# Nos. 18-3717, 18-3718

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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VHC, INC. and SUBSIDIARIES,

Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee

---

ON APPEAL FROM THE DECISIONS OF
THE UNITED STATES TAX COURT
(Nos. 4756-15, 21583-15; Judge Kathleen Kerrigan)

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## BRIEF FOR THE APPELLEE AND SUPPLEMENTAL APPENDIX

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# GLOSSARY

| Abbreviation | Definition |
|---|---|
| Br. | Appellants' opening brief |
| I.R.C. | Internal Revenue Code (26 U.S.C.) |
| PCDI | Partners Concepts Development, Inc. |
| Ron | Ronald H. Van Den Heuvel |
| Treas. Reg. | Treasury Regulation (26 C.F.R.) |
| VHC | Appellant VHC, Inc. and Subsidiaries |

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# BRIEF FOR THE APPELLEE

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## JURISDICTIONAL STATEMENT

The amended jurisdictional statement filed by the appellant, VHC, Inc. and Subsidiaries (collectively, "VHC"), on May 30, 2019 is complete and correct.

## STATEMENT OF THE ISSUES

1. Whether the Tax Court clearly erred in finding that VHC's advances to a member of the family that controlled VHC were not bona fide debt.

2. Whether the Tax Court clearly erred in finding that VHC failed to prove its entitlement to business-expense deductions for advances made with respect to its guarantees of the family member's debts to third parties.

3. Whether the Tax Court clearly erred in finding that VHC is not entitled to adjust its income to exclude unpaid accrued interest for years other than 2005–2007.

## STATEMENT OF THE CASE

Section 166(a) of the Internal Revenue Code (I.R.C.), 26 U.S.C., generally allows taxpayers to deduct debts that become worthless within the taxable year. On its federal income tax returns for the years 2004 and 2006–2013, VHC claimed bad-debt deductions for unrepaid "advances" it claimed to have made to Ronald H. Van Den Heuvel ("Ron"), who was one of VHC's most influential shareholders and a member of the family that controlled VHC, and to Ron's outside companies. After a trial, the Tax Court sustained the Commissioner of Internal Revenue's disallowance of $92 million of those deductions, finding that VHC's advances to Ron and his companies were not bona fide debt. The Tax Court also rejected VHC's alternative arguments

that advances related to its guarantees of Ron's debts to various banks qualified for deduction as business expenses, and that it was entitled to income adjustments for unpaid interest it had accrued in years other than 2005–2007. As a result, the Tax Court entered decisions determining tax deficiencies against VHC for the years 2004 through 2013 totaling over $28 million.

### A. VHC and the Van Den Heuvel family

Founded in 1985 by Raymond Van Den Heuvel, VHC is a family-controlled holding company for several successful businesses that primarily provide construction and contracting services to the paper industry. (RA6–9.)[1] Those wholly owned businesses include VOS Electric, Inc.; Spirit Construction Services, Inc.; Spirit Fabs, Inc.; VDH Electric, Inc.; and Best Built, Inc. (RA6; SuppApp18.)

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[1] "RA" references are to the Required Appendix bound with the appellant's brief. "SA" references are to the appellant's Separate Appendix. "SuppApp" references are to the Supplemental Appendix bound with this brief. For portions of the record that are not included in the appendices, "Doc." references are to the documents filed in Tax Court No. 4756-15, as numbered by the clerk of that court, and "Ex." references are to the numbered exhibits admitted at trial.

Ron is one of Raymond's five sons. (RA6.) Many members of the Van Den Heuvel family, including Ron and his four brothers, have worked for VHC in various capacities, including as officers and directors of VHC and its subsidiaries. (RA6–8; SuppApp17–21.)

Although Raymond founded VHC, it was Ron who started VHC's two most successful subsidiaries, VOS Electric and Spirit Construction, and Ron served as president of each until August 2002. (RA7–8; SuppApp18, 20; Doc. 244 at 490:7–12.) Through 2009, Ron served as president, vice president, and/or director of several of VHC's subsidiaries. (RA7–8, 21.) Ron was known to VHC's shareholders as a great salesman whose primary job functions included sales and working on jobsites. VHC credits Ron for the company's expansion from a local company to a national one. (RA12–13.)

Ron personally holds 28 licenses in approximately 20 states as a general contractor, HVAC contractor, electrical contractor, pipe fitter, and millwright. (RA13; SuppApp22; Ex. 24-J.) Those licenses are essential in VHC's operations even through today (RA13–14; SuppApp26–27) and, through 2007, had brought VHC approximately $810 million in sales (Exh. 24-J at 00867).

During the years at issue, the ultimate decision makers at VHC were Raymond and another of his sons, David. (Doc. 251 at 1066:5–8.) David has been VHC's president and one of its directors since 1998. (RA10.) But from 1998 through 2012, David and Ron were equal shareholders in VHC, each owning 1,100 shares of its stock, more than anyone else. And throughout that time, Ron's shares included either the most (1998–2007) or the second-most (2008–2012) voting stock of anyone. (RA9–10.)

### B. Ron Van Den Heuvel's outside companies

Beginning in the 1990s, Ron also started and controlled a number of businesses outside of VHC. (RA14.) Chief among them was Partners Concepts Development, Inc. ("PCDI"). (RA16–20; SuppApp22.) From 1998 through 2002, Ron's father, Raymond, all of Ron's brothers, and a number of other shareholders of VHC each owned shares in PCDI. (RA17, 60; Ex. 1054-R; Doc. 248 at 827:4–828:18.) And since at least 1999, Raymond served as PCDI's chief financial officer and held weekly PCDI-related meetings with Ron at VHC's headquarters. (RA16, 61.)

Through PCDI's ownership of controlling interests, Ron controlled a number of companies that were involved in different aspects of the

paper industry, including Oconto Falls Tissue, Inc., Tissue Products Technology Corp., and Re-Box Paper, Inc. (later renamed EcoFibre), among others. (RA18–20; SuppApp22–23.)

### C. VHC's "advances" to Ron and his outside companies and guarantees of debts they owed to third parties

Although VHC and Ron's outside companies shared close family ties and many of the same shareholders, several of Ron's companies competed with VHC. (RA15, 21.) And by 1998, they had taken business from VHC that was potentially worth hundreds of millions. (RA21, 67–69.) Yet VHC not only allowed Ron to work on his competing ventures while still working for VHC's subsidiaries, but also supported Ron's outside businesses financially. (*Id.*)

Most significantly, VHC claims to have advanced about $111 million to Ron and his companies from 1997 through 2013. (RA23.) According to VHC, its advances took a variety of forms, such as guarantees of Ron's and his companies' debts, payments to their creditors, lines of credit, and nonguaranteed advances.[2] (RA23.) VHC's

[2] Whether these purported transactions actually created bona fide debt is one of the central issues in this case. But for consistency and

(continued…)

position is that, with interest, its advances represented a $132 million debt that Ron and his companies owed to VHC, of which only about $39 million was repaid. (RA38.)

With respect to VHC's guarantees of debts that Ron and his companies owed to third parties, VHC agreed before 2002 to guarantee approximately $27 million of Ron's companies' debts to Associated Bank. (RA27–28.) But in 2002, Associated Bank tied the renewal of VHC's own lines of credit to VHC's acceptance of an even broader guarantee. VHC acquiesced and, as a result, guaranteed *all* of Ron's companies' debts to Associated and subordinated to Associated all debts those companies owed to VHC. (RA29–30.)

In 2003, VHC guaranteed a $3.4 million debt that several of Ron's companies owed to Baylake Bank. (RA32.) In 2004, VHC guaranteed all of Ron's companies' debts to Baylake Bank and also agreed to guarantee monthly payments of up to $69,758. (*Id.*) That same year, VHC also guaranteed Ron's debts at F&M Bank up to $2 million. (RA34.) In 2007,

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(…continued)
simplicity, we follow the Tax Court's lead and "refer to these transactions as advances" merely because VHC does. (RA23 n.4.)

VHC guaranteed $1 million of debt that one of Ron's companies owed to Nicolet Bank, and it guaranteed another $4.6 million in 2009. (RA31.)

Despite this enormous support from his family's company, Ron and his outside companies were insolvent from as early as 1999, and there is no evidence that his companies ever became profitable. (RA63.) Moreover, VHC knew as early as 1998 not only of Ron and his companies' precarious finances, but also that Ron had taken funds for personal use that outside partners had invested in one of his companies.[3] (RA26.) By 2000, VHC knew that banking institutions and other third-party creditors were no longer lending to Ron and his companies. (RA66.) And VHC learned at some point between 2002 and 2010 that Ron had obtained bank loans for his companies by fraud. (RA29; Doc. 251 at 1112:9–1123:7.)

From 1997 through 2002, VHC advanced funds to Ron and his companies even though (i) the companies were financially unstable (RA26, 63), (ii) VHC sometimes had to borrow the funds it advanced (RA42), and (iii) the advances diminished VHC's ability to obtain surety

[3] An advance to buy out one of those partners was one of VHC's first advances to Ron. (RA26; Doc. 259 at 1752:1–1753:16.)

bonds that it needed in order to bid on public contracts and some private contracts (RA24, 67). Moreover, VHC continued making new advances while also routinely renewing the promissory notes on existing advances without receiving payment of principal or interest from Ron and his companies. (RA40–41.) And this continued even after VHC began in 2004 to treat existing advances as worthless "bad debts" for federal tax purposes, as discussed below. (RA35, 41, 57.)

Eventually recognizing that it had no reasonable prospect of being repaid, VHC stopped accruing interest after 2007 on the advances. (RA 45, 70, 78.) Yet VHC continued making additional advances to Ron and his companies through 2013. (RA53, 66.)

### D. VHC's deduction of advances as "bad debt" on its federal income tax returns

Although it continued accruing interest through 2007 and making new advances through 2013, VHC began in 2004 to claim tax deductions for partially worthless debt under I.R.C. § 166(a)(2) with respect to its advances. (RA35, 48–49.) In total, for the years 2004 through 2013, VHC "wrote-off" as bad debt almost $95 million, nearly all of it attributable to its claimed advances to Ron and his companies. (SA62, 94.)

After an audit, the Commissioner issued notices of deficiency to VHC disallowing $92 million of its bad-debt deductions and determining deficiencies in tax totaling nearly $32.5 million for the years 2004–2013. (SA55, 62, 74, 94.) With respect to the disallowed bad-debt deductions, the notices explained:

> It is determined that you did not establish that the [disallowed] amounts . . . were bad debts arising from a true debtor-creditor relationship. . . .
>
> Alternatively, you have failed to establish that the debts were wholly or partially worthless during the tax years [claimed] . . . .

(SA62, 94.)

**E. The Tax Court proceedings**

VHC petitioned the Tax Court for redetermination of the deficiencies, and the case was tried to the Tax Court (Judge Kerrigan) over ten days. The court heard testimony from 26 witnesses and admitted more than 1,000 exhibits comprising approximately 12,000 pages. VHC's single most important piece of evidence was Exhibit 40-J (SA96–101), a 436-line, 28-column spreadsheet prepared by its bookkeeper for this litigation based on his review of VHC's tax workpapers, which purportedly summarized by year and general

purpose the total amount of VHC's advances to Ron and each of his companies.

The Tax Court also received more than 1,100 pages of post-trial briefing submitted by the parties. (Docs. 269, 282, 285, 286.) In addition to defending its claimed bad-debt deductions, VHC made a number of alternative arguments (two of which are relevant here) in the event the Tax Court were to find that its advances were not bona fide debt. First, VHC argued that many of its claimed advances would be deductible under I.R.C. § 162(a) as ordinary and necessary business expenses, including unspecified advances made with respect to VHC's 2002 guarantee of the debts that Ron's companies owed to Associated Bank and VHC's subsequent guarantees of debts that Ron and his companies owed to other banks. (RA71.) VHC also argued that it would be entitled to reduce its income for the years 2005–2007 and 2009–2013 by the amount of unpaid interest on its claimed advances that VHC had accrued and reported as income for those years on the assumption that the advances were bona fide debt. (RA78; Doc. 282 at 431.)

With respect to all of those arguments, the Commissioner responded that VHC had failed to substantiate the amounts of any

advances. (RA71, Doc. 269 at 107.) On the issue of bad debt, the Commissioner also argued that VHC had failed to prove that any advances were bona fide debt (RA51) and had become partially worthless in the years and amounts claimed (RA71). As for VHC's alternative arguments, the Commissioner argued that VHC had failed to prove that any advance was an "ordinary and necessary" expense of its business (*id.*) or that it was entitled to any income adjustment for unpaid accrued interest.

Based on the voluminous record, the Tax Court issued an opinion sustaining the Commissioner's disallowance of VHC's bad-debt deductions and, with one small exception, rejecting VHC's alternative arguments. The court first recognized that "[i]ntrafamily transactions, such as those in this case, are subject to rigid scrutiny and are particularly susceptible to a finding that a transfer was intended as a gift rather than a debt." (RA 52–53 (citing *Estate of Van Anda v. Commissioner*, 12 T.C. 1158, 1162 (1949), *aff'd per curiam*, 192 F.2d 391 (2d Cir. 1951)).) The court then analyzed ten objective factors to determine whether VHC's advances to Ron and his companies constituted bona fide debt. (RA53–71.)

Of particular note, the Tax Court found that repayment of VHC's claimed advances was "contingent on several events that had not occurred at the time VHC made the advances" and "on the success of Ron[ ]'s companies." (RA58–59.) As the court explained, "A taxpayer willing to condition repayment of an advance on the financial well-being of the receiving company does not act 'as a creditor expecting to be repaid regardless of the company's success or failure.'" (RA59 (quoting *Calumet Indus., Inc. v. Commissioner*, 95 T.C. 257, 287–88 (1990)).) The court also found, for example, that "VHC influenced the management of Ron[ ]'s companies" and "was inextricably linked to them" (RA60, 62), and that VHC made advances (i) "without reasonable expectation of repayment throughout the years at issue" (RA63); (ii) "knowing that there were no reasonable prospects of repayment" (*id.*); and (iii) that "[a] third-party creditor would not have made" (RA64).

Based on these and other factors, the Tax Court found that "VHC did not intend to create a bona fide debtor-creditor relationship" and "did not reasonably expect repayment" when it made the advances. (RA70–71.) Accordingly, the court determined that the advances were not bona fide debt and therefore not deductible under § 166. (*Id.*) *See*

Treas. Reg. § 1.166-1(c) ("Only a bona fide debt qualifies for purposes of section 166.").[4]

The Tax Court also rejected (RA 71–75) VHC's alternative argument that, if its advances are not deductible as bad debts, then it is entitled to deduct as business expenses under I.R.C. § 162 any amounts it advanced as a result of the 2002 Associated Bank guarantee and subsequent guarantees. VHC argued that such advances were ordinary and necessary business expenses because it was "forced" to make those guarantees in order to protect its own business reputation and access to credit. (RA71.) But the Tax Court found that VHC had failed to substantiate the amounts of the alleged expenses, finding that "VHC's records are riddled with inconsistencies," and that "[i]ts spreadsheet"—*i.e.*, Exhibit 40-J—"is inconsistent with documentary evidence

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[4] Having thus sustained the disallowance of VHC's bad debt deductions on the basis that the debt was not bona fide, the court declined to address (RA71) the Commissioner's argument that VHC also failed to establish that the advances became partially worthless during the tax years at issue, as required by I.R.C. § 166(a)(2) and Treas. Reg. § 1.166-1(a)(1). The court's bad-debt analysis also did not reach the Commissioner's argument that VHC failed to substantiate the amount of any advances, though the court went on to adopt that argument in the context of its business-expense analysis (RA72–73).

supporting the entries." (RA 72–73.) The court held further that "even if VHC did substantiate some of the advances or payments made on guaranties, it has not established that these expenses were ordinary and necessary" because VHC entered into many of the guarantees against its own interest. (RA 73–74.) Although the court acknowledged that VHC's acceptance of the 2002 Associated Bank guarantee was at least partly motivated by concern about its own lines of credit at that same bank, the court found that overall, "[t]he motive for [VHC's] advances seemed to be more about helping [Ron] than protecting its business." (RA 74–75.)

The Tax Court partly accepted (RA 78–79), however, VHC's other alternative argument that, if its advances are not deductible as bad debts, then its income for 2005–2007 and 2009–2013 should be reduced to account for unpaid accrued interest. As an accrual-method taxpayer, VHC had reported the interest on its advances as income when the interest accrued, instead of when (and if) it received payment of the interest. *See* Treas. Reg. §§ 1.451-1(a), 1.446-1(c)(1)(ii). VHC argued that if the advances were not bona fide debt, then the accrued-but-unpaid interest on the advances was not income to VHC. The Tax Court

agreed and allowed VHC to reduce its income for the years 2005–2007 accordingly, but it denied a reduction for the years 2009–2013, finding that "VHC has not substantiated any amount of interest accrued but unpaid for [those years]." (RA 78–79; *see also* RA 45, 70 (finding that VHC accrued interest on its advances only through 2007).)[5]

Based on its determination of the issues in its opinion, the Tax Court entered decisions determining deficiencies against VHC totaling more than $28 million for the years 2004 through 2013. (RA 88–89.) This appeal followed.

## SUMMARY OF ARGUMENT

VHC fails to show that the Tax Court clearly erred with respect to any of the fact-intensive issues raised in its brief. The Tax Court's decisions in these consolidated cases should therefore be affirmed.

1. The deduction for worthless debts under I.R.C. § 166(a) applies only to "bona fide debt," defined as "debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money." Treas. Reg.

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[5] The Tax Court also resolved several other issues (*see* RA 75–78, 79–87), which are not contested in these appeals.

§ 1.166-1(c). The Tax Court considered a number of factors that this Court and others have consistently deemed relevant, and made detailed findings with ample support in the record. Based on those findings, the Tax Court ultimately found that VHC did not intend to create a debtor-creditor relationship with Ron and his companies and, accordingly, that VHC's claimed advances were not bona fide debt.

VHC fails to demonstrate any clear error. Indeed, VHC does not even challenge most of the Tax Court's underlying findings, including, for example, its finding that repayment of the advances was contingent on the occurrence of certain future events and the financial success of Ron's companies. Those uncontested findings alone are sufficient to sustain the Tax Court's determination that the advances were not bona fide debt.

VHC's attempts to show clear error in the few findings it does contest do not change that result. At bottom, VHC's arguments amount to little more than invitations to reweigh the evidence and the Tax Court's findings. This Court should decline those invitations under the clear-error standard of review.

2. Recognizing the weakness of its claims for bad-debt deductions, VHC has changed course on appeal to focus primarily on its alternative argument for business-expense deductions under I.R.C. § 162(a). According to VHC, a vaguely defined subset of its claimed advances were "ordinary and necessary" business expenses because of their alleged relationship to VHC's 2002 guarantee of Ron's companies' debts to Associated Bank and its subsequent guarantees of debt that Ron and his companies owed to other banks. But as a threshold matter, VHC has never specifically identified which advances those were. This alone is reason to affirm because the Tax Court's finding that VHC failed to substantiate its business expenses cannot be clearly erroneous when VHC failed even to identify the specific expenditures for which it claims the deductions.

VHC has also failed to demonstrate any clear error in the Tax Court's finding that any such expenditures were not "ordinary and necessary" expenses of VHC's business. Even if, as VHC argues, it was "forced" to make the 2002 Associated Bank guarantee and subsequent guarantees to protect its business, that would not establish that any particular expenditure was ordinary and necessary. In any event, while

VHC's "forced guarantee" argument is not implausible with respect to the 2002 Associated Bank guarantee, that is not enough to establish that the Tax Court clearly erred in light of the whole record in finding that VHC's purpose was more about helping Ron than protecting its business. As for guarantees subsequent to the 2002 Associated Bank guarantee, VHC offers nothing more than conclusory assertions that those guarantees were likewise "forced," which are insufficient to establish clear error in the Tax Court's finding that guarantee-related expenditures were not ordinary and necessary business expenses.

VHC cites three cherry-picked "examples" of specific expenditures it claims to have substantiated, but these examples fail to demonstrate that VHC proved any substantiated, guarantee-related expenditure that was an ordinary and necessary expense of its business. And the self-prepared summaries, books, and records on which VHC chiefly relied to substantiate its business-expense claims are inadequate as a matter of both law and fact. Contrary to VHC's assertions, the Commissioner did not stipulate to the sufficiency or accuracy of any of those materials, and VHC was neither prevented by the Tax Court from

adequately substantiating its claims, nor unfairly surprised by its obligation to do so.

3. VHC argues that if the advances were not bona fide debt, then its income should be adjusted to exclude *all* of the interest, whether paid or unpaid, that it allegedly accrued on advances for *any* tax year. But VHC's post-trial brief asked the Tax Court to exclude from income only *unpaid* interest that VHC accrued for the years 2005–2007 and 2009–2013. The court granted that relief for 2005–2007 but denied adjustments for 2009–2013 because it found that VHC had stopped accruing interest after 2007.

VHC argues that Exhibit 40-J shows that it accrued interest on some advances after 2007. But VHC argued in its post-trial brief that it accrued interest *until* 2007, and that is consistent with other evidence in the record. Accordingly, the Tax Court's finding that VHC did not accrue interest after 2007 is not clearly erroneous.

## ARGUMENT

### The Tax Court correctly determined VHC's deductions and gross income for the years in suit

#### Standard of review

Tax deductions are "a matter of legislative grace" and are "strictly construed." *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992). A taxpayer bears the burden of "clearly showing" its entitlement to the deductions it claims. *Id.*; *see* I.R.C. § 6001; *Buelow v. Commissioner*, 970 F.2d 412, 415 (7th Cir. 1992). Moreover, the Commissioner's determination of a tax deficiency is presumed to be correct, and the taxpayer bears the burden of proving it incorrect. Tax Ct. R. 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Cole v. Commissioner*, 637 F.3d 767, 773 (7th Cir. 2011).

This Court reviews the Tax Court's factual determinations and application of law to facts only for clear error. *Wellpoint, Inc. v. Commissioner*, 599 F.3d 641, 644 (7th Cir. 2010); *Pittman v. Commissioner*, 100 F.3d 1308, 1312–13 (7th Cir. 1996). "The tax court's determination that a taxpayer has failed to come forward with sufficient evidence to support a deduction is a factual finding subject to reversal only if found to be clearly erroneous." *Buelow*, 970 F.2d at 415.

The determination that an expenditure was not an ordinary and necessary business expense is likewise reviewed for clear error, *Wellpoint*, 599 F.3d at 645, as is the determination that a taxpayer did not intend to create a bona fide debtor-creditor relationship, *see Frierdich v. Commissioner*, 925 F.2d 180, 182 (7th Cir. 1991); *Busch v. Commissioner*, 728 F.2d 945, 949–50 (7th Cir. 1984).

"To be clearly erroneous, a decision must strike [this Court] as more than just maybe or probably wrong." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). So long as the Tax Court's "account of the evidence is plausible in light of the record viewed in its entirety," including any "inferences that may be drawn from the facts in the record," this Court must affirm. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74, 577 (1985); *accord Hough v. Commissioner*, 882 F.2d 1271, 1276 (7th Cir. 1989); *see also Pittman*, 100 F.3d at 1313 ("Moreover, 'this court, in [making that determination], must view the evidence in the entire record in the light which is most favorable to the finding.'"). Only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" may a finding be reversed as

clearly erroneous. *Anderson*, 470 U.S. at 573; *Cole*, 637 F.3d at 773; *Pittman*, 100 F.3d at 1313; *see Parts & Elec. Motors*, 866 F.2d at 233 ("[I]t must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.").

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VHC argues that the Tax Court erred in finding that its advances to Ron and his companies were not bona fide debt. (Br. 27–34.) VHC also argues, in the alternative, that the Tax Court erred in finding that its purported business expenses were neither substantiated nor "ordinary and necessary" expenses of its business (Br. 13–27), and in finding that VHC failed to substantiate any amount of interest accrued but unpaid for years other than 2005–2007 (Br. 34–36).

Reviewing these fact-bound issues for clear error, this Court should affirm for the reasons that follow.

### A. The Tax Court correctly found that VHC's claimed advances were not bona fide debt

The disallowance of VHC's bad-debt deductions should be affirmed because the Tax Court's determination that the claimed advances were not bona fide debt is thoroughly supported by detailed findings (RA 54–71) with ample support in the record. *See* I.R.C. § 166(a) (allowing

deduction of debt that becomes worthless within the taxable year); Treas. Reg. § 1.166-1(c) ("Only a bona fide debt qualifies for purposes of section 166."). As the Tax Court ultimately found (RA70–71), "VHC did not intend to create a bona fide debtor-creditor relationship, and the economic circumstances that existed during the time VHC made its advances establish that it did not reasonably expect repayment." VHC fails to show that the record clearly proves otherwise.

The burden of proving that an advance is bona fide debt is on the taxpayer. *See, e.g.*, *Frierdich v. Commissioner*, 925 F.2d 180, 182 (7th Cir. 1991). "This burden is 'a difficult one to meet,' especially when the 'transaction is cast in sufficiently ambiguous terms to permit an argument either way depending on which is subsequently advantageous from a tax point of view.'" *Ellinger v. United States*, 470 F.3d 1325 (11th Cir. 2006) (quoting *Estate of Leavitt v. Commissioner,* 875 F.2d 420, 424 (4th Cir. 1989)). Moreover, "[i]ntrafamily transactions" that a taxpayer characterizes as debt, such as the transactions in this case, "are subject to rigid scrutiny" and are particularly susceptible to a finding that the transfer was a gift. *Estate of Van Anda v. Commissioner*, 12 T.C. 1158, 1162 (1949), *aff'd per curiam*, 192 F.2d 391 (2d Cir. 1951).

The regulations define bona fide debt as "debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money." Treas. Reg. § 1.166-1(c). Thus, a gift or contribution to capital, for example, is not considered a bona fide debt. *Id.*

An "essential element" of a debtor-creditor relationship "is the intent of the recipient to make monetary repayment of the amount of the advance and the intent of the person advancing the funds to enforce such repayment." *Beaver v. Commissioner*, 55 T.C. 85, 91 (1970); *cf. Frierdich*, 925 F.2d at 182 (taxpayer claiming bona-fide-loan treatment of funds received must prove intent to repay); *Busch v. Commissioner*, 728 F.2d 945, 948 (7th Cir. 1984) (same). Courts have looked to a variety of "objective factors as indications of [such] intent." *Busch*, 728 F.2d at 948 (citations omitted). But the central question is "whether the objective facts establish an intention to create an unconditional obligation to repay the advances." *Roth Steel Tube Co. v. Commissioner*, 800 F.2d 625, 630 (6th Cir. 1986).

### 1. The Tax Court correctly found that VHC did not intend to create a bona fide debtor-creditor relationship

The Tax Court found no intention to create an unconditional repayment obligation here. (RA70–71.) Instead, the court found that "[t]he objective facts in the record establish" that neither VHC (RA67) nor Ron and his companies (RA69) intended to create a bona fide debtor-creditor relationship. The court based that finding on its careful analysis (RA54–70) of ten "objective factors" that it found are relevant to the facts in this case. And this Court and other circuits have consistently recognized that the same or similar factors are "proper considerations." *In re Larson*, 862 F.2d 112, 117 (7th Cir. 1988); *see, e.g.*, *Busch*, 728 F.2d at 948; *Ortmayer v. Commissioner*, 265 F.2d 848, 854 (7th Cir. 1959); *Ellinger*, 470 F.3d at 1333–34; *Roth Steel*, 800 F.2d at 630; *Bauer v. Commissioner*, 748 F.2d 1365, 1368 (9th Cir. 1984); *Estate of Mixon v. United States*, 464 F.2d 394, 402 (5th Cir. 1972).

Now on appeal, VHC challenges almost *none* of the Tax Court's findings with respect to those factors. Indeed, the following are just a few of the Tax Court's uncontested findings:

- Repayment of the advances was "contingent on several events that had not occurred at the time VHC made the

advances" and on "the financial well-being of Ron[ ]'s companies." (RA58–59.)

- "A third-party creditor would not have made these advances." (RA64.)
- VHC "made advances without reasonable expectation of repayment throughout the years at issue." (RA63.)
- "VHC continued to advance funds knowing that there were no reasonable prospects of repayment." (*Id.*)
- "Ron[ ] and his related companies routinely failed to comply with the terms of the promissory notes [for the advances] and VHC failed to enforce the terms." (RA67.)
- "VHC routinely renewed advances without receiving payments of principal or interest" and "continued to renew advances after it began claiming bad debt deductions in 2004." (RA56–57.)
- "VHC had no guaranties, collateral, or recourse for failure to repay." (RA66.)
- "VHC advanced funds for payments that were without any business purpose, including covering Ron[ ]'s Federal and State income tax liabilities, reducing the principal owed on his home, and paying past-due property taxes on his home." (RA68.)
- "VHC influenced the management of Ron[ ]'s companies" and "was inextricably linked to them." (RA60, 62.)
- Ron's father "Raymond and all of [Ron's] brothers" were shareholders of both VHC and PCDI from 1998 through 2002. (RA60.)

- Ron's brother "David owned stock in PCDI while he was president of VHC," and "Raymond played a major role in VHC and PCDI at the same time." (RA60–61.)
- "Throughout the years at issue Raymond and David negotiated with banks on Ron[ ]'s behalf, agreeing to pay his debts at other banks and even providing substitute collateral." (RA62.)

VHC has not specifically disagreed with these findings, much less attempted to show that they are clearly erroneous. And these uncontested findings provide ample support for the Tax Court's ultimate findings that "VHC did not intend to create a bona fide debtor-creditor relationship, and . . . did not reasonably expect repayment." (RA70–71.)

Indeed, the court's uncontested finding that repayment was contingent on the occurrence of certain future events and the financial success of Ron's companies (RA58–59) is alone sufficient to warrant affirmance because it shows there was no "intention to create an *unconditional* obligation to repay the advances." *Roth Steel*, 800 F.2d at 630 (emphasis added); *see Allen-Bradley Co. v. Commissioner*, 112 F.2d 333, 335 (7th Cir. 1940) ("Indebtedness signifies an unconditional obligation to pay."). As this Court has explained, "The distinction between a capital investor and a creditor . . . . is that the creditor

expects repayment *regardless* of the debtor corporation's success or failure." *Larson*, 862 F.2d at 117 (emphasis added); *accord Arlington Park Jockey Club, Inc. v. Sauber*, 262 F.2d 902, 905 (7th Cir. 1959). The Tax Court's uncontested finding here that "[re]payment depended on the success of Ron[ ]'s companies or a future event occurring" (RA59) "indicates that [VHC] acted as a classic capital investor *hoping* to make a profit, not as a creditor expecting to be repaid regardless of the company's success or failure," *Larson*, 862 F.2d at 117.[6]

**2. VHC's arguments fail to demonstrate clear error**

a. VHC argues (Br. 29–30) that it incurred "economic harm" from treating the claimed advances as debt on its books, inasmuch as it interfered with VHC's "ability to get bonding" and caused VHC to "pa[y] income tax on interest accruals (whether or not such interest was received) for most of the life of these loans, until it moved them to non-

[6] This is not to say that VHC's claimed advances necessarily were capital investments, only that they were *not* bona fide debt. The former question was not before the Tax Court, and the court did not purport to decide it. Having found that VHC failed to satisfy its burden of proving the advances were bona fide debt, it was unnecessary for the court to decide how they should be categorized instead. *See Ellinger*, 470 F.3d at 1334 n.8, 1337 n.11.

accrual status in 2007." The Tax Court acknowledged those harms in its analysis, but the court viewed the fact that VHC continued to advance funds *despite* the bonding difficulties it caused as evidence that VHC did not intend to form a genuine debtor-creditor relationship. (RA67.) And the Tax Court was unmoved by VHC's accrual of taxable interest income because VHC's evidence of interest payments was inconsistent, there was "no evidence that interest was paid regularly and consistently," and "VHC accrued interest only until 2007 because after that it did not have a reasonable expectation of being repaid."[7] (RA70.) This Court should decline VHC's invitation to reweigh the evidence. *See, e.g.*, *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995) ("A finding is not clearly erroneous simply because we would have weighed the evidence differently had we been given the first shot at it.").

Moreover, VHC's suggestion that the "economic harm" it incurred is *conclusive proof* of bona fide debt (Br. 29–30) or "an especially

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[7] The Tax Court did, however, adjust VHC's income to exclude accrued-but-unpaid interest (to the extent VHC requested such relief and proved such accrual, *see infra* pp. 65–68), since the court's determination that the claimed advances were not bona fide debt meant that interest should not have accrued. (RA78–79.)

significant factor" (Br. 31) under this Court's decision in *J & W Fence Supply Co. v. United States*, 230 F.3d 896 (7th Cir. 2000), is meritless. In that case, the Court suggested in passing that the taxpayer's accrual and payment of taxes on interest it never received "put[ ] money behind the characterization of the transaction as debt" and thereby "made its claim [that the transaction was debt instead of equity] more believable." *Id.* at 898. That passing suggestion was plainly dicta, however, as the Court then continued: "But this subject was not litigated in the district court, and we discuss it no further." *Id.*

Here, in contrast, the characterization of VHC's advances as debt was thoroughly litigated and resulted in a host of findings, nearly all of them unchallenged on appeal, supporting the Tax Court's rejection of that characterization. Thus, even if this Court were to find that VHC's accrual of taxable interest income makes its debt claim "more believable," *J & W Fence Supply*, 230 F.3d at 898, that would not make clearly erroneous the Tax Court's ultimate findings (RA70–71) that "VHC did not intend to create a bona fide debtor-creditor relationship, and . . . did not reasonably expect repayment." *See, e.g.*, *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 381 (7th Cir. 1991)

("[O]ur review is not *de novo*, and we are not to re-weigh the factual findings of the district court.").

b. Equally unavailing are VHC's challenges (Br. 30–31, 32–33) to the Tax Court's finding (RA59–60) that "[t]here is no evidence that VHC had any right to enforce repayment of the claimed advances." Again, the findings that VHC does not contest are sufficient alone to sustain the Tax Court's determination that the claimed advances were not bona fide debt. That determination would not become clearly erroneous even if this Court were to find that VHC did have a right to repayment because the existence of an "enforceable obligation" alone does not establish the existence of a bona fide debt. *See* Treas. Reg. § 1.166-1(c) (second sentence).

And in any event, VHC fails to show clear error in the Tax Court's finding that it lacked a right to repayment. That finding is consistent with VHC's actions, which certainly never demonstrated that VHC intended to enforce any such right to repayment, as a bona fide debtor-creditor relationship requires. *Beaver*, 55 T.C. at 91. Indeed, it is undisputed that VHC (i) never took action to collect any repayments (RA45); (ii) failed to enforce the terms of the promissory notes (RA67);

(iii) subordinated its rights under the notes to the rights of Associated Bank and other creditors (RA60); and (iv) renewed notes when no principal or interest had been paid, while also making new advances, even after it began claiming bad-debt deductions (RA35, 40–41, 56–57.)

VHC argues (Br. 30–31) that about $8 million of its claimed bad debts are attributable to unpaid accounts receivable and rents, and are therefore enforceable obligations *per se* under the third sentence of Treas. Reg. § 1.166-1(c), which states:

> A debt arising out of the receivables of an accrual method taxpayer is deemed to be an enforceable obligation . . . to the extent that the income such debt represents ha[s] been included in the return of income for the year for which the deduction as a bad debt is claimed or for a prior taxable year.

VHC contends that the Tax Court's "failure to even cite to and address this regulation is clear error." (Br. 31.)

But that "failure" is understandable in light of the fact that in the 650 pages of post-trial briefs that VHC filed in the Tax Court, its argument about the regulation's *per se* rule comprised less than one paragraph that cited no evidence. (Doc. 282 at 359.) As this Court has recognized, "A skeletal 'argument', really nothing more than an assertion, does not preserve a claim. Especially not when the brief

presents a passel of other arguments, as [VHC's] did. Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (citation omitted).

Moreover, even if VHC did not thus waive its argument under the regulation, VHC makes no attempt to show that it qualified for application of the *per se* rule by reporting the alleged $8 million in unpaid accounts receivable and rents on its income tax return for the same year that VHC deducted those items as bad debts or for a prior year. *See* Treas. Reg. § 1.166-1(c). Nor does VHC show that it substantiated $8 million in unpaid accounts receivable and rents. The record contains no contracts for services or rental agreements. (RA72.) And the only admitted evidence that VHC cites is Exhibit 40-J (SA101), the summary spreadsheet prepared by its bookkeeper, which the Tax Court correctly found (RA72–73) was inadequate substantiation of the amounts of VHC's claims. *See infra* pp. 55–60.

VHC also quibbles (Br. 32–33) as a factual matter with the Tax Court's finding that there is "no evidence" it had a right to enforce repayment. But its argument is merely that there is *some* evidence, rather than *no* evidence. Even if that is so, it does not clearly establish

that VHC had a right to enforce repayment (or ever would have exercised such a right), much less that the court's ultimate findings that "VHC did not intend to create a bona fide debtor-creditor relationship, and . . . did not reasonably expect repayment" (RA70–71) were clearly erroneous. *See, e.g.*, *Van Anda*, 12 T.C. at 1162 ("The giving of a note or other evidence of indebtedness which may be legally enforceable is not in itself conclusive of the existence of a bona fide debt.").

c. VHC similarly quibbles (Br. 33) with the Tax Court's finding that "[VHC] has not introduced objective evidence establishing the advances as loans" (RA56) by pointing out that the record contains *some* evidence supporting that characterization. But the Tax Court weighed that evidence and found it wanting. Even if it could have supported a finding in VHC's favor (which VHC does not even argue), the Tax Court's choice between "two permissible views of the evidence . . . cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. None of VHC's arguments establishes that the Tax Court clearly erred in determining that VHC's claimed advances were not bona fide debt.

### 3. The disallowance of bad-debt deductions may also be affirmed on the alternative ground that VHC failed to substantiate the amounts of its claimed advances

This Court has long recognized that "before a taxpayer may deduct from his gross income, as a bad debt, the debt must have had an existence in fact, and the burden of proving that fact devolves upon the taxpayer." *Allen-Bradley*, 112 F.2d at 335. The Tax Court here squarely acknowledged VHC's obligation to substantiate "the amounts related to [its] claimed related-party bad debt deductions" (RA50), and the Commissioner argued that VHC failed to satisfy that obligation. But the Tax Court decided that the claimed advances were not bona fide debt, and therefore sustained the Commissioner's disallowance of bad-debt deductions, without clearly addressing substantiation in that context.[8]

As we discuss below, however, the Tax Court did address substantiation, and found that VHC had failed to substantiate the

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[8] The court also did not "address whether VHC established that the advances became partially worthless during the tax years at issue" (RA71), which is an issue the Tax Court would need to decide on remand if this Court were to determine that the Tax Court's decisions cannot be affirmed on any of the grounds discussed herein. *See generally Cole v. Commissioner*, 871 F.2d 64, 66–68 (7th Cir. 1989) (discussing the worthlessness requirement).

amounts of its claims, in the context of VHC's alternative argument that many of its claimed advances should be treated as deductible business expenses. (RA72–73.) Rejecting VHC's argument that its "spreadsheet [*i.e.*, Exhibit 40-J], books and records, and self-prepared summaries are sufficient to substantiate the amounts of expenses," the Tax Court found that evidence to be inconsistent and unreliable. (*Id.*; *see also* RA39–40, 68, 70.)

VHC relied on that same evidence to substantiate the amounts of the advances it claimed were bad debt, just as it did to substantiate the amounts of the subset of those advances that it claimed, in the alternative, were business expenses. So if that evidence was inadequate to substantiate the latter, as the Tax Court correctly found, then it was also inadequate to substantiate the former.

### B. The Tax Court correctly found that VHC failed to prove its alternative claims for business-expense deductions and adjustments to income

#### 1. VHC failed to prove its entitlement to business-expense deductions for guarantee-related advances

Recognizing the weakness of its claims for bad-debt deductions, VHC has changed course on appeal. It now focuses primarily on its

alternative argument (Br. 13–27) that it is entitled to business-expense deductions for a vaguely defined subset of its purported advances, which VHC claims to have made in connection with its 2002 guarantee of debts that Ron and his companies owed to Associated Bank "and subsequent, related guarantees." But that argument has no more merit than VHC's argument that its advances were bona fide debt.

Section 162 of the Internal Revenue Code states that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." I.R.C. § 162(a); *see generally INDOPCO*, 503 U.S. at 85–86. To qualify as an "ordinary" expense, "the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved." *Deputy v. Du Pont*, 308 U.S. 488, 495 (1940). And an expense is "necessary" so long as it is "'appropriate and helpful' for 'the development of the (taxpayer's) business.'" *Commissioner v. Tellier*, 383 U.S. 687, 689 (1966) (quoting *Welch v. Helvering*, 290 U.S. 111, 113 (1933)). In addition, "business expense deductions generally must be substantiated, meaning the taxpayer must keep records sufficient to establish the amounts of the expenses" and the taxable year in which

they were paid or incurred. *Gorokhovsky v. Commissioner*, 549 F. App'x 527, 530 (7th Cir. 2013); *see* I.R.C. § 6001; Treas. Reg. §§ 1.446-1(a)(4), 1.6001-1(a), (e); *cf. Buelow*, 970 F.2d at 415 (taxpayer's burden of proof requires "specific evidence to support a claimed deduction").

Here, the Tax Court determined (RA72–75) that VHC's claims met none of these requirements. It found that VHC "has failed to substantiate the amounts of expenses, including payments on guaranties . . . , underlying its claimed section 162 deductions." (RA73.) And the court found further that "[e]ven if VHC did substantiate some of the advances or payments made on guaranties, it has not established that these expenses were ordinary and necessary." (*Id.*)

VHC fails to show that the record clearly proves otherwise, and the Tax Court's determination should therefore be affirmed.

**a. VHC never identified the specific expenditures it claims are deductible as business expenses**

VHC contends that its 441-page post-trial brief "devoted over 150 pages to laying out, in detail, all transactions with the Ron Entities." (Br. 21 n.14 (citing Doc. 282 at 174–335).) But with only a handful of exceptions, VHC has *never* specified which of those transactions were

deductible business expenses, much less substantiated the amounts and years of the expenditures. Instead, VHC has chosen to rely on generalities, discussing the purported expenses almost exclusively in the aggregate and citing summary exhibits prepared by its bookkeeper and charts not in evidence purporting to summarize those summary exhibits. (*E.g.*, Br. 7, 15 (citing SA96–101 (Ex. 40-J); Doc. 282, Ex. A; Doc. 286, Ex. A).)

Thus, VHC claims (Br. 7, 13, 15, 20) that, in total, its ordinary and necessary business expenses comprise $65 million of the $92 million in claimed advances for which the Tax Court disallowed bad-debt deductions. But except for three meritless "examples" (Br. 21–22) that we address *infra*, pp. 50–55, VHC identifies no specific expenditures. Instead, it vaguely and variously describes its purported expenses (Br. 7, 13, 15, 20, 21) as "payments," "advances," "loan[s]," or "transactions" that VHC made "as a result of," "pursuant to," "with respect to," "to satisfy," "due to," "because of," or "related to" the 2002 Associated Bank guarantee and VHC's "subsequent, related guarantees" of debts that Ron and his companies owed to other banks. And according to VHC, those guarantee-related expenditures included not only "amounts paid

directly to banks," but also "advances to cover payments to other lenders, and [advances] for operating expenses in order to prevent liens from arising and throwing the Ron Entities' loans at Associated into default." (Br. 7.)

The record, however, contains no list (or other clear identification) of individual expenditures that VHC contends are encompassed in those arguably guarantee-related categories, much less any list of such expenditures totaling $65 million. Indeed, in the more than 150 pages of VHC's post-trial brief that purportedly "la[id] out, in detail, all transactions with the Ron Entities" (Br. 21 n.14), the word "guarantee" appears *not once* (Doc. 282 at 174–335). Likewise, the 10 pages in that brief that set forth VHC's argument for business-expense deductions identified *not one* specific expenditure said to be guarantee-related. (*Id.* at 416–425.)

This alone is reason to affirm. The Tax Court's finding that VHC failed to substantiate its business expenses (RA72–73) cannot be clearly erroneous when VHC failed to identify the specific expenditures for which it claims the deductions. *See JPMorgan Chase & Co. v. Commissioner*, 530 F.3d 634, 640 (7th Cir. 2008) ("The Tax Court is not

required to take a stab in the dark, particularly when the party asking it to do so has turned out the lights."). The burden of substantiating its business expenses was on VHC, and the Tax Court was not required to *guess* which expenditures VHC was talking about. *See Buelow*, 970 F.2d at 415 (citing *Lerch v. Commissioner*, 877 F.2d 624, 627–29 (7th Cir. 1989); *Pfluger v. Commissioner*, 840 F.2d 1379, 1386 (7th Cir. 1988)).

**b. VHC's arguments that guarantee-related expenditures were "ordinary and necessary" expenses of its business are unavailing**

Even if VHC's failure to identify the specific guarantee-related expenditures it seeks to deduct under I.R.C. § 162 were not fatal to its appeal, the Tax Court's finding (RA73–75) that VHC failed to prove that any such expenditures were "ordinary and necessary" business expenses is. "Generally, payment by one taxpayer of the obligation of another taxpayer is not ordinary and necessary." *Lohrke v. Commissioner*, 48 T.C. 679, 684 (1967) (citing *Welch*, 290 U.S. at 114; *Deputy*, 308 U.S. 488). But courts have recognized an exception "when the expenditures were made by a taxpayer to protect or promote his own business." *Lohrke*, 48 T.C. at 685; *see, e.g.*, *Cap. Video Corp. v.*

*Commissioner*, 311 F.3d 458, 464 (1st Cir. 2002); *Dietrick v. Commissioner*, 881 F.2d 336, 339 (6th Cir. 1989).

To qualify for this exception, the taxpayer must first "demonstrate that his 'ultimate purpose in paying [the other taxpayer's] obligation was [not] to keep [the other taxpayer] in existence, thereby perhaps realizing a return on his payment through corporate profits, . . . [but rather] his purpose was to protect or promote his own business realizing a return on his payment through continued profits in that business.'" *Dietrick*, 881 F.2d at 339 (alterations in original) (quoting *Lohrke*, 48 T.C. at 688). "[A]ny benefit conferred on the party whose expenses are being paid must be only incidental." *Cap. Video*, 311 F.3d at 464. The taxpayer must also prove "that the expense is an ordinary and necessary expenditure in furtherance of *his* trade or business—not in furtherance of the trade or business of the other taxpayer." *Dietrick*, 881 F.2d at 339 (citing *Lohrke*, 48 T.C. at 688).

VHC contends (Br. 14–15) that it satisfied these requirements with respect to expenditures resulting from the 2002 Associated Bank guarantee and its subsequent guarantees of Ron and his companies' debts at other banks because, according to VHC, it was "forced" to make

those guarantees to protect its business.[9] But as a threshold matter, that is not enough to establish that any particular expenditure was ordinary and necessary. Even if the Tax Court had accepted that VHC was "forced" to make the 2002 Associated Bank guarantee to protect its business, "the fact that a payment is imposed compulsorily upon a taxpayer does not in and of itself make that payment an ordinary and necessary expense within the meaning of § 162(a)." *Commissioner v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 359 (1971). And it is far from clear, based on VHC's vague definitions (*e.g.*, Br. 7), that the guarantee-related expenditures it seeks to deduct are even limited to those that were "imposed compulsorily." Indeed, the one "example" (Br. 22) of an expenditure related to the 2002 Associated Bank guarantee that VHC discusses in its brief concerns its *voluntary* decision, four years later, to buy some of the loans it had guaranteed. *See infra* pp. 54–55.

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[9] VHC asserts that it "pa[id] out over $39 million as a result of" the 2002 Associated Bank guarantee, "and $65 million all told" when "payments made pursuant to guarantees subsequently required by other banks" are included. (Br. 7.) But it cites no evidence that even mentions Associated Bank or specific guarantees, much less attributes $39 million to the Associated Bank guarantee and/or $26 million to subsequent guarantees.

Moreover, the fact that a payment is "necessary," in that it is "helpful and appropriate" to the taxpayer's business, does not establish that it is also "ordinary." *United Draperies, Inc. v. Commissioner*, 340 F.2d 936, 938 (7th Cir. 1964). VHC has made no attempt to prove that any guarantee-related expenditure, or "the transaction which g[ave] rise to it," was "of common or frequent occurrence in the [paper-making] business." *Deputy*, 308 U.S. at 495; *see United Draperies*, 340 F.2d at 938.

Accordingly, VHC could not prevail even if the Tax Court had clearly erred in rejecting its "forced guarantee" arguments. But in any event, VHC fails to demonstrate any such clear error.

**(i) The 2002 Associated Bank guarantee**

In support of its position that it gave the 2002 guarantee of Ron and his companies' debts at Associated Bank to protect its own business, VHC argues at length (Br. 14–15, 25–27) that Associated Bank "forced" it to provide that guarantee in order to preserve VHC's own lines of credit with the bank, without which VHC could not have stayed in business. But the Tax Court viewed the evidence differently, finding that VHC had "not established that these expenses were

ordinary and necessary." (RA73.) Although the court "acknowledge[d] that VHC was concerned about its lines of credit," it found that VHC "did not show the [guarantee-related] advances were necessary to protect its business." (RA74.) The court found instead that VHC's "motive for the advances seemed to be more about helping Ron[ ] than protecting its business." (RA74–75.)

While VHC's contrary argument is not implausible, that does not make the Tax Court's findings clearly erroneous in light of the record as a whole. *See Frierdich*, 925 F.2d at 182–83. The Commissioner's disallowance of a deduction for VHC's claimed advances, including any advances related to guarantees, is entitled to a presumption of correctness, and intrafamily transfers, in particular, are rigidly scrutinized. *Van Anda*, 12 T.C. at 1162. As the Tax Court found, VHC "had entered into substantial guaranties with Associated Bank before 2002, and it provided guaranties at numerous other banks without providing explanations for entering into those guaranties." (RA74.)

> [Moreover,] many of the guaranties that VHC entered into harmed it.[10] The advances and guaranty agreements limited its ability to obtain surety bonds, causing it to lose revenue by not being able to bid on public work. The guaranties also affected its lines of credit and other financing ability with other banks. Two of its major customers stopped conducting business with it because of Ron[ ]'s competing ventures, yet it continued to advance funds and guarantee his debts at banks.

(RA73; *see also* RA63–64 ("[VHC] disregarded clear signs that Ron[ ] and his related companies were financially unstable and even negotiated on behalf of him and his related companies at banking institutions. . . . A third-party creditor would not have made these advances.").)

These uncontested findings undercut VHC's argument that it entered into the 2002 Associated Bank guarantee to protect its business, and that "the benefit to Ron [and his companies] was incidental." (Br. 14.) That these findings do not "disprove" VHC's argument or directly controvert the testimony of its witnesses regarding VHC's subjective intent is of no moment. *Frierdich*, 925 F.2d at 185

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[10] This is true even of the 2002 Associated Bank guarantee, which took away VHC's ability to force repayment from Ron and his companies. (Doc. 259 at 1779:18–21; RA29, 45, 59–60.)

("[The taxpayer], as a party to a lawsuit, cannot expect the Tax Court to accept his personal testimony as the absolute fact. The statements of an interested party as to his own intentions are not necessarily conclusive, even when they are uncontradicted.").

And the same is true of VHC's argument that the 2002 Associated Bank guarantee was different than prior guarantees. Under the clear error standard, "[this Court's] review of the case is not one which attempts to determine the greater probability of competing theories explaining certain factual events." *Id.* at 183. The Tax Court found that VHC's purpose in making the 2002 Associated Bank guarantee was "more about helping Ron[ ] than protecting its business," and that VHC had failed to prove otherwise. (RA73–74.) Those findings are, at the very least, "plausible in light of the record viewed in its entirety," *Anderson*, 470 U.S. at 574, given the presumption of correctness, the close family ties between VHC and Ron, and VHC's history of voluntarily acting against its own interest to advance funds and guarantee Ron and his companies' debts. *See Dietrick*, 881 F.2d at 340. Accordingly, the Tax Court's findings are not clearly erroneous, and its

rejection of business-expense deductions for guarantee-related expenditures should therefore be affirmed.

**(ii) Subsequent guarantees**

In addition to its argument regarding the 2002 Associated Bank guarantee, VHC states that "when VHC later moved its obligations to other local banks (all of which had lent to the Ron Entities), those banks demanded similar forced guarantees on existing loans to the Ron Entities." (Br. 15 (citing Doc. 259 at 1783:2–21).) But that conclusory assertion is the extent of VHC's argument that expenditures relating to the subsequent guarantees were ordinary and necessary business expenses. In contrast to its thorough (albeit unavailing) argument regarding the 2002 Associated Bank guarantee (Br. 14–15, 25–27), VHC offers no reasoned argument that the Tax Court's findings were clearly erroneous with respect to the subsequent guarantees.

As a result, VHC has waived that argument. *See, e.g.*, *Clarett v. Roberts*, 657 F.3d 664, 674 (7th Cir. 2011) (deeming two-sentence argument waived because this Court "ha[s] repeatedly held that undeveloped arguments are considered waived"); *Mahaffey v. Ramos*, 588 F.3d 1142, 1146 (7th Cir. 2009) ("Perfunctory, undeveloped

arguments without discussion or citation to pertinent legal authority are waived."); *Dunkel*, 927 F.2d at 956 ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim.").

In any event, the Tax Court's findings and the clear-error analysis discussed above apply with equal, if not greater, force to the subsequent guarantees as to the 2002 Associated Bank guarantee. Indeed, it is difficult to understand how VHC could have been "forced" to guarantee Ron and his companies' debts to other banks as a condition of moving VHC's own debts to those banks, when the decision to move its debts to those banks was its own. Even if the argument were not waived, VHC's conclusory assertion about the subsequent guarantees would fall well short of establishing clear error.

### c. VHC fails to show even a single guarantee-related expenditure that was both substantiated and an "ordinary and necessary" expense of its business

VHC cites three "examples" (Br. 21–22) of individual expenditures it claims to have substantiated, but none establishes clear error in the Tax Court's denial of a business-expense deduction. Its first example (Br. 21) is a "loan" of $125,000 to one of Ron's companies, "evidenced by a promissory note and a copy of the check" that are dated November 30,

2005. But VHC does not contend, and its cited evidence in no way suggests, that this $125,000 expenditure had anything to do with VHC's guarantees of Ron and his companies' debts or was otherwise an ordinary and necessary expense of VHC's business. Accordingly, it was not a deductible business expense whether or not VHC substantiated the expenditure.

In its second example (Br. 21), VHC argues that it substantiated several payments under its 2004 agreement with Baylake Bank (SA202) to guarantee monthly payments of $69,758.39 on debts owed by Re-Box and two of Ron's other companies. But as we have shown, *supra* pp. 49–50, VHC has waived any argument—and, in any case, failed to prove—that the Tax Court clearly erred in finding that expenditures related to guarantees subsequent to the 2002 Associated Bank guarantee were not "ordinary and necessary."

As a result, VHC's argument that it substantiated payments on the 2004 Baylake Bank guarantee is moot. And even it were not, the argument is unavailing. VHC does cite past-due notices, checks, and receipts substantiating that it made payments of $69,758.39 to Baylake Bank on December 30, 2005 (SA171), January 30, 2006 (SA176), and

April 26, 2006 (SA183).[11] But VHC never argued in the Tax Court that those three expenditures were made pursuant to the Baylake Bank guarantee. Indeed, despite VHC's claim that its post-trial brief "devoted over 150 pages to laying out, in detail, all transactions with the Ron Entities" (Br. 21 n.14), one searches those pages in vain for any reference to a guarantee-related payment to Baylake Bank. Although VHC claimed to have *lent* $69,758.39 to *EcoFibre* on those three dates, it said nothing to alert the Tax Court that those three transactions—among "hundreds" (Br. 19) of purported lending transactions—were even related to each other, much less related to the Baylake Bank guarantee. (Doc. 282 at 248 ¶ 1344, 263 ¶ 1445, 273 ¶ 1512.) Nor did VHC cite in support of those purported loans the evidence substantiating the December 30, 2005 and April 26, 2006 payments to Baylake Bank (SA171, 183) on which it now relies on appeal. And the Tax Court had no reason to examine VHC's substantiation of the January 30, 2006 "loan" because VHC conceded it was nondeductible by

[11] VHC also cites a page from its general ledger that lists several more such payments (SA174, 201), but it is well settled that the Tax Court need not credit unsubstantiated entries in a taxpayer's books. *See infra* pp. 56–57.

claiming that EcoFibre had repaid it a few days later. (Doc. 282 at 263 ¶ 1447; *see also* SA174, 201.)

Accordingly, VHC's new argument that the evidence it cites on appeal substantiates payments on the Baylake Bank guarantee is waived. *See Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018) ("Failing to bring an argument to the district court means that you waive that argument on appeal."). Even though that evidence is in the record, "the waiver doctrine charges litigants with raising the arguments they present on appeal in the district court, not just the facts on which their appellate arguments will rely." *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012) (citing *Bus. Sys. Eng'g., Inc. v. Int'l. Bus. Mach. Corp.*, 547 F.3d 882, 889 n.3 (7th Cir. 2008)); *see Wheeler*, 891 F.3d at 1073 ("[E]ven if the district court did miss a tangible *Brady* claim . . . Wheeler and Thomas certainly never brought that to the court's attention. So that argument is also waived."); *Poullard v. McDonald*, 829 F.3d 844, 855 (7th Cir. 2016) ("Poullard did not preserve the argument that Mailand was an appropriate comparator simply because his district court brief mentioned her. He

did not identify her as a comparator or argue that she was similarly situated.").

And in any event, it was not clearly erroneous for the Tax Court not to find that three payments on the Baylake Bank guarantee—which VHC never clearly claimed to have made—were substantiated by three pages of notices, checks, and receipts (SA171, 176, 183)—which VHC never clearly brought to the court's attention. Indeed, those three pages are scattered across two exhibits comprising more than 300 pages (Doc. 205, Exs. 1107-P, 1108-P) in a trial record that contains well over *a thousand* exhibits comprising roughly *12,000* pages. *See Gross v. Town of Cicero, Ill.*, 619 F.3d 697, 702 (7th Cir. 2010) ("As we have repeated time and again, 'Judges are not like pigs, hunting for truffles buried in [the record].'" (alteration in original)).

VHC's third example (Br. 22) cites a copy of a 2006 loan-purchase agreement (SA207) in which VHC agreed to buy from Associated Bank for nearly $8.3 million some of the loans to Ron's companies that VHC had guaranteed in 2002. But VHC fails to cite any evidence substantiating that it actually paid the $8.3 million purchase price recited in the agreement. And as we have shown, *supra* pp. 44–49, VHC

has also failed to show that the Tax Court clearly erred in finding that expenditures related to the 2002 Associated Bank guarantee were not ordinary and necessary. Moreover, even if VHC had proven that entering into the 2002 Associated Bank guarantee was necessary to protect its business, that would not establish that the same was true of its decision four years later to buy some of the loans it had guaranteed. *Cf.* Treas. Reg. § 1.166-9(d) ("A payment in discharge of part or all of taxpayer's agreement to act as guarantor . . . is to be treated as a worthless debt only if . . . (2) There was an enforceable legal duty upon the taxpayer to make the payment . . . ."). VHC makes no attempt to explain why buying the loans from the bank, instead of simply performing its contractual obligations as guarantor, was necessary to protect its business.

**d. The Tax Court correctly found that VHC's self-prepared summaries, books, and records did not substantiate its purported expenses**

Except for its three "examples," VHC relies on its self-prepared summaries and books (Br. 17–20), but the Tax Court correctly found (RA72–73) that those materials did not substantiate its business-expense claims. Disputed summaries of other evidence, prepared for

litigation, "cannot overcome the presumption of correctness connected with the Commissioner's notices of deficiency" if the summarized evidence is not in the record or is itself insufficient. *JPMorgan*, 530 F.3d at 640. And as the Tax Court recognized (RA72 (citing *Olive v. Commissioner*, 139 T.C. 19, 32–33 (2012), *aff'd*, 792 F.3d 1146 (9th Cir. 2015))), it has long been settled that a taxpayer's books and other self-generated records do not substantiate the entries stated therein. *See Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 187 (1918) ("[B]ooks [of account] are no more than evidential, being neither indispensable nor conclusive."); *Kikalos v. United States*, 408 F.3d 900, 901 (7th Cir. 2005) (self-generated records held insufficient because Treas. Reg. §§ 1.446-1(a)(4) and 1.6001-1(a) require taxpayers to maintain "books of account *and such other records and data as may be necessary to support the entries on his books of account*" (emphasis added by Court)); *Glasgow Vill. Dev. Corp. v. Commissioner*, 36 T.C. 691, 703 (1961) ("The presence of entries upon the books of a taxpayer are not conclusive of the occurrence of the transaction which they purport to reflect."); *Gorokhovsky*, 549 F. App'x at 530 (endorsing "the relatively basic

proposition that 'self-generated or non-itemized receipts or expense records are insufficient to substantiate expenses'").

VHC tacitly concedes as much. (*See* Br. 18–19 nn.11–12 (citing, *inter alia*, *Kenna Trading, LLC v. Commissioner*, 143 T.C. 322 (2014), *aff'd*, 911 F.3d 854 (7th Cir. 2018)).) That the Tax Court found corporate records sufficient in another case where, unlike here (RA72–73), it also found that the records were supported by credible testimony (*see* Br. 18–19 (discussing *Ill. Tool Works & Subs. v. Commissioner*, T.C. Memo. 2018-121, 2018 WL 3751966 (Aug. 6, 2018))) does not establish that the Tax Court clearly erred here in following the general rule.

In any event, the Tax Court correctly found (RA 72–73) that VHC failed to prove the reliability of its summaries, books, and records. VHC does not dispute the court's finding (*id.*) that its C.P.A., who "attested to the reliability of its books and records, . . . did not audit those books and records" and "did not reconcile the general ledgers with the underlying source documentation to determine their accuracy." And the record provides ample support for the court's findings (RA72) that "VHC's records are riddled with inconsistencies" and "[i]ts spreadsheet [*i.e.*,

Exhibit 40-J] is inconsistent with documentary evidence supporting the entries." (RA39–40, 68, 70; Doc. 269 at 108–142; Doc. 285 at 154–155.)

These deficiencies and inconsistencies in VHC's approach to substantiation are well illustrated by its assertions (Br. 7, 13, 15, 20) that the total amount of its guarantee-related "business expenses" was $65 million.[12] That $65 million figure is found only in a self-prepared summary that is not in evidence, which VHC attached to its post-trial reply brief. (Doc. 286, Ex. A.) Citing Exhibit 1027-P in support, that summary states that the $65 million "reflects payments made pursuant to guarantee obligations of [VHC], including post-September 30, 2002 guarantee obligations, $5,000,000 in Irwin Bank obligations, and $1,000,000 for a Scotia Capital Bond Payment." (Doc. 286, Ex. A.) But Exhibit 1027-P, which was prepared by VHC's bookkeeper and admitted as a purported summary over the Commissioner's objection (Doc. 243 at 423:22–425:2), lists the $5 million Irwin Bank expenditure and $1

[12] Even if the Tax Court had been inclined to accept that $65 million total for the years 2002–2013, it could not have allowed a deduction because business expenses must be deducted in the taxable year during which they are paid or incurred. I.R.C. § 162(a). Moreover, the years 2002 and 2003 are not even at issue in this case.

million Scotia Capital expenditure as "Non-Guarantee Lending Events" that preceded the 2002 Associated Bank guarantee (SuppApp30), which excludes them from VHC's own definition of its purported business expenses. And while Exhibit 1027-P also lists a lump sum of $59 million in "Guarantee lending (2002-2013)," it does not explain the basis for that figure. (SuppApp30.)

VHC's bookkeeper testified that Exhibit 1027-P "ties to" Exhibit 40-J, which is another summary exhibit he prepared. Without elaborating, he stated that the amounts listed in Exhibit 1027-P "were within the data [he] examined to prepare" Exhibit 40-J and reflect his "judgment now as to what is a guarantee or non-guarantee payment." (Doc. 243 at 422:15–423:21.) But Exhibit 40-J does not list anything close to $59 million in guarantee-related expenditures. Rather, the total amount that Exhibit 40-J assigns to even arguably guarantee-related categories is only about $18–$33 million. (SA100–101, columns d–f & nn.2–4.) And even that much smaller (and indeterminate) amount cannot be credited because, as the Tax Court found (RA72), Exhibit 40-J is not a reliable summary of the evidence it purports to summarize.

Thus, VHC's claim of $65 million in deductible business expenses is supported only by an inconsistent summary that is not in evidence (Doc. 286, Ex. A) of an inconsistent summary (Ex. 1027-P (SuppApp30)) of an unreliable summary (Ex. 40-J (SA96–101)). The Tax Court did not clearly err in rejecting such shoddy substantiation.

Tacitly acknowledging as much, VHC argues (Br. 19–20) that if the Tax Court was unsatisfied with its substantiation evidence, then it should have applied the rule of *Cohan v. Commissioner*, 39 F.2d 540, 544 (2d Cir. 1930), which allows the Tax Court to estimate the amount of expenses when a taxpayer has proven its entitlement to a deduction but failed to prove the precise amount. But VHC waived that argument by failing to present it to the Tax Court. *See Wheeler*, 891 F.3d at 1073.

And in any event, VHC has not proven its entitlement to a deduction because it failed to prove that any expenses were ordinary and necessary. Nor has VHC identified any basis on which the court could reasonably estimate the amount of any such expenses. The *Cohan* rule does not require the Tax Court to guess. *Lerch v. Commissioner*, 877 F.2d 624, 628, 629 n.9 (7th Cir. 1989) (citations omitted); *see Green Gas Del. Statutory Trust v. Commissioner*, 147 T.C. 1, 66 (2016)

(declining to apply *Cohan* rule where taxpayer did not provide a reliable basis for estimates and adoption of taxpayer's estimates would require "a leap of faith"), *aff'd*, 903 F.3d 138 (D.C. Cir. 2018).

Moreover, "the *Cohan* rule is rarely compulsory." *Lerch*, 877 F.2d at 629 n.9. It need not be applied if the Commissioner has not conceded that the taxpayer is entitled to some amount of deduction or if "the taxpayer could have and should have maintained the necessary records" to substantiate the amount. *Id.* at 628, 629 n.9. Since both of those circumstances are present here, the Tax Court would have had no obligation to apply the *Cohan* rule even if VHC had timely raised the issue and the rule were otherwise applicable.

**e. VHC's efforts to blame the Tax Court and the Commissioner for its failure to substantiate its expenses are unavailing**

VHC tries to shift the blame for its overreliance on summaries and account books to the Commissioner by asserting that the Commissioner stipulated to VHC's summaries, books, and records (Br. 10 & n.7, 17, 19, 24), but those assertions are baseless. With respect to VHC's most significant summary, Exhibit 40-J, the Commissioner expressly declined to stipulate to "the truth or accuracy of [its] contents."

(SuppApp15.) Instead, the Commissioner merely stipulated to Exhibit 40-J's admissibility (along with hundreds of other exhibits proposed by VHC), and to its description as "Petitioner's 8-page chart entitled ['] "Advances" by VHC made to or for the benefit of Ron Van Den Heuvel or Companies Controlled by Ron Van Den Heuvel.'" (SuppApp15, 27.) And there were no stipulations with respect to the exhibits that VHC variously describes as "books and records" (Br. 10 n.7), "excerpts from its corporate records" (Br. 19), and "summary excerpts of [its audit and tax] workpapers" (Br. 24). The Commissioner merely did not object to their admission. (Doc. 257 at 1584:8–10.)

Equally baseless are VHC's assertions that "[t]he Tax Court refused to allow admission of the entirety of [VHC's] workpapers and rather instructed [the parties] to submit summaries" (Br. 24) or "ordered the parties to stipulate to a summary" (Br. 10 n.7). According to VHC's counsel, those "workpapers" contained "all relevant financial records to determining [VHC's] financial statements and/or tax items" that VHC had compiled at the end of every year from 1997 through 2013. (Doc. 243 at 398:8–22.) And as VHC admits, they filled "dozens of bankers' boxes." (Br. 10 n.7.)

Incredulous at VHC's suggestion during trial that it would "like to put them in," the Tax Court quite reasonably responded that "[t]he Court's not going to look through these" dozens of boxes of undifferentiated records. (Doc. 243 at 398:25–399:3.) But VHC never moved (or laid a foundation) for their admission, nor did the Tax Court make any ruling excluding them. And the court certainly never ordered or instructed the parties to submit summaries instead.

Finally, VHC also tries to escape its duty to substantiate altogether by arguing (Br. 23–24) that substantiation was an untimely "new issue" raised by the Commissioner that the Tax Court improperly allowed only a few days before trial. This is wrong. VHC's own *petitions* alleged that it "has complied with all the requirements under Title 26 *to substantiate all items at issue*," and that the Commissioner "has not questioned the *amounts of any items* as recorded in [VHC's] records (only their proper treatment)." (SA3 ¶ 5.c, SA10 ¶ 5.d (emphasis added).) The Commissioner's answers denied those allegations. (SuppApp3 ¶ 5, SuppApp8 ¶ 5.) Substantiation has thus been a disputed issue in these cases from the start. *See Zmuda v.*

*Commissioner*, 731 F.2d 1417, 1420 (9th Cir. 1984) (allegation and denial in pleadings established that issue "was in question at trial").

Indeed, substantiation was fairly at issue even before VHC petitioned the Tax Court because "[a] theory not inconsistent with the language of a broadly worded deficiency notice is not 'new matter.'" *Id.* And as the Tax Court recognized (RA50 (citing *Wayne Bolt & Nut Co. v. Commissioner*, 93 T.C. 500, 507 (1989)), the Commissioner's "theory" that VHC failed to substantiate the amounts of its advances is not remotely inconsistent with the language of the deficiency notices advising VHC "that *you did not establish that the amounts [disallowed for each year] were bad debts* arising from a true debtor-creditor relationship." (SA62, 94 (emphasis added)).

In short, VHC has only itself to blame for its failure to substantiate its purported expenses. *See Zmuda*, 731 F.2d at 1420 ("The Zmudas argu[ment] that they were disadvantaged . . . at trial . . . . is specious. The disadvantage, if any, was a result of petitioners' strategic choice to ignore the wording of the deficiency notice [and the Commissioner's answer to their petition].").

### 2. VHC failed to prove its entitlement to income adjustments for interest it accrued on advances for years other than 2005–2007

The Tax Court adjusted VHC's income to exclude only *unpaid* interest that it had accrued on advances and only for the years *2005–2007*. (RA78–79.) VHC argues on appeal (in addition to its argument for business-expense deductions) that if the advances were not bona fide debt, then its income should be adjusted to exclude *all* of the interest, whether paid or unpaid, that it allegedly accrued on advances (Br. 35) for *any* year, including years "before 2004 and after 2007" (Br. 36). But that is not what VHC told the Tax Court. Instead, the Tax Court understood VHC to be asking "to reduce income for tax years 2005–07 and 2009–13 by the amount of interest accrued but unpaid from [Ron and his] companies" (RA78; *see also* RA5), and that accurately reflects VHC's argument to the Tax Court (Doc. 282 at 431).

Although VHC began that argument with general assertions that it was entitled to reduce income "by any amounts of interest accrued" and "no interest should have accrued" (*id.* at 430), VHC then concluded: "*Accordingly*, to the extent [VHC] accrued any income for *unpaid* interest amounts due from [Ron and his companies], and the Court

determines that the underlying debt was not in fact debt, [VHC] overpaid tax." (*Id.* at 431 (emphasis added).) VHC next proceeded to list a specific amount of interest allegedly accrued "against" a specific amount of interest allegedly received (*i.e.*, paid) for each of the years *2005–2007* and *2009–2013*. (*Id.*) And lest there be any doubt, VHC then closed: "*These excess amounts*, to the extent that they arise from amounts which did not constitute bona fide debt, should not have been accrued, and [VHC's] income *in the years at issue* should be reduced by *these amounts*." (*Id.* (emphasis added).)

Thus, VHC clearly asked the Tax Court to exclude from its income only the "excess"—*i.e.*, unpaid—accrued interest and only for the years 2005–2007 and 2009–2013. (*Id.*) VHC's bare assertion (Br. 36) that it used the years 2005–2007 merely "as examples on brief" is not a reasonable interpretation of the language it used (Doc. 282 at 431). Accordingly, VHC waived its arguments on appeal with respect to *paid* interest and years *other than* 2005–2007 and 2009–2013. *See Wheeler*, 891 F.3d at 1073.

And since the Tax Court agreed with VHC that accrued-but-unpaid interest for 2005–2007 should be excluded from its income, the

only issue properly before this Court is whether the Tax Court clearly erred in denying such adjustments for 2009–2013 based on its finding that VHC accrued interest on its advances only until 2007. (RA78–79; *see* RA45, 70.) Citing Exhibit 40-J (SA101), VHC argues (Br. 36) that it accrued interest on some advances after 2007.

But VHC is betrayed once again by the different argument it made to the Tax Court, in which VHC conceded that it "accrued interest on the notes in this case until 2007, when [it] determined that the probability of repayment was not sufficient to warrant continued accrual." (Doc. 282 at 430.) That concession mirrors the Tax Court's finding that "VHC accrued interest only until 2007," and "stopped" in 2008, "because after that it did not have a reasonable expectation of being repaid." (RA45, 70; *see* RA78.) And that finding, like VHC's concession, is supported by the consistent testimony of VHC's accountant (Doc. 252 at 1181:25–1182:18, 1211:23–25).

So even if the Tax Court had not properly found Exhibit 40-J to be unreliable and insufficient substantiation (RA72), VHC's citation of that exhibit (Br. 36) would establish, at most, that there is conflicting evidence on the question whether VHC accrued interest after 2007. It is

settled that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574. Accordingly, the Tax Court's finding that VHC did not accrue interest after 2007 and is therefore not entitled to income adjustments for the years 2009–2013 is not clearly erroneous.

## CONCLUSION

The decisions of the Tax Court should be affirmed.

Respectfully submitted,

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*Principal Deputy Assistant Attorney General*

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JANUARY 2020

## CERTIFICATE OF COMPLIANCE

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(s) /s Clint A. Carpenter

Attorney for the Appellee

Dated: January 15, 2020

# SUPPLEMENTAL APPENDIX

## Index

VHC, INC. AND SUBSIDIARIES
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 21583-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

# ANSWER

CERTIFICATE OF SERVICE

**UNITED STATES TAX COURT**

| | | |
|---|---|---|
| VHC, INC. and SUBSIDIARIES, | ) | |
| | ) | |
| Petitioners, | ) | |
| | ) | |
| v. | ) | Docket No. 21583-15 |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | Filed Electronically |
| | ) | |
| Respondent. | ) | |

**ANSWER**

RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

Unnumbered unlettered paragraph. Admits the Commissioner issued a notice of deficiency on May 28, 2015. Denies remaining allegations.

1. Admits.

2. Admits.

3. Admits.

4. (a) Admits Respondent made the determination alleged; denies Respondent erred.

(b) and (c) Denies.

(d) through (g) Admits Respondent made the determination alleged; denies Respondent erred.

5. (a) through (d) Denies.

(e) Admits Petitioner has already provided voluminous detailed information to Respondent; denies remaining allegations.

(f) Admits that Docket No. 4756-15 addresses tax years of the Petitioner prior to the Years at Issue in this case; admits that some issues of law and fact in this case are common to Docket No. 4756-15; denies that all the issues of fact and law are common to Docket No. 4756-15.

(g) and (h) Denies.

(i) and (j) Denies for lack of knowledge and information.

(k) through (p) Denies.

(q) through (s) Denies for lack of knowledge and information.

(t) Denies.

(u) Denies for lack of knowledge and information.

(v) (i) Denies.

(1) Denies.

(2) Denies for lack of knowledge and information.

(ii) Denies.

(iii) Admits that certain years prior to the years at issue may not be open years under the statute of limitations; Denies the remainder of subparagraph (iii).

(w) Denies.

6. Denies generally each and every allegation of the petition not herein specifically admitted, qualified or denied.

WHEREFORE, it is prayed:

(1) That the relief sought in the petition be denied;

(2) That the deficiencies in income tax for the taxable years 2011 through 2013, inclusive, as set forth in the statutory notice, be in all respects approved;

(4) That the Court determine that a determination of the application of I.R.C. § 7491 is premature based upon the pleadings; and

(5) That the Court determine that the Commissioner bears the burden with respect to all defenses, and the petitioner bears the burden of proof with respect to the deficiencies.

WILLIAM J. WILKINS
Chief Counsel
Internal Revenue Service

Date: Oct. 8, 2015

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Docket No. 21583-15

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing ANSWER was served on counsel for petitioners by mailing the same on 10/8/15 in a postage paid wrapper addressed as follows:

Robert E. Dallman
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Suite 1700
555 East Wells Street
Milwaukee, WI 53202

Date: Oct. 8, 2015

J. Paul Knap

J. PAUL KNAP
Senior Attorney (Milwaukee)
(Large Business and International)
Tax Court Bar No. KJ0797

VHC, INC. AND SUBSIDIARIES
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 4756-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

# ANSWER

**UNITED STATES TAX COURT**

| | | |
|---|---|---|
| VHC, INC. and SUBSIDIARIES, | ) | |
| | ) | |
| Petitioners, | ) | |
| | ) | |
| v. | ) | Docket No. 4756-15 |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | Filed Electronically |
| | ) | |
| Respondent. | ) | |

**ANSWER**

RESPONDENT, in answer to the petition filed in the above-entitled case, admits, denies and alleges as follows:

Unnumbered unlettered paragraph. Admits the Commissioner issued a notice of deficiency on November 21, 2014. Denies remaining allegations.

1. Admits.

2. Admits.

3. Admits.

4. (a) and (b) Admits Respondent made the determination alleged; denies Respondent erred.

(c) and (d) Denies.

(e) through (g) Admits Respondent made the determination alleged; denies Respondent erred.

(h) Denies.

5. (a) through (f) Denies.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(g) Admits.

(h) Denies for lack of knowledge and information.

(i) Denies for lack of knowledge and information.

(i) Denies for lack of knowledge and information.

(ii) The allegation is a mixed question of law and fact, accordingly denies allegations of fact, if any.

(iii) through (v) Denies.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(j) through (l) Denies for lack of knowledge and information.

(m) Denies.

(i) Denies.

(ii) Admits some of petitioner's shareholders invested in Ron Van Den Heuvel's companies. Denies remaining allegations.

(iii) through (v) Denies.

(1) Admits Ron Van Den Heuvel was a director of certain of petitioner's subsidiaries. Denies remaining allegations.

(2) Denies.

(n) Admits petitioner began and continued to transfer money to or pay expenses on behalf of Ron Van Den Heuvel's Companies. Denies remaining allegations for lack of knowledge or information.

(i) through (viii) Denies.

(o) Admits UAE Investments, Inc. negotiated for the purchase of Oconto Falls Tissue, Inc. or its assets. Denies remaining allegations for lack of knowledge and information.

(i) though (vi) Denies allegations for lack of knowledge and information.

(p) Admits that Enron Corporation filed for bankruptcy in 2001. Denies remaining allegations.

(i) Denies.

(q) Denies allegations for lack of knowledge and information.

(r) Denies.

(i) and (ii) Denies.

(s) Admits petitioner extended additional monies. Denies remaining allegations.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(t) through (v) Denies.

(w) Denies.

(i) through (iii) Denies allegations for lack of knowledge and information.

(iv) Denies.

(x) Denies.

(i) and (ii) Admits a sale to ST Paper occurred in 2007. Denies remaining allegations for lack of knowledge and information.

(y) Denies.

(i) and (ii) Denies.

(z) Denies.

(i) and (ii) Denies.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(aa) Denies.

(bb)(i) through (viii) Denies.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(cc) Denies.

(dd) Denies for lack of knowledge or information.

(i) through (iii) Denies for lack of knowledge or information.

(ee) Denies.

(i) through (vi) Denies for lack of knowledge and information.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(ff) through (ii) Denies.

(jj) Denies for lack of knowledge and information.

(kk) Denies.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(ll) (i) through (iii) Allegations are a mixed question of law and fact, accordingly denies allegations of fact, if any.

Unnumbered Header. To the extent any facts are inferred, respondent denies.

(mm) and (nn) Allegations are a mixed question of law and fact, accordingly denies allegations of fact, if any.

6. Denies generally each and every allegation of the petition not herein specifically admitted, qualified or denied.

WHEREFORE, it is prayed:

(1) That the relief sought in the petition be denied;

(2) That the deficiencies in income tax for the taxable years 2004 through 2010, inclusive, as set forth in the statutory notice, be in all respects approved;

(4) That the Court determine that a determination of the application of I.R.C. § 7491 is premature based upon the pleadings; and

(5) That the Court determine that the Commissioner bears the burden with respect to all defenses, and the petitioner bears the burden of proof with respect to the deficiencies.

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VHC, INC. AND SUBSIDIARIES, ET AL.
Petitioner(s)

ELECTRONICALLY FILED

v.

Docket No. 4756-15, 21583-15

COMMISSIONER OF INTERNAL REVENUE,
Respondent

# FIRST STIPULATION OF FACTS

**UNITED STATES TAX COURT**

| | | |
|---|---|---|
| VHC, INC. AND SUBSIDIARIES, | ) | |
| | ) | |
| Petitioners, | ) | |
| | ) | |
| v. | ) | Docket No. 4756-15 and |
| | ) | Docket No. 21583-15 |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

## STIPULATION OF FACTS

The parties hereby stipulate and agree that for purposes of this case the following facts may be taken as true and correct and the attached Exhibits may be taken as authentic, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation (including any supplemental stipulation of facts). The parties do not admit and specifically reserve their rights to challenge the truth or accuracy of the contents of the Exhibits stipulated to herein. All evidentiary objections are waived unless expressly reserved within this stipulation. All headings in this stipulation are for organizational purposes only and do not in themselves constitute any form of stipulation or admission.

Reference in this document to "debts," "loans," or "notes" owed to the Petitioners by Ronald H. Van Den Heuvel or any other company is for convenience

only; it is not an admission or agreement by the Respondent that said amounts are debts in substance.

**Preliminaries**

1. VHC, Inc. is, and at all relevant times was, a corporation incorporated in the state of Wisconsin. VHC, Inc., and its consolidated subsidiaries are the "Petitioners" in this case and are referred to collectively as such herein.

2. The Petitioners' principal place of business at the time of the mailing of the notices of deficiency and at the time they filed their petitions in this case was 3090 Holmgren Way, Green Bay, Wisconsin.

3. The Petitioners filed corporate income tax returns (Forms 1120) for the tax years ended on December 31 of the years 2004 through 2013 (inclusive) with the Commissioner of Internal Revenue (hereinafter "Respondent"), copies of which are attached as Exhibits 1-J through 10-J.

4. Petitioners have provided copies of corporate income tax returns (Form 1120) for tax years ended December 31, 1999-2003 (inclusive) copies of which are attached as Exhibits 11-J through 15-J. Respondent objects to the admission of Exhibits 11-J through 15-J on the basis of hearsay and relevance.

5. On November 21, 2014, Respondent mailed a notice of deficiency to the Petitioners determining a deficiency and no penalties for the tax years ended December 31, 2004 through 2010, a copy of which is attached as Exhibit 16-J. On

Exhibit 16-J. On May 28, 2015, Respondent mailed a notice of deficiency to the Petitioners determining a deficiency and no penalties for the tax years ended December 31, 2011, 2012, and 2013, a copy of which is attached as Exhibit 17-J.

6. The Petitioner's tax returns claimed deductions for bad debts which Petitioners assert were owed to the Petitioners by Ronald H. Van Den Heuvel and companies controlled by Ronald H. Van Den Heuvel, which amounts were disallowed by the Service in the notices of deficiency, as follows:

| Year of Deduction | Amount Disallowed |
|---|---|
| 2004 | $5,889,650 |
| 2005 | -0- |
| 2006 | 10,039,574 |
| 2007 | 1,642,373 |
| 2008 | 15,448,547 |
| 2009 | 7,562,648 |
| 2010 | 10,175,075 |
| 2011 | 29,182,217 |
| 2012 | 1,229,017 |
| 2013 | 10,907,594 |
| TOTAL: | $92,076,695 |

**Ownership and Family Relationships**

7. Ronald H., David, Steven, Timothy, and Raymond II Van Den Heuvel are brothers. Raymond and Patricia Van Den Heuvel are their parents.

8. Ronald H. Van Den Heuvel is the father of Ronald A. Van Den Heuvel and Ryan R. Van Den Heuvel.

9. VHC, Inc. during all of the years at issue, owned 100% of the stock in VOS Electric, Inc., Best Built, Inc., Spirit Fabs, Inc., Spirit Construction Services, Inc., and VDH Electric, Inc.

10. VHC, Inc., whose President is currently Dave Van Den Heuvel, is and has been at all relevant times a holding company that owns commercial and residential properties in addition to being the sole owner of the five subsidiary companies listed in Paragraph 9, above. VHC, Inc. directly employs four people at its headquarters location.

11. VOS Electric, Inc., (3131 Market Street, Green Bay, WI) whose President is currently Timothy Van Den Heuvel, operates primarily in the general electrical contractor business/industry within the construction-special trade contractors sector. VOS Electric, Inc. employs approximately 250 people at its headquarters location.

12. VOS Electric, Inc. was incorporated in September, 1985. Concurrent with its date of incorporation, VHC purchased 100% of the stock of VOS Electric.

13. In March 1986, Ronald H. Van Den Heuvel became President and director of VOS Electric. Ronald H. Van Den Heuvel remained President until August 2002, at which time he became Senior Vice President in Charge of Sales. Ronald H. Van Den Heuvel was a director of VOS Electric until September 2005 and he received wages from VOS Electric until December, 2009.

14. Ronald H. Van Den Heuvel received a Form W-2 from VOS Electric, Inc., until December 2009.

15. Health insurance for Petitioners, including VOS Electric, is offered through a self-funded plan referred to as SBV Health Plan. Ronald H. Van Den Heuvel has been enrolled in this plan at all relevant times and to date.

16. Best Built, Inc., (3100 Holmgren Way, Green Bay, WI), who's President is currently Jim Boyea, is a General Contractor specializing in commercial and residential construction.

17. Best Built was incorporated in August 1992. Concurrent with the date of incorporation, VHC purchased 100% of the stock of Best Built. Craig Kassner served as President of Best Built from August 1992 until April 2015. In April 2015 Jim Boyea became President of Best Built.

18. Spirit Fabs, Inc., (3261 Spirit Way, Green Bay, WI) whose President is currently Dean McNeill, is a provider of structural steel and pipe fabrication services for customers throughout the Unites States and employs approximately 50-99 people. Spirit Fabs was incorporated in November 1993. From 1995 through 2005, Ronald H. Van Den Heuvel was a director of Spirit Fabs.

19. Spirit Construction Service, Inc., (118 Coleman Boulevard, Savannah, GA), who's President is currently Steven Van Den Heuvel, operates in industrial construction, primarily servicing the paper industry.

20. Spirit Industrial Contractors was a company incorporated in the state of Georgia in 1989. Ronald H. Van Den Heuvel was its President and a director, and owned one third of its shares.

21. In 1991, Spirit Industrial Contractors entered into a joint venture with The Boldt Group and formed the company Boldt/Spirit, Inc. VHC and the Boldt Group each purchased 100 shares of Boldt/Spirit, Inc. Boldt/Spirit, Inc. then purchased the assets of Spirit Industrial Contractors.

22. In 1992, Boldt/Spirit, Inc. changed its name to Spirit Construction Services, Inc. In 1995, VHC bought out the Boldt Group's stake and became the sole owner of Spirit Construction Services.

23. Ronald H. Van Den Heuvel was the President and a director of Spirit Construction Services from 1995 until August 2002, at which time he became Senior Vice President in Charge of Sales. Ronald H. Van Den Heuvel remained a director until 2005. Ronald H. Van Den Heuvel received wages from Spirit Construction Services, Inc., until December 2009 and also received a W-2 through 2009.

24. VDH Electric, Inc., (3080 Holmgren Way, Green Bay, WI) whose President is currently Ronald Lentz, is an electrical contractor.

25. Petitioners are a privately held company with the majority of voting stock owned by members of the Van Den Heuvel family (including relatives by blood and marriage).

26. Ownership in VHC, Inc. and its subsidiaries for each of the years 1998 through 2003 is stated in the attached six-page Exhibit 18-J. Shareholders who are not named Van Den Heuvel but are related to the Van Den Heuvel family include William (Bill) Bain (one time brother in law), Guy Piontek and Craig Kassner and Ronald Lentz.

27. Ownership in VHC, Inc. and its subsidiaries for each of the years 2004 through 2013 is stated in the attached ten-page Exhibit 19-J.

28. Attached hereto as Exhibit 20-J is "Stock Sale and Transfer Agreement" dated April 10, 1999 for voting and non-voting stock of VHC, Inc.

29. Attached hereto as Exhibit 21-J is "VHC is a family and/or closely held stock ownership corporation Agreement Year 2000."

30. Attached hereto as Exhibit 22-J is "Revised Stock Sale and Transfer Agreement" dated April 14, 2012.

31. Attached hereto as Exhibit 23-J is Petitioners' summary entitled "VHC, Inc., and Subsidiaries Timeline of Incorporation/Directors/Officers" for years 1982 through 2013.

32. Ronald H. Van Den Heuvel holds 28 licenses for approximately 20 states as a general contractor, HVAC contractor, electrical contractor, pipe fitter and millwright.

33. Attached hereto as Exhibit 24-J is a "Schedule of Ronald Den Heuvel Licenses, Financial Performance in States where Ron Van Den Heuvel held Licenses 1985-2007, and Requirements for Licensure."

34. Beginning in 1997, Ronald H. Van Den Heuvel owned a majority of the shares of Partners Concepts Development, Inc. ("PCDI").

35. PCDI was incorporated in Wisconsin in 1997. Its current business address is 2077A Lawrence Drive, De Pere, WI, and Ronald H. Van Den Heuvel is its President and Chairman. PCDI is a holding company that has owned interests in a number of forest product companies. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for PCDI is attached hereto as Exhibit 25-J.

36. Tissue Products Technology Corporation ("TPTC") was incorporated in Wisconsin in 2001. It has registered a principal address of 2077A Lawrence Dr., Green Bay, WI, and Ronald H. Van Den Heuvel is its President. TPTC is a holding company and a manufacturing and outsourcing company which designs and builds tissue machines in the United States. A copy of the Wisconsin Department of

Financial Institutions' Corporate Records lookup results for TPTC is attached hereto as Exhibit 26-J. PCDI owned 100% of TPTC.

37. Oconto Falls Tissue Inc. ("OFTI") was incorporated in Wisconsin in 1997 as PCDI Oconto Falls Tissue, Inc. It has a registered principal address of 2077A Lawrence Dr., De Pere, WI, and its President is Ronald H. Van Den Heuvel. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for PCDI is attached hereto as Exhibit 27-J. TPTC owned 100% of OFTI.

38. From July 1997 to April 16, 2007, OFTI owned a tissue mill located in Oconto Falls, WI.

39. Eco-Fibre Inc. was incorporated in Wisconsin in 1996 as Re-Box Paper, Inc.(and changed to Eco-Fibre Inc., in 2006), and has registered a principal address of 500 Fortune Ave., De Pere, WI. Its President is Ronald H. Van Den Heuvel, is a recycled fiber de-inked and pulp manufacturer. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for Eco-Fibre is attached hereto as Exhibit 28-J. PCDI owned 88% of Eco-Fibre.

40. Attached hereto as Exhibit 29-J is "Summary of Shareholders" for EcoFibre Inc., for years 2005 and 2006.

41. Attached hereto as Exhibit 30-J is "Summary of Shareholders" for Tissue Products Technology Corp., for years 2005 and 2006.

42. Attached hereto as Exhibit 31-J is "Summary of Shareholders" for Oconto Falls Tissue, Inc., as of October 18, 2005.

43. Tissue Technology, LLC ("TTL") was incorporated in 2006, and has registered a principal address of 2077A Lawrence Drive, De Pere, WI. TTL is a holding company, wherein Ronald H. Van Den Heuvel was one of its members. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for TTL is attached hereto as Exhibit 32-J.

44. Custom Tissue, LLC ("Custom Tissue), was incorporated in 2003, and registered a principal address of 2107 American Boulevard, De Pere, Wisconsin. Two thirds (67%) of Custom Tissue was owned by PCDI, and the other one third was owned by employees or other related parties. Custom Tissue was administratively dissolved in 2012. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for Custom Tissue is attached hereto as Exhibit 33-J.

45. Custom Tissue owned 49% of Nature's Way Tissue Corp. ("NWTC"). NWTC registered as its principal address 2107 American Boulevard, De Pere, Wisconsin. 51% of NWTC was owned by Native American interests, but it had an operating agreement with TPTC whereby TPTC performed management of NWTC. NWTC was administrative dissolved in 2012. A copy of the Wisconsin Department

of Financial Institutions' Corporate Records lookup results for NWTC is attached hereto as Exhibit 34-J.

46. NWTC owned 100% of both Custom Paper Products, Inc., and Purely Cotton Products Corporation. Purely Cotton Products Corporation owned the patents, technology and intellectual property to produce a 100% cotton tissue.

47. Custom Paper Products, Inc. ("Custom Paper") was administratively dissolved in 2012. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for Custom Paper Products, Inc. is attached hereto as Exhibit 35-J.

48. Purely Cotton Products Corp., 2107 American Blvd, De Pere, Wisconsin, was administratively dissolved in 2012 but restored to good standing in 2016. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for Purely Cotton Products Corporation is attached hereto as Exhibit 36-J.

49. Attached hereto as Exhibit 37-J is a listing of PCDI Shareholders through 2007.

50. Ronald H. Van Den Heuvel also owned 100% of RVDH Development Corp., which owned a Lear jet. RVDH Development was dissolved via articles of dissolution on July 29, 2015. A copy of the Wisconsin Department of Financial

Institutions' Corporate Records lookup results for RVDH Development Corp. is attached hereto as Exhibit 38-J.

51. Generally the business of Ronald H. Van Den Heuvel's companies (PCDI, TPTC, OFTI, Custom Paper, NWTC and Eco-Fibre) was making and converting paper into tissue.

52. Ronald H. Van Den Heuvel has also been associated with Care for All Ages, Inc., which provides child and adult care services. Care for All Ages, Inc. was administratively dissolved on March 16, 2009. A copy of the Wisconsin Department of Financial Institutions' Corporate Records lookup results for Care for All Ages, Inc. is attached hereto as Exhibit 39-J.

53. A memorandum prepared by Petitioners' counsel dated December 2, 2009 states on page 5:

> "… Second VHC viewed the "installation (at OFTI) as an opportunity to obtain valuable institutional knowledge and showcase its abilities in installing a 100 inch state of the art tissue machine, which was the first of its kind in the country in 2000. In fact OFTI agreed to allow VHC to showcase its work to potential customers. Based on this experience, VHC was hired to install three similar machines in Lincoln, Maine; Celleyne, Florida; and Gila Bend, AZ. . . ."

And on page 8 of the same memorandum it states:

> "… VHC was also concerned that Ronald H. Van Den Heuvel would declare personal bankruptcy if OFTI declared bankruptcy. VHC sought to avoid this result because (a) Ron held electrician licenses in various states both as an individual and through VHC and (b) VHC did not want Ron to lose these

licenses on a bankruptcy proceeding. The loss of electrician licenses would have severely limited VHC's ability to perform in these various states…"

**Financial Transactions**

54. Attached as Exhibit 40-J is Petitioner's 8-page chart entitled "Advances" by VHC made to or for the benefit of Ron Van Den Heuvel or Companies Controlled by Ron Van Den Heuvel." According to that summary

| Year End | Debts claimed owed to the Taxpayer and outstanding Interest | | | Bad debt losses declared |
|---|---|---|---|---|
| 1997 | $1,610,023 | + | $6,356 | $ -0- |
| 1998 | 6,484,955 | + | 31,364 | -0- |
| 1999 | 17,030,023 | + | 249,134 | -0- |
| 2000 | 25,724,829 | + | 952,932 | -0- |
| 2001 | 27,580,651 | + | 636,909 | -0- |
| 2002 | 31,535,568 | + | 507,575 | -0- |
| 2003 | 37,330,568 | + | 1,933,487 | -0- |
| 2004 | 38,990,199 | + | 1,570,863 | 5,889,650 |
| 2005 | 41,211,447 | + | 2,765,947 | -0- |
| 2006 | 48,244,987 | + | 4,750,826 | 8,365,674 |
| 2007 | 52,209,052 | + | 8,721,065 | -0- |
| 2008 | 41,049,260 | + | 6,131,183 | 12,858,665 |
| 2009 | 42,141,320 | + | 6,131,325 | 7,481,533 |
| 2010 | 40,722,708 | + | 835,874 | 2,924,573 |
| 2011 | 15,800,798 | + | 863,215 | 27,328,516 |
| 2012 | 15,488,308 | + | 925,115 | 1,527,611 |
| 2013 | 5,861,935 | + | 945,148 | 10,907,594 |

55. The Petitioners deducted bad debt with respect to interest income in the amounts of $1,673,901; 2,589,882; 5,297,150; 35,691; and 10,809, for the years ended December 31, 2006; 2008; 2010; 2011; and 2012, respectively. Petitioners

claimed a bad debt expense for rent in the amount of $1,953,352 for the year ended December 31, 2010.

56. Attached hereto as Exhibit 41-J is a Note from PCDI to VOS Electric, Inc., in the amount of $1,000,000 dated December 3, 1997.

57. Attached hereto as Exhibit 42-J is a Note from PCDI Oconto Falls Tissue LLC (which later became TPTC) to VHC, Inc., in the amount of $3,500,000 dated September 18, 1998; and a renewal of said Note in the amount of $2,126,465.75 dated October 1, 2002. The Note was renewed again on October 1, 2004.

58. Attached hereto as Exhibit 43-J is a letter from PCDI relating to VHC's agreement to back an $800,000 letter of credit for it dated December 29, 1998.

59. Attached hereto as Exhibit 44-J is a "Working Line of Credit" from Re-Box Packaging, Inc., to VHC, Inc., in amount totaling $500,000 dated March 3, 1999.

60. Attached hereto as Exhibit 45-J is a Note from PCDI to VHC, Inc., in the amount of $250,000 dated May 7, 1999.

61. Attached hereto as Exhibit 46-J is a Note from PCDI to VOS Electric, Inc., in the amount of $100,000 dated July 2, 1999.

549. Attached hereto as Exhibit 537-J is "VHC, Inc., and Subsidiaries, Consolidated Financial Statements, December 31, 2008 and 2007."

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VHC to Ron/PCDI Group Companies, Major Non-Guarantee Lending Events

| Date | Amount | Entities | Purpose |
|---|---|---|---|
| 1998 | 813,022 | PCDI/VHC | Stockholder Buyout - Stumpf |
| 1998 | 3,500,000 | TPTC/VHC | Pay Spirit/Vos Receivable |
| 4/16/1999 | 2,000,000 | RVDH/VHC | Taxes |
| 11/11/1999 | 1,000,000 | PCDI/Vos | Stockholder Buyout - Schierl |
| 11/30/1999 | 4,500,000 | EcoFibre/VHC | Purchase building/land |
| 11/30/1999 | 5,000,000 | EcoFibre/Spirit | Purchase building/land |
| 8/18/2000 | 8,000,000 | TPTC/VHC | TM2 |
| 8/18/2000 | 3,000,000 | TPTC/Vos | TM2 |
| 7/18/2001 | 1,000,000 | PCDI/Vos | Scotia Capital |
| 12/31/2001 | 1,000,000 | TPTC/SCS | Payment for OFTI Winder |
| Irwin Bank Co Loan 2000 | 5,000,000 | | |
| Subtotal | 34,813,022 | | |
| Other nonguarantee lending 1997-2002 | 12,530,048 | | |
| Post-2002 nonguarantee lending | 1,415,431 | | |
| Guarantee lending (2002-2013) | 59,528,872 | | |
| Total | 108,287,373 | | |