SO ORDERED.

SIGNED this 13 day of November, 2007.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

NOT DESIGNATED FOR PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
GARY E. KRAUSE,	)	**Case No. 05-17429**
Debtor.	)	**Chapter 7**
	)	
UNITED STATES OF AMERICA,	)	
	)	
and **Plaintiff,**	)	
	)	
LINDA S. PARKS, Trustee	)	
	)	
Intervener,	)	
v.	)	**Adversary No. 05-5775**
	)	
GARY KRAUSE and RICHARD KRAUSE,	)	
	)	
Defendants	)	
and	)	
	)	
DRAKE KRAUSE and RICK KRAUSE,	)	
	)	
Interveners.	)	
	)	

MEMORANDUM OPINION DENYING MOTIONS FOR SUMMARY JUDGMENT FILED BY THE PLAINTIFFS UNITED STATES OF AMERICA AND LINDA PARKS, TRUSTEE

The Government moves for summary judgment on all of its claims against defendants Gary Krause ("Gary") and his brother Richard Krause ("Dr. Krause"), in his capacity as trustee of the Krause Children Trusts I, II, III, IV and V.[1] Those claims revolve around the Government's efforts to enforce its federal tax liens and collect Gary's $3 million dollar income tax liability. Specifically, the Government seeks (1) to have Gary's tax debt excepted from discharge under 11 U.S.C. § 523(a)(1)(C); (2) to declare that certain property transferred to the Krause Children's Trusts constitute fraudulent transfers; (3) to declare that the Krause Children Trusts I, II, III, IV, and V are Gary's nominees and that the Government's federal tax lien attaches to property held by the Krause Children Trusts; and (4) to permanently enjoin Gary and Dr. Krause from transferring assets to and from the Krause Children Trusts.

Linda Parks ("Trustee"), the chapter 7 trustee in Gary's bankruptcy moves for summary judgment on her claims for turnover under 11 U.S.C. § 542 (claiming the Krause Children Trusts are Gary's nominees and therefore property of the estate under § 541) and for avoidance of fraudulent transfers under 11 U.S.C. § 544 and § 548. She adopts the statements of fact and arguments of the Government.[2]

In previous proceedings in this adversary, the Court defaulted Gary with respect to certain entities and trusts as a sanction for discovery abuses, including spoliation of evidence by Gary.[3]

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1 Dkt. 405-407.

2 Dkt. 415. For ease of reference, the Court will refer to the movants' motions for summary judgment and their positions collectively as the Government's motion.

3 Dkt. 314 and 317.

After the default sanction, only the Krause Children Trusts I, II, III, IV and V remain at issue in this adversary.[4]

Gary and his intervener sons, Drake Krause and Rick Krause ("Krause Interveners"), named beneficiaries of the Krause Children Trusts, oppose the Government's and Trustee's summary judgment motion.[5] The Government has filed a reply and a response to Krause's additional statements of uncontroverted fact.[6]

Gary and the Krause Interveners have also filed their own motions for partial summary judgment.[7] The Court will address those summary judgment motions in a separate opinion.[8]

Defendant Dr. Krause

Dr. Krause in his capacity as trustee of the Krause Children Trusts, was named a party defendant when this proceeding was originally filed November 1, 2005. Initially, he was represented by counsel and actively participated in pretrial proceedings. When the Court ruled that Dr. Krause's attorney's fees could not be paid with trust assets, his attorney withdrew.[9] Since that time, Dr. Krause has appeared *pro se* in these proceedings and has voluntarily ceased to

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4 Default judgment was entered with respect to the Gary E. Krause Trust, the Krause Irrevocable Family Trust, Financial Investment Management Corporation ("FIMCO"), Federal Gasohol Corp., PHR, LLC, and Drake Enterprises, Inc. As a result of the default judgment, these entities and trusts were declared to be Gary's nominees, subject to the Government's federal tax liens and property of the bankruptcy estate subject to turnover.

5 Dkt. 446 and 450. The responses of Gary and the Krause Intervenors are substantially the same. For ease of reference in this opinion, Gary and the Krause Intervenors shall be referred to collectively as "Krause."

6 Dkt. 468

7 Dkt. 400-401, 410-411.

8 *Atlantic Richfield Co. V. Farm Credit Bank ov Wichita,* 226 F.3d 1138, 1148 (10th Cir. 2000) (Cross-motions for summary judgment are to be treated separately; the denial of one does not require the grant of another).

9 Dkt. 128 and 151.

affirmatively participate in defense of the trusts.[10] He has not, however, resigned as trustee of the Krause Children Trusts. This allegedly prompted the Krause Children Trust beneficiaries, Drake and Rick Krause, to intervene in this proceeding.[11]

Dr. Krause has not filed a memorandum in opposition to the Government's motion nor contested the Government's statements of uncontroverted facts, and therefore, the Government's statements of uncontroverted fact as to Dr. Krause are deemed admitted.[12] Curiously, however, Dr. Krause has signed an affidavit, apparently at Gary's or the Krause Interveners' behest, for Krause's use in controverting certain of the Government's statements of fact – the same facts which Dr. Krause has chosen not to controvert himself. Much of Dr. Krause's affidavit pertains to the same subjects and topics of his previous deposition testimony on January 17, 2007, and indeed, in some instances, contradicts his earlier deposition testimony.

These circumstances lead the Court to believe that Dr. Krause's affidavit is an attempt to create sham fact issues and may be disregarded. In *Franks v. Nimmo*,[13] the Tenth Circuit set forth the factors for courts to determine whether an affidavit that conflicts with earlier deposition testimony is a sham affidavit. Those include whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of the deposition testimony or whether the affidavit was based on newly discovered evidence, and whether

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10 The order granting Dr. Krause's attorney's motion to withdraw was entered October 27, 2006 with an effective date of withdrawal of November 9, 2006. Dkt. 179. As a named party defendant, Dr. Krause has been compelled to respond to some written discovery and gave deposition testimony on January 17, 2007. *See* Ex. 81 to Government's Memorandum in Support of Summary Judgment, Dkt. 406.

11 The order granting the Krause Interveners' motion to intervene was entered February 22, 2007. Dkt.232.

12 D. Kan. LBR 7056.1(a); Fed. R. Civ. P. 56(e).

13 796 F.2d 1230, 1237 (10th Cir. 1986).

the deposition testimony reflects confusion which the affidavit attempts to explain. Some of these factors require the Court to examine specific statements of fact as they relate to Dr. Krause's deposition testimony and subsequent affidavit.[14]

However, some comment on other *Franks* factors is appropriate here. When Dr. Krause's deposition was taken January 17, 2007, he was unrepresented by counsel. However, Gary, a licensed lawyer, was present at the deposition and had the opportunity, and right, to cross-examine his brother. It is not apparent from the deposition excerpts attached to the summary judgment motion whether Gary availed himself of this opportunity. Given the fact that Gary has presented Dr. Krause's subsequent affidavit, the Court assumes Dr. Krause's deposition testimony went unchallenged by Gary and that he opted not to cross-examine his brother.

With respect to the subject matter of Dr. Krause's deposition testimony, to the extent his examination pertained to Dr. Krause's actions as trustee or activity in the trusts, the Court would assume that type of information to be in the possession and control of a trustee performing his duties in the ordinary course. The Court would not expect a trustee performing his duties to be faced with newly discovered evidence regarding the trusts. Trust activity and transactions would be the type of information peculiarly within the trustee's knowledge and records. Dr. Krause could have easily brought his trust records with him to the deposition to refer to and assist him in answering the Government's questions.

Gary and the Krause Interveners assert even more broadly that because Dr. Krause appeared at his deposition without counsel, the Government wilfully misled him and that use of his entire deposition testimony is improper. Dr. Krause had every opportunity to be represented in this

14 The Court will review the specific facts controverted with Dr. Krause's affidavit to determine whether it conflicts with his prior deposition testimony, rather than disregarding his affidavit in toto.

matter.[15] He chose to proceed without counsel. Moreover, Dr. Krause would have been afforded an opportunity to review and make corrections to his deposition testimony.[16] It is not apparent that Dr. Krause availed himself of this opportunity. Finally, if Krause, or Dr. Krause himself, had any objection to the manner in which the deposition was taken, he could have lodged an objection at the time of the deposition and preserved his complaints.[17] Having failed to do so, any objection to the manner of taking the deposition, or other alleged irregularities asserted now, are waived.[18]

Applicable Summary Judgment Standards

This Court's function in reviewing the Government's motion for summary judgment is to first determine whether genuine issues of fact exist for trial. In making this determination the Court may not weight the evidence nor resolve fact issues.[19] On summary judgment, it is not the Court's function to determine witness credibility, weigh evidence or decide upon competing inferences.[20] Nor does the fact that cross motions for summary judgment have been filed establish the absence of a material issue of fact.[21]

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15 Indeed, as the Court noted in its August 8, 2006 order, Dr. Krause's personal asset disclosures reflected an ability to hire counsel to represent him and the trusts. *See* Dkt. 128 at p. 24.

16 *See* Fed. R. Civ. P. 30(e).

17 *See* Fed. R. Civ. P. 30(c) and (d)(4).

18 *See* Fed. R. Civ. P. 32(d)(3)(B).

19 *First Sec. Bank of New Mexico, N.A. v. Pan American Bank*, 215 F.3d 1147, 1154 (10th Cir. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986); *Concrete Works of Colo., Inc. V. City and County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (Court may not resolve disputed questions of fact at the summary judgment stage).

20 *Pan American Bank, supra; Masilionis v. Falley's Inc.*, 904 F. Supp. 1224, 1226 (D. Kan. 1995); *Boyer v. Board of County Com'rs of Johnson County*, 922 F. Supp 476, 484 (D. Kan. 1996), *aff'd* 108 F.3d 1388 (10th Cir.1997).

21 *Atlantic Richfield Co. V. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000); *Eagle v. Louisiana & Southern Life Ins. Co.*, 464 F.2d 607, 608 (10th Cir. 1972).

Once the Court determines those facts to which there is no dispute, it must then determine whether those uncontroverted facts establish a sufficient legal basis which entitle the movant to judgment as a matter of law.[22] If different ultimate inferences may properly be drawn from the facts, summary judgment is not appropriate.[23]

Findings of Uncontroverted Facts

Before addressing the specifically numbered paragraphs of the statements of fact, a few general comments are in order regarding the parties' compliance with summary judgment procedure with respect to their statements of uncontroverted fact and controversions. The Court has disregarded those factual disputes that are not material to the outcome and has attempted to indicate those factual disputes that are not material.[24] The Court has disregarded those statements contained in footnotes to the Government's statement of uncontroverted facts. In addition to making it difficult for Gary and the Krause Interveners to respond to those footnotes, the summary judgment rules do not contemplate footnoted statements of uncontroverted fact; if the footnoted statement of fact is material to the Government's claims then it should be set forth in a separately numbered paragraph

in the body of the memorandum.[25] The Court has also disregarded the characterization of facts,

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22 *E.E.O.C. v. Lady Baltimore Foods, Inc.*, 643 F. Supp. 406, 407 (D. Kan. 1986) (Even if there are no genuine issue of material fact, the movant still has the burden to show it is entitled to judgment as a matter of law.); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).

23 *Security Nat. Bank v. Belleville Livestock Commission Co.*, 619 F.2d 840, 847 (10th Cir. 1979).

24 *See Cease v. Safelite Glass Corp.*, 911 F. Supp. 477 (D. Kan. 1995) (Only disputes over facts that might affect the outcome under governing law will preclude summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (Factual disputes that are irrelevant or unnecessary will not be considered); *Richards v. City of Topeka*, 934 F. Supp. 378 (D. Kan. 1996).

25 *See* D. Kan. LBR 56.1(a); *Phelps v. Hamilton*, 840 F. Supp. 1442, 1447 (D. Kan. 1993), *aff'd in part and rev'd in part* 122 F.3d 1309 (10th Cir. 1997) (Briefs using "favorite undergraduate gambits" [*i.e.* unnecessary footnotes interspersed in movant's statement of facts] may be struck and will not be tolerated by the court).

whether made by the movant or the non-movant. For example, the characterization placed on an admitted transaction or transfer will be disregarded.[26] The characterization of a transaction is a question of law for the Court.

The Government's Statement of Uncontroverted Facts

The Court has carefully reviewed the statement of uncontroverted facts presented by the Government as well as Krause's controversions of same and finds the following facts to be uncontroverted.

1. Between February of 1980 and July of 1985, the IRS notified Gary that it was auditing his personal Forms 1040 for tax years 1975 through 1983.

2. Between 1983 and 1986, the IRS notified Gary, as tax matters partner for Barton Enhanced Oil Production Income Fund ("Barton"), that it was auditing Barton's 1982 and 1983 tax returns.[27]

3. Additionally, on June 28, 1983, the IRS sent Gary a notice informing him that it was auditing the 1981 and 1982 tax returns for his entities Cardinal Oil Technology Partners, Energy Associates, Inc., Caxton Oil Technology Partners, and Harrow Oil Technology Partners.

4. In 1986, Gary personally owned the following:

- partnership interests in several limited partnerships, including: Cardinal Oil Technology Partners, Caxton Oil Technology Partners, Harrow Oil Technology Partners, Bishop Energy Technology Associates, Barton

26 *See Patton v. AFG Industries, Inc.*, 92 F. Supp. 2d 1200, 1202 n. 3 (D. Kan. 2000) (Controversion only denied characterization of a fact [a conversation] and therefore the fact is deemed admitted); *Stephens v. City of Topeka, Kan.*,, 33 F. Supp. 2d 947 (D. Kan. 1999) (Conclusory terms or characterizations without any concrete facts to support characterizations are afforded no weight by the court); *Rogers v. United States*, 58 F. Supp. 2d 1235 (D. Kan. 1999) (The general characterization of a transaction is a question of law).

27 The disputed portion of this fact (specificity of the fact statement) is not material and is deemed admitted. *See* footnote 24, *supra.*

Enhanced Oil Production Income Fund, and Trojan Energy Technology Associates.

- 100% of the stock of Energy Associates, Inc., the corporate general partner of Barton.
- 100% of the stock in Federal Gasohol Corporation.
- 510 shares of Financial Investment Management Corporation ("FIMCO").
- 500 shares of Development Associates, Inc., which, in 1986, owned, and to date continues to own, real property in Reno County.
- general partnership interests in several real estate partnerships, including Great Bend Duplex Housing Ltd., Hutchinson Duplex Housing Ltd., Liberal Commons Ltd., Norton Commons Ltd., Newton Associates, Liberal Duplex Housing Ltd., and Norton Duplex Housing Ltd.
- 100% of the stock of Rural Housing Associates, Inc.
- a personal residence at 37 N. Mission Road.
- 100% of the stock in Kanzoil Corporation.

5. In 1986, Gary was also the president of Federal Gasohol Corporation, Energy Associates, Inc., FIMCO, and Development Associates, Inc., as well as a director of Quivira Associations.

6. On April 4, 1986, Gary and his then-fiancee, Teresa Briggs ("Briggs"), signed a pre-nuptial agreement in which she waived any right, title or interest in and to the assets listed in paragraph three including, the Mission Road residence, Great Bend Duplex Housing Ltd., Hutchinson Duplex Housing Ltd., Liberal Commons Ltd., Norton Commons Ltd., Newton Associates, Liberal Duplex Housing Ltd., Norton Duplex Housing Ltd., Rural Housing Associates, Inc., Western Associates of Kansas, Inc., Barton Enhanced Oil Production Income Fund; Barton Enhanced Oil Income Fund 1983-1, Bishop Energy Associates, Bruin Energy Associates, Cardinal Oil Technology Partners, Caxton Oil Technology Partners, Caxton Oil Technology Partners 1982, Caxton Oil Technology Partners 1983, Harrow Oil Technology Partners; Trojan Energy Technology Associates, Energy Associates, Inc., and Beverly Terrace Apartments, Inc. The agreement also provided that Gary and Briggs intended all their separate property to be held as separate property unless they clearly indicated by written instrument, which referred to the Agreement, and signed by

them that such property would be held as marital property.

7. Gary married Briggs in April 1986, and they had two sons, Drake and Rick, before divorcing in 2002.[28]

8. On May 28, 1986, after the IRS disallowed deductions taken by Barton for losses allegedly incurred by the partnership, Gary—as Barton's tax matters partner—filed suit 16425-86 in the United States Tax Court to challenge the IRS decision. *Krause v. Commissioner*, 99 T.C. 132, 150 (1992), *aff'd. sub. nom.*, *Hildebrand v. Commissioner*, 28 F.3d 1024 (10th Cir. 1994) *cert. denied*, 513 U.S.1079 (1995).

9. On April 5, 1989, the IRS advised Gary that it was examining his personal 1986 Form 1040. The scope of the examination was limited to the Schedule C bad debt losses claimed by Gary.[29]

10. On October 25, 1990, the IRS issued Notices of Deficiency to Krause personally which notified him that the IRS had determined that he had underpaid his taxes for the years 1975-1983 and 1986 by, in part, failing to report certain income paid to him by his corporation, Energy Associates, and as a result of losses he claimed by participating in limited partnerships such as Barton.[30] 11. On January 22, 1991, Krause filed suits 1268-91 and 1279-91 in Tax Court to challenge his personal tax deficiencies for 1975 through 1983 and 1986.

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28 Although the record cite does not support the Government's statement, neither Gary nor the Krause Interveners dispute the substance of the statement and it is therefore deemed uncontroverted.

29 The Government's characterization of the bad debt losses as "inflated" is not supported by the record cite and is disregarded. *See* footnote 26, *supra*.

30 Gary's and the Krause Interveners' attempted controversion does not meet the substance of the statement and is ineffective.

12. On July 29, 1992, the Tax Court disallowed Barton's and the other partnerships' losses and accrued interest deductions, stating:

> In summary, presented to us in this case is a chain or multi-layered series of obligations, stacked or multiplied on top of each other via the numerous partnerships to produce debt obligations in staggering dollar amounts, using a largely undeveloped and untested product, in a highly risky, very speculative, and non arm's-length manner in an attempt to generate significant tax deductions for investors. The transactions did not, and do not, constitute legitimate for-profit business transactions.
>
> Losses of the partnerships are disallowed under section 183, and accrued interest deductions are disallowed due to the non-genuine nature of the underlying debt obligations.

Krause, 99 T.C. at 175-76.

13. The Tenth Circuit Court of Appeals affirmed the decision in 1994, and the Supreme Court denied *certiorari* in 1995. *Hildebrand*, 28 F.3d at 1024; *cert. denied*, 513 U.S.1079 (1995).

14. The *Barton* case represented the first, "test case" for over 2,000 related, pending TEFRA partnership matters. Alleged total tax deficiencies at issue in connection with this group of related cases and TEFRA partnerships were in excess of $2 billion.

15. On January 15, 1997, the IRS notified Gary that it was auditing his 1994 Form 1040 and, on July 11, 1997, the IRS notified Gary that it was auditing his 1995 Form 1040.

16. On July 13, 1999, the IRS mailed Gary a Notice of Deficiency for tax years 1994 and 1995. The IRS assessed the deficiencies for 1994 and 1995 in December 1999.

17. Gary and the Commissioner settled their dispute with respect to Krause's 1975 through 1983 and 1986 tax years in February 2001. In accordance with the settlement, Gary agreed that he owed taxes for 1975, 1978 through 1983, and 1986.

18. In total, the IRS assessed federal income taxes, interest, and penalties in the following amounts and on following dates:

Year	Amount	Date Of Assessment
1975	$11,990.45	05/31/2001
1978	$393,919.32	05/31/2001
1979	$104,665.13	07/13/2001
1980	$178,438.54	07/13/2001
1981	$89,294.04	07/13/2001
1982	$711,092.52	05/31/2001
1983	$784,180.78	05/31/2001
1986	$40,460.99	07/13/2001
1994	$60,725.01	12/01/1999
1995	$239,267.18	12/01/1999

19. The IRS filed Notices of Federal Tax Lien against Krause in the Sedgwick County Courthouse in the State of Kansas on the following dates:

Tax Year	Date of Lien
1975	10/12/2001
1978	10/12/2001
1979	11/16/2001
1980	11/16/2001
1981	11/16/2001
1982	10/12/2001
1983	10/12/2001
1986	11/16/2001
1994	04/06/2001
1995	04/06/2001

20. Currently, with interest and penalties, Gary owes the United States about $3,000,000 for tax years 1975, 1978 through 1983, 1986, 1994, and 1995.

21. In December 1988, while the *Barton* Tax Court case was pending and while the IRS was auditing Gary's personal returns for 1975 through 1983 and 1986, Gary, as grantor, established the Krause Children's Trust No. I for the benefit of his eldest son, Drake Krause, and any other children that might be born as a result of his marriage to his then-wife, Teresa Briggs.[31]

31 Gary and Krause Interveners object to the Government's characterization that the KCT No. 1 was established "ostensibly" for the benefit of his son; the Court will disregard this characterization other than to note that the terms of the trust provide that it is for the benefit of the minor child. *See* footnote 26, *supra.*

22. In February 1989, Gary's father, Lawrence E. Krause, established two trusts, the Gary E. Krause Trust and the Krause Irrevocable Trust. Gary is the sole beneficiary of both trusts.[32]

23. On December 23, 1989, Gary, as grantor, established the Krause Children's Trust No. II for his sons Drake and Rick Krause.

24. In May 1990, Gary, as grantor, created the Krause Children's Trusts No. III, IV, and V for the benefit of his sons.

25. Gary's brother, Dr. Krause, is (and always has been) the named trustee for the Krause Children's Trusts, the Gary E. Krause Trust, and the Krause Irrevocable Trust.

26. Gary transferred the entities listed below to the Gary E. Krause Trust, of which he is (and was) the sole beneficiary.

Date	*Transferred to Gary E. Krause Trust*
July 26, 1989	Krause transferred 100% of the stock of Development Associates.
October 31, 1989	Krause transferred 100% of the stock of Federal Gasohol.

27. These transfers were made after the filing of the *Barton* Tax Court case in 1986 and after the IRS notified Krause about his personal audits between 1980 and 1985.

28. The Gary E. Krause Trust paid no consideration for either Federal Gasohol or Development Associates, which still owned real property in Reno County.[33]

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32 The Government's characterization that Gary "purportedly" established these two trusts is disregarded; both trusts identify Lawrence E. Krause as the grantor of the trusts and the Government does not challenge or refute the trusts' execution or Lawrence's signature with any record support. *See* footnote 26, *supra.*

33 The Court acknowledges Gary's and the Krause Interveners' attempted controversion of this fact on the basis that the GEKT bought the Federal Gasohol and Development Associates assets for their "book value"which happened to be zero. There is no legitimate factual distinction between paying "no consideration" and paying "book value" which is zero. Zero equals zero. This factual dispute is therefore not material and is disregarded. *See* footnote 24, *supra.*

29. Dr. Krause, the trustee, has no recollection of ever negotiating on behalf of the Gary E. Krause Trust its acquisition of Gary's company, Federal Gasohol, and never asked why Gary wanted to transfer Federal Gasohol to the Trust.

30. Gary exercised control over the assets of the Gary E. Krause Trust, including the operation of Federal Gasohol, without any oversight by Dr. Krause, and it was Dr. Krause's practice not to inquire about the use of the Gary E. Krause Trust's assets.[34]

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34 The Court's review of the record support cited by the Government -- Dr. Krause's deposition testimony on January 17, 2007 -- supports the statement of fact. At page 240, line 22 to page 241, line 1, Dr. Krause testified as follows:

> Q: Now, earlier you told me when I was asking you about the checks that, that it wasn't your practice to make inquiries in to how Gary spent the trust's assets; is that right?
> A: That's true.

And at page 241, line 20-25, Dr. Krause testified:

> Q: You didn't authorize specific withdrawals from the Gary E. Krause Trust every time Gary wanted to withdraw money from the trust, did you?
> A: I don't remember. If he asked me and if he did, I probably said yes. But I don't remember his asking.

Gary and the Krause Interveners controvert Fact No. 30 with an affidavit from Dr. Krause which states: "Gary Krause did not control the assets of the various trusts in issue in this case. I am sure I did inquire as to certain expenditures regarding the Gary E. Krause Trust, however at the time of my deposition I did not recall any specific inquiry. Gary Krause did in fact manage the business of Federal Gasohol when it became property of the trust." Dr. Krause's affidavit conflicts, at least in part, with his prior deposition testimony as it relates to the non-Federal Gasohol assets of the Gary E. Krause Trust.

The Court believes that Dr. Krause's affidavit is an attempt to create a sham fact issue and may be disregarded after applying the *Franks v. Nimmo* factors. *See* pp. 4-6, *supra.* It is not apparent from the record that Dr. Krause was cross-examined during his deposition testimony. However, Gary (a licensed lawyer) was present at the deposition and had the opportunity to cross-examine his brother about this line of testimony if he chose to do so. Secondly, there is nothing in Dr. Krause's affidavit to suggest that it is based on newly discovered evidence. Dr. Krause was at all relevant times, and still is, the trustee of the Gary E. Krause Trust. As the trustee of the Gary E. Krause Trust since its inception, Dr. Krause would have had access to the pertinent evidence at the time of his deposition, including who controlled the assets of this trust and whether he authorized withdrawals from the trust. Finally, Dr. Krause's deposition testimony does not suggest any confusion on his part and the questions were straightforward. His recall at the deposition was that "I don't recall his [Gary] asking." Now in his subsequent affidavit, Dr. Krause avers that Gary Krause did not control the assets of the various trusts and that his present recall is "I am sure I did inquire" as to certain expenditures regarding the Gary E. Krause Trust. Curiously, Dr. Krause does not describe or explain in his affidavit any specific inquiry he now recalls having been made but could not recall at the deposition. In short, Dr. Krause's affidavit does not explain or clarify his deposition testimony but instead, contradicts it. This portion of Dr. Krause's affidavit will be disregarded and Fact No. 30 will be deemed uncontroverted.

31. This Court has ruled that Federal Gasohol and the Gary E. Krause Trust are nominees of Gary Krause.

32. On September 1, 1992, Gary transferred his shares of FIMCO stock—a company he founded in 1980 — to C.N. Taylor, Krause's employee and other FIMCO shareholder.

33. This transfer was made within 40 days after the Tax Court disallowed Barton's and the related partnerships' losses and accrued interest deductions, *Krause*, 99 T.C. at 177-78, and within 2 years after the IRS issued Gary notices of deficiency for his personal Forms 1040 for tax years 1975-1983 and 1986.

34. Taylor did not pay Gary any consideration for the transfer, although each share had a par value of $1.[35]

35. Taylor signed a contract obligating him to transfer FIMCO to the Krause Irrevocable Trust—of which the Debtor is the sole beneficiary—upon Taylor's retirement.[36]

36. While C.N. Taylor was owner and president of FIMCO, Gary retained signing authority on the corporate bank account. The signature card for FIMCO's corporate checking account dated February 14, 2001 shows Gary as the president of FIMCO and the authorized signatory on the account.[37]

37. After Taylor retired, he complied with his contractual obligation and transferred FIMCO

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35 *See* Fact No. 28 and footnote 33, *supra.*

36 The Agreement containing this stipulation is dated February 8, 1993 (not 2003 as Taylor's affidavit suggests).

37 The Court disregards the Government's characterization of Taylor as the "nominal" owner and president of FIMCO. *See* footnote 26, *supra*.

to the Krause Irrevocable Trust. The date of Taylor's retirement is controverted.[38]

38. The Krause Irrevocable Trust paid no consideration for Taylor's transfer of FIMCO.[39]

39. Dr. Krause, the trustee, provided no oversight when the Krause Irrevocable Trust acquired FIMCO, and Dr. Krause stated that his brother, Gary, negotiated the transaction.

40. Dr. Krause testified that he did not know whether the FIMCO assets in the Krause Irrevocable Trust were spent wisely.[40]

41. Gary completely runs FIMCO without any oversight from Dr. Krause as Trustee of the Krause Irrevocable Trust, the owner of FIMCO.[41] For instance, FIMCO has contributed at least $215,120.44 to a media company, Live Wire Media Partners LLC, since 2003.[42] Dr. Krause played no role in evaluating this transaction, but rather delegated the entire responsibility for this acquisition and all of FIMCO's business dealings to Gary Krause.

42. This Court has ruled that FIMCO and the Krause Irrevocable Trust are nominees of Gary Krause.

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38 The Government states that Taylor retired in 2002 while Gary and the Krause Interveners state that Taylor left FIMCO in 2001. It is not apparent to the Court that this factual dispute is material to the outcome, other than perhaps reflecting on the degree of Gary's control of FIMCO while owned by Taylor.

39 *See* Fact No. 28 and footnote 33, *supra.*

40 Gary and the Krause Interveners do not controvert this statement but "object" to Dr. Krause's testimony as "speculative." The Court does not believe that Dr. Krause's testimony about what he knows is speculation. Moreover, Dr. Krause (who appeared at the deposition pro se) or Gary could have objected to the question as calling for speculation. Having failed to object at the deposition to the form of the question or answer, the objection is deemed waived. *See* Fed. R. Civ. P. 32(d)(3)(B); *State Farm Mut. Auto. Ins. v. Dowdy ex rel. Dowdy*, 445 F.Supp. 2d 1289, 1293 (N.D. Okla. 2006); *Order of United Commercial Travelers of America v. Tripp*, 63 F.2d 37, 39-40 (10th Cir. 1933).

41 The Court disregards the Government's characterization of the Trust as "nominal owner" of FIMCO. *See* footnote 26, *supra.*

42 Krause denies that FIMCO has contributed more, though the financial records of Live Wire, Exhibit 38, belie that assertion. The Court deems any contributions in excess of the $215,120 to be controverted.

43. By at least 1990, Dr. Krause, the trustee of both the Gary E. Krause Trust and the Krause Irrevocable Trust knew that Gary Krause had tax disputes with the IRS.[43]

44. On November 29, 1989, Krause transferred the assets listed below to his wife Briggs.

- Krause's interest in his home at 37 N. Mission Road.
- A promissory note between Gary E. Krause and Federal Gasohol, whereby Federal Gasohol agreed to pay Krause $695,161.86.
- A promissory note between Gary E. Krause and Rural Housing Associates, whereby Rural Housing agreed to pay Krause $188,938.94.
- A promissory note between Gary E. Krause and Liberal Commons Limited, whereby Liberal Commons agreed to pay Krause $189,676.18.
- A promissory note between Gary E. Krause and Barton, whereby Barton agreed to pay Krause $75,000.00.
- A promissory note between Gary E. Krause and Kanzoil Corp. whereby Kanzoil agreed to pay Krause $20,072.00.
- A security interest in Krause's general partnership interest in two housing complexes, Great Bend Housing Duplex Ltd. and Hutchinson Duplex Housing Ltd.
- Krause's or Kanzoil's ownership interest in Quivira—which holds the hunting lodge.

45. Additionally, on June 27, 1990, Krause transferred to Briggs a promissory note between Gary E. Krause and Norton Commons Ltd., whereby Norton Commons agreed to pay Krause $3,276.37. On December 1, 1990, Krause transferred to Briggs a promissory note between Gary E.

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43 This fact essentially summarizes Dr. Krause's deposition testimony and parallels this Court's recollection of his previous live testimony in court. Krause's attempted controversion of this fact is, at best, one of semantics.

Krause and Liberal Commons Ltd., whereby Liberal Commons agreed to pay Krause $37,015.44.

46. Briggs could not remember any details of the transfer of Quivira and she characterized the remaining transfers as gifts.

47. Gary testified that the only consideration Briggs provided for these assignments was love, devotion and motherhood (the commitment to raise "his" two sons).[44]

48. By 1989, Briggs knew that Gary Krause was embroiled in litigation with the IRS.[45]

49. The corporate annual reports for Quivira indicates that, in 1999, Briggs's interest in Quivira was transferred to the Gary E. Krause Trust.[46]

50. Despite huge tax debts and little or no taxable income on his 1998 through 2004 tax returns, Krause continued to support his family financially.

51. Krause's wife, Briggs, did not work outside the home after 1990 and suffered from scleroderma, a debilitating medical condition, so the family's financial support did not come from Briggs.[47] Additionally, Krause's sons, born in 1988 and 1989 are both full-time students, and, until this year, both were minors, so the family's financial support did not come from the minor sons.

52. Despite subpoenaing banks (including Bank of America, Commerce Bank, and InTrust

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44 Krause's purported controversion – additional adjectives for "love and affection" – is not material. *See* footnote 24, *supra*.

45 Despite Krause's attempted controversion, the Government's statement is a fair gloss of Briggs' testimony, to wit, "I knew he was in lawsuit with the IRS."

46 In response, Gary and the Krause Intervenors cite to Dr. Krause's affidavit where he now declares that the interest "was ultimately transferred to Drake and Rick Krause" and states that the annual report (which he signed as President), is in error. This explanation does not "controvert" the fact of what the corporate annual states.

47 Gary and the Krause Interveners, relying on Gary's declaration, controvert Briggs own testimony that she did not work outside the home after 1990, contending that she promoted her 'Cookie Diet' business. They do not however, controvert that the family's financial support did not come from Briggs. This controversion is not material. *See* footnote 24, *supra.*

Bank) and requesting personal bank account records from Gary, the United States received no evidence of Krause maintaining any personal bank accounts from 1986 through 2005, despite Gary's protestations to the contrary.

53. Krause filed pleadings in this case stating that he has historically paid his family's living expenses through accounts maintained by the Family Trusts, the Children's Trusts, FIMCO, and Federal Gasohol.[48]

54. Briggs, Krause's ex-wife, filed pleadings in her 2000 divorce case against Krause that stated that Krause "routinely borrows funds from the [Children's] Trusts to pay [his] personal and household expenses."

55. In the divorce proceedings , Briggs also stated that Krause "withdraws funds from the Trusts for his personal use by directing the trustee of the Trusts to make distributions to [Briggs' and Krause's] minor children and to [Krause's] personal friends; such funds are then given to [Krause] who uses them to pay his personal and household expenses."

56. Shortly before June 1991, at Krause's instance, and with his assistance, Briggs opened a Merrill Lynch account in her name with a deposit of a $150,000 check.[49]

57. Briggs did not manage or pay attention to the Merrill Lynch account.

58. Shortly before February 1992, Krause assisted Briggs in opening a Paine Webber account in Briggs's name.

59. Briggs's only responsibility over this account was to sign the checks; Gary would write

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48 In controversion, Krause asserts that he paid family expenses from distributions from the Gary E. Krause Trust, not "historically" from FIMCO, but supplies no support for this comment beyond his self-serving Declaration. This controversion is inconsistent with the evidence previously adduced in this case that Krause paid numerous family expenses with checks drawn on a FIMCO account.

49 The controversion, if any, is not material.

or type a majority of the checks for the Paine Webber account and decide what bills were paid and when.[50]

60. The handwriting on the monthly statements for the Paine Webber account is Krause's handwriting.

61. Briggs left the monthly statements, deposit slips, and cancelled checks for both the Paine Webber and Merrill Lynch accounts at the Oneida residence after divorcing Gary.

62. Krause entities made deposits totaling $204,803 into Briggs's Merrill Lynch Account:[51]

- On June 29, 1991, Energy Associates, Krause's wholly owned company, deposited $150,000.
- On August 22, 1991, Norton Commons and Liberal Commons made deposits of $3,276 and $11,851.
- On August 27, 1991, Energy Associates made a $39,676 deposit.

63. Krause entities made deposits totaling $664,615.10 into Briggs's Paine Webber Account:[52]

DATE	**AMOUNT**	**PAYOR**
11/24/1993	$99,000.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 1;
11/24/1993	$16,000.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 1;
12/17/1993	$50,000.00	Hutchinson Commons, Ex. 51 at 2;
12/31/1993	$7,425.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 3;
12/31/1993	$1,200.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 3;

50 Krause's controversion suggests that he acted only at Briggs' request, but her deposition testimony clearly sets out that she had acceded control of family matters financial to him and that he acted accordingly.

51 Gary and the Krause Interveners do not dispute the amount of the deposits; they simply characterize the "deposits" as payments made to Briggs pursuant to notes. This explanation does not controvert the fact of the deposits but is more in the nature of a characterization of the deposits which will be disregarded. *See* footnote 26, *supra*. To the extent the explanation is an effective controversion, it is not material and will be disregarded. *See* footnote 24, *supra.*

52 *See* footnote 51, *supra.*

3/16/1994	$19,800.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 4, 6;
3/16/1994	$9,164.31	Hutchinson Duplex Housing Ltd., Ex. 51 at 5-6;
5/12/1994	$1,800.00	Great Bend Duplex Housing, Ltd., Ex. 51 at 7;
5/12/1994	$11,137.50	Great Bend Duplex Housing, Ltd., Ex. 51 at 7;
1/10/1995	$88,938.94	Rural Housing Associates, Ex. 51 at 8;
11/24/1995	$97,415.37	Rural Housing Associates, Ex. 51 at 9-10;
1/12/1996	$18,325.00	Norton Commons, Ex. 51 at 11;
1/16/1996	$18,062.00	Liberal Commons, Ex. 51 at 11;
10/11/1996	$14,606.85	Liberal Commons, Ex. 51 at 12;
10/11/1996	$12,236.00	Norton Commons, Ex. 51 at 12;
3/13/1998	$142,351.73	Drake Enterprises/Sale of Home; Ex. 51 at 13-14;
4/23/1998	$23,393.00	Norton Commons, Ex. 51 at 15;
10/5/1998	$1,378.80	Drake Enterprises, Ex. 51 at 16;
10/15/1999	$18,109.09	Norton Commons, Ex. 51 at 17;
10/29/1999	$12,651.45	Kanzoil, Ex. 51 at 18;
12/1/1999	$1,539.06	Development Assoc., Ex. 51 at 19-20.

64. From 1991 through the present, Briggs never had an ownership interest in Energy Associates or Development Associates. Krause granted Briggs security interests in his interests in Great Bend Duplex Housing, Ltd. and Hutchinson Duplex. Briggs held promissory notes from Rural Housing Associates, Kanzoil, Norton Commons, and Liberal Commons. The security interests and notes were conveyed from Krause to Briggs in 1989 or 1990.

65. The money in the Payne Webber account was used, in part, to pay Krause's and Briggs's living expenses.

66. Additionally, the money in the brokerage accounts was used, in part, to fund the Children's Trusts. Briggs filed pleadings in her 2000 divorce case against Krause, which stated that "Krause has historically funded the [Krause Children's] Trusts using the following method: [Krause] deposited funds obtained from an unknown source in a Merrill Lynch U.S. Treasury Money Fund or a Paine Webber Resource Management account that is marital property but is held in the name of [Briggs]. Krause then forced [Briggs] to sign blank checks drawn on such account, which [Krause] completed by making such checks payable to one or more of the Trusts in amounts of

[Krause]'s choosing. [Krause] either handwrote or typed all information regarding the payee and the check amount on the blank checks that had been signed by [Briggs]."[53]

67. The following funds were transferred from one of the brokerage accounts to an account in the name of one of the Children's Trusts:

KRAUSE CHILDREN'S TRUST I

DATE	**AMOUNT**	**PAYOR**
12/30/1993	$4,000	Briggs's Paine Webber Account
3/31/1998	$50,000	Briggs's Merrill Lynch Account
3/31/1998	$40,000	Briggs's Merrill Lynch Account
3/31/1998	$50,000	Briggs's Paine Webber Account
12/6/1999	$30,000	Briggs's Paine Webber Account

KRAUSE CHILDREN'S TRUST II

DATE	**AMOUNT**	**PAYOR**
4/6/1998	$90,000	Briggs's Merrill Lynch Account
4/6/1998	$50,000	Briggs's Paine Webber Account

KRAUSE CHILDREN'S TRUST III

DATE	**AMOUNT**	**PAYOR**
4/6/1998	$90,000	Briggs's Merrill Lynch Account
4/6/1998	$50,000	Briggs's Paine Webber Account

68. During the five years preceding the bankruptcy and after Krause's separation and divorce from Briggs, FIMCO, which is owned by the Krause Irrevocable Trust, paid his family's personal and home expenses, such as phone, electricity utilities, insurance, country club

53 In controversion, Gary and the Krause Interveners characterize the funding of the Children's Trusts from the brokerage accounts as gifts or loans from Briggs. That characterization will be disregarded. *See* footnote 26, *supra.*

membership, medical expenses, computers, and lawn care.[54]

69. Also, in April 2005, FIMCO "purchased" automobiles for Krause's sons Drake and Rick. The automobile titles identify the owner of each automobile as FIMCO.

70. Krause did not report the living expenses contributed by FIMCO, the Trusts, and Federal Gasohol as income on his federal income tax returns.[55]

71. In the early eighties, Krause did not report the personal expenses paid by his entity Energy Associates. In a Notice of Deficiency dated October 20, 2990, the IRS stated that "personal expenses of Gary E. Krause were paid by Energy Associates, Inc., ... These payments are determined to constitute taxable income to Gary E. Krause and taxable income is increased accordingly."[56]

72. Krause's home at 7711 Oneida was purchased by Briggs in September of 1995 with $296,675 from the Paine Webber Account. Briggs stated that she acquired the money to purchase 7711 Oneida from "payments of notes that were gifted to her from Gary."[57]

73. On September 22, 1995, within weeks of the closing, Briggs provided the Krause

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54 Krause controverts this statement by stating that FIMCO in fact paid many of Krause's individual and family expenses during this time, pursuant to various agreements. This explanation does not present a disputed fact and the controversion is not material.

55 In response, Krause argues that he was not required to report distributions from the Gary E. Krause Trust as income and challenges the Government's characterization of the items as "living expenses." However characterized, the items paid to Gary were not reported as income; this fact is uncontroverted.

56 According to Gary, he negotiated these matters with the IRS and many were resolved in his favor. This explanation, however, does not controvert the statement regarding what the notice of deficiency stated.

57 The Government's characterization that Briggs "ostensibly" purchased the Oneida property is disregarded. *See* footnote 26, *supra.*

Children's Trust No. V with a "mortgage" on 7711 Oneida for $305,000.[58] Title to the property remained in Briggs's name and the Krause Children's Trust No.V, as the mortgagee, filed the mortgage statement with Sedgwick County.

74. Briggs never received $305,000 from Krause Children's Trust V, and she never made any payments on this "mortgage."

75. In March 1998, approximately three years after the purchase of the Oneida home, Drake Enterprises, Inc. sold the family home at 37 N. Mission Road. At the time of the sale, Briggs had previously transferred title to the home in January 1996 to Drake Enterprises, which was owned by Briggs. In March of 1998, Krause, acting as President of Drake Enterprises, granted a limited power of attorney to one G. Nelson Van Fleet to close on the sale of the Mission property for Drake Enterprises. The $142,351.73 proceeds from the 1998 sale of the 37 N. Mission Road home were deposited into Briggs' Paine Webber account.

76. Shortly after depositing the proceeds of the sale into Briggs' Paine Webber account, on March 31, 1998, three checks for $50,000 were drawn on this account and made payable to the Krause Children's Trusts I, II, and III.

77. On February 15, 1999, Dr. Krause signed and issued check in the amount of $64,816 from the Krause Children's Trust I account to Briggs for the Oneida property.

78. Briggs deeded 7711 Oneida to the Krause Children's Trust I on February 11, 1999.

79. As of 2000, Krause claims that he and FIMCO "lease" space at 7711 Oneida from Polo Executive Rentals; however, Polo does not exist as an entity separate from any of the other entities

58 The Government states in its uncontroverted fact that "the KCTV provided Briggs" with a mortgage. The mortgage attached as record support, however, shows that Briggs granted a mortgage in favor of KCTV. Krause asserts that this mortgage was designed to "secure" a "gift" of $305,000 to the KCT V. This may explain, but does not controvert, this statement of uncontroverted fact.

and is simply a name on a bank account.[59] Krause drafted the leases, which Dr. Krause signed on behalf of Polo Executive Rentals. Neither Krause nor FIMCO paid rent to Polo Executive Rentals on a regular basis. And, although Krause listed Polo Executive Rentals as a creditor, this purported entity never filed a proof of claim.[60]

80. As of July 2005, Krause's tax liabilities for 1975, 1978, 1979, 1980, 1981, 1982, 1983, 1986, 1994, and 1995, remained unpaid.

81. On July 8, 2005, IRS Revenue Officer Waterbury served a collections summons on Dr. Krause as trustee to appear before her at the IRS offices in Wichita on August 5, 2005 and provide, *inter alia*, "all records in [his] possession pertaining to the following trusts: Gary E. Krause Trust, Krause Children's Trust No. I, Krause Children's Trust No. II, Krause Children's Trust No. III, Krause Children's Trust No. IV, and Krause Children's Trust No. V."

82. After receiving the summons, Dr. Krause contacted Gary Krause and asked him how to respond.

83. Gary Krause advised Dr. Krause to hire attorney Brian Grace to respond to the summons. 84. Rather than comply with this summons, Dr. Krause filed a Petition to Quash Summons in the United States District Court for the District of Kansas on July 28, 2005. *Richard D. Krause v. United States*, (D. Kan. Case. No. 05-1243-WEB).

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59 Krause attempts to controvert the nature of Polo Executive Rentals with a subsequent affidavit from Dr. Krause where Dr. Krause now avers that Polo Executive Rentals is a sole proprietorship with the Krause Children's Trust I as the proprietor. The Court will disregard the conflicting affidavit from Dr. Krause's previous testimony. *See* discussion of sham affidavits, *supra* at pp. 4-5. The Court also notes that Gary's previously-filed asset disclosures in this proceeding identified Polo Executive Rentals as "the name on a checking account . . . owned by the Krause Children's Trust Number 1." It was not identified as a separate sole proprietorship and does not have any assets. *See* Dkt. 98, p. 5.

60 The balance of Krause's attempted controversion of this fact is not responsive to the Government's statement of fact.

85. Approximately one week later, on August 5, 2005, Dr. Krause signed a deed which conveyed 7711 Oneida from Krause Children's Trust I to a company named PHR, LLC.[61] The Operating Agreement for PHR, LLC was signed two days later, on August 7, 2005.

86. Dr. Krause left all the details of the PHR transaction to Gary.

87. This Court has already ruled that PHR, LLC holds title to the Oneida property as a nominee of Gary Krause.

88. Dr. Krause voluntarily dismissed his Petition to Quash on October 20, 2007 after the United States filed a Petition to Enforce Summons on September 27, 2005. *See United States v. Richard Krause, et al.*, (D. Kan. Case No. 05-MC-113).

89. Less than two weeks later, on October 10, 2005, the Debtor sought relief from the IRS collection summons by filing a Chapter 7 bankruptcy petition.

90. Gary Krause executed checks on the Merrill Lynch Account of the Krause Children's Trust I that identified him as a co-trustee of the Krause Children's Trust I on those checks.

91. Although he made some investment decisions regarding certificates of deposits, Dr. Krause was an essentially passive trustee for the Children's Trusts, and told his brother Gary Krause that he wanted it that way.

92. Dr. Krause was unaware of who contributed money to the trusts or the sources of that money, describing it as "stick your head in the sand and then you don't know what is going on."

93. Dr. Krause does no accounting on behalf of the trusts and testified that he keeps no

61. The entity PHR, LLC is also referred to in documents as PRH, LLC (Operating Agreement) and PHC, LLC. The Court understands that Krause intends this entity to be one and the same, notwithstanding the name variations. For the sake of consistency, the Court will refer to the entity as PHR, LLC.

ledgers or records beyond aggregating bank statements in binders.

94. Dr. Krause keeps no computer records of the trust activity.

95. Dr. Krause simply receives the bank statements and forwards copies of them to Gary Krause.

96. Whenever Gary Krause needed a check from the Children's Trusts' accounts, Dr. Krause would "grab the checkbook out, I sign it and I take it to Gary and I say, fill it out. I don't have to look at it."[62]

97. Dr. Krause never objected to or disagreed with Gary Krause about expenditures of any of the trust's funds.

98. Dr. Krause did not exercise "a lot" of independent oversight over how the trusts' funds were spent. Dr. Krause did make investments in certificates of deposits and recommended the purchase of gold coins.

99. Gary Krause or C.N. Taylor, not Dr. Krause, prepared the annual tax returns for all of the trusts.

100. Dr. Krause never reviewed the trusts' tax returns for accuracy, despite signing them.

101. Gary Krause was responsible for selecting the private schools that Drake and Rick Krause attended, even though the tuition for these schools was paid from the Children's Trusts Accounts.

102. Krause used $13,125.18 from the Krause Children's Trust I account in Southwest

62 In controversion, Krause places this testimony in context, explaining that this testimony pertains to the Children's Trust purchasing a car for Gary, which Dr. Krause admitted would have been improper and explained must have been due to his mistake in grabbing the wrong checkbook. Dr. Krause's testimony explained his practice of signing a check on the Children's Trust and giving it to Gary to fill out. This part of the statement was not controverted.

National Bank in February 2000 to purchase a car from his friend, Andrew Peressin, for Gary Krause's personal use.[63]

103. In 1999, while his sons were age 10 and 11, Gary Krause used Krause Children's Trust I to provide $25,000 in financing to Dream Swing Corp., a corporation set up by Gary Krause to market a product used to help improve a person's golf swing. Dr. Krause did not run the investment by any independent financial advisors before making it.

104. Between November 2004 and August 2005, Dr. Krause signed six checks from the Children's Trust I bank account that Gary Krause drafted and made payable to Federal Gasohol, nominally owned by the Gary E. Krause Trust for which Gary Krause was the sole beneficiary, for $8,920.12, $5,058.73, $2,831.62, $2,282.42, $6,288.43, and $14,700.00. At his deposition, Dr. Krause did not know why these checks were paid to Federal Gasohol, and admitted that he did not exercise much independent oversight on how the money from Children's Trust I was spent.[64]

105. As of May 24, 2005, the account at Southwest National Bank in the name of the Children's Trust I has $35,084.78.

106. As of July 25, 2005, the account at Southwest National Bank in the name of the Children's Trust II has $2,195.56. As of July 30, 2005, Children's Trust II has two CD's a $104,167.07 at Farmer's Bank & Trust, and, as of August 4, 2005, $87,324 at First Kansas Bank.

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63. In controversion, Krause contends that the check was mistakenly drawn on the Krause Children's Trust I rather than the Gary E. Krause Trust due to Dr. Krause using the wrong checkbook. *See* footnote 62, *supra*. According to Dr. Krause's supporting affidavit, he recalls Gary executing a promissory note and repaying the sum to Krause Children's Trust I. While this may explain the check and repayment of the funds, it does not controvert the fact that Gary in fact purchased a car using funds from the Krause Children's Trust 1.

64 Since his deposition, Dr. Krause has reviewed documentation and states in his affidavit that the checks in questions were used to reimburse Federal Gasohol for expenses of the boys and roof replacement on the Oneida property. While this provides Dr. Krause's explanation for the checks, it does not controvert the fact that the Children's Trust paid six checks to Federal Gasohol. *See* discussion of sham affidavits, *supra* at pp. 4-5.

107. As of June 24, 2005, the account at Southwest National Bank in the name of the Children's Trust III has $20,503.19. As of July 20, 2005, Children's Trust III has a CD at Farmer's Bank & Trust worth $78,236.26.

108. Quivira Associates holds title to the Krause brothers' hunting property.[65]

109. Development Associates, which was nominally owned by the Gary E. Krause Trust prior to this Court's sanctions order, holds title to real property in Reno County.

110. PHR, LLC, which was nominally owned by one of the Children's Trusts prior to this Court's sanctions order, holds title to the 7711 Oneida house.

111. As of August 2005, FIMCO has a bank account at Commerce Bank with a balance of at least $1,324.11.

112. As of the most recently listed disclosure date, Federal Gasohol has the following bank accounts and investment accounts with a total balance of at least $70,524.31:

STATEMENT DATE	**BANK/INVESTMENT FIRM**	**BALANCE**
3/31/2006	Merrill Lynch	$24,499.03, Ex. 78 at 1;
2/28/2006	TerraNova Trading, LLC	$7,545.00, Ex. 78 at 2;

65 In the Krause response to the Government's Fact No. 44, it is disputed that Gary ever owned an interest in Quivera and that he transferred that interest to Briggs. *See* Dkt. 446, ¶ 44; Dkt. 450, ¶ 44. However, in Gary's and the Krause Intervenors' own summary judgment motions, (*i.e.*Statement of Fact No. 19), they assert that Gary transferred "all of his shares of stock in Quivira" to Briggs on November 29, 1989. *See* Dkt. 411, ¶ 19; Dkt. 401, ¶ 19. The annual reports of Quivira (signed by Dr. Krause as president) show 4,000 shares or 1/3 original ownership by Kanzoil (100% owned by Gary), transferred to Federal Gasohol (100% owned by Gary), transferred to Gary, transferred to Briggs, and transferred to the Gary E. Krause Trust. *See* Ex. 9, Dkt. 406. Krause contends that the annual reports are erroneous and submits an affidavit to refute. A controversion of fact based upon a self-serving affidavit is insufficient to controvert a statement of fact on summary judgment. *Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995)). *See also, Fanslow v. Chicago Mfg. Center, Inc.*, 384 F.3d 469, 483 (7th Cir. 2004)("a plaintiff cannot defeat summary judgment by submitting a self-serving affidavit that contains the bald assertion of the general truth of a particular matter")(internal quotation omitted). The Court is inclined to disregard the affidavits for purposes of summary judgment, particularly since the annual reports were signed by Dr. Krause and non-movants have affirmatively asserted as uncontroverted fact that Gary transferred his Quivira stock to Briggs. The real dispute appears to be whether Briggs subsequently transferred the stock to the Gary E. Krause Trust or her sons, Drake and Rick. That remains controverted. *See also*, ¶ 49, *supra.*

3/31/2006	The Vanguard Group	$14,073.62, Ex. 78 at 3;
3/31/2006	Charles Schwab	$1,629.50, Ex. 78 at 4;
10/31/2005	Commerce Bank	$12,712.66, Ex. 78 at 5-6;
3/31/2006	UBS Financial Services, Inc.	$8,566.19, Ex. 78 at 7-10;
4/10/2006	Southwest National Bank	$1,498.31, Ex. 78 at 11.

113. The Children's Trusts I, II, III, and IV own life insurance policies.

Gary's and Krause Interveners' Additional Statements of Fact

The Court's determination with regard to Gary's and the Krause Interveners' additional statements of uncontroverted fact are set out below. The Court notes with interest that many of Gary's and the Krause Interveners' statements of fact are substantially the same.

In the first three statements of additional "fact," Krause complains about the manner in which Dr. Krause's deposition was conducted, essentially urging the Court to disregard his deposition testimony. As record support for these statements, Krause points not to the deposition transcript citing examples of his complaints, but submits an affidavit from Dr. Krause. The Court has previously addressed the matter of Dr. Krause's affidavit and has concluded that these belated complaints regarding his deposition are without merit.[66] To the extent these statements can be construed as statements of substantive fact, the only statements that are uncontroverted are:

114. The Government deposed Dr. Krause and that Dr. Krause appeared at the deposition unrepresented.

115. Gary attended Dr. Krause's deposition; Gary had the right and opportunity to cross-examine Dr. Krause.

116. The Government examined Dr. Krause regarding expenditures from the Children

66 *See* pp. 4-6, *supra.*

Trusts.[67]

117. Briggs deeded the Oneida Court residence to the Krause Children's Trust I in 1999.

118. At times during 1999, the Krause family resided in California.[68]

119. When the Krause family was in California, the Oneida premises were vacant.

120. A lease was entered into between Polo Executive Rentals and FIMCO on the Oneida property.[69]

121. Another lease was entered into between Polo Executive Rentals and Gary Krause on the Oneida property.[70]

122. When Gary and Briggs returned from California, Dr. Krause did not enforce the lease agreement between the Polo Executive Rentals and Gary.

123. Krause Children's Trust I, II, and III and the Gary E. Krause Trust have filed and paid, if required, federal and state income taxes from 1989 through 2004.

124. Gary transferred his shares of FIMCO to C.N. Taylor, Jr. in 1992. Taylor transferred his stock to the Krause Irrevocable Trust.[71]

125. The Children's Trusts made a transfer to Gary for the purchase of an automobile.[72]

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67 These facts are more in the nature of procedural facts and are not material to the outcome of this case. *See* footnote 24, *supra.*

68 In controversion, the Government states that the Krause family did not live together as a family unit at all times they lived in California during 1999. This disputed fact is not material. *See* footnote 24, *supra.*

69 *See* Fact No. 79, *supra.*

70 *See* Fact No. 79, *supra.*

71 *See* Fact Nos. 32-37.

72 *See* Fact No. 102, *supra*.

126. The Children's Trusts made no loans to Federal Gasohol.[73]

127. The Children's Trusts only issued one check to FIMCO.

128. Dr. Krause retained Gary to prepare tax returns for the trusts.

129. When Briggs transferred 37 North Mission to Drake Enterprises in 1996 she was the 100% stockholder of Drake Enterprises.[74]

Analysis and Conclusions of Law[75]

1. 11 U.S.C. § 523(a)(1)(C) Exception from Discharge

The Government seeks summary judgment on its first cause of action, that Krause's substantial tax debt should be excepted from discharge under § 523(a)(1)(C) of the Bankruptcy Code. That subsection excepts from discharge any debt which is a tax (1) with respect to which the debtor made a fraudulent return or (2) which the debtor has willfully attempted to evade or defeat in any manner. While the Government alleges both prongs of § 523(a)(1)(C) in the final pretrial order, it focuses on the willful evasion prong in its summary judgment brief.[76] The Court will nonetheless address both aspects of § 523(a)(1)(C) as it gives readers valuable background regarding Krause's tax debt.

There are no Tenth Circuit cases addressing the fraudulent return aspect of § 523(a)(1)(C), but there are numerous cases in other circuits. In general, courts dealing with fraudulent returns ask these questions. First, were the taxes underpaid? Second, did the taxpayer/debtor know that his

73 The Children's Trusts wrote six checks payable to Federal Gasohol. *See* Fact No. 104, *supra.*

74 *See* Fact No. 75, *supra*.

75 In its summary judgment analysis of the Government's claims the Court will refer to the Krause Children's Trusts I, II, III, IV, or V as the "KCTs."

76 *See* Dkt. 407, p. 27-30.

return or returns contained materially false information? Third, did the taxpayer intend to evade taxes by his returns?[77]

This Court has reviewed at length the Tax Court's opinion in Krause's challenge to the deductions disallowed by the IRS and the resulting tax liability.[78] The Tax Court findings of fact are lengthy, but may be summarized to this extent. In the early 1980's, at a time before the enactment of the Tax Equity and Fairness Reform Act of 1985 (TEFRA), numerous promoters took advantage of the turmoil of the worldwide oil and gas markets to sell shares of investment vehicles predicated on the utilization of new and unproven technologies to develop previously unprofitable oil and gas properties. As the Tax Court notes in its opinion, these entities were highly layered and their debt was structured in a manner to guarantee the greatest possible tax benefits to the investors without any real or legitimate profit motive. Krause acted as the tax matters partner for one of these entities and, in fact, his case was a "test case" under TEFRA concerning the legitimacy of such promotions. The Tax Court concluded that the partnerships in which Krause was involved were devised without any legitimate or honest profit motive and that the debts upon which their deductions (and hence, the deductions taken by the investors) were based, were shams. The Tax Court noted that Krause had extensively researched these partnerships and the technologies in which they invested before becoming the tax matters partner of the entities. In assessing these taxes and penalties, the Tax Court declined to enhance Krause's taxes for negligence or intentional disregard of regulations as it could have done under Internal Revenue Code (I.R.C.) § 6653. Nor did it find that Krause and the partnerships had filed returns overstating the value of their assets, another

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77 *See In re Burgess*, 199 B.R. 201, 206 (Bankr. N.D. Ala. 1996).

78 *Krause v. Commissioner*, 99 T.C. 132 (1992), *aff'd sub. nom., Hildebrand v. Commissioner*, 28 F.3d 1024 (10th Cir. 1994) *cert. denied* 513 U.S. 1079 (1995).

ground for tax enhancement under I.R.C. § 6659. While it is apparent from the Tax Court's opinion that the businesses in which Krause was involved and that generated his massive tax debt were likely shams devised without any profit motive, no actual fraud is attributed to him, nor is it asserted that the returns he filed as tax matters partner were false per se.

On summary judgment, this Court is required to resolve any disputed facts or possible inferences in favor of the non-moving party based upon the uncontroverted facts. There is simply no showing at this point that Krause's returns were fraudulent, although it is apparent that these partnerships initially under-reported taxes and that Krause, acting as tax matters partner, intended to limit his investors' tax liability to the greatest extent. In the absence of a showing of fraud that is apparent from the current record before it, the Court cannot conclude that the Government is entitled to summary judgment under § 523(a)(1)(C) on the basis that Krause's returns were fraudulent.

This then requires the Government to show that, based upon the uncontroverted facts, the Court can find as a matter of law that Krause willfully evaded or defeated his tax obligations in the course of the collection process. In *Dalton v. I.R.S.*, the Court of Appeals held that mere non-payment of one's taxes is not sufficient to demonstrate the evade/defeat prong of § 523(a)(1)(C).[79] Instead, a court is to consider the totality of the circumstances and may find willful evasion of taxes where it is shown that the debtor's actions are voluntary, conscious, knowing and done with intent to evade collection.

This Court can safely conclude that all of Krause's conduct in the "arrangement" of his assets beginning in 1989 was voluntary, conscious, and knowing. It may well be that at trial the

79 77 F.3d 1297, 1301 (10th Cir. 1996).

Government will easily demonstrate by a preponderance of the evidence that Krause did so with intent to evade or defeat his tax debt. However, on summary judgment, courts do not weigh evidence. There must be no doubt of his intent whatever and, while many of the transactions are highly suspicious and would support an inference of willful evasion, some have at least facial legitimacy (the pre-nuptial agreement and creation of the KCTs, for instance) from which a competing inference could be drawn. While a court weighing evidence at trial and assessing witness credibility may infer a willful attempt to evade or defeat taxes, this Court cannot do so on summary judgment.[80] Accordingly, summary judgment must be denied on the Government's § 523(a)(1)(C) claim.

2. Fraudulent Transfer or Conveyance Claims

The Government's and the Trustee's motions for summary judgment on the fraudulent conveyance claims must succumb to the same fate. Whether the transfers attacked by the Government here[81] are fraudulent requires the Court to assess the uncontroverted facts in light of the badges of fraud under Kansas common law[82] or the Kansas Uniform Fraudulent Transfers Act ("KUFTA")[83] to determine whether the transfers were made with the intent to hinder, delay or

80 From what is presented in the summary judgment papers, Krause has proffered plausible explanation for at least some of the transactions. When the Court can draw reasonable inferences from the uncontroverted facts in favor of the non-movant, summary judgment is improper. *See Dayton Hudson Corp. V. Macerich Real Estate Co.*, 812 F.2d 1319, 1322-23 (10th Cir. 1987) (Summary judgment not appropriate where different, ultimate inferences may be drawn.); *Thomas v. U.S. Dept. Of Energy*, 719 F.2d 342, 344 (10th Cir. 1983) (Summary judgment not appropriate if facts support an inference whereby the non-movant might prevail.).

81 The Government lists the subject transfers as follows: transfer of ownership of Federal Gasohol and Development Associates to the Gary E. Krause Trust; transfer of ownership of FIMCO, ultimately to the Krause Irrevocable Trust; transfer of 7711 Oneida property (the family home) to KCT I, and ultimately to PHR, LLC (owned by KCT I, II and IV); transfer of $450,000 from Briggs Paine Webber and Merrill Lynch accounts to the KCTs; transfer of 50% Quivira interest to the Gary E. Krause Trust. *See* Dkt. 407, p. 34.

82 *See Mohr v. State Bank of Stanley*, 244 Kan. 555, 568, 770 P.2d 466 (1989) (6 badges of fraud).

83 KAN. STAT. ANN. § 33-204(b) (2000) (11 statutory non-exclusive badges of fraud).

defraud the IRS. Although the Court is most interested in the transfers that made their way to the KCTs, the other transfers cited by the Government do suggest a pervasive pattern by Gary to rid himself of assets and will be considered by the Court here to the extent it bears generally on Gary's intent.[84] The difficulty in assessing the transfers in this case is the multiple layers of transfers before the asset in question reached its ultimate "resting place" and the apparent use of intermediate transferees as conduits. While the initial transfer may appear quite innocuous, the tracing of the asset to subsequent transferees arouses considerable suspicion.

The uncontroverted facts do support the presence of a number of the badges of fraud: transfers to relatives (Briggs); retention of control of the property after the transfer (FIMCO and Federal Gasohol); timing of transfers (while Gary and the IRS were engaged in tax controversy or after tax debt was established); and transfers without consideration. Other badges, however, are either inapplicable in the context of this case or disputed: Gary's insolvency; some transfers were a matter of public record; transfers were not to insiders[85]; and no absconding by Gary. For example, the Court cannot reasonably infer Gary's intent one way or the other by the transfer (assignment of notes) to Briggs. It is only when the subsequent payment of those notes and use of those deposited funds is considered that Gary's intent can be inferred. Even that intent, however, is susceptible of differing inferences. Moreover, Gary and the Krause Interveners proffer an explanation of some of the transfers out of the KCTs which negates the badge of Gary's possession or control (for example, KCT 1 funds improperly used to buy Gary's personal car and his repayment of those funds

84 The Court has already declared the Gary E. Krause Trust, the Krause Irrevocable Family Trust, FIMCO, Federal Gasohol Corporation, Drake Enterprises, Inc. and PHR, LLC are Gary's nominees, as a result of the default judgment administered pursuant to this Court's Sanctions Order entered in June, 2007. *See* Dkt. 314, 317.

85 *See* Definition of "insider" under the KUFTA, § 33-201(g).

to KCT 1). A fair amount of the Government's evidence relative to Gary's use or control of the *KCT funds* appears to rest upon allegations made in Gary's and Briggs' divorce proceeding. The uncontroverted facts and record before this Court do not fully develop or substantiate those allegations.

Taken as a whole, the Court could infer Gary's intent to "hinder, delay, or defraud," but to do so would require the Court to weigh the evidence which it is not permitted to do. The fraudulent transfer claims as they relate to the KCTs is susceptible to reasonable inferences either way. With the uncontroverted facts before the Court, the Government has not shown that it is entitled to summary judgment beyond a reasonable doubt.[86]

3. The Government's Nominee Theory

The Government asserts that the KCTs are Gary's nominees and as such, its federal tax liens attach to the assets held by the KCTs. Both Gary and the Krause Interveners attack the Government's "nominee" theory as somehow contrary to Kansas law because, they say, it relies upon this Court determining that the KCTs are his "alter ego."[87] In fact, the Government has not sought a determination that the KCTs are "alter egos," rather it seeks this Court's determination that as a matter of *federal* law, the trusts and entities are his "nominees."[88]

Nominee status for tax collection purposes is defined in case law, and has been recognized

86 *United Missouri Bank of Kansas City, N.A. v. Gagel*, 815 F. Supp. 387, 391 (D. Kan. 1993), *citing Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985).

87 Similarly, Krause's assertion that the Government's case is based on "reverse-piercing" of the KCTs and entities is misplaced. This aspect of the Government's complaint is focused on whether Krause's prior conduct with regard to these assets suggests that, despite legal title, he continues to own and control them.

88 *See* Dkt. 445, p. 12-13.

in this District by *U.S. v. Dawes.*[89] Whether the KCTs are nominees does not rely on alter ego theory; instead, the inquiry is focused on the degree to which Gary exercises control over the KCTs and their assets. In assessing Gary's position vis-a-vis the KCTs in light of *Dawes,* we consider the following factors: the taxpayer's control over the trust and its assets; the use of trust funds to pay personal expenses of the taxpayer; the relationship between the taxpayer and the trust; the lack of internal controls and oversight over the taxpayer's actions; and the lack of consideration for transfers of property into the trust.[90]

While the uncontroverted facts admittedly suggest the presence of most of these factors, the Court cannot unequivocally conclude that the KCTs are Gary's nominees. In particular, the use of KCT funds to pay Gary's personal expenses is not without doubt if the Court views the facts in a light most favorable to Gary. Where the Court is in doubt, however small that doubt may be, it must resolve that doubt in favor of Gary and the Krause Intervenors and deny summary judgment. Because the Court denies summary judgment to the Government today, Krause will have the opportunity to explain how his conduct vis-a-vis the KCTs belies their nominee status and this Court will have the opportunity to weigh that evidence before makings its own determination as to whether some, all, or none of the factors are met.

4. <u>Permanent Injunction</u>

Because the Court today denies summary judgment on the Government's claims, it cannot

89 344 F. Supp. 2d 715 (D. Kan. 2004), *aff'd* 161 Fed. Appx. 742 (10th Cir. 2005).

90 *Id.* at 721, *citing Shades Ridge v. U.S.*, 888 F.2d 725, 729 (11th Cir. 1989) and *Loving Saviour Church v. U.S.*, 728 F.2d 1085, 1086 (8th Cir. 1983).

meet its burden of showing "actual success on the merits" to be entitled to a permanent injunction.[91] And while some of the uncontroverted facts determined here were presented at the hearing on the preliminary injunction, the Court cannot enter summary judgment on the basis of the evidence at the preliminary injunction hearing.[92] For these reasons, the Court denies summary judgment on the Government's claim for injunctive relief

Conclusion

The Government's and the Trustee's motions for summary judgment are **DENIED (Dkt. 405 and 415)**. The Court finds, pursuant to Fed. R. Civ. P. 56(d), that the uncontroverted facts as set out above are deemed established for trial.

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91 *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1180 (10th Cir. 2003) (The party requesting a permanent injunction bear burden of showing *inter alia*, actual success on merits.)

92 *See Securities and Exchange Commission v. North Am. Research & Development*, 59 F.R.D. 111 (S.D.N.Y. 1972); *Brokers' Assistant, Inc. V. Williams Real Estate Co., Inc.*, 646 F. Supp. 1110 (S.D.N.Y. 1986).