The following constitutes the ruling of the court and has the force and effect therein described.

Signed July 20, 2018

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
SAMUEL EVANS WYLY,	§	BANKR. CASE NO. 14-35043-BJH
	§	(CHAPTER 11)
DEBTOR.	§	
	§	
	§	
EVAN ACTION WYLY and LISA LYN WYLY, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE WRANGLER TRUST,	§	ADV. PROC. NO. 17-3013
	§	
	§	Related to ECF Nos. 55 & 73
PLAINTIFFS,	§	
v.	§	
	§	
SAMUEL EVANS WYLY, Defendant, and THE INTERNAL REVENUE SERVICE, Defendant/Counter-Plaintiff,	§	
	§	
v.	§	
	§	
EVAN ACTION WYLY and LISA LYN WYLY, IN THEIR CAPACITIES AS CO-TRUSTEES OF THE WRANGLER TRUST, Counter-Defendants, and SAMUEL EVANS WYLY, Cross-Defendant.	§	

MEMORANDUM OPINION

Evan Action Wyly and Lisa Lyn Wyly as co-trustees of the Wrangler Trust (the "**Trustees**") and the United States of America on behalf of the Internal Revenue Service (the "**IRS**") both seek partial summary judgment on the IRS's claims. This opinion comprises the reasons the IRS is entitled to summary judgment on its fraudulent transfer claim under Texas Uniform Fraudulent Transfers Act ("**TUFTA**") § 24.006(a) challenging the Debtor's transfer of a 9.1% partnership interest in Maverick Capital, Ltd. ("**Maverick**") to the Wrangler Trust effective as of June 30, 2000. All other requests for summary judgment are denied.

I. FACTUAL AND PROCEDURAL HISTORY

Samuel Wyly (the "**Debtor**") settled the Wrangler Trust effective June 30, 2000. Gov. Ex. 1 at APP 000174, 000195. The beneficiaries of the trust are the Debtor's children and their respective descendants, and his former wife, Rosemary Acton. *Id.* at APP 000182-183. The Trustees are two of the Debtor's adult children and the plaintiffs in this lawsuit. *Id.* at APP 000178. At issue in this adversary proceeding is a collective 12.98% partnership interest in Maverick transferred to the Wrangler Trust in 2000. The trust has received no contributions apart from the combined 12.98% partnership interest and a nominal amount of money the Debtor transferred to settle it. Gov. Ex. 101 at APP 001581-83; Gov. Ex. E at APP 000083 (lines 66:25-68:23).

The Debtor filed for chapter 11 relief on October 19, 2014. One of the Debtor's goals in filing for bankruptcy was to address his potential tax liability to the IRS, as reflected in the Motion Pursuant to Bankruptcy Code § 505 to Determine Tax Liability, If Any [BC No. 4].[1] After a lengthy trial held in January 2016, the court entered its Memorandum Opinion [BC No. 1247] (the "**Tax Memorandum Opinion**") and Order Determining Tax Liabilities of Debtor Samuel Wyly

[1] "BC No. __" refers to documents filed in the Debtor's underlying bankruptcy case, while "AP No. __" refers to documents filed in the adversary proceeding.

[BC No. 1356] (the "**Tax Liability Order**"), which allowed the IRS a $1,107,672,719 claim against the Debtor's bankruptcy estate. Tax Liability Order at 2.

The corpus of the Wrangler Trust has been a point of contention between the Trustees and the IRS for some time because the IRS contends that the trust's assets are property of the Debtor's bankruptcy estate and available to satisfy his significant tax debt. To resolve the dispute, the Trustees filed their Complaint [AP No. 1] for a declaratory judgment that the Wrangler Trust is not the Debtor's alter ego.[2]

The IRS's answer to the Trustees' Complaint [AP No. 11] made assorted counterclaims against the Wrangler Trust, which the court dismissed in part for reasons rendered orally on October 12, 2017, while granting the IRS leave to amend.[3] After being granted derivative standing [AP No. 40], the IRS filed its Second Amended Counterclaim Against the Trustees and the Debtor [AP No. 44] (the "**Counterclaim**"). The IRS's Counterclaim alleges that: (1) the Wrangler Trust is the Debtor's alter ego and/or nominee, (2) the transfer of the Maverick partnership interests to the trust were fraudulent transfers under TUFTA §§ 24.005(a)(1), 24.005(a)(2), and/or 24.006(a), (3) the court should impose a constructive trust on the Wrangler Trust's assets, and (4) alternatively, the Wrangler Trust is a self-settled trust. Both the Trustees and the Debtor filed answers to the Counterclaim [AP Nos. 49 and 50, respectively].

The IRS filed its Motion for Summary Judgment [AP 55] on all of its counterclaims other than constructive trust on January 5, 2018. The Debtor responded with a statement incorporating his answer to the Complaint [AP No. 69], and the Trustees filed a response in opposition and

[2] The Debtor's answer maintains that he is merely a nominal defendant and unnecessary in this lawsuit. Debtor's Answer to Complaint [AP No. 9] at 2. Thus, he has been passive in this adversary proceeding, leaving briefing and oral argument to the Trustees and the IRS.

[3] The transcript of the court's oral ruling is at AP No. 48. The court ultimately denied the Trustees' request to dismiss the TUFTA-based claims on statute of repose grounds. Order Denying Plaintiffs' Motion to Dismiss the IRS's TUFTA-Based Claims Due to the Statute of Repose [AP No. 52].

supporting brief [AP Nos. 72 and 73]. Although the Trustees do not formally move for summary judgment by separate motion, their response brief requests summary judgment under Federal Rule of Civil Procedure 56(f)(1) as to the IRS's counterclaims for constructive fraudulent transfer and self-settled trust. Brief in Support of Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment [AP No. 73] at 39, 42.

The court held a hearing on April 26, 2018 to address the Trustees' request to seal a portion of their appendix and the parties' respective objections to the proposed record on summary judgment;[4] and on May 17, 2018 heard argument on the parties' requests for summary judgment.[5] This matter is now ripe for ruling.

II. JURISDICTION AND VENUE

The District Court for the Northern District of Texas has subject matter jurisdiction over the Debtor's bankruptcy case and this adversary proceeding under 28 U.S.C. § 1334. Venue is proper in this district under 28 U.S.C. § 1409. The claims among the parties are core proceedings under 28 U.S.C. § 157(b)(2)(C), (H) and (O). The District Court has referred the Debtor's bankruptcy case and all core and non-core proceedings in the bankruptcy case to this court under the August 3, 1984 Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc*.

III. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, a court must determine whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56, as made applicable by FED. R. BANKR. P. 7056. In deciding whether a fact issue has been raised, the facts and inferences drawn from the evidence

[4] A transcript of the court's oral ruling is at AP No. 137.

[5] A transcript of the summary judgment hearing is at AP No. 141.

must be viewed in the light most favorable to the non-moving party. *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007). A court's role at the summary judgment stage is not to weigh the evidence or determine the truth of the matter, but rather to determine only whether a genuine issue of material fact exists for trial. *Peel & Co., Inc. v. The Rug Market*, 238 F.3d 391, 394 (5th Cir. 2001) ("the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence") (citing *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 135 (2000)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Pylant v. Hartford Life and Acc. Ins. Co.*, 497 F.3d 536, 538 (5th Cir. 2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"After the movant has presented a properly supported motion for summary judgment, the burden then shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (internal citation omitted). When parties file cross-motions for summary judgment, the court must review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party. *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014).

IV. LEGAL ANALYSIS

A. Alter Ego

Under Texas law, alter ego applies when there is such unity between a corporation and an individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice. *Seidel v. Warner (In re Atlas Fin. Mortg., Inc.*), 2014 WL 172283, at *4 (Bankr. N.D. Tex. Jan 14, 2014). This standard applies equally to reverse-piercing cases such as this dispute, where it is alleged that holding only the individual liable would result in

injustice. *See Zahra Spiritual Trust v. U.S.*, 910 F.2d 240, 244 (5th Cir. 1990). A court must consider the totality of the circumstances to determine whether the alter ego doctrine applies. *Id.* at 245.

In support of its alter ago allegations, the IRS cites *U.S. v. Washington*, 2011 WL 3902737, at *18 (S.D. Tex. Sept. 6, 2011), where the court listed 15 factors to be considered when determining whether, under the totality of the circumstances, an alter ego relationship exists. Those factors include:

(1) Whether the debtor expended personal funds for the property;
(2) Whether the debtor enjoyed the benefits of the disputed property;
(3) Whether a close family relationship existed between the debtor and the trust;
(4) Whether the debtor exercised dominion and control over the disputed property;
(5) Whether the trust interfered with the debtor's use of the property;
(6) Whether the debtor owned the trust;
(7) Whether the trust observes corporate (or trust) formalities;
(8) Whether the trust maintains bank accounts, books, and records;
(9) Whether the trust and the debtor commingled funds;
(10) The trust's capitalization;
(11) Whether the debtor transferred assets, property, or funds to the trust or vice versa;
(12) Whether the trust was organized by the debtor;
(13) Whether the trust operated as a traditional trust;
(14) Whether the trust transacted the debtor's business; and
(15) Whether the trust paid the debtor's personal obligations.

Id. at *18 (citing *Century Hotels v. U.S.*, 952 F.2d 107, 110 & n.5 (5th Cir.1992)).

Although the IRS argues that the undisputed facts support a finding that each factor is met here, many of the factors are not particularly informative considering the facts of this case. The IRS has not established the existence of others based on the summary judgment record. For example, it is undisputed that the Debtor transferred a 9.1% partnership interest in Maverick to the Wrangler Trust, which he claims to have established for the benefit of his family and over which

two of his adult children serve as trustees. This single fact satisfies factor 1, that the Debtor expended personal funds; factor 3, that a close family relationship existed between the Debtor and the Wrangler Trust; factor 11, that the Debtor transferred assets to the trust; and factor 12, that the Debtor organized the trust. These are informative but are not alone determinative because they are found whenever a settlor uses personal assets to establish a trust for his family.

Nor has the IRS established the existence of factors 7, 8 and 13. The Wrangler Trust appears to have operated as a traditional trust, observed trust formalities and maintained separate bank accounts, books, and records. Moreover, the summary judgment record does not support a conclusion that the IRS has established factors 6, 9, 10, 14 or 15.

The remaining three of the 15 factors from *U.S. v. Washington* on which the IRS premises its motion are the most relevant to the analysis:

- whether the Debtor enjoyed the benefits of the trust (factor 2);
- whether he exercised dominion and control over the trust (factor 4); and
- whether the trust interfered with the Debtor's use of the trust's property (factor 6).

Some evidence in the record could lead to a finding in the IRS's favor on these points. For example, the record indicates that the Debtor unilaterally directed the Wrangler Trust to purchase the Norman Rockwell painting "Rosie the Riveter" for nearly $5 million and the Trustees did not become aware of the purchase until after-the-fact. Hr'g Tr. 1/20/16 [BC No. 1438][6] at 29:23-24 (Q: "Did you [the Debtor] purchase Rosie the Riveter?" A: "Yes"); Gov. Ex. 134 at APP 002116-17 ("we will need to let Lisa [Wyly, Trustee] know about Wrangler Trust's new purchase."); Gov. Ex. 135 at App.002118 ("He [Evan Wyly, Trustee] had no idea that Wrangler had purchased the painting and that we were doing the loan.").

[6] Transcript from the 505 tax proceeding.

The record also indicates, however, that the Wrangler Trust treated the painting as its asset and when it sold for $12.5 million, the proceeds were deposited into the Wrangler Trust's bank account and recorded in its books and records. Trustees' Ex. 9 at APP 002073, 2067, 2069, 2073, 2074. The record contains similarly conflicting evidence regarding whether the substantial transfer of funds from the Wrangler Trust to the Debtor were distributions or loans that were to be repaid. On this record, it is not possible to conclude that no disputed issue of material fact exists.

In summary, construing the inferences drawn from this evidence in the light most favorable to the Trustees, issues of material fact preclude summary judgment on the IRS's alter ego claim. Accordingly, the court denies the IRS's request for summary judgment for that relief.

B. Nominee

The nominee theory is a basis for attaching the property of a third party to satisfy a delinquent taxpayer's liability that is similar to but distinct from the alter ego theory. *Oxford Capital Corp. v. U.S.*, 211 F.3d 280, 284 (5th Cir. 2000). The nominee theory requires determining the true beneficial or equitable ownership of property in possession of a person other than the taxpayer. *Id.* The critical determination in deciding whether to apply the nominee theory is whether the Debtor exercised active and substantial control over the property, measured by the six factors listed in *Oxford Capital Corp.:* (1) lack of or inadequate consideration paid by the nominee; (2) whether the property was placed in the nominee's name in anticipation of a lawsuit or of incurring liabilities while the transferor continued to exercise control over the property; (3) whether a close relationship existed between the transferor and nominee; (4) failure to record the conveyance; (5) whether the transferor retained possession of the property; and (6) whether the transferor continued to enjoy the benefits of the transferred property. *Id.* at 284 n.1 (quoting *Towe Antique Ford Found. v. I.R.S.*, 791 F.Supp. 1450, 1454 (D. Mont. 1992) (citing *U.S. v. Miller Bros. Constr. Co.*, 505 F.2d 1031 (10th Cir.1974)).

The IRS has established the first factor, inadequate consideration, as the analysis of the reasonably equivalent value prong of the IRS's claim under TUFTA § 24.006(a) explains below. *See* § IV.C.1.b). No dispute of material facts exists as to factor 3, a close relationship between transferor and nominee, because the Debtor settled the trust for the benefit of his family and two of his adult children serve as trustees. However, for the reasons explained above with respect to alter ego, material fact issues remain regarding the Debtor's retention of control over the transferred property, or continued receipt of benefits from it. These include evidence showing that the Wrangler Trust documented and treated its disbursements to the Debtor as loans, and that the Debtor, or individuals acting on his behalf, would seek the Trustees' approval when making a request of the Wrangler Trust. Thus, based upon the record before it the court is unable to find that the IRS proved factors 2, 5 and 6. Finally, factor 4 is not met, as the record reflects that the Debtor and the Wrangler Trust fully documented the transfer of the 9.1% interest in Maverick.

This same analysis applies to the 3.88% interest in Maverick transferred to the Wrangler Trust, regardless of whether the interests were transferred from the Debtor or an entity controlled by the Debtor, as discussed further below. Accordingly, material fact issues preclude summary judgment on the IRS's nominee claim.

C. TUFTA §§ 24.006(a), 24.005(a)(2), and 24.005(a)(1)

The Wrangler Trust received its 12.98% interest in Maverick from two sources: (1) a 9.1% interest the Debtor transferred directly, and (2) a 3.88% interest transferred from Tallulah, Ltd. ("**Tallulah**"), an entity the Debtor controlled. Gov. Ex. 101 at APP 001581-83; Gov. Ex. 103 at APP 001613-14. The IRS contends that the Debtor's control over Tallulah proves that he was the true owner of the 3.88% interest, despite the IRS's failure to put into the record any evidence of his control. The Trustees, on the other hand, argue that they are entitled to summary judgment.

They argue that Tallulah is a separate legal entity and that the IRS has not sought to pierce the corporate veil or otherwise hold it liable for the Debtor's debts.

These arguments need not be addressed because the summary judgment record contains conflicting evidence regarding ownership of the 3.88% interest in Maverick immediately before Tallulah transferred it. Without this fundamental evidence, summary judgment is inappropriate on the TUFTA-based claims involving the 3.88% interest. Additional background is necessary to place this ruling into context.

Effective June 30, 2000, the Debtor, as general partner of Tallulah, caused Tallulah to assign all of its interest in Maverick to him. Gov. Ex. A at APP 000241-242 ("Assignor [Tallulah] ...does hereby irrevocably assign, transfer, and convey, to Assignee [the Debtor] all of Assignor's right, title and interest as a partner in the Partnership [Maverick]…."). Effective the same day, the Debtor settled the Wrangler Trust, selling a 9.1%[7] partnership interest in Maverick to the Wrangler Trust through a Memorandum of Sale and Assignment of Partnership Interests (the "**Memorandum of Sale**"). Gov. Ex. 1 at APP 000237-239.

However, Tallulah owned more than a 9.1% interest in Maverick on that date. Effective January 1, 2000, Tallulah bought an additional 3.88% interest in Maverick from Cohasset, Ltd. Gov. Ex. 103 at APP 001613; Gov. Ex. 101 at APP 001582 n.4. Although it is undisputed that the Wrangler Trust ultimately acquired this 3.88% interest in Maverick, the court cannot determine whether Tallulah sold the interest to the Debtor before or after Tallulah's alleged transfer of those same interests to the Wrangler Trust. Evidence in the record supports both scenarios.

[7] Although the transaction documents reference a 9.125% interest, the parties appear to agree that the Debtor only owned and transferred a 9.1% interest. Gov. Ex. 101 at APP 001582 n.3. This opinion discusses why the record does not seem to warrant their agreement on this point. Regardless, the potential .025% discrepancy is not material to the court's analysis.

For example, in their Responses to the United States First Set of Interrogatories (the "**Interrogatory Response**"), the Trustees list the following transfers from the Debtor to the Wrangler Trust:

> (i) A nominal amount of money gratuitously transferred by the Debtor to the Trustees of Wrangler Trust in order to create the Wrangler Trust;
>
> (ii) Effective June 30, 2000, 9.1[]% of the Debtor's partnership interest in Maverick Capital, Ltd.;
>
> (iii) Effective January 1, 2000, 3.88% of the Debtor's partnership interest in Maverick Capital, Ltd.

Gov. Ex. 101 at APP 001582.

Two things about the Trustees' response in (iii) are striking. First, the Trustees state that the Debtor, not Tallulah, owned and then transferred the 3.88% interest in Maverick to the Wrangler Trust. Second, the Trustees state that the transfer occurred January 1, 2000, the very same day that Tallulah acquired the 3.88% interest from Cohasset, Ltd. and six months before the Debtor settled the Wrangler Trust.[8]

The explanatory footnote to the Interrogatory Response fails to shed light on the issue, and instead contradicts the January 1, 2000 date – "Maverick Capital changed ownership on or around January 1, 2000. At that time, Maverick Capital determined that Tallulah, Ltd. owned an additional 3.88% partnership interest. … The 3.88% retained by Tallulah was eventually transferred [to] Wrangler Trust." Gov. Ex. 101 at APP 001582 n.4. A June 11, 2001 e-mail from Maverick's tax manager further belies the January 1, 2000 transfer date—

[8] Notably, the Interrogatory Response initially stated that the transfer in (iii) occurred on January 1, 2001; but Keeley Hennington, the Wyly family office's chief financial officer, corrected the date at her December 21, 2017 deposition. Gov. Ex. E at APP 000087 (lines 81:15-82:4). Presumably, this is why a "0" is handwritten over the "1" in the Interrogatory Response, changing the transfer date of the 3.88% interest from January 1, 2001 to January 1, 2000.

> Per our information, Tallulah purchased a 3.88% interest in Maverick Capital from Cohasset, Ltd. effective 1/1/00 and then transferred the 3.88% interest to Wrangler on 7/1/00. The 3.88% interest coupled with the 9.1% interest equals 12.98%.

Gov. Ex. 103 at APP 001613. Thus, this evidence suggests that the January 1, 2000 date is incorrect and the transfer from Tallulah to the Wrangler Trust actually took place July 1, 2000 (or possibly January 1, 2001), *after* Tallulah sold all of its interests in Maverick to the Debtor.

Weighing of the conflicting evidence relating to the date of the transfer of the 3.88% to the Wrangler Trust as well as the ownership of that interest at relevant dates is inappropriate on a motion for summary judgment. Accordingly, neither party is entitled to summary judgment on the TUFTA-based claims with respect to the 3.88% interest in Maverick transferred to the Wrangler Trust. Thus, the following analysis of the TUFTA-based claims addresses the remaining 9.1% interest Maverick Capital, Ltd.

1. TUFTA § 24.006(a)

TUFTA § 24.006(a) provides in relevant part:

> [a] transfer made or obligation incurred by a debtor is fraudulent 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.

TEX. BUS. COMM. CODE § 24.006(a).

To prove that the Debtor's transfer of the 9.1% interest in Maverick to the Wrangler Trust was fraudulent under § 24.006(a), the IRS must show that (1) a portion of its claim arose before the transfer, (2) the Wrangler Trust did not pay reasonably equivalent value for the interests, and (3) the Debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. *Id.*

a) The Date the Tax Claim Arose

Neither party disputes that part of the IRS's tax claim against the Debtor arose before June 30, 2000. As reflected in the Tax Liability Order, the Debtor's unpaid tax liabilities date back to 1992. Tax Liability Order at 1-2. The fact that the IRS did not assess these taxes until a later date is immaterial because the IRS becomes a creditor of a taxpayer on the date the obligation to pay income taxes accrues and not when the tax assessed. *U.S. v. Evans*, 513 F.Supp.2d 825, 834 (W.D. Tex. 2007) (citing cases). Thus, the IRS has proven the first factor of TUFTA § 24.006(a).

b) Reasonably Equivalent Value

TUFTA defines *reasonably equivalent value* to include, without limitation, "a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction." TEX. BUS. COMM. CODE § 24.004(d). Value in an allegedly fraudulent transfer is determined from the creditors' standpoint, where "'[t]he proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors.'" *Hinsley v. Boudloche (In re Hinsley*), 201 F.3d 638, 644 (5th Cir. 2000) (quoting *Viscount Air Serv., Inc. v. Cole (In re Viscount Air Serv., Inc.)*, 232 B.R. 416, 435 (Bankr. D. Az. 1998)). A debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value. *Hoffman v. AmericaHomeKey, Inc.*, 2014 WL 7272596, at *12 (N.D. Tex. Dec. 22, 2014) (citing cases).

The Trustees argue that the IRS has not carried its burden of proof because it failed to obtain an appraisal or provide other direct evidence of the value of the 9.1% interest in Maverick as of June 30, 2000. Their argument is unpersuasive.

In 1993, the Debtor and his eldest son, Evan Wyly, established and initially ran Maverick, an investment management company. Tax Memorandum Opinion § III at 19. As this memorandum previously explained, the Debtor, as Tallulah's general partner, caused the

partnership to assign all its interest in Maverick to him effective June 30, 2000. Gov. Ex. A at APP 000241-242. Effective the same day, the Debtor sold a 9.1% interest in Maverick to the Wrangler Trust via the Memorandum of Sale. Gov. Ex. 1 at APP 000237-239. The Trustees then executed a Secured and Partially Guaranteed Promissory Note (the "**Note**"), in which the Wrangler Trust promised to pay the Debtor the "appraised fair market value" of a 9.1[]% interest in Maverick Capital pursuant to an appraisal that the Memorandum of Sale required. Gov. Ex. A at App. 000244-246.

No appraisal as of June 30, 2000 ever took place. Gov. Ex. 102 at APP 001611; Gov. Ex. E at APP 000085 (lines 73:17-74:25). Instead, about one year later, in June 2001, the Wyly family office relied on appraisals as of December 31, 1999 and December 31, 2000 to assign a $2,103,313 value to the 9.1% interest. Gov. Ex. 50 at APP 001153; Gov. Ex. 102 at APP 001611-12; Gov. Ex. E at APP 000085-86 (lines 76:4-78:7). Then, on June 30, 2002, the Debtor received $2,103,313, plus interest of $283,948.00, in the form of an offset against his unpaid loans from the Wrangler Trust. Gov. Ex. 50 at APP 001153.

However, the Debtor had received substantially more than $2.4 million from Maverick before transferring his 9.1% interest to the trust. For example, from 1993 to 1996, the Debtor deferred $4,183,685[9] of income due from Maverick, ultimately receiving $18,243,523 million[10] from Maverick on account of those deferrals. Gov. Ex. 139 [AP No. 121-2] at 1 of 4. In 1997, the Debtor transferred his interests in Maverick to Highland Fund, of which he owned 40%. Gov. Ex. 157 at APP 002247. Highland Fund then deferred $34,581,189[11] in income from 1997 to 1999,

[9] $646,126 + $600,000 + $2,937,559 = $4,183,685.

[10] $3,702,612 + $2,662,100 + $11,878,811 = $18,243,523.

[11] $6,383,020 + $9,107,483 + $19,090,686 = $34,581,189.

ultimately receiving $196,665,726[12] from Maverick on account of those deferrals. Gov. Ex. 139 [AP No. 121-2] at 1 of 4. The Debtor's 40% ownership in Highland Fund meant that his share of the deferred income was $13,832,475,[13] resulting in $78,666,298[14] in distributions to him on account of the deferred income.

After the interests in Maverick were transferred to the Wrangler Trust, the trust deferred $18,550,066 of income in 2000 and $1,542,186 of income in 2001, ultimately receiving $53,887,763 and $4,260,564, respectively, on account of those deferrals. *Id.* at 3 of 4. In fact, the very year the Debtor transferred his 9.1% interest in Maverick to the Wrangler Trust, the trust received $10,620,041 in partnership distributions from Maverick. Gov. Ex. 141 [AP No. 121-3] at 1 of 2.

Additionally, an internal working trial balance sheet valued the Wrangler Trust's assets as of December 31, 2000 at $23,654,324.29. Gov. Ex. 52 at APP 001169; Gov. Ex. E at App. 000100 (135:5-19). Considering that the Maverick partnership interests were the only material contributions to the Wrangler Trust and the trust paid $2,387,261 for those interests, that is a $21,267,063.29 increase in value over six months. Gov. Ex. 101 at APP 001582; Gov. Ex. 50 at APP 001153. Nothing in the record accounts for this enormous increase in value, suggesting that the Debtor did not receive reasonably equivalent value for the Maverick partnership interests.

In response, the Trustees point to provisions in the Third Amended and Restated Limited Partnership Agreement of Maverick Capital, Ltd. (the "**Maverick Partnership Agreement**") that require the general partner's consent to transfer interests, as well as provisions permitting the general partner, at its option, to purchase interests from other partners at book value. Trustees Ex.

[12] $50,065,184 + $57,643,207 + $88,957,335 = $196,665,726.

[13] $34,581,189 x .40 = $13,832,475.60.

[14] $196,665,726 x .40 = $78,666,290.40.

287 at APP 006865-889 (§§ 2.01(b), 5.01, 5.05, 6.01, 6.02, and 6.06). According to the Trustees, these provisions add substantial risk to any transfer or ownership of Maverick interests and warrant a significantly lower purchase price that must be based on contributions made to Maverick instead of income the Debtor received from Maverick.

The Trustees' argument is unpersuasive. The obvious solution to this problem is to request preapproval of the transfer of Maverick interests from its general partner, as contemplated by § 5.01(a) of the Maverick Partnership Agreement. Trustees Ex. 287 at APP 006885. Nothing in the record indicates that this took place. Moreover, the parties to the transfer were the Debtor and a trust he ostensibly created for the benefit of his family and over which Evan Wyly, who with the Debtor co-founded Maverick, served as Trustee. Thus, it is unlikely that Maverick's general partner would force the sale of the transferred interests at book value to the detriment of the Debtor or his family; and nothing in the record indicates that the general partner threatened to do so.

The record supports the conclusion, as a matter of law, that the Debtor's receipt of $2,387,261 on the Note issued by the Wrangler Trust over a year after the transfer and without the required appraisal was not reasonably equivalent value for his 9.1% interest in Maverick, especially considering the substantial distributions those interests produced.[15] Thus, the IRS has proven the second factor of TUFTA § 24.006(a).

c) Insolvency

Insolvency, the third TUFTA § 24.006(a) factor, can be proven by showing that (1) at the time of the transfer, the sum of the debtor's debts was greater than all of his assets at a fair valuation, or (2) the debtor was generally not paying his debts as they became due. TEX. BUS.

[15] This analysis applies regardless of whether the Debtor's distributions from Maverick were on account of a 9.1% ownership interest or a 12.98% ownership interest.

COMM. CODE § 24.003(a). Insolvency, like reasonably equivalent value, is determined from the creditor's perspective. *U.S. v. Washington*, 2011 WL 3902737, at *16.

The challenged transfer was effective as of June 30, 2000, but the record does not contain the Debtor's financial information as of that date. Instead, the IRS relies on the Debtor's financial statements as of March 31, 2000 and September 30, 2000, showing that his assets were valued at $280,222,265 and $269,425,941, respectively. Relying on those values and the Debtor's alleged $318,030,144 tax liability as of June 30, 2000, the IRS argues that Wyly was insolvent when he caused the transfer of the Maverick partnership interests to the Wrangler Trust. *See* Gov. Ex. 150 at APP 002234; Gov. Ex. 151 at APP 002235; Gov. Ex. I [AP No. 83-1] at APP 0001-0004 and related documents [AP No. 63-1] at APP 000018-00002;[16] Gov. Ex. A at APP 00001-02.

The Trustees respond that the IRS's calculation fails to take into account that the Debtor's tax liability was contingent as of June 30, 2018. They contend the IRS's tax claim should be reduced to 85% of its face value to account for the contingency. But nothing in the record supports the application of a 15% discount. At the hearing, the Trustees pivoted, arguing instead that the penalty portion of the tax claim should be set as $0 for purposes of the calculation because the imposition of penalties is discretionary, leaving them contingent until the court entered its Tax Liability Order over a decade later. Finally, the Trustees maintain that in any case the solvency calculation must exclude all income taxes attributable to tax year 2000 because the transfer occurred mid-year and tax year 2000 taxes were not due until 2001.

To address the parties' respective arguments, it is helpful to consider the taxes in their component parts of: (1) Form 1040 taxes and interest, (2) civil fraud penalties and interest, and

[16] The IRS amended Government Ex. C, the Jynes declaration, several times. The final declaration is filed at AP No. 121-1 and is Government Ex. I. The documents authenticated by Government Ex. I are not attached to that declaration but are instead filed at AP No. 63. Both Government Exhibit I and the authenticated documents at AP No. 63 were admitted into the record.

(3) Form 3520-A and 5471 penalties. *See* Tax Liability Order at 1-2 (breaking the $1.1 billion tax claim into its component parts). This analysis also must include whether it is appropriate to discount the face value of the IRS's allegedly contingent tax claim.

Most courts apply the probability-discount approach the Trustees propose when considering the complexities of valuing contingent debt. That approach requires a court to discount the face value of the contingent liability by the probability that it will become real, resulting in a face value of less than 100%. *See, e.g., WRT Creditors Liq. Trust v. WRT Bankr. Lit. Master File Defendants (In re WRT Energy Corp*.), 282 B.R. 343, 399 (Bankr. W.D. La. 2001) (citing cases). The probability-discount approach, however, only applies to claims that are contingent on a future event that gives rise to the liability (for example, a borrower's default triggering a third party guarantee). The discount only applies to contingent liabilities, not debts that are merely unliquidated. *Indiana Bell Tel. Co., Inc. v. Lovelady*, 2008 WL 11408781, at *4-5 (W.D. Tex. March 5, 2008) (holding claims were not contingent when all events giving rise to the liability had occurred before the transfers); *W.R. Grace & Co. v. Fresenius Med. Care Holdings, Inc. (In re W.R. Grace & Co.)*, 281 B.R. 852, 859 (Bankr. D. Del. 2002) (same).

(1) Form 1040 Taxes and Interest

It cannot be disputed that all amounts the Debtor owed for tax years 1999 and prior were not contingent liabilities as of the date of the transfer. All events necessary to give rise to this liability had already taken place before June 30, 2000, and no extrinsic event occurring after the transfer was necessary to trigger the Debtor's Form 1040 tax liability. *U.S. v. Evans*, 513 F.Supp.2d at 834 (IRS becomes a creditor of a taxpayer on the date the obligation to pay income taxes accrues, not when assessed). That the IRS had not yet discovered the Debtor's tax fraud or obtained a judgment as of June 30, 2000 does not change this analysis. *See, e.g., Indiana Bell Tel. Co., Inc.*, 2008 WL 11408781, at *4-5 (claims not contingent when all events giving rise to liability

occurred prior to the transfers, regardless of whether plaintiff had filed suit or obtained judgment); *In re W.R. Grace & Co.*, 281 B.R. at 863 ("To say that the act of making the claim was the extrinsic event stretches the meaning of that phrase too far; the formal claim is not extrinsic to the underlying liability, nor is it an event creating liability where none existed before.").

Further, even if the Form 1040 tax liabilities were contingent, it is appropriate to look to the 2016 Tax Liability Order to determine the value of those claims as of June 30, 2000, particularly considering the Debtor's fraudulent concealment of assets detailed in the Tax Memorandum Opinion. *See, e.g., SEC v. Antar*, 120 F.Supp.2d 431, 443 (D. N.J. 2000) (holding that 1998 judgment against debtor for securities law violations should be counted as liability of debtor at time of 1991 and 1997 transfers); *Canney v. Fisher & Strattner, LLC (In re Turner & Cook, Inc.)*, 507 B.R. 101, 109 (Bankr. D. Vt. 2014) ("When a liability was contingent at the time of the challenged transfers but is reduced to judgment before the court's insolvency determination, however, a court may permissibly use the judgment amount in valuing the contingent liability at the time of the transfers.").

The Debtor's Form 1040 taxes and interest from 1992 through 1999 total $102,955,580 and $26,806,203, respectively, for an aggregate of $129,761,783. Gov. Ex. I [AP No. 121-1] at APP 002-004 and related documents [AP No. 63-1] at APP000018-00002.

(2) Civil Fraud Penalties and Interest

The IRS was required to prove its entitlement to civil fraud, penalties and interest at the 505 tax proceeding by clear and convincing evidence. 26 U.S.C. § 6663; Tax Memorandum Opinion § IV.B at 52. *Fraud* in this context is defined as intentional wrongdoing, with the specific purpose of avoiding a tax known or believed to be owed. *Id.* This court found that the IRS met this substantial burden of proving the Debtor's civil fraud for each tax year in question by proving, among other things, that the Debtor had intentionally perpetrated one of the largest and most

complex individual tax frauds in U.S. history, spanning over 20 years and culminating in the Debtor owing over $1 billion in taxes, penalties and interest. Considering this, and for the reasons discussed immediately above with respect to the Form 1040 liabilities, the Trustees cannot now essentially revisit the IRS's claims for fraud penalties and interest as of June 30, 2000 by a conjectural probability that the Debtor's tax fraud would remain undiscovered. Though tax penalties are discretionary, the Tax Memorandum Opinion leaves no room for indecision that the IRS would seek, and the court would impose, civil tax fraud penalties in a case involving tax fraud of a nature and magnitude of the Debtor's.

The § 6663 penalties and interest on penalties the Debtor owed at the time of the transfer, at full face value, total $97,321,338, which comprises $77,216,685 in fraud penalties and $20,104,653 in related interest. Gov. Ex. I [AP No. 121-1] at APP 002-003 and related documents [AP No. 63-1] at APP000018-00002. They will not be discounted for the purpose of TUFTA § 24.006(a) analysis.

(3) Form 3520-A and 5471 Penalties

The foregoing analysis regarding Form 1040 liability and fraud penalties applies equally to the penalties arising from the Debtor's failure to file Forms 3520-A and 5471, which total $70,288,214 and $1,740,000, for an aggregate of $72,028,214. Gov. Ex. I [AP No. 121-1] at APP 002-003 and related documents [AP No. 63-1] at APP000018-00002.

(4) 2000 Mid-Year Taxes

The Debtor's liability for year 2000 taxes cannot be included in the insolvency calculation. The IRS is considered a creditor from the date when the obligation to pay income taxes accrues: essentially April 15 of the year following the tax year at issue. *U.S. v. Green*, 201 F.3d 251, 257 (3d Cir. 2000); *see also U.S. v. Ripley (In re Ripley)*, 926 F.2d 440, 445-46 (5th Cir. 1991); *U.S.*

v. Evans, 513 F.Supp.2d at 834. Because the transfer at issue occurred June 30, 2000, year 2000 taxes were not yet due and owing.

(5) Summary

In summary, as of June 30, 2000, the Debtor's assets were valued between $280,000,265 and $269,425,941. His tax liabilities totaled $299,111,335, with additional liabilities on his financial statements totaling between $41,917,107 and $33,089,321. *See* Gov. Ex. 150 at APP 00234; Gov. Ex. 151 at APP 002235; Gov. Ex. I [AP No. 121-1] at APP 002-003 and related documents [AP No. 63-1] at APP000018-00002. Accordingly, the Debtor was insolvent as of June 30, 2000 when he transferred his 9.1% interest in Maverick to the Wrangler Trust.

Thus, the court concludes as a matter of law that (1) a portion of the IRS's tax claim arose before June 30, 2000, (2) the Wrangler Trust did not pay reasonably equivalent value for the Debtor's 9.1% partnership interest in Maverick, and (3) the Debtor was insolvent when the transfer occurred. The IRS is entitled to summary judgment on its claim under TUFTA § 24.006(a) as to the 9.1% interest in Maverick. The Trustees' motion for summary judgment on this claim is denied for the same reasons.

2. TUFTA § 24.005(a)(2)

TUFTA § 24.005(a)(2) addresses constructively fraudulent transfers. The statute requires proof that the debtor made the transfer without receiving reasonably equivalent value and the debtor either (1) was engaged or was about to engage in a business or a transaction for which his remaining assets were unreasonably small in relation to the business or transaction, or (2) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. TEX. BUS. COMM. CODE § 24.005(a)(2).

For the reasons previously explained in its analysis of the reasonably equivalent value prong of TUFTA § 24.006(a), the Debtor did not receive reasonably equivalent value in exchange

for the transfer of his 9.1% interest in Maverick to the Wrangler Trust. *See* § IV.C.1.b). However, the record lacks direct evidence of either of the two remaining factors, the parties instead impermissibly asking the court to draw inferences. Accordingly, both parties' request for summary judgment on this claim are denied.

3. TUFTA § 24.005(a)(1)

To prevail under TUFTA § 24.005(a)(1), the IRS must prove that the Debtor transferred his interests in Maverick to the Wrangler Trust with "actual intent to hinder, delay or defraud any creditor of the debtor." TEX. BUS. COMM. CODE § 24.005(a)(1). Direct evidence of fraudulent intent is rarely available; hence the intent to hinder, delay or defraud may be established by circumstantial evidence. *In re The Heritage Org., LLC*, 413 B.R. 438, 463-64 (Bankr. N.D. Tex. 2009) (citing cases). Circumstantial evidence of actual fraudulent intent under TUFTA, commonly known as "badges of fraud," are codified in the non-exclusive list of factors found in TUFTA § 24.005(b). These factors include whether:

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

> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
>
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

TEX. BUS. COMM. CODE § 24.005(b).

A finding of actual fraud does not require proof of all, or even a majority, of the badges. Rather, proof even of several factors can be a proper basis for an inference of fraud. *Soza v. Hill (In re Soza),* 542 F.3d 1060, 1067 (5th Cir. 2008) (citing *Roland v. U.S.*, 838 F.2d 1400, 1403 (5th Cir. 1988)). Although this is a fact-specific inquiry, a court may find actual intent to defraud given evidence of numerous badges of fraud where the only evidence supporting the opposing party's theory is a series of "conclusional, self-serving statements." *In re Phillips & Hornsby Litig.,* 204 Fed. Appx. 398, 401 (5th Cir.2006) (quoting *BMG Music v. Martinez*, 74 F.3d 87, 90–91 (5th Cir.1996)).

Of the 11 badges of fraud, the IRS claims to have proof of badges 1, 2, 8, 9 and 10. *See* Counterclaim [AP No. 44] at ¶ 46. The Trustees do not dispute that the first badge of fraud is met because the Debtor settled Wrangler Trust for the benefit of his family and two of the Debtor's adult children serve as its Trustees; but they dispute the existence of all other badges.

The IRS has proven the eighth (receipt of reasonably equivalent value) and ninth badges (insolvency at the time of transfer), as this opinion previously addressed. *See* §§ IV.A, IV.C.1.b) and IV.C.1.c). But the IRS failed on its burden of proof regarding the second badge (possession or control of transferred property). *See* § IV.A.

Turning to badge 10, that the transfer occurred shortly before or shortly after substantial debt was incurred, the IRS alleges that, as of June 30, 2000, the Debtor already had incurred substantial tax debt to the IRS, including the liability resulting from his use of various foreign trusts and corporations to commit the tax fraud detailed in the Tax Memorandum Opinion. The

IRS contends that the Debtor was fully aware that his fraudulent use of the offshore system was causing massive tax debts to accrue and that he transferred the Maverick interests to the Wrangler Trust to place those assets out of the reach of his creditors, specifically the IRS.

In response, the Trustees argue that they were not a party to the 505 tax proceeding and are not bound by the court's findings regarding the Debtor's actions and his offshore tax system. They also insist that the Wrangler Trust is a simple domestic trust wholly unrelated to the complex offshore system that underlies the Debtor's tax liabilities.

The findings in the 505 tax proceeding do not bind the Trustees but they do bind the Debtor/defendant. The Debtor settled the Wrangler Trust nearly a decade into the massive tax fraud he perpetrated through his offshore system. As reflected in the Tax Memorandum Opinion, the Debtor went to considerable, and often illegal, lengths to conceal his personal assets from the IRS. *See* Tax Memorandum Opinion § IV.B.1. The record plainly supports an inference that he established the domestic Wrangler Trust to try to shield from the IRS his interests in Maverick – interests that were expected to, and did in fact produce, substantial sums. Thus, the IRS has proven the tenth badge of fraud.

The Debtor's intentional concealment from the IRS of hundreds of millions of dollars in assets, reflected in the findings in the Tax Memorandum Opinion, supports the conclusion that the IRS has proven badge 7, whether the debtor removed or concealed assets. Tax Memorandum Opinion at § IV.B.1. Although the 9.1% interest in Maverick does not appear to have been directly involved in the Debtor's offshore tax scheme, the Debtor's purposeful concealment of significant assets at a time coinciding with the disputed transfer here cannot be ignored.

Finally, the parties have not argued the remaining badges of fraud. They are badge 3, which was not proven because the transfer was not concealed; badge 4, not met because the IRS

had not sued or threatened suit against the Debtor at the time of transfer; badge 5, not proven because the challenged transfer did not comprise substantially all the Debtor's assets; badge 6, not proven because the Debtor did not abscond after the transfer. Last, badge 11 does not appear applicable to this case.

Considering the totality of the circumstances and the highly fact-specific nature of intent, a reasonable factfinder could find for either party on this issue based on this record. Accordingly, the IRS is not entitled to summary judgment with respect to actual fraudulent intent.

D. Self-Settled Trust

Finally, the IRS argues in the alternative that the Debtor is not only the settlor of the Wrangler Trust, but he is also a *de facto* beneficiary and that, under Texas law, the assets he contributed to the trust are not protected from his creditors' claims. The Trustees respond that the Debtor is not a named beneficiary of the Wrangler Trust and that funds the trust made available to the Debtor were loans, not distributions to a beneficiary.

It is undisputed that the Wrangler Trust distributed substantial assets to the Debtor. However, whether those distributions were true loans that the Debtor was obliged to repay or gratuitous transfers turns on disputed material facts. Neither party is entitled to summary judgment on this claim.

E. Conclusion

The IRS is granted summary judgment on its fraudulent transfer claim under TUFTA § 24.006(a) with respect to the 9.1% interest in Maverick the Debtor transferred to the Wrangler Trust effective as of June 30, 2000. Motions for summary judgment by both parties on all other issued are denied.

Counsel for the parties shall confer on a form of order consistent with this ruling, to be submitted within ten days of the entry of this Memorandum Opinion on the docket. If they cannot

reach an agreement, each party shall submit a proposed order on or before the tenth day after entry of this Memorandum Opinion on the docket accompanied by an explanation of why the opponent's proposed order is improper.

END OF MEMORANDUM OPINION # #