 12 weeks. Reasonable diligence required petitioner and his advisers to insist that Fortrend explain its debt reduction strategy in sufficient detail to enable PwC to evaluate it.

Numerous other features of Fortrend's proposal raised red flags that demanded further inquiry. Fortrend offered to pay petitioner $11.2 million more than the net book value of West Side--representing a premium of 47%--while insisting that West Side's assets be reduced to cash. Petitioner was a sophisticated entrepreneur who had built a company and knew how to value a business. It should have provoked tremendous skepticism to discover that Fortrend was willing to pay a 47% premium to acquire cash, which by definition cannot be worth more than its face value.

The business purpose alleged for the transaction, moreover, made absolutely no sense. Petitioner and his advisers were told that Fortrend intended to put West Side into the "distressed debt" business. "[T]he business purpose for the acquisition," according to PwC's memo, was "based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purposes is apparently difficult."

This explanation demanded further inquiry from any reasonably diligent person. In order to purchase West Side's stock, Fortrend needed to have cash or be able to borrow cash. If Fortrend had cash or could easily borrow cash, why would it want to acquire West Side in order to get cash? Moreover, as PwC noted in a parenthetical, "most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [Fortrend] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock." Since there was going to be precious little cash left in West Side after the deal closed, the "business purpose" alleged for the transaction did not pass the straight-face test.

The icing on the cake was the manner in which the purchase price was determined. Numerous spreadsheets prepared by petitioner's brother explicitly state that the purchase price would equal West Side's closing cash balance plus 68.125% of its accrued tax liabilities. A sophisticated businessman like petitioner should have been curious as to why the purchase price for his company was being computed as a percentage of its tax liabilities, and why this was the only number that Fortrend seemed to care about. In effect, Fortrend was offering to assume a $16.9 million tax liability in exchange for a $5 million fee. Because the economics of the deal made it obvious that Fortrend was not going to pay West Side's tax liabilities, this fact alone put petitioner on "inquiry knowledge."[15]

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15. In the stock purchase agreement, Nob Hill represented that it would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side]." This representation was not worth the paper it was printed on. Petitioner and his advisers knew that Nob

Petitioner testified that he had no contemporaneous understanding that the "Fortrend premium" was correlated to West Side's accrued tax liabilities. The Court did not find this testimony credible. Petitioner actively participated in negotiating Fortrend's fee. When confronted with his brother's spreadsheets that invariably compute Fortrend's fee as 31.875% of West Side's tax liabilities, petitioner became visibly uncomfortable. Petitioner's evasive testimony is further evidence that he had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West Side's tax liability.

To conclude that the totality of these circumstances did not give rise to constructive knowledge on petitioner's part "would do away with the distinction between actual and constructive knowledge." *Diebold Found., Inc.*, 736 F.3d at 189. And to relieve petitioner and his advisers of the duty to inquire, when the surrounding circumstances

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Hill was a shell corporation, that West Side would have virtually no assets left after the closing, and that neither would have the wherewithal to pay a $16.9 million tax liability. And because Nob Hill and Millennium (its parent) were offshore companies with no U.S. assets, this representation was completely unenforceable. The language in the stock purchase agreement allocating West Side's 2003 tax obligation to Nob Hill did not relieve petitioner of his duty to inquire. *See Diebold Found., Inc.*, 736 F.3d at 189 ("[T]he knowledge requirement for collapsing a transaction was designed to 'protect[] innocent creditors or purchasers for value.' * * * It was not designed to allow parties to shield themselves, when having knowledge of the scheme, by simply using a stock agreement to disclaim any responsibility." (quoting *HBE Leasing Corp.*, 48 F.3d at 636)).

cried out for such inquiry, "would be to bless the willful blindness the constructive knowledge test was designed to root out." *Ibid.* We find as a fact that petitioner had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities. The various steps of the Midco transaction may thus be "collapsed" in determining whether petitioner was a "transferee" of West Side under Ohio law.[16]

The remaining question is whether these steps, once collapsed, yield a de facto "liquidation" of West Side from which petitioner received a $35.2 million liquidating distribution. Petitioner appears to believe that, for this to occur, there must have been a *complete* liquidation of West Side. We do not see the logic of this position: under state corporate law, as well as under Federal tax law, a corporation can be the subject of either a partial or a complete liquidation.[17] In either event, petitioner received

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16. As the Second Circuit explained in *Diebold Found., Inc.*, "collapsing" the transactions in this way requires, not only that the ultimate transferee have "constructive knowledge of the entire scheme," but also that the debtor's property "be reconveyed * * * for less than fair consideration." 736 F.3d at 186. We address the absence of "fair consideration" below in discussing the requirements of OUFTA section 1336.05. *See infra* pp. 58-59.

17. *See, e.g.*, sec. 302(b)(4)(B), (e) (defining "partial liquidation"); *Armstrong v. Marathon Oil Co.*, 32 Ohio St. 3d 397, 513 N.E.2d 776 (Ohio 1987) (noting that corporation was considering complete or partial liquidation to prevent hostile takeover); *Cleveland Tr. Co. v. Hickox*, 32 Ohio App. 69, 167 N.E. 592, 595-596, 29 Ohio L. Rep. 452 (Ohio Ct. App. 1929) ("If there is

a $35.2 million liquidating distribution upon surrendering his stock. We fail to see how it matters which kind of liquidation it was.

In any event, we find as a fact that West Side was in substance completely liquidated. There is no evidence that West Side conducted any bona fide business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Those loans were not operational assets of a business; they were simply tools for implementing a sham tax-avoidance scheme. In reality, West Side was nothing but a shell company immediately after the Midco deal closed.

At the insistence of petitioner's lawyers, West Side was kept in formal existence for several years. It filed tax returns; it cut checks to Fortrend affiliates; and it maintained a nominal cash balance. But keeping West Side in notional existence was simply a charade designed to create a defense to the precise argument the IRS is advancing here, an argument that petitioner and his attorneys knew the IRS would advance if this

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liquidation of a corporation, partial or complete, the determining element of the transaction is whether the stockholders surrender and cancel the stock which is given in exchange[.]"); 18B Am. Jur. 2d Corporations sec. 1064 (noting that shareholders' right to receive accumulated dividends on liquidation applies identically in partial and complete liquidations).

Midco transaction came to its attention. Such lawyerly stratagems cannot hide the fact that West Side had been liquidated in substance. It continued as a Potemkin village intended to deceive the IRS, just as the original was designed to fool Catherine the Great.

In sum, we find that petitioner had constructive knowledge of Fortrend's tax-avoidance scheme; that the multiple steps of the Midco transaction must be collapsed; and that collapsing these steps yields a partial or complete liquidation of West Side from which petitioner received in exchange for his stock a $35.2 million liquidating distribution. *See Salus Mundi Found.*, 776 F.3d at 1019-1020 (following the Second Circuit's analysis to the same effect in *Diebold Found., Inc.*). Under the OUFTA, petitioner is thus a direct transferee of West Side's assets under respondent's "de facto liquidation" theory as well as under the "sham loan" theory discussed previously.[18]

2. Petitioner's Liability Under Ohio Law as a "Transferee"

OUFTA section 1336.05(A) provides that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the

18. Respondent advances the alternative contention that Nob Hill was a direct transferee of West Side and that petitioner has transferee-of-transferee liability as a subsequent transferee of Nob Hill. *See* sec. 6901(c)(2); *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo 2014-59 (finding transferee-of-transferee liability). Because we find that petitioner is liable as a direct transferee of West Side, we need not consider respondent's alternative position.

transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor became insolvent as a result of the transfer. We find that all three of these elements are satisfied here. Petitioner is thus liable as a transferee of West Side under Ohio law.

a. When the IRS Claim Arose

During April and May 2003, West Side received proceeds of $65 million from the PUCO settlement. This yielded a large gain that generated a tax liability of approximately $16.9 million. West Side thus had an accrued tax liability of approximately $16.9 million before September 9, 2003, the day the Midco deal closed.

The OUFTA defines the term "claim" expansively to mean "a right to payment." *Id.* sec. 1336.01(C). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Ibid.* A "creditor" is any person who has a "claim." *Id.* sec. 1336.01(D). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. *See Zahra Spiritual Tr. v. United States*, 910 F.2d 240, 248 (5th Cir. 1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim'" in the UFTA. *Stuart v. Commissioner*, 144 T.C. 235, 258, 2015 U.S. Tax Ct. LEXIS 14 (2015).

Petitioner does not seriously dispute that the IRS had a "claim" against West Side before the stock sale. Rather, he argues that the IRS had no claim against *Nob Hill* when his stock was purchased because West Side had not yet transferred its cash into Nob Hill's Rabobank account. The precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various transactions must be collapsed for purposes of determining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, it is irrelevant in what order the subsidiary transfers are thought to have occurred.

West Side's Federal tax liability had accrued by late May 2003. The IRS had a claim against West Side at that time. The transfer of West Side's assets to petitioner occurred on September 9, 2003. Respondent's claim thus "arose before the transfer was made." OUFTA sec. 1336.05(A).

b. "Reasonably Equivalent Value"

OUFTA section 1336.05(A) imposes, as a second condition of liability, that the debtor not have received "a reasonably equivalent value in exchange for the transfer." Whether the debtor received "reasonably equivalent value" is a question of fact. *See Shockley v. Commissioner*, T.C. Memo. 2015-113, at *50.

On September 9, 2003, West Side consisted of nothing but cash and tax liabilities. The value of petitioner's stock thus equaled West Side's net asset value, which

was about $23.7 million (cash equivalents of $40.6 million minus accrued tax liabilities of $16.9 million). West Side transferred $35.2 million to petitioner in exchange for his shares. Since his shares were worth only $23.7 million, West Side did not receive "a reasonably equivalent value in exchange for the transfer." OUFTA sec. 1336.05(A).

The only other thing West Side got at the closing was a representation from Nob Hill that it would "cause" West Side to pay its 2003 tax liabilities in full. As we have found previously, this representation was not worth the paper it was printed on. Nob Hill was a shell company, incorporated offshore, with no assets in the United States (or anywhere else). Nob Hill's parent, Millennium, was also a Cayman Islands company with no assets in the United States. Both were affiliates of a tax shelter promoter. The value of Nob Hill's promise was zero.

c. West Side's Insolvency

OUFTA section 1336.05(A) imposes, as a third condition of liability, that the debtor making the transfer "was insolvent at that time or * * * became insolvent as a result of the transfer." Petitioner asserts that West Side was solvent when he received Nob Hill's cash because, at that moment, West Side had not yet transferred its cash to Nob Hill. Thus, West Side supposedly had assets in excess of its tax liabilities when the transfer to petitioner occurred.

As with petitioner's argument about when the IRS claim arose, the precise timing of the back-to-back cash

transfers is immaterial under our analysis. We have found that the various transactions must be collapsed for purposes of determining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, West Side's solvency must be judged on that basis.

Under OUFTA sections 1336.02 and .05, solvency is measured at the time of the transfer. A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. *Id.* sec. 1336.02(A)(1). Following the transfer of $35.2 million to petitioner, West Side was left with tax liabilities of $16.9 million and assets of $5.1 million (consisting of a Rabobank account soon to be emptied by payments to tax shelter promoters). West Side thus "became insolvent as a result of the transfer." *Id.* sec. 1336.05(A).

In sum, we find that the IRS claim arose before West Side's assets were transferred to petitioner; that West Side made this transfer without having received "a reasonably equivalent value in exchange"; and that this transfer caused West Side to become insolvent. Petitioner is thus liable for West Side's tax debts under OUFTA section 1336.05(A).[19]

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19. The result would be the same if the IRS' claim were thought to have arisen after West Side's assets were transferred to petitioner. OUFTA section 1336.04(A)(2) provides that a transfer is fraudulent with respect to a present *or future* creditor if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and if (among other things) the debtor "intended to incur, or believed or reasonably should have

3. Petitioner's Liability Under Ohio Law For Penalties

Even if he can be held liable for West Side's unpaid tax, petitioner contends that the penalties assessed against West Side cannot be collected from him as its "transferee" under Ohio law. According to petitioner, "the distressed debt transaction giving rise to those penalties was not entered into until after petitioner sold his stock and petitioner had nothing whatsoever to do with that transaction." In support of this proposition he relies on *Stanko v. Commissioner*, 209 F.3d 1082 (8th Cir. 2000), *rev'g* T.C. Memo. 1996-530.

In *Stanko*, the Eighth Circuit interpreted Nebraska law in effect before 1989, when Nebraska adopted the UFTA. *See id.* at 1084 n.1. The Court reasoned that "penalties for negligent or intentional misconduct by the transferor that occurred many months after the transfer * * * are not * * * existing at the time of the transfer." *Id.* at 1088. The Eighth Circuit concluded that "[a] creditor whose debt did not exist at the date of the * * * [transfer]

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believed that he would incur, debts beyond his ability to pay as they became due." As discussed in the text, West Side did not receive "a reasonably equivalent value in exchange" for its transfer to petitioner. And if the IRS claim were regarded as arising after, rather than before, this transfer, West Side knew that it would incur tax debts "beyond * * * [its] ability to pay as they became due." *Ibid.* In view of our disposition, however, we need not discuss in any detail petitioner's liability under this alternative provision. We likewise need not decide whether petitioner would be liable under the OUFTA's "actual fraud" provision.

cannot have the conveyance declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time." *Id.* at 1087 (quoting *United States Nat'l Bank v. Rupe*, 207 Neb. 131, 296 N.W.2d 474, 476 (Neb. 1980)).

We find the *Stanko* case to have no application here. The instant case is governed by Ohio law, and the governing Ohio law differs from the pre-UFTA Nebraska statute that the Eighth Circuit was construing. The OUFTA defines "claim" expansively to include any "right to payment" even if it is "unliquidated" and "unmatured." OUFTA sec. 1336.01(C). The IRS may thus have a "claim" for the penalties whether or not they are thought to have been "existing at the time of the transfer." *Stanko*, 209 F.3d at 1088. The OUFTA, moreover, does not require proof that the transfer was made to defraud specific creditors; nor does it require proof that the debts in question "were in contemplation at the time" the assets were conveyed. *Id.* at 1087.

Finally, the OUFTA provides that a transfer may be held fraudulent as to future as well as present creditors. Liability as to future creditors exists if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." OUFTA sec. 1336.04(A)(2)(b). Thus, even if respondent's claim for the penalties were regarded as not being "in existence" on the date of the transfer, petitioner would have transferee liability to the IRS under OUFTA

section 1336.04(A)(2) in its capacity as a "future creditor" with respect to those penalties. *See supra* pp. 60-61 and note 19.

For these reasons, we conclude that petitioner is liable under Ohio law as a transferee both with respect to West Side's unpaid tax deficiency and with respect to the penalties properly assessed against it. We have reached the same conclusion concerning transferee liability for penalties under the fraudulent transfer laws of other States. *See, e.g., Kreps v. Commissioner*, 42 T.C. 660, 670 (1964) (New York law), *aff'd*, 351 F.2d 1 (2d Cir. 1965); *Cullifer*, T.C. Memo. 2014-208, at *30, *74 (Texas law); *Feldman v. Commissioner*, T.C. Memo 2011-297, 102 T.C.M. (CCH) 613, 623 (Wisconsin law).[20]

B. Petitioner's Status as a "Transferee" Under Federal Law

Whether a person is a "transferee" within the meaning of section 6901 is "undisputedly [a question] of

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20. In *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo. 2014-128, at *10-*11, this Court cited *Stanko*, 209 F.3d. at 1088, in holding that a transferee was not liable for accuracy-related penalties assessed against the transferors. The facts of the instant case, which must be evaluated under Ohio law, differ substantially from those of *Frank Sawyer Trust*, which involved Massachusetts law. The First Circuit accepted our "factual finding that the Trust lacked knowledge--actual or constructive--of the new shareholders' tax avoidance intentions." *Frank Sawyer Trust of May 1992*, 712 F.3d at 599. Here, we have found that petitioner had at least constructive knowledge that West Side's tax liabilities would not be satisfied.

federal law." *Starnes*, 680 F.3d at 427; *see Slone*, F.3d , 2015 U.S. App. LEXIS 15247, 2015 WL 5061315; *Feldman*, 779 F.3d at 458. "Transferee" is an expansive term that includes a "donee, heir, legatee, devisee, and distributee." Sec. 6901(h). The term also includes "the shareholder of a dissolved corporation," "the successor of a corporation," and "the assignee * * * of an insolvent person." Sec. 301.6901-1(b), Proced. & Admin. Regs.

In determining "transferee" status for Federal law purposes, the Ninth Circuit has recently held that a court must consider whether to disregard the form of the transaction by which the transfer occurred. *See Slone*, 810 F.3d at 605, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315, at *5. "[F]or purposes of transferee liability under § 6901," the Ninth Circuit ruled, relevant precedent requires that the court "look through the form of a transaction to consider its substance." *Id.* at 605, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315, at *4. Analyzing a transaction similar to that here, the Ninth Circuit explained in *Slone*:

> [W]hen the Commissioner claims a taxpayer was "the shareholder of a dissolved corporation" for purposes of 26 C.F.R. § 301.6901-1(b), but the taxpayer did not receive a liquidating distribution if the form of the transaction is respected, a court must consider the relevant subjective and objective factors to determine whether the formal transaction "had any practical economic effects other than the creation of income tax losses."

Id. at 606, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315, at *5 (quoting *Reddam v. Commissioner*, 755 F.3d 1051, 1060 (9th Cir. 2014), *aff'g* T.C. Memo. 2012-106).[21]

In performing this "substance over form" inquiry, the Ninth Circuit does not engage in a rigid two-step analysis. Rather, it focuses "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." *Id.* (quoting *Reddam*, 755 F.3d at 1060). Following a commonsense review of the transaction, if the court concludes that the transaction lacks a nontax business purpose, has no economic substance, and was entered into solely to generate illegitimate tax benefits, the Commissioner may disregard the form the parties have selected and tax the transaction on the basis of its underlying economic substance. *Id.* at 606, 2015 U.S. App. LEXIS 15247, 2015 WL 5061315, at *5-*6.

For the reasons discussed previously, we find that the transaction by which Nob Hill "purchased" petitioner's West Side stock relied on sham transactions, had no economic substance, had no bona fide business purpose, and was entered into solely to evade West Side's Federal

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21. At least two other Circuits have previously ruled similarly. *See Feldman*, 779 F.3d at 454-457 (7th Cir. 2015); *Owens v. Commissioner*, 568 F.2d 1233 (6th Cir. 1977) ("[T]he law does not permit a taxpayer * * * to cast transactions in forms when there is no economic reality behind the use of the forms. 'The incidence of taxation depends on the substance of a transaction.'" (quoting *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334, 65 S. Ct. 707, 89 L. Ed. 981, 1945 C.B. 58 (1945))), *aff'g in part, rev'g in part*, 64 T.C. 1 (1975).

and Ohio tax liabilities. *See supra* p. 40 and note 11 and pp. 41-55. We therefore disregard the form of the transaction and find that petitioner in substance was a direct recipient of West Side's cash, i.e., as a "distributee," "the shareholder of a dissolved corporation," or "the assignee * * * of an insolvent person." Sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. In any of those capacities, he was a "transferee" of West Side within the meaning of section 6901.

IV. Respondent's Collection Efforts

In certain circumstances the IRS may be required to show that it exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferee. *See Sharp v. Commissioner*, 35 T.C. 1168, 1175 (1961); *Shockley v. Commissioner*, T.C. Memo. 2015-113, at *54; *Kardash v. Commissioner*, T.C. Memo. 2015-51, at *22-*24; *Zadorkin v. Commissioner*, T.C. Memo. 1985-137, 49 T.C.M. (CCH) 1022, 1028 (1985). The reasonableness of the IRS' collection efforts against the tax debtor must be assessed in the light of the facts of the particular case. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." *Zadorkin*, 49 T.C.M. (CCH) at 1028.

In 2008, during the course of its examination of West Side, the IRS searched for any existing West Side assets upon which to levy. Unsurprisingly, it found none. In 2008, as in late September 2003, West Side had no meaningful assets. What little cash it had post closing was quickly

dissipated by payments to Fortrend, MidCoast, and their tax shelter promoter affiliates. Millennium, West Side's postclosing parent, was likewise immune from IRS collection efforts because it was a Cayman Islands company with no assets in the United States. We find that the IRS acted completely reasonably in declining to take further, useless, steps to collect this liability from West Side.

Petitioner also argues that the IRS failed to make collection efforts against Moffatt, whose $5 million "loan" was allegedly repaid with some of West Side's cash. We have already determined that the Moffatt loan was a sham. In substance, West Side's cash went directly to petitioner, and the Moffatt "loan" was simply an overnight shuffling of funds between two Fortrend affiliates. Under these circumstances, it is not certain that Moffatt was a transferee of West Side.

Even if Moffatt were thought to be a transferee of West Side, collection efforts against it would almost certainly have been futile. As far as the trial revealed, Moffatt was a shadowy entity that appeared and quickly disappeared. There is no evidence in the record about what assets Moffatt had or where they were. It is a fair assumption that Fortrend established this affiliate, like Nob Hill, Millennium, and its other affiliates, in a manner that effectively immunized them from the reach of U.S. tax authorities.

In any event, the IRS is not required to pursue collection efforts against Transferee A before seeking to

collect from Transferee B. "Transferee liability is several" under section 6901. *Alexander v. Commissioner*, 61 T.C. 278, 295 (1973); *Cullifer v. Commissioner*, T.C. Memo. 2014-208, at *74 (same). "It is well settled that a transferee is severally liable for the unpaid tax of the transferor to the extent of the assets received and other stockholders or transferees need not be joined." *Estate of Harrison v. Commissioner*, 16 T.C. 727, 731 (1951) (citing *Phillips v. Commissioner*, 283 U.S. 589, 51 S. Ct. 608, 75 L. Ed. 1289, 1931-1 C.B. 264 (1931) (construing predecessor statute)). "In the event that one transferee is called upon to pay more than his pro rata share of the tax, he is left to his rights of contribution from the other transferees." *Id.* Petitioner is free to pursue against Moffat any right of contribution he may have.

We accordingly conclude (1) that petitioner is liable under Ohio law for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith and (2) that the IRS may collect this aggregate liability from petitioner as a "transferee" under section 6901. *See* OUFTA sec. 1336.08(B); *Schussel v. Werfel*, 758 F.3d 82 (1st Cir. 2014) (discussing the calculation of prejudgment interest on transferee liability), *aff'g in part, rev'g in part and remanding* T.C. Memo. 2013-32.

To reflect the foregoing,

Decision will be entered under Rule 155.

APPENDIX F — ORDER DENYING PETITION FOR PANEL REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 7, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-73418

Tax Ct. No. 23630-12

ORDER

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent-Appellee.

Filed, January 7, 2019

Before: W. FLETCHER, BEA, and OWENS, Circuit Judges.

The panel has voted to deny Appellant's petition for panel rehearing.

Appellant's petition for panel rehearing is DENIED.

APPENDIX G — STATUTES AND REGULATIONS

26 U.S.C. § 6901

§ 6901. Transferred assets.

(a) Method of collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.

(A) Transferees. The liability, at law or in equity, of a transferee of property--

(i) of a taxpayer in the case of a tax imposed by subtitle A [26 USCS §§ 1 et seq.] (relating to income taxes),

(ii) of a decedent in the case of a tax imposed by chapter 11 [26 USCS §§ 2001 et seq.] (relating to estate taxes), or

(iii) of a donor in the case of a tax imposed by chapter 12 [26 USCS §§ 2501 et seq.] (relating to gift taxes),in respect of the tax imposed

by subtitle A or B [26 USCS §§ 1 et seq. or 2001 et seq.].

(B) Fiduciaries. The liability of a fiduciary under section 3713(b) of title 31, United States Code, in respect of the payment of any tax described in subparagraph (A) from the estate of the taxpayer, the decedent, or the donor, as the case may be.

(2) Other taxes. The liability, at law or in equity of a transferee of property of any person liable in respect of any tax imposed by this title (other than a tax imposed by subtitle A or B [26 USCS §§ 1 et seq. or 2001 et seq.]), but only if such liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a) [26 USCS § 368(a)].

(b) Liability. Any liability referred to in subsection (a) may be either as to the amount of tax shown on a return or as to any deficiency or underpayment of any tax.

(c) Period of limitations. The period of limitations for assessment of any such liability of a transferee or a fiduciary shall be as follows:

(1) Initial transferee. In the case of the liability of an initial transferee, within 1 year after

the expiration of the period of limitation for assessment against the transferor;

(2) Transferee of transferee. In the case of the liability of a transferee of a transferee, within 1 year after the expiration of the period of limitation for assessment against the preceding transferee, but not more than 3 years after the expiration of the period of limitation for assessment against the initial transferor;

except that if, before the expiration of the period of limitation for the assessment of the liability of the transferee, a court proceeding for the collection of the tax or liability in respect thereof has been begun against the initial transferor or the last preceding transferee, respectively, then the period of limitation for assessment of the liability of the transferee shall expire 1 year after the return of execution in the court proceeding.

(3) Fiduciary. In the case of the liability of a fiduciary, not later than 1 year after the liability arises or not later than the expiration of the period for collection of the tax in respect of which such liability arises, whichever is the later.

(d) Extension by agreement.

(1) Extension of time for assessment. If before the expiration of the time prescribed in subsection (c) for the assessment of the liability, the Secretary and the transferee or fiduciary have both consented in writing to its assessment after such time, the liability may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period agreed upon. For the purpose of determining the period of limitation on credit or refund to the transferee or fiduciary of overpayments of tax made by such transferee or fiduciary or overpayments of tax made by the transferor of which the transferee or fiduciary is legally entitled to credit or refund, such agreement and any extension thereof shall be deemed an agreement and extension thereof referred to in section 6511(c) [26 USCS § 6511(c)].

(2) Extension of time for credit or refund. If the agreement is executed after the expiration of the period of limitation for assessment against the taxpayer with reference to whom the liability of such transferee or fiduciary arises, then in applying the limitations under section 6511(c) [26 USCS § 6511(c)] on the amount of the credit or refund, the periods specified in section 6511(b)(2) [26 USCS § 6511(b)(2)] shall be increased by the period

from the date of such expiration to the date of the agreement.

(e) Period for assessment against transferor. For purposes of this section, if any person is deceased, or is a corporation which has terminated its existence, the period of limitation for assessment against such person shall be the period that would be in effect had death or termination of existence not occurred.

(f) Suspension of running of period of limitations. The running of the period of limitations upon the assessment of the liability of a transferee or fiduciary shall, after the mailing to the transferee or fiduciary of the notice provided for in section 6212 [26 USCS § 6212] (relating to income, estate, and gift taxes), be suspended for the period during which the Secretary is prohibited from making the assessment in respect of the liability of the transferee or fiduciary (and in any event, if a proceeding in respect of the liability is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(g) Address for notice of liability. In the absence of notice to the Secretary under section 6903 [26 USCS § 6903] of the existence of a fiduciary relationship, any notice of liability enforceable under this section required to be mailed to such person, shall, if mailed to the person subject

to the liability at his last known address, be sufficient for purposes of this title, even if such person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(h) Definition of transferee. As used in this section, the term "transferee" includes donee, heir, legatee, devisee, and distributee, and with respect to estate taxes, also includes any person who, under section 6324(a)(2) [26 USCS § 6324(a)(2)], is personally liable for any part of such tax.

(i) Extension of time. For extensions of time by reason of armed service in a combat zone, see section 7508 [26 USCS § 7508].

Appendix G

Chapter 1336: Ohio Uniform Fraudulent Transfer Act

ORC Ann. Title 13, Ch. 1336

§ 1336.01 Definitions.

As used in this chapter:

(A) "Affiliate" means any of the following:

(1) A person who directly or indirectly owns, controls, or holds with power to vote, twenty per cent or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following manners:

(a) As a fiduciary or agent without sole discretionary power to vote the securities;

(b) Solely to secure a debt, if the person has not exercised the power to vote.

(2) A corporation twenty per cent or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote, twenty per cent or more of the outstanding voting securities of the debtor, other than a person who holds the securities in either of the following manners:

(a) As a fiduciary or agent without sole discretionary power to vote the securities;

(b) Solely to secure a debt, if the person has not exercised the power to vote.

(3) A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor;

(4) A person who operates the business of the debtor under a lease or other agreement, or controls substantially all of the assets of the debtor.

(B) "Asset" means property of a debtor, but does not include any of the following:

(1) Property to the extent it is encumbered by a valid lien;

(2) Property to the extent it generally is exempt under nonbankruptcy law, including, but not limited to, section 2329.66 of the Revised Code;

(3) An interest in property held in the form of a tenancy by the entireties created under section 5302.17 of the Revised Code prior to April 4, 1985, to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(C) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated,

fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(D) "Creditor" means a person who has a claim.

(E) "Debt" means liability on a claim.

(F) "Debtor" means a person who is liable on a claim.

(G) "Insider" includes all of the following:

(1) If the debtor is an individual, any of the following:

(a) A relative of the debtor or of a general partner of the debtor;

(b) A partnership in which the debtor is a general partner;

(c) A general partner in a partnership described in division (G)(1)(b) of this section;

(d) A corporation of which the debtor is a director, officer, or person in control.

(2) If the debtor is a corporation, any of the following:

(a) A director of the debtor;

(b) An officer of the debtor;

(c) A person in control of the debtor;

(d) A partnership in which the debtor is a general partner;

(e) A general partner in a partnership described in division (G)(2)(d) of this section;

(f) A relative of a general partner, director, officer, or person in control of the debtor.

(3) If the debtor is a partnership, any of the following:

(a) A general partner in the debtor;

(b) A relative of a general partner in, a general partner of, or a person in control of the debtor;

(c) Another partnership in which the debtor is a general partner;

(d) A general partner in a partnership described in division (G)(3)(c) of this section;

(e) A person in control of the debtor.

(4) An affiliate, or an insider of an affiliate as if the affiliate were the debtor;

(5) A managing agent of the debtor.

(H) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest

created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common law lien, or a statutory lien.

(I) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(J) "Property" means anything that may be the subject of ownership.

(K) "Relative" means an individual related by consanguinity within the third degree as determined by the common law, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(L) "Transfer" means every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(M) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

§ 1336.02 When debtor is insolvent.

(A)

(1) A debtor is insolvent if the sum of the debts of the debtor is greater than all of the assets of the debtor at a fair valuation.

(2) A debtor who generally is not paying his debts as they become due is presumed to be insolvent.

(B) A partnership is insolvent under division (A)(1) of this section if the sum of the debts of the partnership is greater than the aggregate, at a fair valuation, of all of the assets of the partnership and the sum of the excess of the value of the nonpartnership assets of each general partner over the nonpartnership debts of the general partner.

(C) For purposes of this section:

(1) "Assets" do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors, or that has been transferred in a manner making the transfer fraudulent under section 1336.04or 1336.05 of the Revised Code.

(2) "Debts" do not include an obligation to the extent that it is secured by a valid lien on property of the debtor not included as an asset.

§ 1336.03 When value is given for transfer or obligation; reasonably equivalent value; transfer for present value.

(A) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the business of the promisor to furnish support to the debtor or another person.

(B) For the purposes of division (A)(2) of section 1336.04 and division (A) of section 1336.05 of the Revised Code, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(C) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and in fact is substantially contemporaneous.

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§ 1336.04 When transfer or obligation incurred is fraudulent as to a creditor.

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:

(a) The debtor 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;

(b) The debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:

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(1) Whether the transfer or obligation was to an insider;

(2) Whether the debtor retained possession or control of the property transferred after the transfer;

(3) Whether the transfer or obligation was disclosed or concealed;

(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

(5) Whether the transfer was of substantially all of the assets of the debtor;

(6) Whether the debtor absconded;

(7) Whether the debtor removed or concealed assets;

(8) Whether 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;

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

§ 1336.05 Creditors whose claims arose before the transfer made or obligation incurred.

(A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(B) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

§ 1336.06 When transfer is made or obligation incurred.

For the purposes of this chapter:

(A)

(1) A transfer is made if either of the following applies:

(a) With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee;

(b) With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee.

(2)

(a) If applicable law permits the transfer to be perfected as provided in division (A) of this section and the transfer is not so perfected before the commencement

of an action for relief arising out of a transfer that is fraudulent under section 1336.04 or 1336.05 of the Revised Code, the transfer is deemed made immediately before the commencement of the action.

(b) If applicable law does not permit the transfer to be perfected as provided in division (A) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

(3) A transfer is not made until the debtor has acquired rights in the asset transferred.

(B) An obligation is incurred as follows:

(1) If oral, when it becomes effective between the parties;

(2) If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

§ 1336.07 Remedies of creditor or child support enforcement agency.

(A) In an action for relief arising out of a transfer or an obligation that is fraudulent under section 1336.04 or 1336.05 of the Revised Code, a creditor or a child support enforcement agency on behalf of a support creditor, subject to the limitations in section 1336.08 of the Revised Code, may obtain one of the following:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the claim of the creditor;

(2) An attachment or garnishment against the asset transferred or other property of the transferee in accordance with Chapters 2715. and 2716. of the Revised Code;

(3) Subject to the applicable principles of equity and in accordance with the Rules of Civil Procedure, any of the following:

(a) An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(b) Appointment of a receiver to take charge of the asset transferred or of other property of the transferee;

(c) Any other relief that the circumstances may require.

(B) If a creditor or child support enforcement agency has obtained a judgment on a claim against the debtor, the creditor or agency, if the court so orders, may levy execution on the asset transferred or its proceeds in accordance with Chapter 2329. of the Revised Code.

§ 1336.08 Bona fide transferees; judgment where transfer is voidable; exceptions.

(A) A transfer or an obligation is not fraudulent under division (A)(1) of section 1336.04 of the Revised Code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(B)

(1) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor or a child support enforcement agency under division (A)(1) of section 1336.07 of the Revised Code, the creditor or agency may recover a judgment for the value of the asset transferred, as adjusted under division (B)(2) of this section, or the amount necessary to satisfy the claim of the creditor or agency, whichever is less. The judgment may be entered against either of the following:

(a) The first transferee of the asset or the person for whose benefit the transfer was made;

(b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(2) If the judgment under division (B)(1) of this section is based upon the value of the asset

transferred, the judgment shall be in an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(C) Notwithstanding the voidability of a transfer or an obligation under division (A)(1) of section 1336.07 of the Revised Code, a good faith transferee or obligee is entitled, to the extent of the value given to the debtor for the transfer or obligation, to any of the following:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred;

(3) A reduction in the amount of the liability on the judgment.

(D) A transfer is not fraudulent under division (A)(2) of section 1336.04 or section 1336.05 of the Revised Code if the transfer results from either of the following:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law;

(2) Enforcement of a security interest in compliance with section sections 1309.601 to 1309.604 of the Revised Code.

(E) A transfer is not fraudulent under division (B) of section 1336.05 of the Revised Code as follows:

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider;

(3) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

§ 1336.09 Limitations of actions.

A claim for relief with respect to a transfer or an obligation that is fraudulent under section 1336.04 or 1336.05 of the Revised Code is extinguished unless an action is brought in accordance with one of the following:

(A) If the transfer or obligation is fraudulent under division (A)(1) of section 1336.04 of the Revised Code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant;

(B) If the transfer or obligation is fraudulent under division (A)(2) of section 1336.04 or division (A) of section 1336.05 of the Revised Code, within four years after the transfer was made or the obligation was incurred;

(C) If the transfer or obligation is fraudulent under division (B) of section 1336.05 of the Revised Code, within one year after the transfer was made or the obligation was incurred.

§ 1336.10 Other laws supplement chapter.

Unless displaced by this chapter, the principles of law and equity, including, but not limited to, the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement the provisions of this chapter.

§ 1701.08 Acceptance of articles of incorporation and other certificates; filing not constructive notice of contents.

(A) When articles of incorporation and other certificates relating to the corporation are submitted to the secretary of state, the secretary of state shall, after finding that they comply with the provisions of sections 1701.01 to 1701.98 of the Revised Code, accept the articles and other certificates for filing and make a copy of the articles and other certificates by microfilm or by any authorized photostatic or digitized process. Evidence of the filing shall be returned to the person filing the articles or certificate.

(B) All persons shall have the opportunity of acquiring knowledge of the contents of the articles and other certificates filed and recorded in the office of the secretary of state, but no person dealing with the corporation shall be charged with constructive notice of the contents of any such articles or certificates by reason of such filing or recording.