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Shockley v. Commissioner of Internal Revenue, Case No. 16-13473 (11th Cir. 2017).
The Internal Revenue Service is permitted to disregard transactions, including "Midco" transactions, that are without economic reality and may impose taxes as a result of the disallowed transaction.

Savannah College of Art and Design, Inc. v. Sportswear, Inc., No. 15-13830 (11th Cir. 2017).
The protections of federally registered service marks carry over to goods under Eleventh Circuit precedent; *Crystal Entertainment & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1315–16 (11th Cir. 2011), is distinguished as it deals with common-law trademarks and not federally registered marks.

Emerald Coast Utilities Authority v. Bear Marcus Pointe, LLC, Case No. 1D15-5714 (Fla. 1st DCA 2017).
Upon rehearing, the First District reaffirms there is no "excusable neglect" to permit the filing of a belated appeal when the claimed excusable neglect was error to timely see the final judgment email due to the law firm's computer system not being configured to correctly receive and store emails.

Wells Fargo Delaware Trust Company, N.A. v. Petrov, Case No. 2D16-1536 (Fla. 2d DCA 2017).
Servicing agents may verify foreclosure complaints and testify at trials on behalf of a foreclosing plaintiff, and a servicer doing so does not constitute prosecuting a case on behalf of the plaintiff lender.

Managed Care Insurance Consultants, Inc. v. United Healthcare Insurance Company, Case No. 4D16-2767 (Fla. 4th DCA 2017).
The Federal Arbitration Act allows vacatur of an arbitration award only when there is "evident partiality or corruption in the arbitrators[,]" 9 U.S.C. § 10(a)(2) (2015), and "'evident partiality' [means when] a (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998).

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

EMERALD COAST UTILITIES AUTHORITY,

CASE NO. 1D15-5714

Appellant,

v.

BEAR MARCUS POINTE, LLC;
A FLORIDA LIMITED
LIABILITY COMPANY,

Appellee.

_____/

Opinion filed October 6, 2017.

An appeal from the Circuit Court for Escambia County.
Gary L. Bergosh, Judge.

Bradley S. Odom and Richard D. Barlow of Odom & Barlow, P.A., Pensacola, for Appellant.

Major B. Harding and Erik M. Figlio of Ausley & McMullen, Tallahassee; William A. Fixel of Fixel & Willis, Tallahassee, for Appellee.

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION OF QUESTION

PER CURIAM.

Appellant's Amended Motion for Rehearing, Rehearing En Banc, and Certification of Question is denied, but we withdraw our previous opinion and substitute the following opinion in its place.

In this appeal from an order denying its motion for relief from judgment pursuant to Florida Rule of Civil Procedure 1.540(b), appellant claims that the trial court abused its discretion in not vacating and reentering its order assessing attorneys' fees, which appellant alleged to have never received, so that appellant could file a timely notice of appeal. Finding no abuse of discretion, we affirm.

On March 18, 2014, the trial court rendered an order assessing attorneys' fees against appellant in an eminent domain proceeding. On March 20, 2014, the clerk of the court served the order by email sent to the email addresses designated by counsel for each party. On May 12, 2014, appellant filed a motion for relief from the order, requesting the trial court to vacate and reenter the order to allow appellant to file a timely notice of appeal because appellant did not receive a copy of the order until after expiration of the time to appeal.

At the hearing on appellant's motion, Lendy Davis, the IT director for the clerk of the court, testified that the log from the clerk's e-service system indicated that emails containing the order were sent to the primary and secondary email addresses designated by appellant's attorneys at 7:28 p.m. on March 20, 2014. The clerk's email server contacted the email server for the domain of these addresses and handed off the messages to the recipient server. Davis explained that if the email had not been accepted by the recipient server, an error message would have been generated notifying the clerk's office that the email had not been delivered. The log

contained no such error message. Davis did not know what happened after the email was accepted by the recipient server.

William Hankins testified that he provided IT consulting services for appellant's counsel—the law firm of Odom & Barlow P.A.—beginning in 2007. In 2011, about two months after the firm installed its Microsoft Exchange server with a built-in email filtering system, the email filtering system was configured to drop and permanently delete emails perceived to be spam without alerting the recipient that the email was deleted. Hankins advised Richard Barlow that the firm's email system should not be configured to permanently drop and delete emails without alerting the recipient that the email was dropped because the built-in spam filtering on the server was very unreliable and created the risk of identifying and filtering legitimate emails as spam (false positives). Although Hankins believed that it was better to hire a third party that handled spam filtering on a full-time basis, Barlow rejected his recommendation to use a third-party vendor because he did not want to spend the extra money.

Hankins reviewed the transaction logs from the clerk's server to Odom & Barlow's server and concluded that the order assessing attorneys' fees was properly delivered to the Odom & Barlow server. Hankins opined that it was possible that the server deleted the email as spam.

In 2015, Hankins recommended that the firm get an online backup system that would have cost approximately $700 to $1200 a year. This recommendation was rejected. Eventually, Hankins stopped working for Odom & Barlow because the firm rejected his recommendations.

Stephen Reyes testified that he was a shareholder in the firm of Saltmarsh, Cleveland & Gund and managed the information system consulting arms of the firm. Reyes reviewed the email log printouts provided by the clerk's office and saw no evidence that the clerk's office made any mistake or was negligent in the service of the emails in question. He also reviewed five work stations and a server at the law firm of Odom & Barlow, did not find any of the emails, and did not find any evidence of destruction of the emails.

Reyes conceded that it was fairly unusual for a company to configure their system to not create any email logs and that if the server had been configured differently, he could have had complete logs from the period in question to determine whether the server had received the emails from the clerk's server. He also noted that the server was not configured to back up data or configuration files and that it was unusual for a business to operate a server system with absolutely no back up or disaster recovery process. If the server had backup data or configuration files, this would have provided information about additional emails and correspondence and changes in the email system itself. He suggested that a law firm that maintained

confidential and highly sensitive information for clients have a backup or disaster recovery process.

Reyes could not make a definitive determination whether the emails from the clerk's office were received by Odom & Barlow's server because the firm did not maintain logs or archive or backup emails. If he had complete logs, he would have been able to determine whether the emails had been received. However, Reyes acknowledged that the absence of any error messages, bounce-backs, or retries in the clerk's server logs made it more likely that the emails were received by Odom & Barlow's server. Moreover, if Odom & Barlow's server had received other emails from the clerk's server, this would indicate that there was effective communication between the two systems. Given the totality of the information he had, Reyes believed that it was more likely than not that the server received the emails.

James Todd testified that he helped design, implement, and support email systems. Todd explained that when sending an email, the sending server would look up the recipient server and establish a connection with the recipient server to make sure it was there and accepting messages. If there were no issues, the recipient server would send an "okay" message for the sending server to transmit the data. Once the data was received, the recipient server would send an "okay" message letting the sending server know that it got the data. This activity was referred to as

a “handshake,” after which everything was under the control of the recipient. Todd testified that this was the equivalent of placing a piece of mail into a mailbox.

Todd reviewed the transaction logs from the clerk’s server to Odom & Barlow’s server and concluded that an email attaching an order assessing attorneys’ fees was properly delivered to and received by the Odom & Barlow server on March 20, 2014, without any error messages or bounce-backs. According to Todd, after the handshake, an email went through any email filtering system that was in place. An email filtering system could be configured to delete emails perceived to be spam and to alert recipients of the receipt of email identified as spam. These settings were in the exclusive control of the email recipient. Thus, after a handshake occurred, the email could be filtered out as spam or delivered to the recipient.

Based on the information he reviewed, Todd concluded that the law firm of Odom & Barlow did not properly implement and utilize its email filtering system. It was his understanding that Odom & Barlow’s email filtering system was set to drop and delete emails identified as spam. He did not recommend this setup to any business of any kind because it resulted in data loss. In fact, he testified that he would require the client to sign a waiver exonerating him from responsibility if the client insisted on implementing such an email filtering system.

Joe Fixel, lead counsel for appellee, testified that his firm filed a motion for attorneys’ fees that was the subject of a hearing in January 2013. At the conclusion

of the hearing, the trial court asked the parties to submit proposed orders. The court did not enter its own orders until March 2014. While they were waiting for the court to act, Fixel's office had a protocol where an assigned paralegal would check the court's website every three weeks to see if the court had taken any action or entered any orders. Fixel also contacted opposing counsel, Richard Barlow, and suggested they file a joint motion for a case management conference to make sure the case had not slipped through the cracks. When Barlow categorically refused to join such a motion, he consulted with co-counsel who filed a motion for status conference. However, before the status conference occurred, the orders were received by email by all three attorneys and the paralegal who were assigned to the case at his firm. When the attorneys' fees award had not been paid within thirty days as ordered by the court, his paralegal contacted opposing counsel, whose office requested copies of the orders.

At the hearing, appellant argued that it was entitled to relief from the attorneys' fees order because it never received the order in time to file a timely appeal. Appellee responded that appellant was not entitled to relief because appellant's ability to file a timely appeal was not hindered by any action attributable to the trial court or the clerk, but was attributable to the actions of appellant's counsel. Afterwards, the trial court entered an order denying relief. This appeal followed.

Under Florida Rule of Civil Procedure 1.540(b), Florida courts have discretion to set aside a final judgment, decree, order, or proceeding based on "mistake, inadvertence, surprise or excusable neglect." Handel v. Nevel, 147 So. 3d 649, 651 (Fla. 3d DCA 2014). In Pompi v. City of Jacksonville, 872 So. 2d 931 (Fla. 1st DCA 2004), this court held that the appellants' failure to file a timely appeal constituted excusable neglect entitling appellants to relief from judgment under rule 1.540(b) where appellants' counsel made a mistake in reading the file stamp on the judgment, which was much less noticeable than the recording stamp. Id. at 933. While agreeing that the clerk bore no responsibility for counsel's error, this court noted "the fact that a deputy court clerk made precisely the same mistake when reporting the filing date on the telephone is at least some indication that counsel's error was excusable." Id.

Subsequently, in Hollifield v. Renew & Co., Inc., 18 So. 3d 616 (Fla. 1st DCA 2009), this court observed that the trial court had no authority to grant relief from judgment where the neglect in failing to take a timely appeal occurred entirely within the office of the party's counsel and no action attributable to the court or its personnel contributed to counsel's neglect to take a timely appeal. Id. at 617 (citing David M. Dresdner, M.D., P.A. v. Charter Oak Fire Ins. Co., 972 So. 2d 275, 280 (Fla. 2d DCA 2008)). In doing so, this court distinguished Pompi, "whose holding applied to cases

where the court or court staff substantially contributed to counsel's failure to file a timely notice of appeal." Id.

We agree with appellant that this language is dicta in light of the true holding in Hollifield that rule 1.540(b) did not authorize the trial court to grant relief from an interlocutory order. Id. However, because we conclude that appellant failed to demonstrate excusable neglect—or any other basis for relief under the rule—it is unnecessary to address whether rule 1.540(b) requires proof that some action attributable to the court or its personnel contributed to counsel's neglect to take a timely appeal.

"Excusable neglect is found 'where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir.'" Elliott v. Aurora Loan Servs., LLC, 31 So. 3d 304, 307 (Fla. 4th DCA 2010) (quoting Somero v. Hendry Gen. Hosp., 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985)). However, "[t]he law requires certain diligence of those subject to it, and this diligence cannot be lightly excused." John Crescent, Inc. v. Schwartz, 382 So. 2d 383, 385 (Fla. 4th DCA 1980). "A conscious decision not to comply with the requirements of law cannot be 'excusable neglect' under the rule or any other equivalent requirement." Peterson v. Lake Surprise II Condo. Ass'n, 118 So. 3d 313 (Fla. 3d DCA 2013). Likewise, gross neglect is not excusable. Brivis Enters., Inc. v. Von Plinski, 8 So. 3d 1208, 1209 (Fla. 3d DCA 2009); Hornblower

v. Cobb, 932 So. 2d 402, 406 (Fla. 2d DCA 2006); Lehner v. Durso, 816 So. 2d 1171, 1173 (Fla. 4th DCA 2002); Otero v. Gov't Emps. Ins. Co., 606 So. 2d 443, 444 (Fla. 2d DCA 1992).

Although appellant claims that its counsel received no notice of the order assessing attorneys' fees until after expiration of the time to appeal, Lendy Davis, William Hankins, and James Todd testified that they reviewed emails logs from the clerk's server and concluded that the emails attaching the order assessing attorneys' fees were electronically served by the clerk's office on March 20, 2014, and received without error by Odom & Barlow's server. Although Stephen Reyes testified that he could not make a definitive determination whether the emails were received by Odom & Barlow's server because the firm maintained neither email logs nor archive or backup emails, he conceded that it was more likely than not that the server received the emails. Based on this evidence, the trial court could conclude that the order assessing attorneys' fees was received by Odom & Barlow's server, which was the equivalent of placing a physical copy of the order in a mailbox.

In addition, testimony was presented that the spam filter of Odom & Barlow's server was deliberately configured in such a way that it could delete legitimate emails as spam without notifying the recipient, despite Odom & Barlow being warned against this configuration. Specifically, William Hankins advised against this configuration because the built-in spam filtering on the server was very

unreliable and created the risk of identifying and filtering legitimate emails as spam. Hankins also recommended that Odom & Barlow hire a third party to handle spam filtering on a full-time basis and purchase an online backup system. However, these recommendations were rejected because the firm did not want to spend the additional money. Stephen Reyes noted that the server had the ability to generate email logs, but was specifically configured not to create logs in order to save drive space.

Based on this testimony, the trial court could conclude that Odom & Barlow made a conscious decision to use a defective email system without any safeguards or oversight in order to save money. Such a decision cannot constitute excusable neglect. See Onwuchekwe v. Okeke, 404 F. App'x 911, 912 (5th Cir. 2010) ("Even if the district court credited the claim that email settings deflected the notice away from counsel's inbox, it was not an abuse of discretion to conclude that sending court communications to the spam folder is inexcusable neglect."); Crocker v. Child Dev. Sch., Inc., No. 3:10-CV-759-WKW, 2011 WL 4501560, at *5 (M.D. Ala. Sept. 29, 2011) ("Mr. Wiley's evidence on the cause for the delay is the digital age equivalent of 'the dog ate my homework.' Mr. Wiley claims that e-mail difficulties prevented discovery of C.D.S.'s pending motion, but this evidence demonstrates that these difficulties were entirely self-created. . . . An inability to manage an office e-mail system to properly receive notices of filing does not qualify as excusable neglect."); Bequer v. Nat'l City Bank, 46 So. 3d 1199 (Fla. 4th DCA 2010)

(reversing an order setting aside a default final judgment based on excusable neglect where the bank's inaction was not the result of a "system gone awry," but rather of a "defective system altogether").

Finally, testimony was presented that opposing counsel, Joe Fixel, had a protocol where an assigned paralegal would check the court's website every three weeks to see if the court had taken any action or entered any orders. If Odom & Barlow had a similar procedure in place, the firm would have received notice of the order assessing attorneys' fees in time to appeal. The neglect of Odom & Barlow's duty to actively check the court's electronic docket was not excusable where the parties knew that the trial court would be issuing a final order subject to appeal within jurisdictional time limits. See Yeschick v. Mineta, 675 F.3d 622, 629-30 (6th Cir. 2012) (holding that counsel's neglect in not checking the docket was not excusable because the parties had an affirmative duty to monitor the docket to keep apprised of the entry of orders that they may wish to appeal); Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 413 (4th Cir. 2010) (holding that counsel's computer problems did not constitute excusable neglect where counsel failed to actively monitor the court's docket or find some other means by which to stay informed of docket activity); PNC Bank, Nat'l Ass'n v. Lucmaur, LLC, No. 6:14-cv-238-Orl-37KRS, 2015 WL 1020604, at *2 (M.D. Fla. Mar. 9, 2015) (denying defendants' motion to vacate an order based on "mistake, inadvertence and/or

excusable neglect" because counsel's e-mail service flagged and filtered the court's "Notice of Electronic Filing" as spam, noting that if defendants or their counsel had checked the docket they would have seen at least one potentially case-dispositive motion pending and would have known that failure to timely respond might result in the court granting the motion unopposed); Pinks v. M & T Bank Corp., No. 13 Civ. 1730(LAK), 2014 WL 2608084, at *1 (S.D.N.Y. June 5, 2014) ("The fact is that all sorts of things go awry in the electronic universe in which we now live, and lawyers are obliged to protect their clients' interests even if that requires something more than blind reliance on the proper and timely transmission, receipt and filing of computer generated electronic mail. Thus, even if one were to characterize as excusable the error attributed to the IT staff, the lawyer's failure to check the docket sheet, knowing that he had a motion pending before the magistrate judge and that an adverse recommendation would have to be objected to within fourteen days of its entry, was not."); Moncier v. Jones, 939 F.Supp.2d 854, 862 (M.D. Tenn. 2013) (concluding that "Plaintiff's failure to respond to the motion to dismiss as a result of his computer difficulties does not constitute excusable neglect" where "Plaintiff should have expected the filing of an answer or motion to dismiss by the Defendants and owed an affirmative duty to check the court's docket to remain informed about this action").

Counsel has a duty to have sufficient procedures and protocols in place to ensure timely notice of appealable orders. This includes use of an email spam filter with adequate safeguards and independent monitoring of the court's electronic docket. In cases where rendition of an appealable order has been delayed for a significant period of time, it might also include the filing of a joint motion for a case management conference to ensure that the order has not slipped through the cracks. Odom & Barlow made no effort to do any of these things, reflecting an overall pattern of inaction and disengagement. In short, there was an absence of "any meaningful procedure in place that, if followed, would have avoided the unfortunate events that resulted in a significant judgment against" appellant. Hornblower, 932 So. 2d at 406. Accordingly, the trial court did not abuse its discretion in denying appellant's rule 1.540(b) motion.

AFFIRMED.

MAKAR, JAY, and M.K. THOMAS, JJ., CONCUR.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

MANAGED CARE INSURANCE CONSULTANTS, INC.,
Appellant,

v.

UNITED HEALTHCARE INSURANCE COMPANY; UNITED HEALTHCARE OF FLORIDA, INC.; and any and all entities that are its affiliates,
Appellees.

No. 4D16-2767

[October 4, 2017]

ON MOTION FOR CLARIFICATION

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. 15-018699CACE (07).

Glenn J. Waldman, Douglas T. Marx of Waldman Trigoboff Hildebrandt & Calnan, P.A., Fort Lauderdale, for appellant.

Todd R. Legon and William F. Rhodes of Legon Fodiman, P.A., Miami, and David B. Potter and Archana Nath of Fox Rothschild LLP, Minneapolis, MN, for appellees.

WARNER, J.

We grant the motion for clarification, withdraw our prior opinion, and substitute the following in its place.

Managed Care Insurance Consultants, Inc., appeals the order denying its motion to vacate an arbitration award based on the partiality of one of the arbitrators. It contends that it showed that the arbitrator had an actual conflict, as her husband's medical practice had a business connection with the appellee, United Healthcare of Florida. Because the court found that the arbitrator did not have "actual knowledge of such a relationship or potential conflict prior to or during the subject arbitration,"

nor was there any actual bias shown, the court did not err in denying the motion. We affirm.

United Health Care ("United") contracted with Centers for Medicare & Medicaid Services ("CMS") to offer Medicare Advantage health plans to Medicare beneficiaries in South Florida. In exchange for United providing Medicare benefits, CMS made monthly payments to United for each of its Medicare Advantage members. United entered into a delegation agreement with Managed Care Insurance Consultants, Inc. ("MCIC"), whereby United delegated to MCIC some of its medical management responsibilities under the contract with CMS. In return, United was to pay the authorized claims and to fund the payments with funds it received from CMS. MCIC was to be compensated from revenue placed into a risk pool, based upon a ratio of expenses to revenue. Both parties claimed that the other breached the agreement.

The contract had an arbitration provision through the American Arbitration Association ("AAA"). The AAA appointed three arbiters to hear the dispute, including the chairperson.

We need not detail the claims and the arbitral proceedings. In short, MCIC contended that United had not funded the risk pool properly, nor had it paid only authorized expenses from the pool. MCIC claimed lost revenues between $14 million and $21 million. United, on the other hand, claimed that there were deficits in the risk pool due to MCIC's management of patient care. It sought damages in the millions of dollars.

In the Final Arbitration Award, the panel found that United had breached the agreement for funding the risk pool, but did not award any damages to MCIC because it found the evidence in support of the claimed damages was too speculative. Similarly, the panel found for MCIC on its claim that certain patient expenses should have been removed from the risk pool reconciliation. Again, however, it did not award damages because of "its inability to quantify with reasonable certainty the amount of invalid claims that were paid by United." As to United's claim against MCIC, the panel denied relief because United could not establish that it had performed its part of the contract. Thus, neither party obtained a damage award from the other party. MCIC made a motion to affirm the portion of the arbitration award which found that United had breached the agreement and to vacate the portion which refused to award MCIC damages. The panel denied the motion and the order became final.

Subsequently, MCIC filed a petition in circuit court to confirm the award as to its findings of liability in its favor but to vacate the denial of

damages. It claimed that the lack of damage award was contrary to Florida law, and the evidence was clear that it was entitled to at least $24 million in damages.

After filing its petition, MCIC filed an amended petition to vacate the award in its entirety because of the chairperson's failure to disclose the relationship between her physician husband and United. The chairperson's husband was a cardiologist associated with HeartWell, a large cardiology group in South Florida. He treated patients at HeartWell who were insured by United. He was also on the Board of Directors of HeartWell. The motion alleged that the chairperson was the primary architect of the arbitration award based on the amounts she charged to the parties after the close of the final hearing. The motion also alleged that she never disclosed that her husband had a contractual relationship with United or that some of the medical claims at issue were actually paid to her spouse. Because HeartWell was part of United's network—and United reimbursed HeartWell for its doctors' treatment of patients insured by United—the chairperson's failure to disclose that she was married to a physician receiving payments from United established partiality on her part.

The court allowed limited discovery from the chairperson. In the chairperson's deposition via written questions, she testified that she had asked her husband if he had any relationship with United and he told her he didn't. She had him look at the witness lists, as well as the parties, and he said he had no dealings with any of them. She stated that if she had known he had a relationship she would have disclosed it, but "[m]ost of the times he probably doesn't even know who the insurance companies are for his patients, and he did not tell me that he had any relationship with United Healthcare." She was not aware of any money that her husband, or his practice, received from United; nor was she aware that HeartWell had a contract with United. She was asked whether, between 2010 and 2015, HeartWell billed United $41.3 million, and United paid HeartWell $12.9 million for medical services, something she should have disclosed. She testified that she had no idea that there was a relationship. After reviewing the AAA oath, which required her to do a reasonable investigation of potential conflicts, she testified that she had made that investigation by questioning her husband and presenting him with the conflicts checklist of the parties and witnesses.

In lieu of testimony at the hearing on the motion to vacate, MCIC submitted the affidavit of another arbitrator. That arbitrator testified that the relationship between the physician husband and United should have been disclosed and that the chairperson arbitrator was obligated to do an

investigation to ascertain the business relationship. The affidavit did not opine on what a reasonable investigation would include.

The trial court denied both motions to vacate the award. As to the issue of conflict on the part of the chairperson, the court relied on *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.,* 146 F.3d 1309, 1313 (11th Cir. 1998), to conclude that MCIC had not proved an actual conflict nor that actual bias had been shown. The court ruled that "although there was evidence that [the arbitrator's husband] treats patients who are insured by United and, as a result, receives reimbursement from United, there was insufficient evidence demonstrating [that the arbitrator] had actual knowledge of such a relationship or potential conflict prior to or during the subject arbitration." As to the original claim that the arbitration panel had exceeded its powers by not applying the correct law, the court found that this was not a statutory ground for vacating the award and denied the petition. From this order, MCIC appeals.

In order to vacate an arbitration award, one of the statutory grounds listed in section 682.13(1), Florida Statutes (2015), must be present. One of the statutory grounds warranting vacatur is that there was "[e]vident partiality by an arbitrator appointed as a neutral arbitrator[.]" § 682.13(1)(b)1., Fla. Stat. An arbitrator has an affirmative duty to disclose to the parties any business relationships that the arbitrator might have which might create the impression of possible bias. *See Weinger v. State Farm Fire & Cas. Co.*, 620 So. 2d 1298, 1299 (Fla. 4th DCA 1993).

The Federal Arbitration Act, which applies in this case, likewise permits vacatur of an arbitration award where a litigant shows "evident partiality or corruption in the arbitrators[.]" 9 U.S.C. § 10(a)(2) (2015). In *Gianelli*, the Eleventh Circuit followed its prior precedent and held that "an arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli*, 146 F.3d at 1312.

In *Gianelli,* the office manager of the Gray Harris law firm was chosen as an arbitrator for a dispute between Gianelli and an investor service. *Id.* at 1310. Before the arbitration commenced, Gianelli discovered that Gray Harris represented the principal of the adverse party, Kelly, in a lawsuit. *Id.* The office manager professed no knowledge of the case, and the principal indicated that it was an isolated incident. *Id.* After the office manager arbitrator rendered a ruling in favor of ADM, Gianelli discovered that the relationship between Kelly and Gray Harris was considerably more

extensive. *Id.* Prior to the office manager's employment with the Gray Harris firm, the firm had extensive representation of Kelly, but the arbitrator did not know of the representation. *Id.* While the district court granted the motion to vacate for evident partiality, the circuit court reversed. *Id.* It concluded that there was no showing of actual bias, and thus the first criteria of actual conflict did not exist. *Id.* at 1313. As to the second criteria, it found that nothing in the record showed that the arbitrator knew of the prior representation of Kelly. *Id.* "Because [the arbitrator] did not have actual knowledge of the information upon which the alleged 'conflict' was founded, the second 'evident partiality' condition is not present in this case." *Id.*

Gianelli has been criticized in several courts for requiring actual knowledge of a conflict without requiring that the arbitrator conduct an investigation to ascertain whether a conflict exists. *See, e.g.*, *New Regency Prod., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1109 (9th Cir. 2007). Those courts impose a duty to investigate potential conflicts. *Id.*; *see also Schmitz v. Zilveti,* 20 F.3d 1043 (9th Cir. 1994); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007); *ANR Coal Co. v. Cogentrix of N.C., Inc.*, 173 F.3d 493 (4th Cir. 1999).

The cases requiring investigation deal with instances in which lawyers have not made a conflicts check within their own firm or a business person has not make a check of business relationships of the arbitrator's own business with the arbitration parties. In this case, however, the business relationship is between the arbitrator's husband's business and one of the parties to the arbitration. The arbitrator *did* do an investigation by asking her husband about any conflicts and presenting him with a conflicts checklist. Thus, even if a duty to investigate is required, the arbitrator complied. We do not believe that the arbitrator is compelled to disbelieve the information she is given by her husband and investigate further. We are not even sure that the arbitrator would have the ability to probe the corporate business to determine whether a conflict exists.

Under Florida law, section 682.041, Florida Statutes (2015), requires that an arbitrator disclose any "*known* facts that a reasonable person would consider likely to affect the person's impartiality as an arbitrator in the arbitration proceeding[.]" § 682.041(1), Fla. Stat. (emphasis added). If there was no evidence that the arbitrator knew of the facts, then there would be no basis for vacatur. Thus, the Florida Arbitration Code adheres most closely to *Gianelli*.

There was no actual bias shown by the arbitrator in this case, nor was there an actual conflict. The arbitrator did not know of the business relationship between her husband's corporate employer and United (nor, apparently, did her husband). The trial court did not err in denying the motion to vacate.

In its other claim for vacatur of the arbitration award, MCIC claims that the arbitrators exceeded their powers under the agreement by failing to apply controlling Florida law in denying any damage award. As found by the trial court, this is an attempt to disguise what is clearly a claim of legal error by the arbitration panel, which is not a ground to vacate an arbitration award. *See Hall St. Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576, 585-86 (2008) (holding that arbitrator's legal error is not reviewable under the Federal Arbitration Act and contract cannot expand grounds for vacating award).

For the foregoing reasons, we affirm the order denying the motion to vacate the arbitration award.

DAMOORGIAN and FORST, JJ., concur.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-13830

D.C. Docket No. 1:14-cv-02288-TWT

SAVANNAH COLLEGE OF ART AND DESIGN, INC.,

Plaintiff - Appellant,

versus

SPORTSWEAR, INC.,
d.b.a. Prep Sportswear,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(October 3, 2017)

Before MARTIN and JORDAN, Circuit Judges, and COOGLER,* District Judge.

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* The Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

JORDAN, Circuit Judge:

"Imitation may be the sincerest form of flattery," Charles C. Colton, Lacon, Vol. 1, No. 183 (1820–22), in Bartlett's Familiar Quotations 393:5 (16th ed. 1992), but when the imitation consists of commercial reproduction for profit, all bets are off. So when Sportswear, Inc. began using the federally-registered service marks of the Savannah College of Art and Design without a license to sell apparel and other goods on its website, SCAD did not take kindly to the copying and sued for equitable and monetary relief. SCAD asserted a number of claims against Sportswear, including service mark infringement under 15 U.S.C. § 1114; unfair competition and false designation of origin under 15 U.S.C. § 1125; and unfair competition under O.C.G.A. § 10-1-372.

This is SCAD's appeal from the district court's grant of summary judgment in favor of Sportswear. The district court, relying on *Crystal Entertainment & Filmworks, Inc. v. Jurado*, 643 F.3d 1313, 1315–16 (11th Cir. 2011)—a case involving a dispute over common-law trademark rights to a band name—concluded that SCAD had failed to establish that it had enforceable rights in its marks that extended to apparel. SCAD, which validly registered its marks only in connection with the provision of "education services," did not show that it had used its marks on apparel earlier than Sportswear in order to claim common-law

ownership (and priority) over its marks for "goods." *See Savannah Coll. of Art & Design, Inc. v. Sportswear, Inc.*, 2015 WL 4626911, at *2 (N.D. Ga. 2015).

We reverse. This case, unlike *Jurado*, does not involve the alleged infringement of a common-law trademark, and as a result the date of SCAD's first use of its marks on goods is not determinative. One of our older trademark cases, *Boston Prof'l Hockey Ass'n, Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975), controls, as it extends protection for federally-registered service marks to goods. Although *Boston Hockey* does not explain how or why this is so, it constitutes binding precedent that we are bound to follow.

I[1]

Founded in 1978, SCAD is a private, non-profit college based in Georgia, and provides educational services to over 11,000 students from across the United States and more than 100 countries. SCAD is primarily known for specialized programs related to the arts, such as painting, sculpture, architecture, fashion, photography, film, and design. In addition to providing educational programs, SCAD fields athletic teams in a variety of sports.

To distinguish itself in the market and promote its programs and services, SCAD holds four federally-registered marks:

[1] Judge Martin joins all except Part IV.C of the opinion.

SCAD

SAVANNAH COLLEGE OF ART AND DESIGN

The federal registrations for these marks were issued for "education services," i.e., the provision of "instruction and training at the undergraduate, graduate, and post-graduate levels." *See, e.g.*, D.E. 1-1, 1-2. And the parties agree that SCAD has continuously used its marks for the promotion of its "education services."[2]

SCAD has used the two word marks at issue here—"SCAD" (registered in 2003) and "SAVANNAH COLLEGE OF ART AND DESIGN" (registered in 2005)—since 1979, and they have now achieved incontestable status. In general, this means that SCAD has filed the requisite affidavit of use and incontestability under 15 U.S.C. § 1065(3), and that the U.S. Patent and Trademark Office has

[2] SCAD may have been able to secure federal trademark registrations for the use of its word marks on goods such as apparel, but apparently did not attempt to do so. "There is no doubt that a given symbol can be used in such a way that it functions as both a trademark for goods and a service mark for services, and be the subject of separate registrations." 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 19:84 (4th ed. June 2017). *See also id.* at § 19:87 ("If a service company (or a producer of goods) puts its mark on promotional items to be used by recipients, such as ball point pens and wearing apparel, the mark can be registered for such goods."); *Hans C. Bick, Inc. v. Watson*, 253 F.2d 344, 344 (D.C. Cir. 1958) (discussing registrations for the word "Nylonized" as a trademark for women's nylon hosiery and as a service mark for the application of a nylon coat); *In re McDonald's Corp.*, 199 U.S.P.Q. 921, 1978 WL 21263, at *3 (T.T.A.B. 1978) (registering "McDonald's" and "golden arches" marks for clothing because they "indicat[e] the source of origin of the various items of apparel in [the] applicant [McDonald's Corporation]").

acknowledged that these two marks have been validly registered and in continuous use for at least five years. *See* D.E. 49-3 at 5, 10, 15, 24.

Sportswear operates entirely online and uses an interactive website to market and sell "fan" clothing and items like t-shirts, sweatshirts, baseball caps, and duffel bags. Sportswear began selling apparel for K-12 schools in 2003, and it now offers made-to-order apparel and related goods for other entities, including colleges, Greek and military organizations, golf courses, professional sports teams, and even fantasy sports teams with—and without—licensing agreements. To purchase an item from Sportswear, a customer is generally required to select its preferred organization's "online store," choose an item like a t-shirt or hat, and select that organization's emblem, mascot, or name. Sportswear's website then generates a sample of the selection, prompts the customer to checkout online, and ships the final product to the customer's home in a package indicating that it was delivered from a Sportswear facility.

In February of 2014, a parent of a student-athlete forwarded Sportswear's website to one of SCAD's coaches. As a result, SCAD learned that Sportswear had been using its word marks on products without authorization (and without a licensing agreement) since August of 2009. Seeking to protect its marks from further unauthorized use, SCAD sued Sportswear in July of 2014. At that point, Sportswear stopped selling products with SCAD's word marks.

During discovery, SCAD provided several examples of Sportswear's products featuring its word marks and a printout of Sportswear's website-generated "SCAD" store. SCAD also submitted images of current merchandise sold on its own website and side-by-side comparisons of Sportswear's products. Sportswear conceded that it was selling products online with virtually indistinguishable reproductions of the "SCAD" and "SAVANNAH COLLEGE OF ART AND DESIGN" word marks, but asserted that its website contained a prominent disclaimer showing that the products were in no way affiliated with the school.

Since 2011, SCAD has licensed Follett Education Group to operate its online stores and Georgia-based on-campus bookstores, which sell clothing and other goods displaying SCAD's word marks. Sportswear agreed that Follett markets and sells SCAD's merchandise, but contested the degree of SCAD's involvement in approving and designing those items. SCAD admitted that it did not submit evidence showing when it first used its word marks on apparel or related goods.

At the close of discovery, the district court reviewed the parties' cross-motions for summary judgment and ruled in favor of Sportswear. Relying on *Jurado*, the district court held that SCAD failed to establish that its service mark rights extended to apparel because it could not show priority in use as to goods.

II

We exercise plenary review of the district court's grant of summary judgment in favor of Sportswear, viewing the record and drawing all factual inferences in the light most favorable to SCAD. *See Tana v. Dantanna's*, 611 F.3d 767, 772 (11th Cir. 2010). Summary judgment is appropriate when "there is no genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III

Trademark law, as codified by the Lanham Act, *see* 15 U.S.C. § 1051 *et seq.*, largely serves two significant but often conflicting interests. It "secure[s] to the owner of the mark the goodwill of his business[;]" and it "protect[s] the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 198 (1985).

The Lanham Act prohibits the infringement of trademarks that are used to identify "goods," and of service marks that are used to identify "services." *See* 15 U.S.C. § 1127. Trademarks and service marks are used "to indicate the source of the [goods and services], even if that source is unknown." *Id*. Generally, "a trademark serves to identify and distinguish the source and quality of a tangible

product," while "a service mark functions to identify and distinguish the source and quality of an intangible service." 3 McCarthy on Trademarks § 19:81.

In most respects, the "analysis is the same under both [types of marks] and courts thus treat the two terms as interchangeable in adjudicating infringement claims." *Frehling Enterprises, Inc. v. Int'l Select Grp., Inc.*, 192 F.3d 1330, 1334 n.1 (11th Cir. 1999) (citations omitted). For both trademarks and service marks, therefore, the "the touchstone of liability . . . is not simply whether there is unauthorized use of a protected mark, but whether such use is likely to cause consumer confusion." *Custom Mfg. & Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 647 (11th Cir. 2007). *See also* 4 McCarthy on Trademarks § 23:1 ("The test for infringement of a service mark is identical to the test of infringement of a trademark: is there a likelihood of confusion?").[3]

The Lanham Act provides different types of statutory protection. As relevant here, § 32(a) of the Act, codified at 15 U.S.C. § 1114(1)(a), guards against

[3] Many other circuits also analyze trademarks and service marks under the same legal standards. *See, e.g.*, *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1156 (9th Cir. 2001) ("Service marks and trademarks are governed by identical standards."); *Circuit City Stores, Inc. v. CarMax, Inc.*, 165 F.3d 1047, 1054 (6th Cir. 1999) (same); *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 192 F.3d 337, 344 n.2 (2d Cir. 1999) (same); *Walt-West Enterprises, Inc. v. Gannett Co., Inc.*, 695 F.2d 1050, 1054 (7th Cir. 1982) (same). This analytical overlap likely contributes to the uncertainty about the scope of protection afforded to registered service marks. *See generally* Paul M. Schoenhard, *Why Marks Have Power Beyond the Rights Conferred: The Conflation of Trademarks and Service Marks*, 87 J. Pat. & Trademark Off. Soc'y 970, 971–72 (2005) (explaining that the two distinct forms of intellectual property have been treated as the same even though "service marks *did not exist* as a protectable form of intellectual property under [f]ederal law prior to the passage of the [Lanham Act]") (emphasis in original).

"infringement"—the "reproduction, counterfeit, copy, or colorable imitation of a registered mark"—while § 43(a), codified at 15 U.S.C. § 1125(a), protects against "false designation of origin," which we have referred to as "a federal cause of action for unfair competition." *Custom Mfg.*, 508 F.3d at 647 (citation omitted). A claim for infringement under § 1114(1)(a) lies only for federally-registered marks, while a claim under § 1125(a) is broader and may also be based on unregistered (i.e., common-law) marks. *See Jurado*, 643 F.3d at 1320.

The statutory claims at issue here more or less required SCAD to establish two things. First, SCAD needed to show "enforceable trademark rights in [a] mark or name[.]" Second, it had to prove that Sportswear "made unauthorized use of [its marks] 'such that consumers were likely to confuse the two.'" *Custom Mfg.*, 508 F.3d at 647 (describing the requirements for a § 1125 claim) (citation omitted); *Dieter v. B & H Indus. of Southwest Florida, Inc.*, 880 F.2d 322, 326 (11th Cir. 1989) (same for a § 1114 claim).

We, like other circuits, often blur the lines between § 1114 claims and § 1125 claims because recovery under both generally turns on the confusion analysis. *See Tana*, 611 F.3d at 773 n.5 (stating that the district court's error in analyzing a trademark case under § 1114 rather than § 1125 was irrelevant "because the district court based its grant of summary judgment on the likelihood-of-confusion prong"); *Tally-Ho, Inc. v. Coast Community Coll. Dist.*,

889 F.2d 1018, 1026 n.14 (11th Cir. 1989) ("an unfair competition claim based only upon alleged trademark infringement is practically identical to an infringement claim"). *Accord Water Pik, Inc. v. Med-Sys., Inc.*, 726 F.3d 1136, 1143 (10th Cir. 2013) (explaining that the "central inquiry is the same" for both § 1114 and § 1125); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 114 (2d Cir. 2006) (same); *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000) (same). The district court here, however, never reached likelihood of confusion. Under the district court's rationale, the infringement claim under § 1114 necessarily failed because the limited federal registrations for "education services" meant that SCAD did not have rights as to "goods," and SCAD did not provide evidence showing that it used its marks on apparel before Sportswear.[4]

But the district court's reliance on *Jurado* for that rationale was misplaced. In *Jurado* neither party had a federally-registered trademark, *see* 643 F.3d at 1316, and as a result both sides could only assert common-law trademark rights. That is why priority of use became a critical issue in that case. As we explained: "Common-law trademark rights are appropriated only through actual prior use in commerce. . . . Crystal [the plaintiff] bore the burden of proving its prior use." *Id.* (citations and internal quotation marks omitted). Because SCAD's claims revolve

[4] Because the district court did not expressly distinguish between SCAD's statutory causes of action, we assume that its analysis applied to both the § 1114 and § 1125 claims.

around federally-registered marks, *Jurado* cannot inform our analysis of the infringement claim under § 1114, a provision which requires a federally-registered mark, or under § 1125, a provision which can apply to a federally-registered mark.

IV

The question for us is whether SCAD has enforceable service mark rights that extend—beyond the services listed in its federal registrations—to goods in order to satisfy the first prong of an infringement analysis: the validity and scope of a contested mark. *See Dieter*, 880 F.2d at 326 (observing that a plaintiff must show that a mark is valid before a likelihood of confusion analysis becomes necessary). As we explain, we do not write on a clean slate, and *Boston Hockey* provides the answer to that question.

A

Before discussing *Boston Hockey*, we analyze *University of Georgia v. Laite*, 756 F.2d 1535 (11th Cir. 1985), a case that SCAD also relies on. SCAD argues that *Laite* stands for the principle that even if a mark is registered only for services, the mark holder is entitled to broader protection in order to prevent *any* infringing conduct that is likely to cause confusion. *See* Appellant's Br. at 17–21. We disagree with SCAD's reading of *Laite*. Although at first glance the facts of that case closely resemble those here, there is one significant difference, and

SCAD's argument conflates the standards for service mark protection under § 1114 and § 1125.

In *Laite*, the University of Georgia Athletic Association sued to enjoin a novelty beer wholesaler from selling "Battlin' Bulldog" beer. *See* 756 F.2d at 1537. The UGAA sued the wholesaler under § 1125 and state trademark law, but it did not (and could not) sue for infringement under § 1114. *See id.* at 1538. SCAD correctly points out that the UGAA had filed state registrations for its marks only for "athletic services," but downplays a significant fact—at the time of the litigation, it had not yet acquired federal registrations for the contested "Georgia Bulldog" mark. *See id.* at 1537 & n.2. Federally-registered marks were not, as SCAD infers, part of the analytical line up in that case.

The key holding in *Laite* was that proof of secondary meaning (i.e., "the power of a name . . . to symbolize a particular business, product, or company") is only required for descriptive marks. *See id.* at 1540 (citation omitted). Reasoning that the "Georgia Bulldog" mascot was not a descriptive mark, we affirmed, on clear error review, the district court's finding that the UGAA had established a likelihood of confusion based on the similarity of the Bulldog designs and the beer wholesaler's intent. *See id.* at 1541, 1543–46. *Laite* therefore does not stand for the principle SCAD advocates. *See Belen Jesuit Preparatory Sch., Inc.*

v. Sportswear, Inc., 2016 WL 4718162, at *6 (S.D. Fla. May 3, 2016) (explaining that *Laite* did not involve or analyze federally-registered marks).

B

Although *Laite* does not resolve the question before us, our binding 1975 decision in *Boston Hockey* stands on different footing. As SCAD correctly asserts, *Boston Hockey* extends protection for federally-registered service marks to goods, and therefore beyond the area of registration listed in the certificate.

In *Boston Hockey*, the National Hockey League and twelve of its member teams sued to prevent a manufacturer from selling embroidered sew-on patches featuring the teams' federally-registered service marks. *See* 510 F.2d at 1008. Like SCAD, most of the hockey teams had registered marks only in connection with the provision of services, and held no registrations for goods, apparel, or promotional merchandise. *See id.* at 1009. Two of the hockey teams had also registered their marks for certain goods, *see Boston Prof'l Hockey Ass'n Inc. v. Dallas Cap & Emblem Mfg., Inc.*, 360 F. Supp. 459, 461 (N.D. Tex. 1973), but we conducted the § 1114 infringement analysis without distinguishing the teams on that basis. *See* 510 F.2d at 1011.

The *Boston Hockey* panel phrased the issue of first impression as "whether the unauthorized, intentional duplication of a professional hockey team's symbol . . . to be sold . . . as a patch for attachment to clothing, violates any legal right of

the team to the exclusive use of that symbol." *Id.* at 1008. As SCAD has done in this case, the NHL and its hockey teams sued for violations of §§ 1114 and 1125 of the Lanham Act, and for common-law unfair competition. *Id.* at 1009. The material facts here are very similar to those in *Boston Hockey*, with one main exception. The manufacturer in *Boston Hockey* sold only mark-replica patches, and did not affix the teams' marks to other goods such as t-shirts or jackets. *See id.* The panel acknowledged that trademark law generally protects against the sale of "something other than the mark itself," *see id.* at 1010, but concluded that each team had an interest in its mark "entitled to legal protection against such unauthorized duplication." *Id.* at 1008.

Recognizing that its "decision . . . [could] slightly tilt the trademark laws from the purpose of protecting the public to the protection of the business interests of [the teams]," the *Boston Hockey* panel was persuaded that granting relief was appropriate because the teams' efforts gave commercial value to the patches, and "the sale of a reproduction of the trademark itself on [a patch] is an accepted use of such team symbols" in the arena of professional sports. *See id.* at 1011. When it came to the statutory claim under § 1114, the panel reasoned that the teams' marks were validly registered and skipped straight to determining whether the manufacturing company's use was likely to cause confusion. *See id.* Absent from the panel's analysis was an explanation for how or why the teams' registrations for

"hockey entertainment services" provided statutory protection as to goods like embroidered patches.

In the end, the *Boston Hockey* panel rejected the manufacturer's argument that consumer confusion must derive from the "source of the manufacture" of the mark because the mark, "originated by the team, [was] the triggering mechanism for the sale of the [patch]." *Id.* at 1012. In other words, "[t]he confusion . . . requirement [wa]s met by the fact that the [manufacturer] duplicated the protected trademarks and sold them to the public knowing that the public would identify them as being the teams' trademarks." *Id.*

Boston Hockey, though in our view lacking critical analysis, implicitly but necessarily supports the proposition that the holder of a federally-registered service mark need not register that mark for goods—or provide evidence of prior use of that mark on goods—in order to establish the unrestricted validity and scope of the service mark, or to protect against another's allegedly infringing use of that mark on goods. On remand, the district court will have to review SCAD's claims under § 1114 and § 1125 in light of *Boston Hockey*.[5]

Among other things, the district court will need to assess the strength of SCAD's word marks. *See, e.g.*, *Welding Servs., Inc. v. Forman*, 509 F.3d 1351,

[5] Given that *Boston Hockey* controls, we need not and do not address whether SCAD used its word marks on apparel prior to Sportswear or whether the district court properly excluded an article on a website submitted by SCAD.

1357–58 (11th Cir. 2007) (describing the "four gradations of distinctiveness"). And it will have to consider whether SCAD has demonstrated that Sportswear's use of its word marks is likely to create consumer confusion as to origin, source, approval, affiliation, association, or sponsorship. *See Burger King Corp. v. Mason*, 710 F.2d 1480, 1491–92 (11th Cir. 1983); *Professional Golfers Ass'n of Am. v. Bankers Life & Casualty Co.*, 514 F.2d 665, 670 (5th Cir. 1975).

Once a party has shown an enforceable right in a mark, a court usually considers a number of factors in assessing whether an infringing use is likely to cause confusion. These are "(1) the strength of the allegedly infringed mark; (2) the similarity of the infringed and infringing marks; (3) the similarity of the goods and services the marks represent; (4) the similarity of the parties' trade channels and customers; (5) the similarity of advertising media used by the parties; (6) the intent of the alleged infringer to misappropriate the proprietor's good will; and (7) the existence and extent of actual confusion in the consuming public." *Florida Int'l Univ. Bd. of Trustees v. Florida Nat'l Univ., Inc.*, 830 F.3d 1242, 1255 (11th Cir. 2016). Generally, "the type of mark and the evidence of actual confusion are the most important" factors. *Id*. (citation omitted); *Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC*, 605 F.3d 931, 935 (11th Cir. 2010).

We add one final note about the confusion analysis. The confusion discussion in *Boston Hockey*, 510 F.2d at 1012, came under strong criticism

because it "did not require proof of a likelihood that customers would be confused as to the source or affiliation or sponsorship of [the] defendant's product," and instead only asked whether "customers recognized the products as bearing a mark of the plaintiff[s]." 4 McCarthy on Trademarks § 24:10 (describing the "heresies" of *Boston Hockey* and concluding that its "attempt to stretch trademark law failed"). *See also* Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 Emory L.J. 461, 474 (2005) ("The court [in *Boston Hockey*] . . . presumed actionable confusion based solely on the consumer's mental association between the trademark and the trademark holder.").

In a binding decision issued only two years later, however, we read *Boston Hockey* narrowly, limited its confusion analysis to the facts in the case, and explained that it did not do away with traditional confusion analysis. *See Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 389 (5th Cir. 1977) ("[W]e do not believe *Boston Hockey* equates knowledge of the symbol's source with confusion sufficient to establish trademark infringement, and we deem the confusion issue unresolved by our existing decisions."). The current Fifth Circuit echoed that discussion and similarly retreated from a broad reading of *Boston Hockey*. *See Bd. of Supervisors for Louisiana State Univ. Agric. & Mech. Coll. v. Smack Apparel Co.*, 550 F.3d 465, 485 (5th Cir. 2008) (reiterating "that a showing of likelihood of confusion [i]s still required [and] . . . not[ing] that the

circumstances in *Boston Hockey* supported . . . 'the inescapable inference that many would believe that the product itself originated with or was somehow endorsed by [the teams]'") (citation omitted); *Supreme Assembly, Order of Rainbow for Girls v. J. H. Ray Jewelry Co.*, 676 F.2d 1079, 1084–85 & n.7 (5th Cir. 1982) (clarifying that confusion must stem from a perceived connection between the product and the rightful owner of the mark because "[i]t is not enough that typical buyers purchase the items because of the presence of the mark").[6]

So, although the district court on remand is to apply *Boston Hockey* as to the validity and scope of SCAD's service marks, it will have to analyze what impact, if any, the case has on the confusion issue.

C

We pause to note the unexplained analytical leap in *Boston Hockey*. Under the Lanham Act, registration is "*prima facie* evidence of the *validity* of the registered mark . . . , of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or *in connection with the goods or services specified in the registration*." § 1115(a) (emphasis added). If that is so, then one would think that there should be some legal basis for extending the scope of a registered service mark in a certain field

[6] In passing, we note that *Laite* has also been recognized—albeit to a much lesser extent—as providing protection where the owner of a common-law mark has not adequately established confusion as to the origin of a contested product. *See, e.g.*, Steve McKelvey & Ari J. Sliffman, *The Merchandising Right Gone Awry: What "Moore" Can Be Said?*, 52 Am. Bus. L.J. 317, 343 (2015) (discussing the "judicial trend expanding the concept of a 'merchandising right'").

(e.g., educational services) to a different category altogether (e.g., goods). As we have noted elsewhere, "[d]etermining whether an infringement has taken place is but the obverse of determining whether the service mark owner's property right extends into a given area." *Jellibeans, Inc. v. Skating Clubs of Georgia, Inc.*, 716 F.2d 833, 839 (11th Cir. 1983).

Yet *Boston Hockey* does not provide any basis for extending service mark rights to goods. This silence is potentially problematic for several reasons.

First, other circuits have said that service marks do not by their nature extend to goods or products. *See Murphy v. Provident Mut. Life Ins. Co. of Philadelphia*, 923 F.2d 923, 927 (2d Cir. 1990) ("Clearly, the term ['services' in the Lanham Act] does not apply to goods or products."); *Application of Radio Corp. of Am.*, 205 F.2d 180, 182 (C.C.P.A. 1953) ("Clearly had Congress intended service marks to apply to goods or products, we believe it would have so stated."). *See also* A. Samuel Oddi, *The Functioning of 'Functionality' in Trademark Law*, 22 U. Houston L. Rev. 925, 958 (1985) ("In fact, the marks that had been registered by the hockey teams [in *Boston Hockey*] were service marks, and it may be questioned whether it is appropriate to extend service mark protection to 'goods' [the patches]."). If these other circuits and commentators are wrong, in whole or in part, we should explain why.

Second, a right in a mark is not a "right in gross." *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918). This means that "[t]here is no property in a [mark] apart from the business or trade in connection with which it is employed." *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926) (addressing trademarks). The decision in *Boston Hockey*, however, seems to provide the holder of a service mark with a form of monopolistic protection, a so-called "independent right to exclude." 4 McCarthy on Trademarks § 24:10. *See also United States v. Giles*, 213 F.3d 1247, 1250 (10th Cir. 2000) (noting that even though the teams in *Boston Hockey* "had not registered their marks for use on patches, the [former Fifth Circuit] essentially gave the[m] a monopoly over use of the trademark in commercial merchandising"); *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 919 (9th Cir. 1980) ("Interpreted expansively, *Boston Hockey* holds that a trademark's owner has a complete monopoly over its use, including its functional use, in commercial merchandising. But our reading of the Lanham Act and its legislative history reveals no congressional design to bestow such broad property rights on trademark owners.") (footnote omitted).

Third, it is well-settled that trademark (and service mark) rights are derived through use, *see, e.g.*, *United Drug*, 248 U.S. at 97, and we have not critically analyzed whether the procedural advantages of a mark's registration, *see Laite* 756 F.2d at 1541, or incontestability, *see Dieter*, 880 F.2d at 325–26, can serve as a

basis for expanding the scope of service mark protection to a tangible good or product. *See* 3 McCarthy on Trademarks § 19:3 (explaining that, although registering a mark provides procedural and legal benefits, "the registration does not create the trademark"); *id.* at § 32:141 (observing that "the case law usually discusses incontestability when a plaintiff asserts incontestability as the source of its right to be secure from a challenge to the validity of its mark"). *Cf. In re Save Venice N.Y., Inc.*, 259 F.3d 1346, 1353 (Fed. Cir. 2001) (observing that "[a] registered mark is incontestable only in the form registered and for the goods or services claimed").

We recognize that, as to federally-registered trademarks, we have not limited protection to the actual product or products listed in the certificate of registration. "The remedies of the owner of a registered trademark," we have held, "are not limited to the goods specified in the certificate, but extend to any goods on which the use of an infringing mark is 'likely to cause confusion.'" *Continental Motors Corp. v. Continental Aviation Corp.*, 375 F.2d 857, 861 (5th Cir. 1967) (citation omitted). *See also E. Remy Martin & Co., S.A. v. Shaw-Ross Int'l Imports, Inc.*, 756 F.2d 1525, 1530 (11th Cir. 1985) (examining the similarity of products factor, we acknowledged that registered trademark rights may "extend to any goods related in the minds of consumers in the sense that a single producer is likely to put out both goods"). *Accord* 6 McCarthy on Trademarks §§ 32:137, 32:152. Yet

extending the scope of a registered trademark (which identifies "goods") to a different product appears to be qualitatively different from extending the scope of a registered service mark (which identifies "services") to a different category of "goods."

There may be a sound doctrinal basis for what *Boston Hockey* did. But unless the concept of confusion completely swallows the antecedent question of the scope of a registered mark, we have yet to hear of it.

V

On some level, we understand that allowing a party to "take a free ride on another's registered trademark," *see B. H. Bunn Co. v. AAA Replacement Parts Co.*, 451 F.2d 1254, 1261 (5th Cir. 1971), simply feels wrong. Trademark rights, however, do "not confer a right to prohibit the use of [a] word or words" generally and exist "to protect the owner's good will against the sale of another's product as his." *Prestonettes, Inc. v. Coty*, 264 U.S. 359, 368 (1924).

If *Boston Hockey* did not exist, the district court's rationale might provide a reasonable way of analyzing the alleged infringement of registered service marks through their use on goods. But *Boston Hockey* is in the books, and it compels reversal of summary judgment in favor of Sportswear. Although there may be "error in [that] precedent," *United States v. Romeo*, 122 F.3d 941, 942 n.1 (11th Cir. 1997), we do not have the authority, as a later panel, to disregard it. The case

is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-13473

U.S. Tax Court Docket Nos. 28207-08, 28208-08, 28210-08

SANDRA K. SHOCKLEY, et al.,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from the United States Tax Court

(October 3, 2017)

Before TJOFLAT and WILSON, Circuit Judges, and ROBRENO,* District Judge.

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* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ROBRENO, District Judge:

Terry and Sandra Shockley, a husband and wife duo, formerly owned a television and radio company called Shockley Communications Corporation ("SCC"). In conjunction with their retirement, the Shockleys sold SCC and reported their gains from this sale on timely federal income tax returns for calendar year 2001. In September 2007, the Commissioner of the Internal Revenue Service ("IRS") assessed additional tax liabilities against SCC for its tax year ending May 31, 2001, and subsequently asserted transferee liability under I.R.C. § 6901 against each of eight of the largest selling shareholders, including Terry and Sandra Shockley.

The Tax Court upheld the Commissioner's transferee liability assessment. The Shockleys, along with another former SCC shareholder, Shockley Holdings, L.P. (collectively, "Petitioners"), now appeal this ruling, arguing that the Tax Court erred in assessing tax liabilities against them as transferees under both federal and state laws. For the reasons that follow, we will affirm the decisions of the Tax Court.

I.

The facts giving rise to this appeal—some of which are stipulated, and none of which are disputed—are lengthy and complex. Drawing largely on the Tax Court's recitation in the opinion below, we organize this tortuous series of

transactions into the following broad categories: the decision to sell, negotiations, structuring the transaction, the agreements, closing and results, and the tax consequences of all the foregoing.

A.
Decision to Sell

After purchasing a radio station in Madison, Wisconsin, in early 1985, Terry and Sandra Shockley incorporated SCC, a closely held corporation, under the laws of Wisconsin. Between 1985 and 2000, SCC grew to own five television stations, a radio station, and a video production company in Wisconsin, as well as a television station and several radio stations in Minnesota. SCC brought in additional investors during this time to fund its significant business expansion.

SCC eventually came to be owned by 29 separate shareholders, including Petitioners, several other individuals, a number of investment funds, and the State of Wisconsin Investment Board (collectively, "SCC shareholders"). Terry and Sandra, who each separately owned 10.18879% of SCC's common stock, served as members of the SCC Board of Directors ("SCC Board"). Terry also served as SCC's president and treasurer, and Sandra served as SCC's vice president and secretary. Shockley Holdings L.P.—an entity owned by the Shockleys, as general partners, and their adult children, as limited partners—owned 3.52508% of SCC's common stock.

The Shockleys began considering their retirement options in 1999. On January 21, 2000, they met with Stephen A. Schmidt ("Schmidt"), a managing director and tax partner of a professional audit, tax, and consulting services firm called RSM McGladrey, Inc. ("RSM"). During this meeting and through later communications, the Shockleys, other members of the SCC Board, and RSM discussed the following six potential alternative futures for SCC: (1) a sale of assets by SCC followed by its liquidation; (2) a sale of SCC stock; (3) tax-free reorganizations under I.R.C. § 368; (4) a "spin-off" of the SCC's radio assets under I.R.C. § 355, followed by a sale of SCC stock; (5) redemption of SCC stock from the SCC shareholders; and (6) a sale of SCC stock using an employee ownership plan. Schmidt also introduced the Shockleys to Integrated Capital Associates ("ICA"), a firm that facilitated stock sales of companies.

In February 2000, the Shockleys met with media broker Kalil & Co., Inc. ("Kalil") to further discuss potential alternatives for the future of SCC. On April 5, 2000, Terry signed an agreement authorizing Kalil "to act as exclusive broker in the sale of all of [SCC's] assets." Appellee's Corrected Suppl. App. Tab 5 (Ex. 23-J). After this exclusive brokerage agreement was in place, Kalil began seeking potential buyers for SCC. Around the same time, in April 2000, the Shockleys met with Eric Sullivan, a principal of ICA, to learn more about his company's services.

Over the next several months, the Shockleys continued to seek and receive advice from RSM and communicate regularly with Kalil regarding efforts to sell SCC. RSM presented the Shockleys with analyses that compared the projected impacts on both buyers and sellers of a stock sale versus an asset sale. One such analysis, which assumed a value of $190 million for SCC's radio and television assets, showed net after-tax liquidation proceeds to SCC shareholders of $94 million for a hypothetical stock sale, but only $75 million for the correlating proceeds of a hypothetical asset sale. After reviewing this analysis, and out of concern that a piecemeal sale of SCC's assets over time might negatively impact employee retention and decrease productivity, the SCC Board initially decided to pursue a stock sale.

This decision notwithstanding, Terry subsequently discovered that the general preference of buyers in the broadcasting industry was an asset sale. Further, although Kalil was able to find potential buyers interested in SCC's assets, the Shockleys learned it was unlikely that a broadcasting business would be interested in buying the stock of a company, like SCC, that had both television stations and radio stations; buyers who were interested in small-sized-market radio stations generally were not interested in medium-sized-market television stations, and vice versa.

B.
Negotiations

In May 2000, a purchase offer for SCC's television assets was made by an Illinois-based media company named Quincy Newspapers, Inc. ("QNI"). Structured as an asset sale, QNI's offer tendered a purchase price of $160 million for SCC's television stations and production company. These items comprised approximately 95% of SCC's total radio and television assets. No agreement was reached immediately, but negotiations continued throughout the summer of 2000.

Meanwhile, in a letter dated June 7, 2000, Kalil made Terry aware of two separate companies—Fortrend International, LLC ("Fortrend"), and Diversified Group ("Diversified")—that had each expressed willingness to buy the stock of SCC and then sell its assets to third-party buyers. As Kalil explained in the letter, this "buy stock/sell assets" transaction would, with either Fortrend or Diversified, proceed as follows:

> It looks like they negotiate a fee of somewhere between 5-7% on the gain. You would sell them the stock and they would sell the assets to a buyer. Both applications would be filed with the [Federal Communications Commission ("FCC")] concurrently and they would "own" [SCC] for about one hour. They feel confident that their tax attorneys can explain this in such detail as to give both buyer and seller total comfort.

Appellee's Corrected Suppl. App. Tab 7 (Ex. 27-J).

In late August 2000, Schmidt arranged a conference call for the Shockleys and several others to speak with David Kelley, who worked at ICA. The agenda

for the call included an overview of ICA, the possible use of a "Midco" transaction for the stock sale of SCC,[1] and a discussion as to why ICA should be selected over Fortrend or Diversified. During this conference, the Shockleys and other attendees were informed of a risk that the IRS might recharacterize the transaction as an asset sale. ICA, however, represented that none of the similarly structured transactions it had facilitated over an 18-year period had been successfully challenged or unwound.

In September 2000, QNI indicated that it was willing to consider structuring the transaction as a purchase of SCC's stock instead of assets, and it asked Kalil to provide SCC's asking price for the stock. In response, Terry drafted a letter to QNI that (1) showed SCC's projected purchase prices for a stock sale and, alternatively, for an asset sale; (2) indicated that SCC could proceed with a transaction structured either way; (3) provided an analysis comparing an asset purchase with a stock purchase; and (4) explained that the cash savings to SCC of a stock sale, rather than an asset sale, would be $11 million. *See* Appellee's Corrected Suppl. App. Tab 58 (Ex. 349-J). He noted in this letter that SCC had a

[1] "Midco," which stands for "middle company," generally refers to a transaction in which "the seller engages in a stock sale (thus avoiding the triggering of built-in gain in appreciated assets) while the buyer engages in an asset purchase (thus allowing a purchase price basis in the assets), through use of an intermediary company." *The Growing Threat of Transferee Liability in Midco Deals*, Law360, July 5, 2016, *available at* https://www.law360.com/articles/813956/the-growing-threat-of-transferee-liability-in-midco-deals.

"'Midco' company arrangement standing by to proceed."[2] *See id.* QNI did not agree to the terms presented in that letter and never agreed to buy the stock of SCC, but it remained interested in the television assets nonetheless. Kalil therefore continued to negotiate with QNI, on behalf of an ICA affiliate, regarding the price and terms of a potential sale of SCC's assets.

The SCC shareholders represented on the SCC Board finally decided in the fall of 2000 that they would sell SCC's stock to an affiliate of ICA.[3] Terry informed Kalil that this was their intention.

C.
Structuring the Transaction

On October 6, 2000, ICA organized Northern Communications Acquisition, LLC ("NCA LLC"), a Delaware limited liability company. On October 13, 2000, NCA LLC executed a trust agreement with Roger Ohlrich, an agent of ICA, forming Northern Communications Statutory Trust ("NCS Trust") under the laws of Connecticut. According to the trust instrument, for which NCA LLC acted as

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[2] The letter further provided that "[i]n discussions with . . . our FCC Counsel, we have been assured both that the Midco purchase of SCC stock and the Midco sale of the TV assets to QNI can proceed simultaneously with the FCC and should not significantly delay a Closing." *Id.*

[3] Although SCC had 29 total shareholders at that time, a provision in its shareholders' agreement provided that if shareholders owning 65% or more of the shares "determine[d] to sell or otherwise dispose of all or substantially all of the assets of [SCC] or all of the capital stock of [SCC]," they could compel the remaining shareholders to vote in favor of the asset sale or participate in the stock sale. Appellee's App. Tab 55 (Ex. 328-J, § 3.4(a)). At the time this decision was made, the largest shareholders were the State of Wisconsin Investment Board (24.57%), Allsop Venture Partners III, L.P. (21.87%), and Petitioners (collectively, about 23.9%).

trustor and beneficiary and Ohlrich acted as trustee, NCS Trust was established for the sole purpose of acquiring the stock of SCC.[4]

Also on October 6, 2000, QNI faxed a nonbinding letter of intent to ICA regarding QNI's purchase of the television assets from an undisclosed client of ICA.[5] Kalil negotiated with QNI regarding the final price of the potential purchase, and on October 27, 2000, QNI sent Kalil—who was working on behalf of the still-undisclosed client of ICA that would ultimately sell QNI the television assets—a revised draft of the nonbinding letter of intent. On October 31, 2000, Kalil, on behalf of this seller, sent QNI a letter accepting its offer to purchase the television assets.

Although the intent was for QNI to purchase all of SCC's television assets, FCC regulations prohibited QNI from purchasing the Minnesota television station because of market conflict. QNI, however, still desired an economic benefit from its relationship with the Minnesota television station, as well as an option to buy it later, if possible. To accommodate QNI, the Shockleys organized a company called TSTT, LLC ("TSTT"), a Wisconsin entity that would purchase the

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[4] Frank Taboada, counsel for ICA, NCS Trust, and the affiliated entities of NCS Trust, explained at trial that it is customary to create entities specifically for a particular transaction.

[5] This client was later identified as NCS Trust, the ICA affiliate established on October 13, 2000.

Minnesota television station from NCAC. At some point prior to January 23, 2001, TSTT was renamed Shockley Broadcasting, LLC ("SB LLC").

On December 1, 2000, counsel for ICA incorporated Northern Communications Acquisition Corp. ("NCAC"), a Delaware corporation and wholly-owned subsidiary of NCS Trust. NCAC was created to serve as the entity that would purchase the SCC stock. Ohlrich became the president of NCAC, as well as the chairman and sole member of its board of directors.

Terry did not conduct any in-depth background investigation of NCS Trust or NCAC, and the SCC shareholders voiced concerns during stock purchase negotiations about the creditworthiness of NCAC. ICA responded to these concerns by forming Northern Communications Fund, LLC ("NC Fund"), which was wholly owned by ICA-related entity Integrated Acquisitions Group, LLC ("IAG"). NC Fund and another entity, Slabfork LLC, then became the 85% and 15% owner-members, respectively, of the already-established NCA LLC. In a letter dated December 28, 2000, written to Terry in his capacity as shareholder representative, IAG represented that it would cause NCAC to be capitalized using either cash or technology interests via NC Fund, NCA LLC, and NCS Trust.

D.
The Agreements

By the end of December 2000, NCAC had entered into the following three separate purchase agreements:

(1) A stock purchase agreement with the SCC shareholders ("SCC SPA") dated December 28, 2000, providing that the SCC shareholders would sell to NCAC all the SCC stock for a purchase price of $117 million, subject to certain adjustments.

(2) An asset purchase agreement with QNI ("QNI APA") dated December 29, 2000, providing that NCAC would sell SCC's Wisconsin television stations and production company to QNI for $168 million, subject to certain adjustments.

(3) An asset purchase agreement with TSTT ("TSTT APA") dated December 29, 2000, providing that NCAC would sell the Minnesota television station to TSTT for $3 million.

In the course of negotiating these agreements, SCC and NCAC counsel remained wary of "minimiz[ing]" and "eliminat[ing]" any "linkage issues" between the SCC SPA and the APAs with other entities. *See, e.g.*, Appellee's Corrected Suppl. App. Tab 17 (Ex. 78-J) (suggesting edits to the proposed QNI APA "to eliminate linkage issues with respect to the SPA and APA," and further suggesting that the parties "consider how many references are appropriate to SCC if we are attempting to draft an APA that minimizes linkage issues with SCC"); *id.* Tab 56 (Ex. 331-J) (requesting to receive comments "orally, so as to not create too much of a connection between this document and your client").

On January 19, 2001, the IRS released Notice 2001–16, 2001–1 C.B. 730, clarified by Notice 2008–111, 2008–51 I.R.B. 1299, which identified and described certain transactions as types of an "intermediary transactions tax shelter" and advised that direct or indirect participants of the same or substantially similar

transactions would be required to disclose their participation in accordance with 26 C.F.R. § 1.6011–4T(b)(2).[6] Schmidt sent copies of Notice 2001–16 to the Shockleys and their legal counsel because he believed that the proposed transaction with ICA bore some similarities to the transactions described in the notice.

In early 2001, Ohlrich toured the stations that SCC owned and was introduced to SCC employees as the president of the company that was purchasing

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[6] Specifically, Notice 2001-16 provided in relevant part as follows:

> The Internal Revenue Service and the Treasury Department have become aware of certain types of transactions, described below, that are being marketed to taxpayers for the avoidance of federal income taxes. The Service and Treasury are issuing this notice to alert taxpayers and their representatives of certain responsibilities that may arise from participation in these transactions.
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> These transactions generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or § 1.337(d)–4) of the Income Tax Regulations, resulting in no reported gain on M's sale of T's assets.
>
> Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

Notice 2001–16, 2001–1 C.B. 730.

SCC. In addition, NCS Trust applied for a loan of $175 million from Ultrecht–America Finance Co. ("UAFC"), a subsidiary of Coöperatieve Centrale Raiffeisen–Boerenleenbank, B.A. ("Rabobank"), in contemplation of purchasing the SCC stock. On or around January 23, 2001, NCAC, SCC, QNI, and the newly renamed SB LLC filed applications with the FCC seeking consent for the SCC stock sale, transfer of the television stations, and assignment of broadcast station licenses as required by the parties' respective agreements with one another.

In a letter dated March 29, 2001, Midwest Communications, Inc. ("Midwest"), a Wisconsin corporation, made an offer to purchase the SCC radio assets from NCAC for $7.5 million. NCAC, through Ohlrich, accepted the offer on March 31, 2001.

On April 5, 2001, ICA's counsel incorporated Shockley Delaware Corp. ("SDC"), which was wholly owned by NCAC. SDC was created, in part, to hold SCC's assets after the acquisition. At some point on or after April 27, 2001, ICA's agents formed Northern Communications Holdings Co. ("NC Holdings"), which had the same officer and director as NCAC: Ohlrich. ICA instructed that NC Holdings was to be created to serve as an intermediate company so that NC Holdings would wholly own NCAC while being wholly owned by NCS Trust.

In the midst of this activity, the president of Kalil sent a business letter to Terry, SCC, QNI, and Midwest dated April 16, 2001, referencing a discussion that he had had with Terry regarding Kalil's fee schedule:

> Also, we discussed waiving the fee on the midco expense of $9 million to which I have agreed.
>
> In other words, our exclusive agreement fee schedule is applicable for $162 million on the television station sale and dollar-for-dollar on the radio station sale or a combined $178.5 million less $9 million equaling $169.5 million.

Appellee's Corrected Suppl. App. Tab 57 (Ex. 334-R). Subsequently, in a business letter to Kalil drafted on May 1, 2001, Terry referenced an attached exhibit A, which showed a "Stock Transaction Fee - ICA ($9,000,000)."[7] Appellee's Corrected Suppl. App. Tab 37 (Ex. 179-J).

On May 15, 2001, UAFC, which had financed other acquisitions by ICA, approved the loan request made by NCS Trust. This loan was to take the form of a promissory note up to $175 million made by NCS Trust in favor of Rabobank. Purportedly, the proceeds of the note would be used to fund NCAC's purchase of SCC's stock. Besides pledges to be made by NCS Trust, the note would at all times be fully secured by an amount in excess of the borrowed funds as provided by QNI and to be held in an escrow account ("Escrow I")—or, alternatively, QNI

[7] It is unclear whether ICA ever actually received any fee. *See Shockley v. Comm'r*, 109 T.C.M. (CCH) 1579, 2015 WL 3827570, at *17 (2015) (noting that "there are some gaps in the record," including "whether ICA actually received a fee and in what amount").

would provide Rabobank with irrevocable payment instructions for cash held at First Union National Bank ("First Union"). Rabobank expected the loan to be repaid within two days of its being made from the proceeds of the QNI APA, and it expected to receive a transaction fee.

On May 25, 2000, Midwest and NCAC entered into an asset purchase agreement ("Midwest APA") with respect to SCC's radio assets. NCAC, SCC, QNI, and SB LLC received the FCC consents for their broadcast license applications on May 30, 2001. Also on that date, UAFC, NCS Trust, NCAC, the SCC shareholders, and Rabobank entered into an agreement regarding a second escrow account ("Escrow II"), for which Rabobank would serve as the escrow agent. According to the agreement, NCAC would use NCS Trust's loan proceeds to deposit an amount equal to the SPA purchase price into Escrow II, from which the SCC shareholders would subsequently be paid for their stock.

E.
Closing and Results

On May 31, 2001, all closings of the sale of SCC stock and sales of SCC assets took place within a span of less than three hours at one of the law firms representing ICA and NCS Trust.[8] These closings were as follows:

[8] Leading up to and throughout the closing, all parties, including Petitioners, engaged experienced professionals and attorneys to handle complicated portions of the transactions, including negotiations, FCC regulations, and taxation. SCC and the SCC Shareholders were represented in the sale of the SCC stock by three different law firms.

(1) Ohlrich, as trustee of NCS Trust and with respect to its promissory note, instructed UAFC to draw down $130 million and to credit the funds to NCS Trust's Rabobank account. At the same time, Ohlrich authorized UAFC to debit from the same account Rabobank's transaction fee of $750,000. He transferred the remaining $129,250,000 of loan proceeds to NC Holdings in exchange for 100 shares of NC Holdings' preferred stock given to NCS Trust, and he then pledged both NC Holdings' common and preferred stock (held by NCS Trust) to UAFC as additional security for repayment of the loan.

(2) NC Holdings then gave its $129,250,000 in loan proceeds to NCAC as a contribution to capital. From that contribution, NCAC deposited $96,113,235.68 into Escrow II. In accordance with the SCC SPA and the Escrow II agreement, the SCC shareholders sold all their shares of SCC to NCAC. SCC then became a wholly-owned subsidiary of NCAC, and the Shockleys resigned from their positions in SCC.

(3) Immediately following the sale of this stock, $94,713,235.68 from Escrow II was transferred to a third escrow account created for the purposes of making disbursements to the (now former) SCC shareholders.

(4) Next, QNI, NCAC, UAFC, and First Union entered into an agreement with respect to Escrow I, for which First Union served as the escrow agent and QNI and several of its subsidiaries were the guarantors. In accordance with this agreement, QNI caused to be deposited in escrow at least the sum required under the QNI APA for the purchase of the agreed-upon television assets. The agreement further provided that all amounts paid from Escrow I were to be applied to the satisfaction of QNI's obligation to pay the QNI APA purchase price and the obligation to repay the UAFC loan. Finally, the agreement provided that UAFC would be repaid that day, absent any unusual circumstances.

(5) Thereafter, Ohlrich—who was at that point president of both SDC and SCC—caused SCC to merge with and into SDC. Effectively at the same time, Ohlrich authorized SDC to convert

from a corporation to a limited liability company, and thus he formed a new limited liability company under Delaware law named Shockley Communications Acquisition, LLC ("SCA LLC"). SCA LLC immediately admitted an additional member, Hare Street Trading, L.P., an Isle of Man limited partnership, which acquired a 1% membership interest. SCA LLC then purchased the preferred stock subject to the UAFC loan obligation of NCS Trust. As soon as SCA LLC assumed this repayment obligation, UAFC released NCS Trust from its loan obligation. NCAC then merged into NC Holdings, and although NC Holdings was the surviving entity, its name was nevertheless changed to "Northern Communications Acquisition Corp." ("NCAC II").

(6) Following its formation, SCA LLC sold its newly acquired television assets to QNI and SB LLC in accordance with the QNI APA and the TSTT APA, respectively. A portion of the proceeds from these asset sales was disbursed to UAFC in repayment of the loan, and SCA LLC's obligation under the loan was thus fully discharged.

(7) Ohlrich, as president of NCAC II, instructed Rabobank to transfer the remaining $33,136,764.32 of the NCAC contribution to capital/loan proceeds to an account for SCA LLC. The FCC broadcast licenses for the radio stations were assigned from SCC to SCA LLC effective May 31, 2001.

Finally, on September 21, 2001, NCAC II/SCA LLC sold the radio assets to Midwest in accordance with the Midwest APA.[9]

[9] From May 31, 2001, through September 20, 2001, SCA LLC remained responsible for controlling the programming, the employees, and the financial expenditures of the radio stations. SCA LLC was also the FCC licensee at risk for any violations of FCC rules.

As a result of all the foregoing transactions, SCC's appreciated assets were sold without generating any correlating tax liability to SCC, SDC, SCA LLC, NCAC II, ICA, the SCC shareholders, or anyone else.[10]

In exchange for their SCC shares, Terry, Sandra, and Shockley Holdings ultimately received $10,975,059.03, $11,244,084.42, and $4,053,709.13, respectively. Petitioners timely filed federal income tax returns for calendar year 2001 reporting gains from the May 31, 2001, sale of SCC stock.

F.
Tax Consequences

On or about February 24, 2002, the IRS received SCC's Form 1120, U.S. Corporation Income Tax Return, for its short tax year of January 1 through May 31, 2001. This form, which was prepared by ICA's Chief Financial Officer, reported that SCC had zero assets by the end of its 2001 tax year and zero tax due. It further reported that, on May 31, 2001, SCC had merged into SDC, and immediately thereafter, SDC converted into a Delaware limited liability company. This merger and conversion resulted in SCC's liquidation and tax-free distribution under I.R.C. § 332.

[10] This was the basic bottom line of an opinion letter issued on May 31, 2001, describing the events that transpired that day and their expected tax consequences. *See Shockley*, 2015 WL 3827570, at *8-9 (quoting the relevant text of the opinion letter). This letter was prepared by a law firm representing NCS Trust at the requests of NCS Trust, NC Holdings, NCAC II, SCC, SDC, and SCA LLC.

On February 18, 2005, the IRS issued multiple notices of deficiency relating to SCC's short tax year ended May 31, 2001.[11] On September 6, 2007, the IRS assessed the following amounts against SCC for the tax year ending May 31, 2001: (1) corporate income tax of $41,566,515; (2) an addition to tax under I.R.C. § 6651(a)(1) of $2,078,276; (3) an accuracy-related penalty under I.R.C. § 6662 of $8,313,303; and (4) interest of $26,953,309.60. Thereafter, the IRS undertook transferee examinations of eight of the largest SCC shareholders who sold their SCC shares to NCAC on May 31, 2001, including Petitioners. The IRS sent Petitioners notice of transferee liability statements on August 21, 2008.

On November 19, 2008, Petitioners each filed separate Tax Court petitions contesting the IRS's determination that they were liable as transferees for SCC's corporate income tax liabilities. The Tax Court consolidated all three cases and tried them from January 19, 2010, through January 22, 2010. Initially, the Tax

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[11] On May 25, 2005, the Shockleys filed a petition at docket no. 9700-05 in the United States Tax Court in response to a deficiency notice they received at what was then their home address in Madison, Wisconsin. This notice determined a deficiency of $9,868,051 and a penalty of $1,973,610.20 with respect to the Shockleys' jointly filed 2001 individual income tax return. The parties ultimately agreed to settle the case with no deficiency or penalty due, and a stipulated decision to this effect was entered in docket no. 9700-05 on August 23, 2007.

Also on May 25, 2005, a petition was filed at docket no. 9699-05 in the United States Tax Court. This petition stated that it was "filed on behalf of Petitioner subject to the invalidity of the Notice of Deficiency and the failure to properly serve the corporation as required by statute. Without conceding the jurisdiction of this Court, the Petitioner hereby submits this Limited and Special Petition." This case was dismissed for lack of jurisdiction on April 26, 2007, on the basis that SCC lacked legal capacity to proceed through the Shockleys. The order of dismissal stated that the parties had agreed that the case should be dismissed on this ground, and therefore the Court did not need to determine the validity of the notice of deficiency.

Court held that the limitations period for the IRS to assess transferee liability had expired, and it entered decisions in favor of the Shockleys on that basis on May 2, 2011. *See Shockley v. Comm'r*, 101 T.C.M. (CCH) 1451, 2011 WL 1641884, at *9 (2011). The Commissioner appealed, however, and the Eleventh Circuit reversed and remanded to the Tax Court. *See Shockley v. Comm'r*, 686 F.3d 1228, 1239 (11th Cir. 2012). The Tax Court then issued a supplemental opinion on June 22, 2015, holding the Shockleys liable as transferees of SCC. *See Shockley v. Comm'r*, 109 T.C.M. (CCH) 1579, 2015 WL 3827570, at *20 (2015).[12]

On March 18, 2016, the Tax Court entered its final decisions in the three consolidated cases, holding Petitioners liable as transferees of SCC. Terry was held liable for $10,975,059.00, plus interest. Sandra was held liable for $11,244,084.00, plus interest. Shockley Holdings was held liable for $4,053,709.00, plus interest. Petitioners timely appealed.

II.

Whether the Tax Court properly characterized a particular transaction for federal tax purposes is a question of law subject to *de novo* review. *See Frank Lyon Co. v. United States*, 435 U.S. 561, 581 n.16 (1978); *Winn-Dixie Stores, Inc.*

[12] On August 6, 2015, Petitioners filed a motion for reconsideration, and on January 11, 2016, following additional briefing by the parties, the Tax Court issued a second supplemental opinion to clarify that Petitioners were liable for pre-notice interest (*i.e.*, for periods prior to the issuance of the notices of transferee liability) as determined by Wisconsin law, and also for post-notice interest as determined by the Internal Revenue Code. *See Shockley v. Comm'r*, 111 T.C.M. (CCH) 1038, 2016 WL 145818, at *6 (2016). The Tax Court's second supplemental opinion does not address any of the issues raised in the present appeal.

v. Comm'r, 254 F.3d 1313, 1315 (11th Cir. 2001). The Tax Court's application of state law is also subject to *de novo* review. *L.V. Castle Inv. Grp., Inc. v. Comm'r*, 465 F.3d 1243, 1245 (11th Cir. 2006); *see also Pugh v. Comm'r*, 213 F.3d 1324, 1325 (11th Cir. 2000) ("We have jurisdiction to review the decisions of the Tax Court 'in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.'" (quoting 26 U.S.C. § 7482(a)(1))).

A.
Applicable Law

Generally, taxpayers have the right to minimize or avoid their taxes by any means permitted by law. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935). This right, however, "does not bestow upon the taxpayer the right to structure a paper entity to avoid tax when that entity does not stand on the solid foundation of economic reality." *Markosian v. Comm'r*, 73 T.C. 1235, 1241 (1980). Although courts typically "respect the form of a transaction," they will, when warranted, "use substance over form and its related judicial doctrines to determine the true nature of a transaction disguised by formalisms that exist solely to alter tax liabilities." *John Hancock Life Ins. Co. (U.S.A.) v. Comm'r*, 141 T.C. 1, 57 (2013); *see also Markosian*, 73 T.C. at 1241 ("When the form of the transaction has not, in fact, altered any cognizable economic relationships, we will look[ ] through that form and apply the tax law according to the substance of the transaction.").

To determine the true nature of a transaction under federal tax principles, courts rely primarily on three distinct but similar doctrines. The first of these, known as the "substance over form" doctrine, allows courts to "look to the objective economic realities of a transaction rather than to the particular form the parties employed" in deciding how to treat a particular transaction for tax purposes. *Frank Lyon Co.*, 435 U.S. at 573. The "business purpose" doctrine applies when "an operation [had] no business or corporate purpose," but was "a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character." *Gregory*, 293 U.S. at 469. Finally, the "economic substance" doctrine asks whether a transaction "changes in a meaningful way . . . the taxpayer's economic position," and whether "the taxpayer has a substantial purpose (apart from Federal income tax effects)" for entering into it. I.R.C. § 7701(o).

Once a transaction has been recast under any of these principles, a party may qualify as a transferee under § 6901 of the Internal Revenue Code. Section 6901 provides that the liability of a transferee of property of a taxpayer owing federal income tax "shall . . . 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." I.R.C. § 6901(a). "Transferee" is defined broadly to include any "donee, heir, legatee, devisee, and distributee, and

with respect to estate taxes, also includes any person who, under section 6324(a)(2), is personally liable for any part of such tax." I.R.C. § 6901(h).

Importantly, § 6901 does not independently impose tax liability on a transferee; instead, it provides only a procedure by which the IRS may collect unpaid taxes owed by a transferor of assets from the transferee who received those assets. *See Comm'r v. Stern*, 357 U.S. 39, 43-45 (1958) ("[Section 6901] neither creates nor defines a substantive liability but provides merely a new procedure by which the Government may collect taxes. . . . [W]e hold that, until Congress speaks to the contrary, the existence and extent of liability should be determined by state law."). Accordingly, the Commissioner must have an independent basis for liability before collecting taxes under § 6901—or, in other words, transferee status under federal law must be determined independently of substantive liability for fraudulent transfer under state law. *See id.*; *see also Feldman v. Comm'r*, 779 F.3d 448, 459 (7th Cir. 2015) (collecting cases supporting the proposition that "[e]very circuit that has addressed [the] question has . . . required independent determinations of transferee status under federal law and substantive liability under state law").[13]

[13] Regarding the order in which these inquiries are undertaken, the parties do not dispute on this appeal that a court "can start with either part, and the Commissioner must pass both to win." *Buckrey v. Comm'r*, 114 T.C.M. (CCH) 45, 2017 WL 2964716, at *8 (2017) (citing *Slone v. Comm'r*, 810 F.3d 599, 608 (9th Cir. 2015); *Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 185–86 (2d Cir. 2013); *Starnes v. Comm'r*, 680 F.3d 417, 427 (4th Cir. 2012)).

The parties do not dispute that the applicable state fraudulent transfer law that could provide a basis for substantive liability in this case is the Wisconsin Uniform Fraudulent Transfer Act ("WIUFTA").[14] This statute provides in relevant part as follows:

> A transfer made or 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.

Wis. Stat. Ann. § 242.05(1). The WIUFTA defines "transfer" broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, 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." *Id.* § 242.01(12).

The highest state court in Wisconsin has characterized Wis. Stat. Ann. § 242.05(1) as comprising three elements of fraudulent transfer: "(1) the creditor's claim arose before the transfer was made; (2) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and (3) the debtor either was insolvent at the time of the transfer or became insolvent as a

[14] Wisconsin law applies because the transactions in question took place in Wisconsin. This Court has jurisdiction to review the Tax Court's decision under I.R.C. § 7481, and venue is appropriate for this appeal under I.R.C. § 7482 because the Shockleys resided in Florida and Shockley Holdings had its principal place of business in Florida at the time the parties filed their Tax Court petitions.

result of the transfer." *Badger State Bank v. Taylor*, 688 N.W.2d 439, 442 (Wis. 2004). Creditors, including the Commissioner, have the burden to prove all three elements of transferee liability under the WIUFTA "by clear and convincing evidence." *In re Loyal Cheese Co.*, 969 F.2d 515, 518 (7th Cir. 1992) (citing *Kerbet v. Behling*, 61 N.W.2d 205, 207 (Wis. 1953)).

Further, the Wisconsin Supreme Court has explained that the WIUFTA is a creditor-protection statute, and any transfer therefore must be viewed from the perspective of a creditor. *See Badger State Bank*, 688 N.W.2d at 449. Moreover, Wis. Stat. Ann. § 242.05(1) is a "'constructive fraud' provision" constituting a "per se rule" under which good faith (or lack thereof) is irrelevant. *See id.* at 447. For these reasons, "[a] transferee's subjective state of mind does not play a role in resolving [a] case under Wis. Stat. Ann. § 242.05(1)." *Id.* at 449.

Prior to the remand in this case, the Court of Appeals for the Seventh Circuit issued the first decision in any court—state or federal—directly addressing transferee liability under the WIUFTA. *See Feldman*, 779 F.3d at 450.[15] The facts of *Feldman* involved the former shareholders of a closely held Wisconsin corporation that had operated a dude ranch in northwestern Wisconsin for several decades. *Id.* Following the sale of the dude ranch, the former shareholders of the corporation engaged in "an intricate tax-avoidance transaction" involving an

[15] Knowing that this decision was pending, the Tax Court specifically deferred issuing its opinion in the instant case until after the Seventh Circuit issued its opinion in *Feldman*.

intermediary company called MidCoast that served to "effectively liquidat[e] the corporation without absorbing the financial consequences of the tax liability." *Id.* The IRS later sought to hold the former shareholders liable for the unpaid taxes as transferees under § 6901 and the WIUFTA. *See id.*

On appeal, the Seventh Circuit agreed with the Tax Court's conclusion that the shareholders' transaction bore "the hallmarks of a de facto liquidation," and it therefore disregarded the form of the transaction to hold the shareholders liable as transferees under § 6901. *Id.* at 457. The Seventh Circuit then proceeded to make the following holdings:

(1) "[S]tate fraudulent-transfer law is . . . flexible and looks to equitable principles like 'substance over form,' just like the federal tax doctrines," *id.* at 459;

(2) "[T]he independent state-law inquiry will make a difference in outcome only when there is a conflict between the applicable federal tax doctrine and the state law that determines substantive liability"—and "no such conflict" exists between the WIUFTA and § 6901, *id.* at 458; and

(3) The shareholders' "due diligence and lack of knowledge of illegality is simply beside the point" because "subjective intent and good faith play no role in the application of the constructive-fraud provisions of Wisconsin's UFTA," *id.* at 459–60.

Applying these holdings, the Seventh Circuit deemed the shareholders transferees under both state and federal laws, and affirmed the Tax Court's decision upholding

the Commissioner's assessment of transferee liability against the shareholders for the dissolved corporation's unpaid taxes and penalties. *Id.* at 459-61.

B.
Decision Below

At the outset of its analysis, the Tax Court characterized the transaction at issue as a Midco transaction that "allow[ed] the parties to have it both ways" by "letting the seller engage in a stock sale and the buyer engage in an asset sale":[16]

> While the Shockleys testified that neither they nor SCC ever hired ICA, the SCC board nevertheless made a decision in September 2000 to sell SCC's stock to an affiliate of ICA. No ICA "affiliate" existed to hire ICA at that time; thus the SCC board agreed, tacitly or otherwise, to permit ICA to act as an intermediary of a "buy SCC stock/sell SCC assets" transaction. The SCC board wanted ICA's services because the SCC shareholders could avoid the unwanted tax results of an appreciated asset sale and enjoy the sought-after tax savings of a stock sale—something it was unable to obtain before

[16] The Tax Court relied on the definition of this type of transaction provided in the leading Second Circuit case interpreting New York's fraudulent conveyance statute:

> In such a transaction, the selling shareholders sell their C Corp stock to an intermediary entity (or "Midco") at a purchase price that does not discount for the built-in gain tax liability, as a stock sale to the ultimate purchaser would. The Midco then sells the assets of the C Corp to the buyer, who gets a purchase price basis in the assets. The Midco keeps the difference between the asset sale price and the stock purchase price as its fee. The Midco's willingness to allow both buyer and seller to avoid the tax consequences inherent in holding appreciated assets in a C Corp is based on a claimed tax-exempt status or supposed tax attributes, such as losses, that allow it to absorb the built-in gain tax liability. If these tax attributes of the Midco prove to be artificial, then the tax liability created by the built-in gain on the sold assets still needs to be paid. In 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 the other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid.

Diebold Found., Inc. v. Comm'r, 736 F.3d 172, 175-76 (2d Cir. 2013) (citation omitted).

> working with ICA. Over two months after the SCC board's decision, ICA created the stock purchaser, NCAC, which appears to have had no initial assets or any income-producing purpose of its own and was capitalized by ICA only when its lack of finances was questioned by the SCC board.
>
> ICA also generated other shell entities: NCA LLC, NCS Trust, NC Holdings, SDC, and SCA LLC, as well as NC Fund to fund the unfunded NCAC. ICA then used this labyrinthine array to bring about a three-hour program of reorganizations, name changes, and restructurings, all for the ultimate result of a two-member LLC (one member being an Isle of Man entity) that was created for no other explained reason than to avoid the tax consequences of the sales of SCC's assets.

Shockley, 2015 WL 3827570, at *14-15 (quoting *Diebold Found.*, 736 F.3d at 175). Following an extensive analysis of this scheme, the Tax Court ultimately concluded that, "looking to the objective economic realities of the transaction, the evidence and reasonable inferences therefrom sufficiently establish that the true substance of the transaction is different from its form—that the only purpose of the ICA Midco transaction was tax avoidance." *Id.* at *17 (citing *Frank Lyon Co.*, 435 U.S. at 573; *Harris v. Comm'r*, 61 T.C. 770, 783 (1974)). On the basis that "the overall Midco transaction was a sham because it was not a true multiple-party transaction, lacked economic substance, had no business purpose, and was only entered to avoid tax," the Tax Court disregarded the form of the transaction and held Petitioners liable as transferees under § 6901. *Id.* at *20.

The Tax Court then found separately that the transaction was fraudulent under the WIUFTA. Although the sale of SCC's stock occurred "an hour or two"

before the sale of its assets, the Tax Court nevertheless deemed the sale of SCC's television and radio assets "taxable events that fall within the definition of a claim under WIUFTA" because "[l]ogically, these deemed sales would have had to occur before SCC's being theoretically able to distribute/transfer the resulting proceeds to [P]etitioners." *Id.* Further, the Tax Court found as a matter of fact that SCC did not receive "reasonably equivalent value" within the meaning of the WIUFTA because Petitioners "received distributions of approximately $26 million (not including loan repayments) from the proceeds of the sales of SCC's assets while SCC received nothing (or, at best, received petitioners' shares of SCC stock, which—because of the distributions essentially liquidating SCC—were worthless)." *Id.* at *21. Finally, with regard to insolvency, the Tax Court concluded as follows:

> [T]he tax on the sales of the assets was a debt to SCC as of the date of sale, May 31, 2001. That tax debt would have been approximately $39,488,189. (We arrive at this amount by attributing 95% of the deficiency of $41,566,515 to the television assets that accounted for approximately 95% of SCC's total assets. While $39,488,189 may not be the actual amount of tax owed on the sales of the televis[i]on assets, it is close enough to illustrate SCC's economic status.) For our purposes, the approximate fair market value of SCC's remaining assets after the May 31, 2001, sales, i.e., the radio assets, is considered to be their purchase price of $7.5 million. As a result, SCC's tax debt was significantly greater than its remaining assets as of May 31, 2001. When SCC sold its remaining assets in September 2001, it would have continued to be insolvent pursuant to section 242.02(2) of the Wisconsin Statutes.

Id. at *22.

C.
Discussion

On appeal, Petitioners argue that "the Tax Court misapplied the substance over form doctrine in five key ways":

(1) By "disregarding the economic effects of the stock sale on the parties to the transaction and instead requiring that the stock sale provide an economic benefit to the corporation whose stock was sold";

(2) By "finding that the shareholders' legitimate non-tax business purposes for selling their stock were irrelevant because there was insufficient evidence that the corporation shared those purposes";

(3) By "refusing to acknowledge as legitimate any business purpose that was not free of tax considerations";

(4) By "attributing a tax-avoidance purpose to the stock sale based solely on subsequent transactions conducted by the stock purchaser without the selling shareholders' involvement or knowledge"; and

(5) By "determining that a transaction in which numerous unrelated shareholders sold their stock to an unrelated purchaser using funds borrowed from an independent banking institution was not a bona fide multiple party transaction."

Appellants' Br. 21. Petitioners argue further that Wisconsin law does not allow a litigant to use substance-over-form theories to "invent every element required by the constructive fraud provisions of the WIUFTA, including both the transfer to the alleged transferee and the claim at the heart of the debtor/creditor relationship,

regardless of the alleged transferees' good faith and lack of knowledge that there would be an unpaid liability." *Id.* at 22.

1.
Transferee Liability Under § 6901

Whether couched in terms of "substance over form," the "business purpose" doctrine, or the "economic effects" test, we are unpersuaded by Petitioners' arguments that the Tax Court improperly chose to recast the SCC stock sale as an asset sale followed by a liquidating distribution. Had Petitioners simply chosen to sell their stock in a straightforward fashion, they could not be faulted for that choice even if it had been based solely on superior tax efficiency. Instead, however, the Shockleys chose an extraordinarily abstruse route. Nowhere does the record reflect any legitimate business purpose or economic effects that satisfactorily explain why Petitioners undertook the Midco transaction that occurred in this case, nor why the substance of this transaction should be disregarded in favor of its perplexing form.

Petitioners admit that "avoiding corporate tax on built-in gains was certainly a factor in the decision not to sell SCC's assets." Appellants' Br. 37–38. Aside from this tax avoidance purpose, we see no convincing justification for the Petitioners having entered a "buy stock/sell assets" transaction of precisely the sort described in Notice 2001-16. Insofar as Petitioners seek to characterize SCC as a "going concern" at the time of the stock sale, we agree with the Tax Court that "the

overall transaction nullified SCC as a 'going concern' by having it merged out of existence." *Shockley*, 2015 WL 3827570, at *19. Similarly, to the extent that Petitioners claim their non-tax reason for undertaking a Midco transaction was the desire to avoid a piecemeal sale of SCC, we agree with the Tax Court that the Midco transaction produced precisely this result: the sale of SCC's radio assets did not occur until nearly four months after the sale of its television assets, and SCC's collective television and radio assets were ultimately distributed to three different buyers. *See id.* ("If the SCC board was concerned about the 'breaking up' of SCC, however, it nevertheless submitted to the overall transaction with the knowledge that this exact result would occur.").

Moreover, Petitioners' contention that they "engaged in one transaction—the sale of their SCC stock to NCAC for cash" is disingenuous at best. *See* Appellants' Br. 33. In direct contravention of Petitioners' claim that NCAC undertook all actions subsequent to the stock sale "without the Shockleys' involvement or knowledge," the record plainly reveals the Shockleys' awareness that the SCC stock sale was only one piece of a very intricate puzzle. As early as August 2000, the Shockleys were informed of the risk that the IRS might recharacterize the transaction as an asset sale—and this is a warning they presumably would have understood, given Kalil's earlier written communication encouraging Terry to consider not a straightforward stock sale, but instead a "buy

stock/sell assets" involving an intermediary company's "ownership" of SCC "for about one hour." Appellee's Corrected Suppl. App. Tab 7 (Ex. 27-J). Additionally, communications among counsel in the fall of 2000 explicitly express a desire to "minimize[]" or "eliminate" any "linkage issues" between the stock purchase agreement and the asset purchase agreements, thereby suggesting that these agreements were, in fact, linked. *Id.* at Tab 17 (Ex. 78-J).

Even if all of this went over the Shockleys' heads, they must have understood that they were undertaking more than a straightforward stock sale by the time Terry told QNI in writing that SCC had a "'Midco' company arrangement standing by to proceed," and that "the Midco purchase of SCC stock and the Midco sale of the TV assets to QNI can proceed simultaneously . . . ." Appellee's Corrected Suppl. App. Tab 58 (Ex. 349-J). And, of course, the closing of the asset sales to QNI and TSTT took place not only within the same three-hour span as the stock sale to NCAC, but also at one of the law firms representing ICA and NCS Trust. These uncontested facts wholly undermine Petitioners' claim that they knew nothing about the transaction other than that NCAC would purchase SCC stock for cash.

Similarly, although Petitioners argue that the Tax Court made no finding that "ICA, NCAC, Roger Ohlrich or any of the other individuals or entities affiliated with the stock purchaser were related in any way to any of the 29 selling

shareholders or to the bank that made the loan for the purchase price," the parties do not dispute the Tax Court's findings that the stock purchaser, NCAC, (1) had no initial assets or any income-producing purpose of its own, (2) was not created until the SCC Board decided to pursue a stock sale, and (3) was not capitalized by ICA until the SCC Board questioned its lack of financing. *See Shockley*, 2015 WL 3827570, at *15. Nor do the parties dispute that Ohlrich held all of the following positions (and many of them simultaneously): (1) agent of ICA; (2) president, chairman, and sole member of the board of directors of NCAC; (3) trustee of NCS Trust; (4) sole officer and director of NC Holdings; and (5) president of NCAC II. None of these undisputed facts accord with Petitioners' claim that "the stock sale was an arms-length transaction between unrelated parties." Appellants' Br. 35.

At bottom, we agree with the Tax Court that Petitioners entered into the overall transaction solely for tax avoidance purposes. Although we "cannot ignore the reality that the tax laws affect the shape of nearly every business transaction," *Frank Lyon Co.*, 435 U.S. at 580, we nevertheless apply tax law according to the substance of the transaction when its form "has not, in fact, altered any cognizable economic relationships," *Markosian*, 73 T.C. at 1241. Seeing no adequate non-tax justification for the "labyrinthine array" of transactions between numerous shell entities immediately following the sale of SCC stock to NCAC, and given that the ultimate result of these transactions was nothing more than a two-member LLC

(one member of which was an Isle of Man entity), we find that the Tax Court appropriately "use[d] substance over form and its related judicial doctrines to determine the true nature of a transaction disguised by formalisms that exist solely to alter tax liabilities." *John Hancock Life Ins. Co.*, 141 T.C. at 57.

2.
Liability Under State Fraudulent Transfer Law

With respect to substantive liability under state law, Petitioners argue that the Tax Court erroneously conflated "two separate and distinct tests" by applying state fraudulent transfer law to a transaction already recast under federal law. Appellants' Br. 40. Petitioners take the position that Wisconsin courts have not yet determined "whether or under what circumstances a court could recast a transaction to create a transfer that did not actually occur for purposes of the WIUFTA," and the only available guidance "strongly indicates that Wisconsin law would respect corporate form and not recast a stock sale as an asset sale before applying the WIUFTA." *Id.* at 43. In particular, Petitioners rely on *Badger State Bank* to argue that "[i]f creditors were given license to recast a transaction to create the requirements of Section 242.05(1), the statutorily defined class of transfers would expand exponentially beyond the intent of the drafters and would no longer constitute an objective per se rule." *Id.* at 45–46.

The Commissioner agrees that "no Wisconsin court has addressed this issue in the context of WIUFTA." Appellee's Br 33. Like the Tax Court, however, the

Commissioner relies on the Seventh Circuit's recent decision in *Feldman* to support the conclusion that Wisconsin courts would apply substance-over-form principles to cases involving the WIUFTA.

We agree with the Commissioner, the Tax Court, and the Seventh Circuit that substance-over-form analysis is appropriate in context of the WIUFTA. The Wisconsin Supreme Court recognized in *Badger State Bank* that "[t]he Uniform Fraudulent Transfer Act reflects a strong desire to protect creditors," and "[b]oth the language of [WIUFTA] and the policies motivating the Uniform Fraudulent Transfer Act are couched in terms of creditor protection." *Badger State Bank*, 688 N.W.2d at 448. Without the power to look through the form of a transaction to its substance, this statutory purpose would be severely impeded. Furthermore, and as the Seventh Circuit noted in *Feldman*, the Wisconsin state courts are no strangers to the substance-over-form doctrine. *See Feldman*, 779 F.3d at 459 (collecting cases in which the Wisconsin courts have employed a substance-over-form analysis in "a variety of contexts, most notably including tax cases").

More importantly, we disagree with Petitioners' assertion that the Tax Court "rel[ied] on the federal tax substance over form doctrines to recast the Shockley's sale of their SCC stock as an asset sale followed by a liquidating distribution for purposes of applying state fraudulent transfer law." Appellants' Br. 41. Such an action would, as Petitioners suggest, inappropriately conflate the independent

inquiries regarding transferee status under § 6901 and substantive liability under state law. *See Stern*, 357 U.S. at 43–45. Instead, we agree with the Commissioner that the Tax Court in this case "simply followed *Feldman*'s teaching that the substance-over-form analysis under Wisconsin fraudulent-transfer law is substantially the same as the substance-over-form analysis under federal tax law." Appellee's Br. 46; *see also Feldman*, 779 F.3d at 458 (holding that "the independent state-law inquiry will make a difference in the outcome only when there is a conflict between the applicable federal tax doctrine and the state law that determines substantive liability"—and "no such conflict" exists between the WIUFTA and § 6901). Given the similarly broad definitions of "transfer" under § 6901 and the WIUFTA, the creditor-protection goals motivating the WIUFTA, and a dearth of case law suggesting any meaningful difference between substance-over-form analysis under federal law and substance-over-form analysis under Wisconsin state law, the Tax Court was not wrong to have followed this teaching.[17]

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[17] In a slightly different twist, Petitioners argue that it was error for the Tax Court to have recast the transaction at issue without proof that the alleged transferees entered into the transaction in bad faith. The gist of their argument is that, insofar as a Wisconsin court might recast a transaction at all, it would not interpret its UFTA contrary to analogous laws in other states that have adopted the UFTA or UFCA. Citing cases from the First, Second, Fourth, and Ninth Circuits, Petitioners argue that nearly all circuits to have considered the question have held that, "in order to recast a transaction or series of transactions under UFTA or UFCA, the Commissioner must prove that the selling shareholders acted in bad faith, knew or should have known of the entire scheme implemented by the purchaser, or knew or should have known that the corporation would have a tax liability that would go unpaid." Appellants' Br. 49.

In response, the Commissioner directs our attention to *Weintraut v. Commissioner*, 112 T.C.M. (CCH) 122, 2016 WL 4040793 (2016), a recent decision in which the Tax Court noted

Moving to the Tax Court's application of the substance-over-form doctrine to impose substantive liability under the WIUFTA, the primary issue in dispute on appeal is the third requirement outlined in *Badger State Bank*—that is, the insolvency requirement.[18] *See Badger State Bank*, 688 N.W.2d at 442 (requiring, to establish liability for fraudulent transfer under the WIUFTA, that "the debtor either was insolvent at the time of the transfer or became insolvent as a result of the transfer."). With respect to this requirement, Petitioners argue that, even assuming the transaction is recast under both federal and state laws, the Tax Court

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that, although certain courts have imposed a knowledge requirement under their respective versions of the UFTA, "none of the cases imposing the knowledge requirement involved the Indiana UFTA," nor have they "involve[d] the Wisconsin UFTA." *Id.* at *65 & n.129. Citing *Feldman* and *Badger State Bank* with approval, the Tax Court in *Weintraut* concluded that "the Indiana Supreme Court will not impose, and . . . the Court of Appeals for the Seventh Circuit will hold that the Indiana Supreme Court will not impose[] the knowledge requirement before using Indiana substance over form principles" to determine transferee liability under the Indiana UFTA. *Id.* at *72.

We need not decide here whether the Seventh Circuit in *Feldman* properly eschewed any knowledge requirement from the WIUFTA, or whether the Tax Court properly interpreted *Feldman* in *Weintraut*. Even assuming for the sake of argument that the statute does contain a knowledge requirement, we find ample support on this record supporting an inference that Petitioners were aware of both the nature and risks of the Midco transaction they pursued.

[18] Petitioners do not dispute that a corporation making liquidating distributions to its shareholders receives nothing of value in exchange for those distributions, thereby satisfying the second requirement of *Badger State Bank* that "the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer." *Badger State Bank*, 688 N.W.2d at 442. Furthermore, Petitioners do not dispute that, insofar as the IRS's tax claims against SCC relate back to the asset sales that are deemed to have preceded the corresponding liquidating distributions, the requirement that "the creditor's claim arose before the transfer was made" is also satisfied. *Id.* Any arguments Petitioners raise to the contrary—particularly, that the IRS was "not a creditor of SCC at the time the Shockleys sold their stock"—depend on respecting the form of the transaction rather than its substance, which we decline to do for reasons we have already explained.

"misapplied the insolvency tests to the debtor in the transactions it invented."[19] Appellants' Br. 64.

Petitioners approach their insolvency argument from two angles: they first focus on what *came in* to SCC/SCA on the May 31, 2001, closing date, and then they shift to what allegedly *remained* in SCC/SCA by the end of that day. Their basic argument as to what came in to SCC/SCA is as follows:

> (1) On May 31, 2001, SCC sold its television assets for $171 million and transferred $94,713,235.68 into escrow for distribution to the SCC shareholders.
>
> (2) This transaction left $83,786,764.00 in cash plus approximately $7.5 million in radio assets in SCC, totaling $91,286,764.00.
>
> (3) SCC did not have debts in excess of $91,286,764.00 as of May 31, 2001, and therefore it could not have been insolvent.

See Appellants' Br. 67.

The Commissioner identifies certain flaws in this argument, including double-counting the $7.5 million in radio assets and the critical omission of a $45,564,539.73 debt that SCC owed to Finova Capital Corporation as of May 31, 2001. Accounting for these facts, the Commissioner contends that SCC/SCA had only $83,786,764.00 following the May 31, 2001 closings (*i.e.*, $171 million + $7.5 million - $94,713,236)—which is less than the $85,052,728.73 sum of its

[19] At the threshold, we note that Petitioners waived their right to pursue this argument on appeal by failing to raise it until they filed their motion for reconsideration in the Tax Court. *See Thomas v. Bryant*, 614 F.3d 1288, 1305 (11th Cir. 2010). In any event, however, the argument has no merit.

debts as of that date (*i.e.*, $45,564,539.73 owed to Finova Capital Corporation + $39,488,189 in federal income tax liability arising from the television-assets sale).

From the perspective of what *remained* in SCC/SCA by the end of May 31, 2001, Petitioners claim that SCC/SCA had total assets valuing $40,636,764 (*i.e.*, $33,136,764 from Rabobank loan proceeds + $7.5 million in radio assets), but tax liability of only $39,488,189.[20] *See* Appellants' Br. 69. The Commissioner, on the other hand, points to exhibits revealing that SCA made at least ten post-closing disbursements totaling $7,450,366.45. *See* Appellee's Br. 56 (citing Exs. 270-J through 273-J). Additionally, the Commissioner disputes the $33,136,764 cash figure on the basis that "the parties stipulated that SCA wired a total of $2,870,723.11 *out* of [the relevant] account on May 31." *Id.* at 57 (citing Doc. 24 ¶ 362; Ex. 264-J). Accordingly—and even ignoring the fact that "a large portion of the remaining $30,266,041 in the SCA account ($33,136,764 - $2,870,723) was used to repay the Rabobank loan, also on May 31"—SCA's assets were less than its estimated tax liability of $39,488,189.

[20] This estimate of SCC's federal income tax liability comes from the Tax Court, *see Shockley*, 2015 WL 3827570, at *22 (arriving at this amount "by attributing 95% of the deficiency of $41,566,515 to the television assets that accounted for approximately 95% of SCC's total assets"), and is used by both parties in the respective calculations they advance on appeal. Although Petitioners complain that "[t]he Tax Court simply had no evidence from which it could accurately determine the amount of the tax liability that allegedly arose as a result of the sale of SCC's television assets on May 31, 2001," Reply Br. 31, they bear the burden of proving that the Commissioner incorrectly calculated or assessed SCC's tax liability and have offered no arguments or alternative figures in this regard. *See* I.R.C. § 6902(a); Tax Court Rule 142.

We see no error in the Commissioner's reasoning or in the Tax Court's insolvency assessment, and thus we find that the record supports the Tax Court's conclusion that Petitioners qualify as transferees under section 242.05(1) of the Wisconsin Statutes. SCC received nothing of "reasonably equivalent value" in exchange for the proceeds from the sale of its assets, given that the distributions essentially liquidating the company rendered its stock worthless. The Commissioner's claims against Petitioners arose before the transfers were made. *See Swinks v. Comm'r*, 51 T.C. 13, 17 (1968) ("A transferee is liable retroactively for the transferor's taxes and additions to the tax in the year of the transferor to the extent of assets received from the transferor, even though the tax liability of the transferor was unknown at the time of the transfer."). Finally, the transfers caused SCC to become insolvent, meaning that its liabilities exceeded its assets. In light of ample evidence supporting these findings, we uphold the Tax Court's determination that Petitioners are substantively liable for fraudulent transfer under applicable state law.

III.

In summary, we find that the Tax Court appropriately disregarded the Midco transaction and therefore deemed SCC to have transferred the proceeds of its highly appreciated assets to its shareholders, including Petitioners. Recasting the transaction in this manner renders Petitioners liable as transferees pursuant to

federal tax principles, and it also renders them substantively liable under Wisconsin state fraudulent transfer law for the taxes generated by the built-in gain on the appreciated assets that SCC sold. Under these circumstances, the Commissioner was permitted to assess transferee liability for these unpaid taxes against Petitioners by applying the procedural device supplied by I.R.C. § 6901. For these reasons, the decisions of the United States Tax Court are **AFFIRMED**.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WELLS FARGO DELAWARE TRUST COMPANY, N.A., as trustee for VERICREST OPPORTUNITY LOAN LOAN TRUST 201-NPL1,	)	
Appellant,	)	
v.	)	Case No. 2D16-1536
ALEXEY PETROV; FIFTH THIRD BANK; AMSOUTH BANK; TOWNHOMES AT TURTLE CREEK ASSOCIATION, INC.; AMERICAN EXPRESS CENTURION BANK; RHONDA PETROV; and FLORIDA LIMITED INVESTMENT PROPERTIES, INC.,	)	
Appellees.	)	

Opinion filed October 6, 2017.

Appeal from the Circuit Court for Hillsborough County; Perry A. Little, Senior Judge.

David W. Rodstein of Rodstein Law Group, P.A., Ft. Lauderdale; and Norman Rodney Holmes and Silver Deutch of Millennium Partners, Aventura, for Appellant.

Uta S. Grove of Grove & Cintron, P.A., Largo; Starlett M. Massey of McCumber Daniels, Tampa; and

Karen E. Maller of Powell, Carney,
Maller, P.A., St. Petersburg, for Appellee
Florida Limited Investment Properties,
Inc.

No appearance for remaining
Appellees.

ROTHSTEIN-YOUAKIM, Judge.

Wells Fargo Delaware Trust Company, N.A., as Trustee for Vericrest Opportunity Loan Trust 201-NPL1, appeals from an order involuntarily dismissing its foreclosure complaint after a bench trial.[1] Because the trial court erroneously concluded that Wells Fargo's servicer, Caliber Home Loans, f/k/a Vericrest Financial,[2] and its employee, Scott Logue, had prosecuted this action on Wells Fargo's behalf without proving that they had been authorized to do so, we reverse and remand for reinstatement of Wells Fargo's second amended complaint.

THE PROCEEDINGS BELOW

On June 2, 2004, Alexey Petrov executed the mortgage and note at issue in this case. On December 1, 2010, Petrov stopped making mortgage payments.

In February 2012, Wells Fargo filed a foreclosure complaint. Petrov failed to defend, and the clerk entered a default on May 22, 2012. That same day, Wells Fargo moved for a final summary judgment of foreclosure and filed with the trial court

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[1]Although styled as an "Order of Dismissal," the order includes traditional words of finality and refers to itself as a "judgment." Accordingly, we construe it as an entry of judgment that is final and appealable. See HSBC Bank USA, Nat'l Ass'n v. Buset, 216 So. 3d 701, 702-03 (Fla. 3d DCA 2017).

[2]We reject without comment Florida Limited Investment Properties, Inc.'s repeated suggestion that Vericrest and Caliber are separate and distinct entities.

the original mortgage and note. Subsequently, however, Wells Fargo discovered that Florida Limited Investment Properties, Inc. (FLIP), had purchased the property at a tax-deed sale before Wells Fargo had initiated the foreclosure action, so Wells Fargo moved to amend the complaint to include FLIP as a defendant. The trial court granted the motion, and Wells Fargo filed an amended complaint and served FLIP. FLIP filed a motion to dismiss the amended complaint, which the court granted for reasons not pertinent to this appeal.

In April 2014, Wells Fargo filed its second amended complaint, which FLIP unsuccessfully moved to dismiss. At the December 2015 trial, Wells Fargo, through Logue, entered into evidence the original note with allonges, the original mortgage, assignments of the mortgage, the notice of default, the loan payment history, and other exhibits. Logue testified as to the servicer's boarding process and its role in maintaining the mortgagee's loan records. In short, this was—or should have been—a run-of-the-mill foreclosure proceeding at which the plaintiff proved standing, its fulfillment of conditions precedent, the facts supporting the default, and the amounts due.

The groundwork for the error requiring reversal, however, was laid when FLIP objected to the admission of the Limited Power of Attorney (LPOA) between Wells Fargo and Vericrest/Caliber. FLIP argued that the LPOA only authorized Vericrest/Caliber to "creat[e] . . . documents" and did not "provide[] for . . . testimony or the filing of foreclosures." The trial court overruled the evidentiary objection but directly questioned Logue on the issue, repeatedly asking whether Logue could point out in the document itself what provision gave Vericrest/Caliber "the authority to prosecute the foreclosure action."

Post-trial, the trial court directed the parties to file written closing arguments. In FLIP's "Motion for Involuntary Dismissal, Closing Argument, and Memorandum of Law," FLIP argued, in pertinent part, that the LPOA did not give Vericrest "the authority to hold the Note, or to enforce the Note or to foreclose the Mortgage," to verify the complaint on behalf of Wells Fargo, to initiate suit on behalf of Wells Fargo, or to give testimony on behalf of Wells Fargo. Moreover, FLIP argued, Caliber lacked any authority at all under the LPOA because "the power of attorney was only in favor of Vericrest, as Caliber Home Loans didn't exi[s]t."[3]

The trial court granted FLIP's motion for involuntary dismissal, stating:

> A. Plaintiff, WELLS FARGO DELAWARE TRUST COMPANY N.A., AS TRUSTEE FOR VERICREST OPPORTUNITY LOAN TRUST 201-NPL1 [sic], hereinafter referred to as "WELLS FARGO", presented the testimony of a single witness, SCOTT LOGUE, hereinafter referred to as "LOGUE."
>
> B. LOGUE testified that he was not an employee of WELLS FARGO but was an employee of CALIBER HOME LOANS, INC. LOGUE further testified that he was authorized, as an employee of CALIBER HOME LOANS, INC., to testify on behalf of WELLS FARGO pursuant to a Limited Power of Attorney, a photocopy of which was admitted into evidence as Plaintiff's Exhibit 2.
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> C. The Limited Power of Attorney executed by WELLS FARGO did not grant to its Attorney-in-Fact, CALIBER HOME LOANS, INC., the authority to prosecute the litigation

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[3]We question whether FLIP had standing to raise any of these arguments. Although FLIP acquired its interest in the property via a tax deed before the filing of the lis pendens, there is no evidence that FLIP ever attempted to assume the mortgage or to cure the existing default when it purchased the property. Therefore, it does "not stand in the shoes of the mortgagors and cannot participate in the bank's foreclosure as though [it] were a party to the mortgage." Pealer v. Wilmington Tr. Nat'l Ass'n, 212 So. 3d 1137, 1137-38 (Fla. 2d DCA 2017) (Sleet, J., specially concurring). Wells Fargo, however, did not challenge FLIP's standing to participate in the foreclosure proceeding below and, in any event, does not raise this issue on appeal.

> on behalf of WELLS FARGO. LOGUE, who is not an employee of WELLS FARGO, did not have the authority to prosecute the case on behalf of WELLS FARGO.

ANALYSIS

Upon our de novo review, see Green Tree Servicing LLC v. Sanker, 204 So. 3d 496, 497 (Fla. 4th DCA 2016), we hold that the trial court erred in granting FLIP's motion for involuntary dismissal. The basis for the court's error was its misapprehension—fostered by FLIP—that Caliber and Logue were "prosecuting the case on Wells Fargo's behalf." Caliber, as Wells Fargo's servicing agent, verified Wells Fargo's foreclosure complaint, and Logue, as Caliber's employee, testified as a witness for Wells Fargo at the foreclosure trial. Neither of these actions constituted "prosecuting the case on Wells Fargo's behalf"—Wells Fargo is and always has been the plaintiff in this case. Servicing agents routinely verify complaints filed by noteholder-plaintiffs. See Deutsche Bank Nat'l Tr. Co. v. Plageman, 133 So. 3d 1199, 1200-01 (Fla. 2d DCA 2014) (explaining difference between servicer that files foreclosure complaint in its own name on behalf of owner and holder of note and servicer that merely verifies complaint filed in name of owner and holder of note); Deutsche Bank Nat'l Tr. Co. v. Huber, 137 So. 3d 562, 564 (Fla. 4th DCA 2014) (finding error with trial court's determination that appellant's servicing agent lacked standing to bring foreclosure action on appellant's behalf when record "clearly reflect[ed]" that appellant filed foreclosure complaint on its own behalf and that servicing agent merely verified complaint); see also US Bank Nat'l Ass'n v. Marion, 122 So. 3d 398, 399 (Fla. 2d DCA 2013) (reversing dismissal on basis that servicer's employee verified bank's foreclosure complaint); Deutsche Bank Nat'l Tr. Co. v. Prevratil, 120 So. 3d 573, 576 (Fla. 2d DCA 2013) (holding that Florida Rule of

Civil Procedure 1.110 does not require that verification be based on personal knowledge). Moreover, noteholder-plaintiffs routinely call servicing agents to testify regarding business records that servicing agents maintain in connection with the mortgage and note to establish the noteholder-plaintiffs' right to pursue foreclosure. See, e.g., Shaffer v. Deutsche Bank Nat'l Tr., 42 Fla. L. Weekly D889, D889 (Fla. 2d DCA Apr. 19, 2017); Rosa v. Deutsche Bank Nat'l Tr. Co., 191 So. 3d 987, 988 (Fla. 2d DCA 2016); Michel v. Bank of N.Y. Mellon, 191 So. 3d 981, 982 (Fla. 2d DCA 2016); Bolous v. U.S. Bank Nat'l Ass'n, 210 So. 3d 691, 692 (Fla. 4th DCA 2016); Deutsche Bank Nat'l Tr. Co. v. Marciano, 190 So. 3d 166, 167 (Fla. 5th DCA 2016); Seidler v. Wells Fargo Bank, N.A., 179 So. 3d 416, 420 (Fla. 1st DCA 2015); Guerrero v. Chase Home Fin., LLC, 83 So. 3d 970, 972 (Fla. 3d DCA 2012). Consequently, we conclude that Caliber's and Logue's asserted need for "authority to prosecute" this action was nothing more than a red herring with which FLIP somehow managed to mislead the trial court.

CONCLUSION

Because the trial court misapprehended Caliber's and Logue's need for authorization to prosecute this foreclosure action, we reverse the judgment and remand for reinstatement of Wells Fargo's second amended complaint and for further proceedings not inconsistent with this opinion.

Reversed and remanded with directions.

WALLACE and MORRIS, JJ., Concur.