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4 **IN THE UNITED STATES DISTRICT COURT**
5 **DISTRICT OF ARIZONA**

<p>7 UNITED STATES OF AMERICA,</p> <p>8 Plaintiffs,</p> <p>9 vs.</p> <p>10 JOSEPH J. LIPARI, EILEEN H. LIPARI and EXETER TRINITY PROPERTIES, 11 L.L.C.,</p> <p>12 Defendants.</p>	<p>No. 3:10-CV-08142 JWS</p> <p>REPLY ON EXETER’S MOTION FOR SUMMARY JUDGMENT</p> <p>Honorable John W. Sedwick</p>
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13 The Defendant Exeter Trinity Properties, L.L.C., hereby replies to the Plaintiff’s
14 Response to Exeter’s Motion for Summary Judgment. This Reply is supported by the
15 attached Memorandum, by the Statement of Supplemental Facts filed concurrently herewith
16 and by the entire record.

17 Dated: February 15, 2012.

18 RESPECTFULLY SUBMITTED,

19 /s/ John Friedeman

20 John Friedeman
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Attorney for Exeter Trinity Properties, LLC

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. THE LIPARIS DID NOT INTEND TO DEFRAUD THE IRS.**

24 The Defendant Exeter Trinity Properties, L.L.C. [“Exeter”], respectfully
25 submits that the government’s arguments are fundamentally flawed for two reasons: (1) the
26 question of whether the Liparis intended to make a fraudulent transfer must be determined as

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1 of the date the Liparis signed the deed transferring the residence to the Ponderosa Trust and
2 (2) the intention of the Liparis can only be determined by their actions, not by their political
3 views nor the views of persons they know. Most of the facts presented by the government
4 occurred after the Liparis transferred the residence into trust and most of the government's
5 facts concern the actions and views of third parties, not the Liparis.

6 The government's claim for fraudulent transfer is founded on A.R.S. § 44-1004.
7 The government has relied on Subsection (A)(1), which requires intent to defraud.

8 In an attempt to show that the Liparis intended to defraud the IRS, the
9 government has gone to great lengths to build a case on "guilt by association". The
10 government has denounced J. C. "Jimmy" Chisum, Donna Chisum, Elmer Vild (Phillip
11 O'Neil) and Terry Major. It is respectfully submitted that the character of those individuals is
12 irrelevant to the issue of whether the Liparis were attempting, in 1992, to defraud the IRS
13 through a fraudulent transfer of their home. That the government characterizes some of the
14 Liparis' acquaintances as "tax protestors" does not shed any probative light on whether in a
15 specific instance the Liparis defrauded the IRS. The government's argument requires a giant
16 leap of faith (from the political views of third parties to the Liparis' intent) without a factual
17 footing.

18 The government also attempts to smear the Liparis: "the Liparis have
19 EXPRESSED tax defier views in the past and Mrs. Lipari has assisted OTHERS in trying to
20 improperly shield their property from the IRS." (See United States' Response to Exeter's
21 Cross-Motion for Summary Judgment ("Plaintiff's Response"), p. 7, lns 6-8, emphasis
22 added). Clearly, the government is not looking at the Liparis' actions to prove its claim. In
23 support of those allegations, the government referenced "U.S. facts 20-24", which include: a
24 third person transferring real estate to Mrs. Lipari, and Mrs. Lipari being named as a trustee
25 for a trust to which third parties transferred real estate. In neither instance did Mrs. Lipari
26 actually DO anything and both events occurred long after 1992. Other examples offered by

1 the government related to legal conclusions the Liparis’ alleged in their bankruptcy - mere
2 words - and those statements occurred many years after the Liparis put their home in trust.

3 The Court is urged to evaluate this case in the light of the probative and relevant
4 facts, rather than the government’s emotional appeal.

5 Exeter relies on facts, rather than inference:

6 1. The Liparis transferred their home to the Ponderosa Trust. See Exeter’s
7 Statement of Facts in Support of Cross-Motion for Summary Judgment (“Exeter Facts”), at
8 ¶ 3. They did this on the advice of Mr. Chisum (see Supplement to Statement of Facts by
9 Defendant Exeter Trinity Properties, LLC, (“Supp. Exeter Facts”) at ¶ 1) and both of the
10 Liparis have stated under oath that they did it so their house would eventually pass to charity.
11 Supp. Exeter Facts at ¶ 2. Dr. Lipari also stated that he wanted to make sure the house did not
12 go to his daughter and he wanted protection from creditors. See Exeter Facts at ¶ 4. In
13 addition, the Liparis put their residence in trust to avoid probate. See Supp. Exeter Facts, ¶ 3.
14 Mrs. Lipari had been referred to Mr. Chisum by a mutual friend who said he would help them
15 avoid the pitfalls of probate, which again demonstrates the estate planning purpose of the
16 Trust. See Supp. Exeter Facts at ¶ 4.

17 2. When the government refers to the 1992 deed to the Ponderosa Trust as a
18 “purported transfer” it is making an inaccurate statement. The simple truth is that the deed
19 signed by the Liparis in May 1992 was notarized, contained the correct legal description of
20 their residence and identified the grantee. See the Ponderosa Deed, Exhibit 4 to Exeter Facts.
21 Under Arizona law it was an effective and legal transfer. See A.R.S. § 33-401. A review of
22 the government’s Memoranda will disclose that the legal sufficiency of the deed is never
23 questioned, despite the government’s choice of words.

24 3. The government claims that the Liparis did not receive proper consideration
25 in exchange for the deed. However, once again the government relies on its characterization
26 of third parties. For example, in response to the testimony of both Mr. and Mrs. Lipari that

1 they put the house in trust for estate planning reasons (see the fact references in paragraph 1,
2 *supra*), the government responded with the following:

3 But that picture could not be further from the truth. Based on the undisputed facts, the
4 reality is that such individuals [who helped with the trust] are mostly people who have
5 expressed extreme views and have taken highly questionable positions regarding
6 federal taxes and or the IRS. (Plaintiff's Response, p.6, lns 23-26.)

7 The government is attempting to prove fraud based on its characterization of third parties,
8 rather than relying on the conduct of the Liparis. It is respectfully submitted that such
9 evidence cannot be given any weight to contradict the testimony by the Liparis.

10 4. The government ignores the consideration actually received by the Liparis.
11 Elsewhere the government emphasized that the Liparis did not pay rent, yet the government
12 does not see the nonpayment of rent from 1992 - 2007 as consideration. Nor does the
13 government recognize that not paying rent is a common practice in estate plans wherein a
14 family home is placed in trust. Rather than look at these straightforward facts, the
15 government asks the Court to engage in mind-reading based upon the beliefs of third parties.

16 The government seems to place no value at all on the deposition testimony of
17 the Liparis that they put the residence in trust to avoid probate, to prevent his daughter from
18 receiving it and so that it would eventually pass to charity. All of these are common reasons
19 to create trusts, and the Liparis' testimony is uncontradicted. Furthermore, Mrs. Lipari has
20 died and her testimony, which is preserved through her lengthy deposition, shows a high level
21 of consistency and directness. There is no basis to challenge their stated purpose for the trust.

22 The government also ignores that the Trust was merely one part of the financial
23 structure created for the Liparis by Mr. Chisum and his wife. For example, all of the income
24 from their businesses went into accounts of entities controlled by Mr. Chisum and for a time
25 the Liparis were not even signatories on those accounts. See Supp. Exeter Facts, ¶ 5.

26 Both of the Liparis put their complete trust in Mr. Chisum (see Supp. Exeter
Facts at ¶ 6) and they allowed him to handle all of their finances, not just the residence. It

1 was not until 1997 that they realized he was an extremist, but by then they were afraid of him
2 and did not know how to get out of the situation. See Supp. Exeter Facts at ¶ 7.

3 5. The government sidesteps the Liparis' eviction and claims that the Liparis
4 were in "control" of the residence while they lived there. Of course, they were in control - but
5 only to the extent they used the residence as their home. However, the eviction (see Exeter
6 Facts, ¶ 8) is unequivocal proof that the Liparis lived in the house at the pleasure of the
7 Trustee, exactly as the Ponderosa Trust states. (They could live at the residence, while
8 permitted by the Trustee, but were required to provide for the "maintenance and protection of
9 the premises." See Exhibit 1 to Exeter Facts, ¶ H.) It is inconceivable that the Liparis would
10 have voluntarily vacated their home if they had any option to remain. Both of the Liparis
11 testified that they moved out because the residence did not belong to them (see Exeter Facts,
12 ¶ 7) and they could no longer fulfill their financial obligations to stay. See Supp. Exeter Facts
13 at ¶ 8. There can be no stronger evidence that the Ponderosa Trust was valid and was not
14 intended as a ruse.

15 In her deposition at 100:8 - 11, Mrs. Lipari was asked to describe the scene
16 when she received the eviction notice.

17 Q And he said you have to get out of the house?

18 A Yes.

19 Q What did you say?

20 A Well, we had no choice.

21 Even if one assumes that the Ponderosa Trust was, in fact, unenforceable, the
22 government cannot prove fraud because of the inescapable conclusion that the Liparis
23 BELIEVED the Trust was valid in every respect - otherwise, they never would have moved
24 out. In 2007 they were aware of the problems caused for them by Mr. Chisum, yet they still
25 knew they had no option but to honor the eviction and move out. The fact of the eviction is
26 hard evidence of the Liparis' belief in the Trust - and their belief in the validity of the Trust is

1 proof that they made a bona fide transfer of the residence to the Trust. The only possible
2 conclusion is that the Liparis never intended to use the Trust to defraud the IRS.

3 6. It is irrelevant to this case whether the Chisums, Mr. Vild or Mr. Major were
4 good people or bad people. The government's discussion of those persons is a "red herring".
5 The only relevant concern is what the Liparis did in 1992.

6 It is possible that Mr. Chisum and the others involved with the Ponderosa Trust
7 took advantage of the Liparis. It is even possible that the Trust was merely a strategy to take
8 the residence from the Liparis. However, even those extreme hypothetical facts would be
9 irrelevant to the issue of whether the Liparis defrauded the IRS. The intent of the Liparis
10 cannot be determined by examining the people they knew.

11 Nor is the propriety of the transfer of the residence from Ponderosa Trust to
12 Exeter an issue in this case. That transfer occurred many years after the Liparis signed their
13 deed and it can have no relevance to the question of whether they committed fraud in 1992.
14 The Liparis had nothing to do with that transfer.

15 These non-issues raised by the government serve only to cloud the real issues.

16 What is striking is that the government has identified NO questionable conduct
17 by the Liparis before May 1992, when they signed the deed, nor for years thereafter. The
18 government has no evidence that the Liparis were "tax defiers" when they signed the deed.
19 Thus, the government has resorted to denouncing people the Liparis knew, and argues that the
20 beliefs of third parties are evidence of what the Liparis did. It is respectfully submitted that
21 the government has presented no probative evidence of intent to defraud the IRS and
22 summary judgment must be granted to Exeter on A.R.S. § 44-1004(A)(1).

23 The government has used the date the Liparis' deed was recorded, March 24,
24 1993, as the effective date of that transaction, rather than the date they signed the deed, which
25 was May 14, 1992. For purposes of this lawsuit the 1992 date should be used. A portion of
26 the deposition of Mrs. Lipari (50:22 - 51:6) demonstrates that the Liparis were not involved in

1 the recording - - from their perspective the transaction was complete when they signed the
2 deed:

3 Q And you signed that document [the deed] it looks like May 14, 1992?

A Yes.

4 Q Do you know why it wasn't filed until March of 1993?

A No.

5 Q You never figured that out?

6 A I didn't know it. I didn't know it until you guys said so. That's the first I heard about
it.

7 II. THE GOVERNMENT HAS NOT PROVEN FRAUD UNDER A.R.S. § 44-1104(B).

8 The government discusses its badges of fraud argument (see A.R.S. § 44-
9 1004(B)) beginning on page 10 of Plaintiff's Response.

10 The government argues that the Liparis had retained control of the residence
11 because they claimed depreciation on it in their tax returns for 1999 - 2002. The government
12 does not explain why the Liparis did not claim depreciation for 1994 - 1998 nor 2003 - 2007.
13 (See tax returns for those years, Exhibit 7 to Exeter Facts.)¹ Applying the government's
14 theory, the fact that for 10 years from 1994 - 2007 the Liparis did not take depreciation
15 demonstrates that they did NOT believe they owned the residence. Perhaps more important to
16 this issue is that the tax returns were prepared in 2006 and 2007 (see Exeter Facts at ¶ 13), so
17 they cannot provide insight into the issue of control at the relevant time.

18 In this case the government's desire to argue control seems unnecessary because
19 the statute speaks of "possession or control", and the Liparis lived on the property until 2007.
20 See A.R.S. § 44-1004(B)(2). Although they were subject to eviction at any time, the Liparis
21 did have possession by virtue of their physical presence.²

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The government has not made the Liparis' tax returns for 1992 and 1993 available and has
not alleged that the Liparis depreciated the residence in those years.

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26 However, both of the Liparis have stated under oath that they did not have control after they
signed the deed in 1992. See Supp. Exeter Facts at ¶ 11.

1 The government claims the Liparis did not receive equal financial value for the
2 transfer of the house. As noted above, the Liparis received value in many forms: the transfer
3 was essential to their estate plan; they did not have to pay rent to live there; the transfer was
4 only one part of their relinquishment of control of their finances to Mr. Chisum; the trust was
5 intended to avoid probate; through the trust the Liparis were assured his daughter would not
6 receive the residence; through the trust the property was to pass to charity. The government
7 cannot weigh the emotional value the Liparis placed on these benefits, but the Liparis clearly
8 thought it was a fair deal at the time. To the Liparis it was a package deal, involving much
9 more than just the house, and they saw it as a good arrangement for them. Now the Liparis
10 regret having trusted the Chisums. See Supp. Exeter Facts at ¶ 9.

11 The government claims the transfer of the residence was to an insider. The
12 transfer was to a trust and the trustee was Donna Chisum, who was unrelated to the Liparis.
13 By definition, the transfer was not to an insider. However, estate planning transactions are
14 commonly made to insiders without creating an issue of fraud.

15 A.R.S. § 44-1004(B) identifies eight other “badges” of fraud, but the
16 government does not claim any of them. Instead, the government misapplies the burden of
17 proof when it states that Exeter failed to prove those eight statutory elements are not present.
18 It is the party claiming a fraudulent transfer who has the burden of proving the requisite
19 elements. See *Premier Financial Services v. Citibank*, 185 Ariz. 80, 84, 912 P.2d 1309 (App.
20 1995).

21 The three badges of fraud claimed by the government (possession, less than full
22 value received and transfer to an insider) are all directed at disproving the validity of the
23 Trust. However, the government cannot fit the fact of a voluntary eviction into that picture.
24 If the Liparis had understood their transfer of the house to be something other than a bona fide
25 transaction, they would not have moved out voluntarily. Even now, they would prefer that the
26 residence be sold by the government and that the proceeds be applied against their taxes. See

1 Supp. Exeter Facts at ¶ 10. However, they know that cannot happen since they have no
2 interest in the residence. See Exeter Facts at ¶ 7.

3 Exeter's claim that the Liparis gave up all interest in the residence³ and the
4 government's claim that they defrauded the IRS by retaining a beneficial interest in the
5 residence are mutually exclusive. Only one claim can be true, and there is no middle ground
6 for a third option. Because of the voluntary eviction and the other supporting evidence, the
7 only possible answer is that the Liparis did transfer the residence as part of their estate plan
8 and were complying with the terms of the Trust when they moved out in 2007. They could
9 not have defrauded the IRS.

10 The government must carry its burden of proof by "clear and satisfactory
11 evidence." *Premier, Id.* The government cannot carry that burden and summary judgment
12 should be entered for Exeter.

13 The government concedes that its nominee/alter ego argument is "muddled" by
14 the eviction. See Plaintiff's Response at 12:3 - 4. Accordingly, that issue will not be
15 discussed.

16 The government has not cited any case in which the United States prevailed
17 under a fraudulent conveyance and/or alter ego/nominee theory where the alleged alter
18 ego/nominee had evicted the taxpayer from the subject real property. Such a precedent
19 should not be created by the instant suit.

20 Exeter would make one additional comment related to the Court's consideration
21 of the evidence. The key witness in this case, Mrs. Lipari, has passed away, but her testimony
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26 The Trustee even had the power to remove them at any time. See Exhibit 1 to Exeter Facts at paragraph H.

1 was memorialized by her deposition.⁴ The bulk of the evidence in this case is documentary.
 2 The undersigned submits that the Court now has before it essentially the same evidence it
 3 would receive at a trial. Therefore, the Court is respectfully urged to make a dispositive
 4 ruling on these Motions.

5 In considering the depositions of the Liparis and the Affidavit of Joseph Lipari,
 6 it is significant that each of them would like the residence to be sold by the government, with
 7 the proceeds to be applied against their taxes. See Supp. Exeter Facts at ¶ 10. However, they
 8 know that cannot happen because they gave up all interest in the residence when they
 9 transferred it to the Trust. See Exeter Facts at ¶ 7. Those facts make the Liparis' depositions
 10 and Dr. Lipari's Affidavit unusually trustworthy, because the Liparis have provided evidence
 11 contrary to their best interests. They would clearly benefit from a ruling in favor of the
 12 government, rather than a ruling in favor of the folks who evicted them. However, the
 13 Liparis' testimony consistently supported Exeter's position. The obvious conclusion is that
 14 the Liparis were telling the truth. See Fed.R. Evid. 804(b)(1) and 807 and *Land Grantors v.*
 15 *United States*, 86 Fed. Cl. 35 (2/24/2009).

16 Dated: February 15, 2012.

17 RESPECTFULLY SUBMITTED,

18 /s/ John Friedeman

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 22 Attorney for Exeter Trinity Properties, LLC

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26 Exeter did not attend the deposition of either of the Liparis. Questions which might not have been permitted at trial, e.g., leading questions, were answered.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this February 15, 2012, I electronically filed the foregoing with the Clerk of Court and served the following attorney of record using the CM/ECF system:

Charles M. Duffy
P.O. Box 683
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Washington, D.C. 20044-0683

I further certify that on the same day I mailed by U.S. Postal Service the foregoing to the following party who is not represented by counsel.

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Defendant, pro per

/s/ John Friedeman

John Friedeman

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