No. _____

In the Supreme Court of the United States

BILLY F. HAWK, JR., ET AL.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision conflicts with the decisions of the First, Second, Fourth, and Ninth Circuits regarding whether an alleged transferee's knowledge is required for collapsing transactions under the Uniform Fraudulent Transfer Act.

2. Whether the Sixth Circuit's reliance on state tax cases rather than creditor rights cases to justify collapsing under Tennessee's Uniform Fraudulent Transfer Act ("TUFTA") conflicts with *Commissioner v. Stern*, 357 U.S. 39 (1958) and *Frank Sawyer Trust of May 1992 v. Commissioner*, 712 F.3d 597 (CA1 2013).

3. Whether the Sixth Circuit's imposition of strict liability under 26 U.S.C. § 6901 conflicts with *Stern* and the Fourth Circuit's decision in *Starnes v. Commissioner*, 680 F.3d 417 (CA4 2012).

4. Whether the Sixth Circuit's application of federal doctrines to collapse transactions under TUFTA violates *Stern's* required two-step analysis and the decisions of the First, Second, Fourth, Seventh, and Ninth Circuits interpreting *Stern* to prohibit such application.

LIST OF PARTIES

Petitioners are as follows:

1. The Billy F. Hawk, Jr., GST Non-Exempt Marital Trust, Nancy Sue Hawk and Regions Bank, Co-Trustees;

2. The Estate of Billy F. Hawk, Jr., Nancy Sue Hawk and Regions Bank, Co-Executors;

3. The Billy F. Hawk, Jr., GST Exempt Marital Trust, Nancy Sue Hawk and Regions Bank, Co-Trustees; and

4. Nancy Sue Hawk.

Petitioners were petitioners in the Tax Court and appellants in the Court of Appeals.

Respondent is the Commissioner of Internal Revenue ("Commissioner"), who was respondent in the Tax Court and appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows:

Regions Bank, a bank chartered under the laws of Alabama, is wholly-owned by Regions Financial Corporation, a publicly-owned corporation. Regions Bank is Co-Trustee of Petitioners Billy F. Hawk, Jr., GST Non-Exempt Marital Trust and Billy F. Hawk, Jr., GST Exempt Marital Trust, and is Co-Executor of Petitioner Estate of Billy F. Hawk, Jr.

RELATED PROCEEDINGS

Billy F. Hawk, Jr., GST Non-Exempt Marital Trust et. al. v. Commissioner, Nos. 30024-09, 30025-09, 30026-09, 30515-09. U.S. Tax Court. Judgment entered February 14, 2018.

Billy F. Hawk, Jr., GST Non-Exempt Marital Trust et. al. v. Commissioner, No. 18-1534, U.S. Court of Appeals for the Sixth Circuit. Judgment entered July 9, 2019.

There are no additional proceedings in any court that are directly related to this case.

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STATEMENT OF JURISDICTION

The Sixth Circuit issued its opinion on May 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TUFTA, Tenn. Code Ann. §§ 66-3-301 *et seq.* and 26 U.S.C. § 6901 ("I.R.C. § 6901") are reproduced at *App.* 90-108.

INTRODUCTION

This Petition raises important questions concerning the proper interpretation of transferee liability under I.R.C. § 6901 on which the Circuits conflict. In *Commissioner v. Stern*, 357 U.S. 39 (1958), this Court held that an alleged transferee's liability is determined solely under the applicable state's creditor law, which in the vast majority of states is the Uniform Fraudulent Transfer Act ("UFTA"). The Sixth Circuit's decision ("Decision"), together with the decision of the Seventh Circuit, directly conflict with decisions of the First, Second, Fourth, and Ninth Circuits on whether knowledge is required under state fraudulent transfer law to collapse and recast transactions. The Decision also directly conflicts with *Stern* and the First Circuit

by relying on state cases interpreting tax law, rather than creditor law, to determine liability under the UFTA. The Decision directly conflicts with a decision of the Fourth Circuit on whether the stock sale transaction at issue is *per se* tax evasion creating strict liability for the innocent shareholders. The Decision directly conflicts with *Stern* and the decisions of the First, Second, Fourth, Seventh, and Ninth Circuits by applying federal collapsing principles to the state law issue.

As of 2012, Commissioner reported over 500 transferee cases involving intermediary or "MidCo" transactions pending in judicial and administrative proceedings and comprising over $1.3 billion in projected adjustments. Appellant Pet. for Rehearing in *Starnes v. Commissioner*, No. 11-1636 (CA4), Doc. 47, p. 3. Almost every Circuit has addressed a MidCo case,[1] with conflicting results, even on indistinguishable facts. The post-*Stern* conflicts are both widespread and matured, are now ripe for resolution, and affect a myriad of pending judicial and administrative proceedings involving transferee liability under I.R.C. § 6901.

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[1] There were other similar promoters, such as Fortrend, LLC. *See, e.g., Buckrey v. Commissioner*, 114 T.C.M. (CCH) 45 (2017).

STATEMENT OF THE CASE

A. Factual Background

(i) Holiday Bowl's Asset Sale

Billy F. Hawk, Jr., was the principal and majority owner of Holiday Bowl, Inc. ("Holiday Bowl"), which owned and operated two bowling alleys and two parcels of real estate in Tennessee. *App.* 26, 28. Following his death, Petitioners Nancy Sue Hawk, his widow, and the Estate of Billy F. Hawk, Jr., became Holiday Bowl's sole shareholders ("Shareholders") and engaged a broker to sell the bowling alleys and one of the parcels. *App.* 28. In July 2003, Holiday Bowl sold these assets for $6.5 million, leaving the corporation with about $4.2 million in cash and prepaid taxes, and the other parcel known as Snow Hill Road. *App.* 4, 28-29.

(ii) MidCoast's Approach and Advisers' Due Diligence

Shareholders were represented by Chattanooga law firm, Chambliss, Bahner & Stophel, P.C. ("Chambliss"), and accounting firm, Johnson, Hickey & Murchison, P.C. ("JHM") (collectively, "Advisers"). *App.* 28.

In 2001, two years before the asset sale, MidCoast Investments, Inc. (together with its related entities, "MidCoast"), a third-party asset recovery company, had contacted the broker about potential target corporations holding only cash. *App.* 30; J4610[2]; JA4612; JA4645. In March 2003, the broker suggested that Chambliss speak with MidCoast, which

[2] "JA" refers to the Joint Appendix filed with the Sixth Circuit.

represented that it had tax loss carry forwards providing offsets for gains. *App.* 30; JA2787. Shareholders engaged Advisers to "thoroughly look into the transaction" and provide opinions. JA4073; *App.* 30.

MidCoast represented that it bought corporations with cash for its asset-recovery business; the acquired corporation would not be dissolved; MidCoast used cost-recovery tax accounting to front load expenses incurred in debt recovery, enabling it to offset taxable gains and acquire receivables at lower costs; and MidCoast could satisfy the acquired entity's tax liability. *App.* 32-33. MidCoast's promotional materials described it as a top purchaser of delinquent consumer receivables and included its method of buying shares and operating entities for asset recovery, including payment of taxes. *App.* 30-32.

Advisers had extensive discussions with MidCoast's representatives concerning its purpose for buying Holiday Bowl and its post-closing intent and method for reducing or deferring taxes through offsetting expenses from its asset-recovery business. *App.* 35. Advisers researched the tax issues, verified MidCoast's corporate status and its representations with professionals provided as references, and conducted other research. JA4265-66; JA4315-16; JA4359-60; JA4399-401; JA4431; JA4434-35; JA4444-45; JA4464; JA4480; JA2778; *App.* 33, 36-37.

(iii) The Opinion Letters

In August and September 2003, Advisers delivered opinion letters that the transaction was a reasonable exercise of fiduciary discretion. JA2861-64; JA2874-75. Based on their collective due diligence, they opined that MidCoast had a clear business purpose and profit motive, JA2863-64; the stock sale was "viable tax planning strateg[y] [and] the tax treatment and positions taken can be supported upon scrutiny by the IRS and/or other taxing authorities," JA2864; and Shareholders' potential liability for 2003 taxes, if any, was "remote" as "the transaction is not one which under current law would allow the Internal Revenue Service to assess income tax against [Shareholders.]" JA2875. Although MidCoast had refused to disclose financial information to support its indemnification concerning the taxes, which Chambliss did not consider unusual, MidCoast agreed to provide its parent company's guaranty. *App.* 37-39; JA2874. Shareholders decided to proceed. *App.* 41.

(iv) Holiday Bowl Agreements and Escrow Arrangement

Chambliss learned that MidCoast was borrowing the purchase-money from Sequoia Capital, LLC ("Sequoia"), to be disbursed to Shareholders through an escrow closing. JA4250; JA4338; JA4078-79. Morris Manning & Martin, LLP ("Morris Manning"), a well-known Atlanta law firm, represented Sequoia and would act as escrow agent, providing additional comfort to Shareholders and Advisers. JA4094-95; JA4284. A draft of the Escrow Agreement reflected that Holiday Bowl's post-closing cash would secure the loan.

JA3886-90. To ensure the cash would not be used until Shareholders received the loan proceeds, Chambliss modified the draft Escrow Agreement, adding provisions that Morris Manning would hold the cash in escrow and the pledge would not occur until after Shareholders received the purchase price. JA3886-90; JA4261-62; JA3016 § 3(a); JA4273; JA4283.

(v) Closing

On November 12, 2003, the parties entered into the Share Purchase Agreement and Escrow Agreement, the terms of which were incorporated into the Share Purchase Agreement, and closed the stock sale. JA2957 § 2.2; JA2983 § 10.11; JA2994-3002. Pursuant to the agreements, Chambliss wired Holiday Bowl's cash of about $4.2 million to Morris Manning's trust account in escrow ("Escrow Funds"), *App.* 44, which could not be released to Sequoia or MidCoast until Morris Manning remitted the purchase price from Sequoia's loan funds to Shareholders. JA2967 § 2.20; JA2956 §§ 1.1-1.2; JA2971 § 5.5; JA2970 § 5.2; JA2974 § 7.1; JA2974 § 7.3(a); JA2975 § 7.3(k); JA3015, Recitals; JA3015-16 § 1; JA3016 §§ 2, 3(a)-(b).

By the time of closing, however, Morris Manning had not transferred the loan funds to the trust account for the purchase price. As the Tax Court found, "[a]bsent the Holiday Bowl funds, the trust account did not have sufficient cash to pay the purchase price." *App.* 44-45. In violation of the escrow arrangement, and unbeknownst to Shareholders and Holiday Bowl, Morris Manning used a portion of the Escrow Funds to pay the $3.45 million purchase price by return wire to Shareholders. *App.* 44.

Without knowing of the escrow violation, the Shareholders and Holiday Bowl completed the transactions at closing. Holiday Bowl redeemed the remaining shares and deeded Snow Hill Road to Shareholders. JA2954-55; JA4369.

(vi) Sequoia Purchase of Holiday Bowl

Also unbeknownst to Shareholders, on November 12, 2003, the same day it purchased Holiday Bowl, MidCoast resold the Holiday Bowl stock to Sequoia. *App.* 46.

(vii) Flow of Funds through Morris Manning's Accounts

On November 3, 2003, nine days before closing, Sequoia wired $34,999,930 to Morris Manning's trust account, which Morris Manning immediately transferred to a Sequoia client account to earn interest. *App.* 45-46. On the closing date, Morris Manning held Sequoia's funds in the client account well in excess of the purchase price. On the day following closing, Morris Manning transferred $31 million from the Sequoia client account to the trust account. *App.* 45. At the instructions of Holiday Bowl's new president, Morris Manning dispersed a total of about $4.5 million traceable to Sequoia's funds to various parties in several separate wire transfers over a period of five days after the closing. *App.* 45. Shareholders had no knowledge of the flow of funds through Morris Manning. JA4662; JA4666.

(viii) Commissioner's Investigation of MidCoast

In 2005, Commissioner began investigating 60 MidCoast transactions, including Holiday Bowl's. *App.* 48-49; JA5037-38; JA5043-44; JA4824. In December 2006, the investigating agent issued a report detailing MidCoast's history, including purchasing targets with cash and absorbing them into its asset-recovery business, making MidCoast a top purchaser of defaulted receivables, all consistent with the representations to Shareholders and Advisers. JA4749-915, *passim*. Although she found that MidCoast's deals were tax avoidance transactions, and despite access to MidCoast's internal documents and sworn testimony from senior executives and other employees, Commissioner's agent found no fraud. JA5060-64; JA5073-74; JA5093; JA3872 § 13; JA4749-915, *passim*.

(ix) Commissioner's Examination of Holiday Bowl

In July 2007, following an audit of Holiday Bowl's 2003, 2004, and 2005 returns[3], Commissioner issued a notice of tax deficiency of $965,358 and penalties of $378,107 on the 2003 return. *App.* 49; JA3605-18; JA3619; JA3635-41. Sequoia-owned Holiday Bowl did not contest the audit findings. JA2693 ¶ 264.

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[3] Holiday Bowl was not dissolved until July 2006. *App.* 48.

B. Procedural History

In 2009, Commissioner assessed transferee liability under I.R.C. § 6901 against Shareholders, JA2710-49, who promptly filed petitions with the Tax Court challenging the assessments under I.R.C. § 6213(a). Following trial, the court held that Morris Manning's transfer of the Escrow Funds as the purchase price to Shareholders constituted a constructive fraudulent transfer from Holiday Bowl, rendering Shareholders liable as fraudulent transferees under TUFTA and transferees under I.R.C. § 6901. *App.* 62-63. The court reasoned that the Share Purchase Agreement and Escrow Agreement were not integrated, did not require MidCoast to pay funds into escrow, and permitted MidCoast to use the Escrow Funds to pay the purchase price. *App.* 43-44, 62. Although Morris Manning held Sequoia's loan funds in its client account as of closing, *App.* 45, the court disregarded the loan as a sham and Morris Manning's ledgers showing use of Sequoia's loan funds for the purchase price as unreliable. *App.* 61-62. The court made no finding that Holiday Bowl or Shareholders knew of Morris Manning's escrow violation, the sham loan, or the money flow through Morris Manning, including the post-closing transactions directed by Sequoia-owned Holiday Bowl.

Noting the lack of any supporting Tennessee precedent, the court collapsed the transactions under TUFTA's supplementation of "equity" and definition of "transfer." *App.* 59. The court "assumed" Shareholders' knowledge was also required for collapsing and measured it under New York law, concluding that Shareholders, through the Advisers'

insufficient due diligence, were willfully blind to and on inquiry notice of the tax evasion plan. *App*. 65.

On February 14, 2018 the court entered Decisions, JA2525-36, constituting appealable judgments. Tax. Ct. R. 190(a). On May 3, 2018, Shareholders timely appealed to the Sixth Circuit under I.R.C. § 7483. JA2537-42. The Sixth Circuit had appellate jurisdiction and venue under I.R.C. §§ 7482(a)(1) and 7482(b)(1).

On May 15, 2019, the Sixth Circuit affirmed the Tax Court and issued the Mandate on July 9, 2019. Mandate in No. 18-1534 (CA6), Doc. 55. The court agreed that TUFTA permitted collapsing, but held that Shareholders' knowledge and due diligence were irrelevant. *App*. 15. Citing *Owens v. Commissioner*, 568 F.2d 1233 (CA6 1977), the court reasoned that Shareholders were strictly liable as fraudulent transferees under TUFTA because selling shares of an entity with only cash and tax liabilities is *per se* tax evasion. *App*. 10-11.

REASONS FOR GRANTING THE PETITION

Over 60 years ago, this Court held that an alleged transferee's liability is determined solely by state creditor law, thus placing Commissioner on the same footing as private creditors. *Commissioner v. Stern*, 357 U.S. 39, 45, 47 (1958). Consequently, unless Morris Manning's transfer of the Escrow Funds to Shareholders resulting from an escrow violation constituted a fraudulent transfer from Holiday Bowl under TUFTA, Shareholders were not liable as transferees under I.R.C. § 6901.

Under I.R.C. § 6901(b), the Commissioner may collect unpaid corporate income tax liabilities from a transferee of the corporation's property "only if the liability arises on the liquidation" of the corporation. Because the Holiday Bowl transaction was a stock sale, and Sequoia-owned Holiday Bowl was not dissolved until 2006, *App.* 5, 17, Shareholders could not be liable as fraudulent transferees under TUFTA unless the courts recast or "collapsed" the transactions and treated Morris Manning's transfer of the Escrow Funds as a liquidation of Holiday Bowl for the benefit of Shareholders. *App.* 7, 63. "Collapsing" of transactions is a powerful doctrine used by Commissioner to disregard the form of an otherwise facially legitimate transaction to collect taxes if the transaction lacks economic substance.

The Circuits are sharply divided on the issue of whether proof of the shareholder's knowledge of the counterparty's tax evasion scheme is required for collapsing under UFTA. The Sixth Circuit concluded that TUFTA permits collapsing regardless whether Shareholders knew of the tax evasion scheme or conducted appropriate due diligence by following the Seventh Circuit's interpretation of Wisconsin's UFTA. Other Circuits have ruled that proof of knowledge is required for collapsing both under the applicable state's UFTA or Uniform Fraudulent Conveyance Act ("UFCA"). Two Circuits have declined to decide the issue by assuming that knowledge is required and determining whether the record supported it.

Independent of the knowledge issue, the Sixth Circuit also concluded that reference to state tax cases

is appropriate to permit collapsing under UFTA. The First Circuit has held to the contrary.

The Sixth Circuit also ruled that Shareholders were strictly liable because selling shares of an entity with only cash is *per se* tax evasion. This ruling directly conflicts with the Fourth Circuit, which ruled that the same MidCoast transaction was not *per se* tax evasion.

The Sixth Circuit is in conflict with the First, Second, Fourth, Seventh, and Ninth Circuits in holding that federal recasting principles inform the state law collapsing issue under UFTA.

These conflicts affect the proper administration of I.R.C. § 6901 and warrant resolution. *See Commissioner v. Clark*, 489 U.S. 726, 736–37 (1989) (granting *certiorari* to resolve split between Fourth and Fifth Circuits on whether to apply "step-transaction doctrine," analogous to collapsing doctrine, in interpreting I.R.C. § 356).

I. The Decision Creates a Circuit Split on Knowledge Requirement for Collapsing under State Fraudulent Transfer Law.

The Sixth Circuit's ruling that TUFTA permits collapsing regardless of Shareholders' exercise of due diligence or lack of knowledge, *App.* 15, aligns with the Seventh Circuit's ruling applying Wisconsin's UFTA in *Feldman v. Commissioner*, 779 F.3d 448, 459-60 (CA7 2015). Both Circuits conflict with the First, Second, Fourth, and Ninth Circuits' rulings that the shareholder's knowledge is required for collapsing under state fraudulent transfer law. *See Starnes v. Commissioner*, 680 F.3d 417, 433 (CA4 2012) (knowledge

required for collapsing under North Carolina's UFTA); *Tricarichi v. Commissioner*, 110 T.C.M. (CCH) 370, at *47 (2015) (knowledge required for collapsing under Ohio's UFTA), *aff'd*, 752 F. Appx. 455 (CA9 2018), *cert. pending*, No. 18-1520; *Frank Sawyer Trust of May 1992 v. Commissioner*, 712 F.3d 597, 605 (CA1 2013) (knowledge required for collapsing under Massachusetts' UFTA); *Cullifer v. Commissioner*, 108 TCM (CCH) 408, at *62-63 (2014) (knowledge required for collapasing under Texas' UFTA), *aff'd on other grounds*, 651 Fed. Appx. 847 (CA11 2016); *Diebold Foundation, Inc. v. Commissioner*, 736 F.3d 172, 185 (CA2 2013) (knowledge required for collapsing under New York's UFCA); *Salus Mundi Foundation v. Commissioner*, 776 F.3d 1010, 1012 (CA9 2014) (same). There is, therefore, a matured, well-developed Circuit split on this critical issue for imposing liability under I.R.C. § 6901.

Recently, the Ninth and Eleventh Circuits declined to decide this very issue. *See Slone v. Commissioner*, 896 F.3d 1083, 1085 (CA9 2018), *cert. denied*, 139 S. Ct. 1348, 203 L. Ed. 2d 571 (2019), (refusing to "reach the issue of statutory interpretation" because, even if knowledge were required under Arizona's UFTA, the record showed requisite knowledge); *Shockley v. Commissioner*, 872 F.3d 1235, 1254 n.17 (CA11 2017) ("We need not decide here whether the Seventh Circuit in *Feldman* properly eschewed any knowledge requirement" under Wisconsin's UFTA because the record supported knowledge finding).

The Sixth Circuit attempted to distinguish *Starnes* and certain of the other Circuit decisions because they interpreted UFTA's predecessor, UFCA, or cited cases

that did so. *App.* 14-15. However, the Sixth Circuit did not address the conflicting holdings that knowledge is required for collapsing under UFTA by the Ninth Circuit in *Tricarichi*, 752 F. Appx., at 456 (implicitly concluding that Ohio's UFTA requires knowledge for collapsing) and the First Circuit in *Frank Sawyer Tr.*, 712 F.3d, at 605 (Massachusetts' UFTA requires knowledge for collapsing).[4] *See also Cullifer*, 108 TCM (CCH) 408, at *57 n. 31 (2015), *aff'd*, 651 Fed. Appx. 847 (CA11 2016) (cases analyzed under UFCA are instructive in UFTA analysis because collapsing of transactions is a common law doctrine not supplanted by adoption of Texas' UFTA).

II. The Decision Conflicts with *Stern* and the First Circuit by Failing to Apply Creditor Law to Determine if UFTA Permits Collapsing.

In direct contradiction to *Stern*, and without any supporting Tennessee precedent interpreting TUFTA, the Sixth Circuit collapsed and disregarded the form of the transaction. The court determined there was a *per se* tax evasion scheme using federal collapsing

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[4] Commissioner has also adopted a knowledge component for evaluating potential intermediary transactions. *See* I.R.S. Notice 2008-111, 2008-51 I.R.B. 1299 (Dec. 2, 2008) (clarifying Notice 2001-16). As *Starnes* noted, "[a]mong other things, Notice 2008-111 explained that a transaction 'is treated as an Intermediary Transaction with respect to a particular person' only if that person 'knows or has reason to know the transaction is structured' in a way such that 'the person or persons primarily liable for any Federal income tax obligation . . . will not pay that tax.'" 680 F.3d, at 422 n.3.

principles and imposed strict liability because Holiday Bowl held only cash and tax liabilities. According to the court, it was of no consequence that Shareholders did not know of the tax evasion plan. The Decision cites no Tennessee authority giving private creditors these extraordinary collapsing rights under TUFTA or imposing strict liability where neither the debtor nor transferee knew of or intended a transfer to occur, or where the transfer resulted from a third party's escrow violation.

The Tax Court rightly acknowledged the absence of any supporting Tennessee precedent, but "assumed" knowledge was required. *App.* 40, 65. The Sixth Circuit ruled that knowledge and due diligence were irrelevant, relying on two Tennessee tax cases. *App.* 12 (citing *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 88 (Tenn. 2010) (reversing summary judgment in a non-TUFTA use tax case on the issue of whether the court should pierce corporate veil); *M. & M. Stamp Co. v. Harris*, 368 S.W.2d 752, 755 (Tenn. 1963) (noting in another non-TUFTA state privilege tax case that Tennessee courts will look to substance of transaction when construing state tax statutes)). This analysis conflicts with *Stern*'s directive to apply the applicable state's creditor law and with the First Circuit's ruling in *Frank Sawyer Tr.* that "[u]nder *Stern*, when the IRS uses the procedural mechanism of 26 U.S.C. § 6901 to collect taxes from a transferee, the 'state law' that applies is the state law regarding creditors' rights, *not state tax law*." 712 F.3d, at 605 n.1 (emphasis added).

Neither of the Tennessee tax cases cited by the Sixth Circuit addresses collapsing under TUFTA.[5] Moreover, the court violated *Stern's* directive by eschewing the only available data on whether TUFTA permits collapsing. *App.* 13 (citing *Niuklee, LLC, v. Commissioner, Tennessee Department of Revenue*, No. M2014-01644-COA-R3-CV, 2015 WL 6941593, at *7 (Tenn. Ct. App. Nov. 9, 2015) ("No Tennessee court has applied the economic substance doctrine.")). Even the Tax Court observed that there is no "[s]tate court case that applies judicial doctrines of economic substance, substance over form, or sham transaction *with respect to transfers governed by TUFTA*." *App.* 59 (emphasis added).

The question under *Stern* is not, as framed by the Sixth Circuit, whether "Tennessee courts have applied equitable principles to scrutinize the economic realities of transactions in a variety of situations," *App.* 13, but whether courts have applied such principles to permit collapsing under TUFTA. There is no such precedent. The Sixth Circuit reasoned, however, that TUFTA's incorporation of "equitable principles" and definition of "transfer" permitted collapsing, and Shareholders' "'due diligence and lack of knowledge of illegality' doesn't shield [them] from the sham nature of the transaction and absolve them of transferee liability." *App.* 15

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[5] And to the extent it informs the issues at all, *CAO Holdings* warned against disrespecting a transaction's form to collect a state tax, as often the "[f]orm and structure are quite significant in business and commercial transactions, and frequently the form or structure used has controlling significance for taxes and other purposes." 333 S.W.3d, at 89 (quoting *Standard Advertising Agency, Inc. v. Jackson*, 735 S.W.2d 441, 443 (Tenn. 1987)).

(citing *Feldman*, 779 F.3d, at 460). The Decision thereby grants private creditors seeking relief in federal courts these extraordinary collapsing rights under TUFTA and imposes strict liability in circumstances where neither the debtor nor transferee knew of or intended a transfer, or where the transfer resulted from a third party's escrow violation.

TUFTA requires an actual or constructive fraudulent transfer intended by the debtor. The only fraud committed was by the counterparty, MidCoast and its purported lender, Sequoia, and neither Holiday Bowl nor Shareholders knew that any of the Escrow Funds were being returned to pay the purchase price or of the tax evasion scheme. There is nothing in TUFTA's letter or spirit, or any Tennessee decisions interpreting TUFTA, remotely suggesting that a constructive fraudulent transfer occurs where debtor and recipient do not know of or intend the transfer or where the transfer results from a third party's escrow violation.

III. The Decision's Imposition of Strict Liability Conflicts with *Stern* and the Fourth Circuit in *Starnes*.

The Sixth Circuit concluded that the sale of Holiday Bowl shares was *per se* tax evasion, relying on *Owens v. Commissioner*, 568 F.2d 1233, 1239 (CA6 1977), which imposes a "heavy burden" on a selling shareholder to disprove tax evasion where the entity holds only cash and tax obligations. *App.* 9-10; *see also App.* 18 (even if Sequoia's loan were real and loan documents pristine, it was "not likely" the tax-reduction strategy could work). The Decision

thereby conflicts with *Starnes*, which exonerated the shareholders in a materially indistinguishable MidCoast transaction that closed a day after the Holiday Bowl transaction. 680 F.3d, at 420-24; 430-38 (shareholder not liable for MidCoast tax evasion; no actual or constructive knowledge of the scheme). *See also Alterman v. Commissioner*, 110 TCM (CCH) 507 (2015) (same ruling in favor of shareholder on materially indistinguishable MidCoast transaction involving a Sequoia loan that closed three weeks after Holiday Bowl's closing).

The Sixth Circuit's conclusion that the transaction was *per se* illegal also conflicts with *Stern's* required analysis. *Owens* did not decide the question of whether the taxpayer was a transferee under I.R.C. § 6901 or state fraudulent transfer law. *Owens*, 568 F.2d, at 1246. Indeed, the Fourth Circuit found *Owens* "materially distinguishable" on this basis. *Starnes*, 680 F.3d, at 431 n.8 (*Owens* does not inform the state fraudulent transfer issues because *Owens* "had no occasion to consider the Supreme Court's instruction in *Stern* that state law governs an alleged transferee's substantive liability").

IV. The Decision Conflicts with *Stern* and the First, Second, Fourth, Seventh, and Ninth Circuits by Utilizing Federal Collapsing Principles to Inform Whether TUFTA Permits Collapsing.

The Sixth Circuit also relied on federal doctrines of economic substance and substance-over-form to support collapsing under state creditor law. *App.* 7-8 (discussing federal principles); *App.* 11 (stock sale

transaction "counts" as a transfer from Holiday Bowl to Shareholders under Tennessee law "for many of the same reasons" it is a transfer under federal law). By applying federal recasting principles to inform the state law issue, the Sixth Circuit's analysis conflicts with *Stern* and every other Circuit applying *Stern*. *See Frank Sawyer Tr.*, 712 F.3d, at 605 (First Circuit holding that Commissioner may "only rely on the Massachusetts [UFTA] to collect from a 'transferee' as that term is construed for the purposes of state law . . . Thus, if the Trust was not a 'transferee' of the companies for purposes of Massachusetts fraudulent transfer law, then whether or not it was a 'transferee' for purposes of § 6901 is irrelevant") (citing *Stern*, 357 U.S., at 45 and *Starnes*, 680 F.3d, at 419); *Diebold Foundation*, 736 F.3d, at 185-86 (Second Circuit joining the First and Fourth Circuits' interpretation of I.R.C. § 6901 that the two prongs under *Stern* are independent inquiries); *Starnes*, 680 F.3d, at 429 (Fourth Circuit concluding the issue of whether collapsing applies under state's UFTA determined solely by state creditor law); *Feldman*, 779 F.3d, at 458 (Seventh Circuit determining that "[a]llowing federal tax doctrines to dictate substantive outcomes under state law could give the federal government an advantage over other creditors"); *Salus Mundi Foundation*, 776 F.3d, at 1012 (Ninth Circuit concluding "the two requirements of 26 U.S.C. § 6901—transferee status under federal law and substantive liability under state law—are separate and independent inquiries. Therefore, the IRS cannot rely on federal law to recharacterize the series of transactions for purposes of the state law inquiry").

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Counsel of Record
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