

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

WARREN L. BAKER, JR. AND DORRIS J. BAKER,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

ON APPEAL FROM THE DECISION OF THE

UNITED STATES TAX COURT IN NO. 599-00

(Judge Howard A. Dawson, Jr. and Chief Special Trial Judge Peter J. Panuthos)

BRIEF FOR THE APPELLEE

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STATEMENT CONCERNING ORAL ARGUMENT

We believe that oral argument would be appropriate in this case due to the importance of the issue presented.

**IN THE UNITED STATES COURT OF APPEALS
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No. 02-3262

WARREN L. BAKER, JR. AND DORRIS J. BAKER,

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COMMISSIONER OF INTERNAL REVENUE,

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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

The appellants' jurisdictional statement is not correct and complete. On December 22, 1999, the Commissioner of Internal Revenue ("the Commissioner") issued a statutory notice of deficiency to Warren L. Baker, Jr. and Dorris J. Baker ("taxpayers") determining a deficiency in federal income tax for the year 1997. (JA. 19.)¹ On January 18, 2000,

¹"JA" refers to the joint appendix filed with the original brief for the appellants on November 21, 2002. "Br." refers to the corrected brief for the appellants filed on November 26, 2002.

taxpayers timely filed a petition in the United States Tax Court seeking a redetermination of the deficiency. (JA 1, 4); I.R.C. § 6213(a) (26 U.S.C.). The Tax Court had jurisdiction pursuant to I.R.C. §§ 6213(a), 6214 and 7442.

Following a trial and the submission of briefs, the Tax Court found in favor of the Commissioner and, on May 29, 2002, issued an opinion reported at 118 T.C. 452. (JA 204.) It entered a final, appealable decision on June 10, 2002. (JA 228.) On August 19, 2002, taxpayers timely filed a notice of appeal to this Court. (JA 2); I.R.C. § 7483; Fed. R. App. P. 13(a)(1). This Court has jurisdiction pursuant to I.R.C. § 7842.

STATEMENT OF THE ISSUE

Whether the Tax Court correctly found that taxpayers failed to meet their burden of proving that termination payments received by Warren L. Baker, Jr. from State Farm Insurance Companies were received in the sale or exchange of a capital asset and, thus, that the termination payments are taxable as ordinary income and not as capital gain.

STATEMENT OF THE CASE

Warren L. Baker, Jr. (“taxpayer”) was an insurance agent for State Farm Insurance Companies (“State Farm”). Upon terminating his agency agreement with State Farm, taxpayer received termination payments of \$38,622 from State Farm in 1997 pursuant to the agency agreement. Taxpayers reported the payments on their 1997 federal income tax return as long-term capital gain under I.R.C. § 1222. In a notice of deficiency issued to taxpayers, the Commissioner determined that the termination payments are ordinary income and asserted a deficiency in taxpayers’ federal income tax of \$2,519 for 1997.

Taxpayers filed a timely petition in the Tax Court contesting the notice of deficiency.

After a trial and submission of briefs, the Tax Court ruled that the termination payments constitute ordinary income and upheld the Commissioner's deficiency determination.

Taxpayers now appeal.

STATEMENT OF FACTS

1. Taxpayer's Agreement with State Farm

a. Generally

Taxpayer was an insurance agent for State Farm from 1963 to 1997. (JA 14.)

Taxpayer's relationship with State Farm was governed by a series of contracts known as agent's agreements. (JA 14.) The agreements were prepared by State Farm and modified from time to time to increase benefits to agents. (JA 150.) (The agreement at issue was executed on January 26, 1977 ("Agreement"). (JA 15-16.)) Taxpayer was not able to negotiate or change the terms of the agreements, but he had the option to refuse a new or revised agreement. (JA 176.) The Agreement stated that taxpayer's "principal occupation" was to be the fulfillment of the Agreement, and he was required to sell insurance exclusively for State Farm. (JA 51.)

Under the Agreement, taxpayer was required to operate as an independent contractor. (JA 50.) As such, he had full control over his daily activities and was responsible for his office expenses and employees' salaries. (JA 51.) His duties included soliciting applications for insurance, collecting payments and assisting State Farm

policyholders. (JA 50.) His compensation for such duties consisted of commissions on new policies and renewals of existing policies. (JA 51-52.)

Taxpayer was also assigned policies for which he received a smaller commission than those he personally produced. (JA 60, 63, 165.) State Farm could assign policies to him under four circumstances: (i) when policyholders moved to the geographic location covered by his agency, (ii) when other State Farm agents' agreements were terminated, (iii) when, due to illness or other such circumstances, State Farm agents had to reduce the number of policies they serviced, and (iv) when State Farm acquired new business as a result of a merger, purchase, governmental action or insurance industry agreement. (JA 60-61, 155-57, 164-65.) Some of taxpayer's policies were assigned to other agents when policyholders moved out of taxpayer's geographic region. Taxpayer did not compensate other agents for policies he assumed, and he did not receive payments for policies assigned to other agents. (JA 155-57, 165.)

State Farm furnished to taxpayer, without charge, manuals, forms, records and other supplies, and the Agreement provided that "all such property furnished by [State Farm] shall remain the property of [State Farm]." (JA 51.) State Farm also advertised, provided promotional materials and shared in the cost of taxpayer's advertisements. In this regard, taxpayer was not permitted to use any advertisements referring to State Farm without prior approval. (JA 51.) In addition, State Farm made available to taxpayer "the experience and technical knowledge acquired and developed over the years with respect to selling, underwriting and servicing insurance," and it provided information and guidance as to

operation of the agency, new products and ideas, services and procedures, and sales promotion. (JA 50.)

With respect to the business generated by taxpayer, the Agreement provided as follows:

Information regarding names, addresses, and ages of policyholders of [State Farm]; the description and location of insured property; and expiration or renewal dates of State Farm policies acquired or coming into your possession during the effective period of this Agreement, or any prior Agreement, except information and records of policyholders insured by [State Farm] pursuant to any governmental or insurance industry plan or facility, are trade secrets wholly owned by [State Farm]. All forms and other materials, whether furnished by State Farm or purchased by you, upon which this information is recorded shall be the sole and exclusive property of [State Farm].

(JA 51.) Taxpayer was required to deposit all payments collected on behalf of State Farm into a trust fund that was the absolute property of State Farm. (JA 51.)

Each agent's agreement stated that the agreement "constitutes the sole and entire [a]greement between the parties [thereto], and no change, alteration or modification of the terms of [each respective] [a]greement may be made except by agreements in writing signed by an authorized representative of [State Farm] and accepted by you." (JA 55.) The Agreement also stated that taxpayer could not sell, assign or pledge the Agreement or any interest thereunder unless State Farm expressly agreed by prior written consent. (JA 55.)

b. Termination Payments

The Agreement provided that it would terminate upon the death of taxpayer or upon written notice by either party. (JA 52.) If certain conditions were met, taxpayer would be entitled to termination payments. Specifically, taxpayer would be eligible for termination

payments if (i) the Agreement was terminated two or more years after its effective date, and (ii) within ten days after termination of the Agreement, all property belonging to State Farm was returned or made available for return to State Farm. (JA 52.) In addition, taxpayer would forfeit the termination payments if, during the first year following termination, he, personally or through any other person, agency or organization, induced or advised any State Farm policyholder credited to his account to lapse, surrender or cancel any State Farm insurance coverage or solicited any such policyholder to purchase any competing insurance coverage. (JA 52.)

The amount of the termination payments is different for each company comprising State Farm, but, generally, the payments are based on a percentage of taxpayer's compensation for the twelve months prior to the date of termination. (JA 52-54.) The Agreement does not contain any reference to a purchase or sale of taxpayer's agency, nor does it refer to State Farm as a buyer or taxpayer as a seller. (JA 50-55.)

2. Taxpayer's Retirement and Tax Treatment of Termination Payments

Taxpayer retired and terminated his Agreement with State Farm on February 28, 1997. (JA 14.) Approximately ninety percent of taxpayer's policies were assigned to a successor agent. (JA 128.) The successor agent hired two employees previously employed by taxpayer, and he opened an office in the vicinity of taxpayer's office. The successor agent also maintained taxpayer's business telephone number. (JA 128-30.)

Pursuant to the Agreement, within ten days after termination, taxpayer returned to State Farm all its property, including policies and policyholder descriptions, claim draft

books, rate books, agent's service texts and a computer, on which most of the information regarding policyholders was kept. (JA 112, 117-19, 143-44.)

Because taxpayer had fully complied with the conditions precedent to receiving termination payments, State Farm made termination payments of \$38,622 to taxpayer in 1997. (JA 16.) This amount was reported to taxpayer for tax purposes as "non-employee compensation" on a Form 1099 issued by State Farm. (JA 16.) On their 1997 federal income tax return, taxpayers reported the termination payments as long-term capital gain on Schedule D (Capital Gains and Losses). (JA 28, 38.) They attached to their return a two-page statement stating that the payments were made pursuant to "contracts [that] contain specific provisions for the purchase and sale of business intangible assets" and that the sales price was to be paid "in the form of a five year certain annuity designated 'termination payments'" (emphasis in original). (JA 39.) Taxpayers also attached to their return I.R.S. Form 8594 "Asset Acquisition Statement Under Section 1060," indicating that taxpayer purportedly transferred intangible assets in the nature of goodwill and going concern value worth \$164,140. (JA 41.) On the form, taxpayer also indicated that State Farm "purchased a covenant not to compete" in the Agreement. (JA 41.)

On December 22, 1999, the Commissioner issued a notice of deficiency to taxpayers determining a deficiency in income tax of \$2,519 for 1997.² (JA 19-20.) The

² Part of this amount was due to taxpayers' failure to report dividend income of \$919. Taxpayers conceded that the dividends of \$919 were income to them and mailed a check in the amount of \$293 to the Commissioner to be applied to the outstanding tax liability. (JA 14.) The dividend income is not at issue in this appeal.

Commissioner asserted that the termination payments from State Farm must be reported as ordinary income rather than capital gain. (JA 22.)

3. Tax Court Proceedings

On January 18, 2000, taxpayers filed a petition in the Tax Court contesting the portion of the Commissioner's asserted deficiency attributable to the termination payments. (JA 4-6.) On October 2, 2000, the parties filed a stipulation of facts, and a trial was held. In the stipulation, the parties agreed to the facts surrounding the issuance of the notice of deficiency and that taxpayer's relationship with State Farm was governed at all times by a series of three agent's agreements. (JA 13-18.)

a. Trial

At trial, taxpayer acknowledged that all of the information with respect to the individual policyholders of State Farm whose policies he wrote was the property of State Farm. (JA 139-40.) When asked what the termination payments were for, taxpayer testified that he was “under the impression it was a buy-back of my business, my agency.” (JA 131.) He added that, before he became a State Farm agent trainee, a now-deceased State Farm manager “indicated to me that upon termination there would be benefits available to me based upon the dollars of production that I accomplished and that State Farm would buy those back with the proviso that it could not be sold to anybody else.” (JA 131-32.) When asked how much State Farm paid taxpayer for the goodwill he alleged to have sold, taxpayer replied that “[t]hat is what part of the problem is. Goodwill is a salable and tangible asset. I certainly over 34 years and paying all the bills must have accumulated some goodwill.” (JA 154-55.) He then conceded that the Agreement does not contain a specified amount for State Farm’s alleged purchase of his goodwill. (JA 155.)

State Farm’s Vice President of Compliance for agency purposes, Ralph Bolt (“Bolt”), testified that there were no discussions with agents in which State Farm offered to buy back their businesses because State Farm always owned the businesses. (JA 175.) He also stated that, to his knowledge, State Farm had never bought, paid for or negotiated a contract for the purchase of an agent’s goodwill. (JA 200.) Bolt stated that the termination payments are “contingent contractual payments” designed to ensure the loyalty of State Farm’s agency force. (JA 175-76, 184-85.) As to how the termination payments came

about, Bolt testified that “I suspect some agents had asked for help in terms of providing for their old age, the spouse’s survivorship, whatever.” (JA 176.) Bolt further testified that State Farm’s independent contractors, such as taxpayer, are different from “independent agents.” In this regard, he testified that an independent agent, unlike a State Farm agent, owns his own business through which he commonly sells several insurance companies’ products and can sell his business to another agent. (JA 161-62.)

Bolt also testified that State Farm’s property includes --

anything having to do with the policyholder, names, addresses, telephone numbers, dates of birth. Any fact related to the policyholder that is important to the insurance business. As a matter of fact, any documents, any paper on which those kind of data may be written become the property of [State Farm]. A tablet in the office on which are written policyholders names and addresses would be property of [State Farm]. * * * We view that as trade secrets. We view that as wholly owned by [State Farm].

(JA 166-67.) Furthermore, Bolt testified that in the time that taxpayer worked for State Farm, there has been no change in State Farm’s view of what constitutes its property. (JA 167.)

b. Tax Court Opinion

After the filing of briefs by taxpayers, the Commissioner and *amicus curiae* of taxpayers, the Tax Court issued an opinion and entered its decision for the Commissioner.

(JA 2.) The court stated that the question before it was “whether petitioner owned a capital asset and whether petitioner sold or exchanged a capital asset” because “[i]f petitioner did not sell or exchange a capital asset, then the termination payment is taxable as ordinary income.” (JA 218-19.) The court observed that taxpayers bore the burden of proof and that

they did not contend otherwise. (JA 218.) Noting that “[u]pon his retirement, petitioner returned all assets used in the daily course of business, including a computer, books and records, and customer lists pursuant to the agreement,” the court found that “petitioner did not own these assets and, therefore, could not have sold them to State Farm.” (JA 223.) In this regard, the court observed that the instant case was similar to *Schelble v. Commissioner*, 130 F.3d 1388 (10th Cir. 1997), and *Foxe v. Commissioner*, 53 T.C. 21 (1969), cases in which the courts found that where, as here, the insurance company owned all the books and records used by the agent, and the agent was required to return such books and records to the insurance company, the agent owned no vendible assets and there was no sale of a business to the insurance company upon the agent’s termination. (JA 223.) The court rejected taxpayer’s contention that the facts that he taught the successor agent about the agency and introduced him to policyholders and that the successor agent employed two of taxpayer’s former employees and maintained taxpayer’s telephone number indicated that there was a sale of capital assets. (JA 223-24.) In this regard, the court noted that taxpayer did not argue that either the telephone number or the employees were capital assets and that nothing in the record indicated any part of the termination payments was attributable thereto. (*Id.*) The court also rejected taxpayer’s argument that he sold goodwill to State Farm. The court explained that “[t]o qualify as a sale of goodwill, the taxpayer must demonstrate that he sold ‘the business or a part of it, to which the goodwill attaches,’” and, because taxpayer did not own or sell capital assets to State Farm, he could not sell goodwill. (JA 225.) Accordingly, the court found that there was no sale or exchange of a

capital asset and, thus, that the termination payments constituted ordinary income. The court also found that the Agreement contained a covenant not to compete, that the termination payments, at least in part, represented consideration for such covenant, and that that portion of the termination payments was ordinary income in any event. (JA 227.)

SUMMARY OF ARGUMENT

The Tax Court correctly found that the termination payments are ordinary income to taxpayers and not capital gain. For an item of income to be capital gain, the taxpayer must show that the income resulted from the sale or exchange of a capital asset. I.R.C. § 1222. In the instant case, taxpayers did not satisfy their burden of proving that taxpayer owned a capital asset that could be sold to State Farm or that a sale of any such asset occurred.

First, taxpayers did not sustain their burden of proving that taxpayer owned a capital asset to sell to State Farm. Under the express terms of Agreement, and according to taxpayer's testimony, State Farm owned all information regarding policies and policyholders, the computer on which such information was stored, and all records, books, manuals, and supplies – virtually everything that comprised the insurance agency business. Taxpayer attempts to divert attention from this fact by arguing that he developed goodwill and sold it to State Farm in exchange for termination payments. Goodwill is the expectancy of continued patronage for whatever reason. It cannot, however, be transferred with nothing more. To qualify as the sale of goodwill, the taxpayer must demonstrate that he sold the business, or a part of it, to which the goodwill attaches. In this case, because taxpayer did not own or sell any capital assets to State Farm, taxpayer also did not sell goodwill to State

Farm. In any event, nothing in the record establishes that taxpayer developed goodwill other than his own self-serving testimony.

Second, taxpayers did not sustain their burden of proving that a sale occurred, as the record is devoid of evidence indicating that a sale of capital assets or goodwill was even contemplated by the parties. The Agreement, which the parties agree governed taxpayer's relationship with State Farm at all times, contains no language or other indicia of a sale. Likewise, the termination payments, the formula for which was established by State Farm in 1977, when the Agreement was executed, do not represent the parties' bargained-for consideration for the sale of a business. Unlike cases where courts have found that a sale of an insurance agency occurred, there is no evidence in this case of a sales contract, negotiations, or the intent of the parties to effectuate a sale.

Because taxpayers did not satisfy their burden of proving that the termination payments resulted from the sale or exchange of a capital asset, the termination payments are ordinary income. Moreover, the termination payments were made in consideration for the cancellation of taxpayer's contract for personal services with State Farm, and such payments generally constitute ordinary income. Consequently, the Commissioner correctly determined that the termination payments are ordinary income to taxpayers, and the Tax Court correctly upheld the Commissioner's deficiency determination.

ARGUMENT

The Tax Court Correctly Found that Taxpayer Did Not Satisfy His Burden of Proving that the Termination Payments Were Received In the Sale or Exchange of a Capital Asset

Standard of Review

Taxpayers incorrectly assert that the only issue in this case is a legal issue that is subject to *de novo* review. (Br. 9.) The Tax Court found that taxpayer did not own a capital asset to sell to State Farm, that there is no evidence of a sale of any such asset, and, consequently, that the termination payments are ordinary income. (JA 205.) These are factual determinations. This Court reviews factual determinations, as well as the application of legal principles to those factual determinations, for clear error. *Toushin v. Commissioner*, 223 F.3d 642, 645-46 (7th Cir. 2000). Under the clearly erroneous standard of review, a finding of fact is reversed “only when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed,” and this Court “must view the evidence in the entire record in the light which is most favorable to the finding.” *Malachinski v. Commissioner*, 268 F.3d 497, 505 (7th Cir. 2001) (internal quotation omitted).

At issue in the instant case is the tax treatment to be accorded to termination payments received by taxpayer upon his retirement as an insurance agent for State Farm. It is undisputed that the termination payments constituted gross income to taxpayers subject to tax under I.R.C. § 61. Taxpayers argue, however, that the termination payments should be treated as long-term capital gain rather than ordinary income. Long-term capital gain is defined as gain from the sale or exchange of a capital asset held for more than one year, and such gain is taxable at lower rates than ordinary income. I.R.C. §§ 1(h) & 1222(3). In the

proceedings below, taxpayers had the burden of proving that the Commissioner's determination of deficiency was incorrect and that the termination payments were received in consideration of the sale or exchange of a capital asset. Tax Ct. R. 142(a); *see, e.g., Welch v. Helvering*, 290 U.S. 111, 115 (1933).³ Taxpayers did not satisfy their burden of proof, and the Tax Court correctly concluded that taxpayers are not entitled to treat the termination payments as long-term capital gain.

1. *The Tax Court Correctly Found that Taxpayer Did Not Own a Capital Asset*

A capital asset is defined as property held by the taxpayer (whether or not connected to his trade or business), excluding certain enumerated types of property not relevant here.

I.R.C. § 1221(a). As the Eighth Circuit observed in *Vaaler v. United States*, 454 F.2d 1120, 1122 (8th Cir. 1972) (quoting *Commissioner v. Gillette Motor Transp., Inc.*, 364 U.S. 130, 134 (1960)) --

it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset. This Court [*i.e.*, the Supreme Court] has long held that the term "capital asset" is to be construed narrowly in accordance with the purpose of Congress to

³For cases arising out of audits beginning after July 22, 1998, the burden of proof can be shifted to the Commissioner if certain prerequisites are met. I.R.C. § 7491 (added by the Internal Revenue Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3001, 112 Stat. 685, 726-27). In the proceedings below, taxpayers did not allege that I.R.C. § 7491 was applicable or establish that they met the statutory prerequisites for shifting the burden of proof to the Commissioner. The Tax Court noted this in its opinion, and taxpayers do not challenge this finding in their opening brief. (JA 218.) Therefore, they have waived the issue. *See, e.g., Jones v. Union Pac. R.R. Co.*, 302 F.3d 735, 741 (7th Cir. 2002).

afford capital gains-treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year.

See also Hansche v. Commissioner, 457 F.2d 429, 432 (7th Cir. 1972); *Estate of Scharf v. Commissioner*, 316 F.2d 625, 629 (7th Cir. 1963).

a. Under Agent's Agreement, State Farm Owned All Property

The Tax Court correctly found that taxpayers did not satisfy their burden of proving that taxpayer owned a capital asset to sell to State Farm. As taxpayer admitted at trial, State Farm owned all information regarding policies and policyholders, any tangible item upon which such information was recorded, including taxpayer's computer, and all supplies that State Farm had furnished to taxpayer, among other things. (JA 139-43.)⁴ State Farm provided taxpayer with manuals, forms, records and other supplies, and the Agreement

⁴In their brief, taxpayers cite to *State Farm v. John W. Weir & Richard L. Pyorre*, a recent California Superior Court case, in which a jury allegedly found that individual State Farm agents own everything associated with their businesses, including all customer records and policy expirations. (Br. 7.) This case is not final and is not a reported case. The Ninth Circuit has noted that California Superior Court cases rarely are reported and do not have precedential value, as they are not binding on any other court in California. *See Leh v. Gen. Petroleum Corp.*, 330 F.2d 288, 291 (9th Cir. 1964), *rev'd on other grounds*, 382 U.S. 54 (1965); *Cal. Dep't of Employment v. Fred S. Renauld & Co.*, 179 F.2d 605, 609 (9th Cir. 1950); *see also Santa Ana Hosp. Med. Ctr. v. Belshe*, 65 Cal. Rptr. 2d 754, 761 (Cal. Ct. App. 1997). Moreover, the Supreme Court has held that unpublished state court decisions that do not have precedential value within the state's own court system generally are not binding on federal courts. *King v. Order of United Commercial Travelers*, 333 U.S. 153, 160-62 (1948). Consequently, the alleged jury decision in the case cited to by taxpayers should not be given significant weight in the instant case, particularly where taxpayers have not set forth any evidence indicating that taxpayer owned the property that comprised his agency business.

explicitly stated that “all such property furnished by [State Farm] shall remain the property of [State Farm].” (JA 51.) The Agreement also provided that --

Information regarding names, addresses, and ages of policyholders of [State Farm]; the description and location of insured property; and expiration or renewal dates of State Farm policies acquired or coming into your possession during the effective period of this Agreement, or any prior Agreement, except information and records of policyholders insured by [State Farm] pursuant to any governmental or insurance industry plan or facility, are trade secrets wholly owned by [State Farm]. All forms and other materials, whether furnished by State Farm or purchased by you, upon which this information is recorded shall be the sole and exclusive property of [State Farm].

(*Id.*) Further, the Agreement expressly provided that taxpayer was not able to sell, assign or pledge the Agreement or any interest thereunder unless State Farm agreed thereto by prior written consent. (JA 55.) Plainly, the assets comprising taxpayer’s business were never his property.

b. Taxpayer Did Not Own Goodwill That Could Be Sold

Taxpayers attempt to finesse their lack of a capital asset to sell by hypothesizing that taxpayer sold goodwill to State Farm. The Tax Court correctly rejected this argument.

Goodwill is the expectancy of continued patronage for whatever reason. *Boe v.*

Commissioner, 307 F.2d 339, 343 (9th Cir. 1962). However, goodwill is not a capital

asset that can be transferred with nothing more. To qualify as the sale of goodwill, the

taxpayer must demonstrate that he sold “the business or a part of it, to which the goodwill

attaches.” *Elliott v. United States*, 431 F.2d 1149, 1154 (10th Cir. 1970); *see also*

Vaaler, 454 F.2d at 1123; *Webster Investors, Inc. v. Commissioner*, 291 F.2d 192, 195

(2d Cir. 1961); *Commissioner v. Chatsworth Stations, Inc.*, 282 F.2d 132, 136 (2d Cir. 1960).

For example, in *Vaaler*, the taxpayer entered into a contract to act as a general agent, on an independent contractor basis, for an insurance company. 454 F.2d at 1121. The contract provided that, if it was terminated, the insurance company would have the first option to purchase from the agent “all of his claims, interests and rights in policies ... and any renewals thereof” *Id.* The contract was eventually terminated, and the insurance company exercised its option. The taxpayer received the payment due to him under the contract, although no property was actually transferred. *Id.* at 1121, 1123. The taxpayer argued that he had sold his “agency plant” to the insurance company in exchange for the payment, but the Eighth Circuit ruled that the taxpayer had merely relinquished his right to render personal services as a general agent. *Id.* at 1123. The court stated --

Nor can it be said that [taxpayer’s] contract termination resulted in a transfer of goodwill to [the insurance company]. ... “A sale of goodwill for tax purposes, takes place * * * only when the business or a part of it, to which the goodwill attaches is sold ...” As in *Elliott*, whatever goodwill the general agent (*Vaaler*) built up for the insurance company, while acting as its general agent, resulted from his services as such agent and belongs to the insurance company. Whatever goodwill or business reputation he built up for himself as a general agent or as an insurance agent while he served the insurance company under the general agency contract, he retained.

Id. (internal quotations & footnotes omitted). See also *Clark v. Commissioner*, 67 T.C.M.

(CCH) 3105 (1994) (payments received upon termination of insurance agency management

contract were not in exchange for goodwill); *Deal v. Commissioner*, 32 T.C.M. (CCH)

216, 219 (1973) (payments for cancellation of insurance agency management contract

were ordinary income because “the record is void of any evidence that petitioner built up ‘something of value, an organization, a going concern, an agency, call it what you will,’ which was his to sell”); *Brown v. Commissioner*, 28 T.C.M. (CCH) 1330 (1969).

In the present case, the Agreement is silent with respect to any goodwill developed by taxpayer, although it does state that State Farm would make available to taxpayer “the experience and technical knowledge acquired and developed over the years with respect to selling, underwriting and servicing insurance” and information and guidance as to sales promotion. (JA 50, 155.) As noted above, it also explicitly provides that all information regarding policies and policyholders, among other things, are trade secrets wholly owned by State Farm. (JA 51.) In addition, taxpayer testified that he never compensated agents for policies that were assigned to him and he did not receive payments for policies that were assigned to other agents. (JA 155-57, 165.)

In any event, the record contains no evidence that taxpayer developed goodwill that State Farm would purchase, other than taxpayer’s statement at trial that “[g]oodwill is a salable and tangible asset. I certainly over 34 years and paying all the bills must have accumulated some goodwill.” (JA 154-55.) In their brief, taxpayers assert that the loyalty of taxpayer’s customer base was to taxpayer and not to State Farm and, thus, taxpayer’s relationship with the customers is goodwill. (Br. 14.) However, taxpayers do not point to any evidence in the record to support this contention. In addition, taxpayers argue that the termination payments are payment for goodwill because they allowed the successor agent to step into taxpayer’s shoes. (Br. 14.) Whether the overall arrangement between taxpayer

and State Farm accomplished this result is irrelevant where, as here, there is no evidence that goodwill was developed by taxpayer and sold to State Farm.⁵

c. Cases Relied on by Taxpayers Do Not Address the Issues Present in this Appeal

In their brief, taxpayers point to several cases to support their position that taxpayer owned a capital asset. In none of the cases cited to was the tax character of termination payments (or similar payments) directly at issue. For example, taxpayers cite to *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1147 n.1 (9th Cir. 1997), as evidence that “State Farm agents develop equity in an independent business.” (Br. 13.) However, *Cordova* is a Title VII action in which none of the issues relevant to this appeal were present. In the footnote cited to by taxpayers, the court simply described the job position for which the plaintiff applied. Additionally, taxpayers cite to *Norwalk v. Commissioner*, 76 T.C.M. (CCH) 208 (1998), and *MacDonald v. Commissioner*, 3 T.C. 720 (1944), to demonstrate that taxpayer developed salable goodwill. (Br. 16-17.) In those cases, though, the courts merely held that an individual employee’s goodwill is not a salable asset of a corporation. These cases

⁵In their brief, taxpayers allege that, under the instructions for IRS Form 8594, on which taxpayer reported that he sold goodwill, an agent must report termination payments as a transfer of assets. (Br. 6.) This statement is misleading. The instructions state that Form 8594 should be used by the buyer and seller in the case of an “applicable asset acquisition,” *i.e.*, certain transfers of a group of assets that makes up a trade or business. The instructions provide general factors to consider in determining whether there has been an applicable asset acquisition. The instructions by no means require, or even suggest, that the termination payments at issue be reported as a transfer of assets.

do nothing to further taxpayers' position that taxpayer developed goodwill that could be sold, with nothing more, to State Farm.

Taxpayers also cite to *Milligan v. Commissioner*, 38 F.3d 1094 (9th Cir. 1994), and *Jackson v. Commissioner*, 108 T.C. 130 (1997), in which the courts determined whether termination payments were "derived from a trade or business carried on by the individual" for purposes of the self-employment tax under I.R.C. § 1402. The question of whether the taxpayers owned a capital asset was not directly at issue, and, in fact, the courts expressly refused to rule on the question of whether the termination payments were capital gain. *Milligan*, 38 F.3d at 1100; *Jackson*, 108 T.C. at 140. Although the concurring opinion in *Jackson*, 108 T.C. at 141, suggests that termination payments are for the sale or exchange of a capital asset, this opinion is not controlling, and one of the three concurring judges, who was the judge in the present case, disavowed the opinion after the issue was directly before the court and fully litigated in the present case. (JA 205.)

Finally, taxpayers' reliance on *Johnson v. Commissioner*, 53 T.C. 414 (1969), *Kenney v. Commissioner*, 37 T.C. 1161 (1962), and *Aitken v. Commissioner*, 35 T.C. 227 (1960), is misplaced because, in those cases, there was clear evidence that the taxpayers owned the capital assets that comprised their insurance agency businesses, and the taxpayers sold their businesses to the insurance agencies pursuant to contracts that were unquestionably purchase agreements. In the instant case, there is no evidence that taxpayer owned the capital assets comprising his agency business, and, as discussed in more detail

infra, there is absolutely no evidence in the Agreement or otherwise that State Farm contemplated a purchase of any of taxpayer's purported assets.

On the other hand, arguments substantially similar to those raised by taxpayers here have repeatedly been rejected. For example, in *Schelble*, 130 F.3d 1388, 1394, a retired insurance agent argued that "extended earnings" payments that he received upon the termination of his insurance agency agreement were received in exchange for the sale of his agency business and goodwill. The Tenth Circuit rejected the argument, finding that there was "no evidence in the record of vendible assets" because the agency agreement provided that all copies of policies, endorsements, policy records, manuals, materials and supplies were the property of the insurance company. *Id.* at 1394-95. Similarly, in *Foxe*, 53 T.C. 21, an insurance agent argued that payments made to him upon the termination of his employment contract were consideration for the sale of his agency business. The Tax Court found that "even if the petitioner did build up an organization of value, it was not his to sell, since [the insurance agency] under the contract owned all the property comprising such organization." *Id.* at 26. Finally, in *Erickson v. Commissioner*, 64 T.C.M. (CCH) 963 (1992), *aff'd*, 1 F.3d 1231 (1993) (table), a terminated insurance agent argued that payments made to him under a post-termination agreement constituted proceeds from the sale of his insurance business. The Tax Court rejected the argument because there was no express sales agreement and no evidence of vendible business assets. *Id.* at 967-68.

In sum, taxpayers did not sustain their burden of proving that taxpayer owned a capital asset that could be sold to State Farm. Thus, the Tax Court's finding that taxpayer did not own a capital asset that could be sold to State Farm is not clearly erroneous.

2. *The Tax Court Correctly Found that Taxpayer Did Not Receive Termination Payments as Consideration for the Sale or Exchange of a Capital Asset*

To qualify for capital gains treatment, the taxpayer must demonstrate that the income was received pursuant to a sale or exchange of a capital asset. I.R.C. § 1222(3). “‘A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent,’ it is a contract ‘to pass rights of property for money,— which the buyer pays or promises to pay to the seller.’” *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (internal quotations & citations omitted). However, where a contract is discharged by payment in accordance with its terms, there is no sale or exchange of any property. *See Spray Water Power & Land Co. v. Commissioner*, 20 T.C.M. (CCH) 353 (1961); *Estate of Abell v. Commissioner*, 5 T.C.M. (CCH) 969 (1946); *Gann v. Commissioner*, 41 B.T.A. 388 (1940). In this case, the Tax Court correctly found that taxpayers presented no evidence that the termination payments were made in consideration of a sale of capital assets by taxpayer to State Farm.

a. *Agent's Agreement Contains No Indicia of Sale*

The parties agree that, at all times during his affiliation with State Farm, taxpayer's relationship with State Farm was governed by a series of agent's agreements. (JA 14.) The Agreement provides that it constitutes the entire agreement between the parties and that no

other agreements are valid unless they are in writing and signed by both taxpayer and State Farm. (JA 55.) Quite tellingly, in their brief, taxpayers do not point to anything in the Agreement indicating that a sale occurred in this case.

i. Agreement Is Not a Sales Contract On Its Face

Taxpayers had the burden of proving that the termination payments were paid for the sale of taxpayer's business, a notion defeated by the terms of the Agreement (JA 50-55) and wholly unsupported by the factual record below. First, the termination payments are provided for in an agency agreement, not in a sales contract for the purchase of a business. Second, the Agreement contains absolutely no language suggesting that it is a contract for the sale of a business. The Agreement does not refer to a seller, a purchaser, or property to be sold. Nor does it contain a purchase price or attempt to allocate a purchase price to the assets allegedly being purchased, as required under Rev. Rul. 55-79, 1955-1 C. B. 370 (in the sale of a sole proprietorship, transferred assets must be identified and characterized). Third, taxpayer had no ability to negotiate the terms of the Agreement; instead, State Farm unilaterally determined the terms of the Agreement, and taxpayer could merely accept or reject them. (JA 176.)

Furthermore, the termination payments do not represent either party's bargained-for consideration for the purchase of a business. Instead, the termination payments are determined under a formula that was established at the time the Agreement was executed (*i.e.*, 1977) and are based on a percentage of taxpayer's compensation for the twelve months prior to the date of termination. (JA 15-16, 52-54.) Thus, it simply is far-fetched

to suggest that the parties would execute a binding contract (*i.e.*, the Agreement) for the sale of a business under which the date of sale is completely unknown and under which the sales price is completely unknown.

To the contrary, it is apparent that the Agreement does no more than set the terms for the provision of services by taxpayer to State Farm. For example, the Agreement states that taxpayer's principal occupation was the fulfillment of the Agreement and that he was required to sell insurance exclusively for State Farm. (JA 51.) The Agreement provides that taxpayer was to operate as an independent contractor, solicit applications for insurance, collect payments, and assist State Farm policyholders. (JA 50.) Under the Agreement, State Farm agreed to advertise its product and provide taxpayer with promotional materials. (JA 51.) State Farm agreed to make available to taxpayer "the experience and technical knowledge acquired and developed over the years with respect to selling, underwriting and servicing insurance," and to provide information and guidance as to operation of the agency, new products and ideas, service and procedures, and sales promotions." (JA 50.) Plainly, the Agreement was a contract for services and nothing more.

The Tax Court rejected an argument similar to taxpayers' in *Erickson*. In that case, discussed on page 23, *supra*, the taxpayer was a terminated insurance agent who received continuing benefits based on renewal commissions. After disputes with other agents, a "settlement agreement" was entered into providing for fixed monthly benefits, without reference to renewal commissions. The agreement contained a covenant not to compete,

and the taxpayer contended that payments made under the settlement agreement were from the sale of his business. In rejecting this argument, the court explained:

The covenant not to compete is as likely to appear in an agreement terminating petitioner's agency as in an agreement of sale. In fact, a similar covenant appeared in the leveling agreement. Petitioners also miss the point in arguing that the settlement agreement makes no mention of past, present, or future commissions. More important to us is the absence of any language suggesting that the agreement represents a sale.

Erickson, 64 T.C.M. (CCH) at 967. *See also Schelble*, 130 F.3d at 1394-95.⁶ In the present case, the Tax Court correctly concluded that the lack of a sales agreement between taxpayer and State Farm and the lack of evidence in the record of any vendible business assets transferred under the Agreement defeats any argument that a sale of a business occurred.

⁶In the instant case, taxpayer also argues that he entered into a covenant not to compete that is inseparable from his purported sale of goodwill to State Farm, and, consequently, all consideration must be allocated to goodwill and is taxable as capital gain. (Br. 26.) Generally, consideration for a covenant not to compete is ordinary income. *Baldarelli v. Commissioner*, 61 T.C. 44, 48 (1973). If the taxpayer can show that, in a sale of capital assets, the parties did not intend for the covenant to have independent value, then consideration for the covenant is allocated to goodwill and treated as capital gain. *Schulz v. Commissioner*, 294 F.2d 52, 55 (9th Cir. 1961); *Peterson Mach. Tool, Inc. v. Commissioner*, 79 T.C. 72, 81 (1982). (Taxpayers refer to an outdated and disfavored legal standard, *i.e.*, whether the covenant is "separable" from the sale of goodwill. (Br. 26); *see Major v. Commissioner*, 76 T.C. 239, 248 n.8 (1981) (referring to *Wilson Athletic Goods Mfg. Co. v. Commissioner*, 222 F.2d 355 (7th Cir. 1955).) For this principle to apply, there must first be a sale of capital assets and goodwill. As discussed above, taxpayers did not satisfy their burden of proving that a sale or exchange of capital assets occurred, and, in any event, taxpayers have not applied the correct legal test or attempted to satisfy their burden of proof on the issue. Thus, the Tax Court correctly found that the portion of the termination payments attributable to the covenant not to compete contained in the Agreement (JA 52) is ordinary income. (JA 227.)

That the Agreement does not represent a contract for the sale of taxpayer's business is readily apparent when compared with those cases in which the courts have found that such a sale occurred. In *Kenney*, the Tax Court found there was a sale of a capital asset where the agreement transferring the taxpayer's interest in the insurance agency was entitled a "Business Purchase Agreement," the agreement contained specific language that the taxpayer "hereby sells, assigns and transfers to [the] Company" the business of the insurance agency, the parties negotiated the sales price through offers and counteroffers, and the contract was negotiated at the time of the actual sale. 37 T.C. at 1164-65. Similarly, in *Commissioner v. Killian*, 20 T.C.M. (CCH) 376, 377 (1961), *aff'd*, 314 F.2d 852 (5th Cir. 1963), the sales agreement specifically recited that the taxpayer "desires to sell all his right, title and interest in" the insurance agency. *See also Johnson*, 53 T.C. at 418; *Aitken*, 35 T.C. 227. In stark contrast, the Agreement here contains no such language.

ii. Agreement Is Not, In Substance, A Sales Contract

Taxpayers suggest that the Agreement, in substance, is a contract for the sale of taxpayer's business. (Br. 18, 21.) They allege that the amount of the termination payments is consistent with the "benchmark typically used to value insurance agencies." (Br. 25.) However, taxpayers do not cite to any evidence in the record to support this characterization. Moreover, this argument ignores the principle that a taxpayer may not disregard the form of his own transaction: "[W]hile a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, ... and may not enjoy the benefit

of some other route he might have chosen to follow but did not.” *Commissioner v. Nat’l Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974); *see also McCoy Enters., Inc. v. Commissioner*, 58 F.3d 557, 561-62 (10th Cir. 1995); *Crouch v. United States*, 692 F.2d 97, 99-100 (10th Cir. 1982); *Commissioner v. Danielson*, 378 F.2d 771, 775 (3d Cir. 1967); *Dakan v. United States*, 492 F.2d 1192, 1199 (Ct. Cl. 1974). The tax consequences flow from the agreement as written, not from subsequent allegations of what might have been intended by the contracting parties. *See Lane Bryant, Inc. v. United States*, 35 F.3d 1570, 1574-76 (Fed. Cir. 1994). In any event, the Agreement is simply not, in form or substance, a contract for the sale of taxpayer’s business.

b. *Termination Payments are Not a “Buy Out” of Taxpayer’s Business*

Taxpayers contend that the termination payments are consideration for State Farm’s “buy out” of taxpayer’s agency business. (Br. 20.) There is no evidence in the record to support this contention, other than taxpayer’s testimony that he was under the “impression” that the termination payments would be made for a buy-back of his business. (JA 131.) Moreover, at trial, Bolt testified that State Farm never offered to buy back an agent’s business because State Farm always owned the business and that State Farm has never bought, paid for or negotiated a contract for the purchase of an agent’s goodwill. (JA 200.) With respect to the termination payments, he stated that they are “contingent contractual payments” designed to ensure the loyalty of State Farm’s agency force. (JA 176, 184-85.)

Taxpayers cite to a number of cases that purportedly establish that the termination payments relate to a “buy out” of taxpayer’s business.⁷ *Darden v. Nationwide Mut. Ins. Co.*, 922 F.2d 203, 208 (4th Cir. 1991), *rev’d*, 503 U.S. 318 (1992); *Wolcott v. Nationwide Mut. Ins. Co.*, 664 F. Supp. 1533, 1538 (S.D. Ohio 1987), *aff’d in part and rev’d in part*, 884 F.2d 245 (6th Cir. 1989); *Petr v. Nationwide Mut. Ins. Co.*, 712 F. Supp. 504, 506-07 (D. Md. 1989). However, the issue in all of those cases was whether Nationwide Mutual Insurance Company’s post-termination plan for insurance agents was a pension plan for purposes of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, taxpayers claim that the Fourth Circuit, in *Darden*, characterized termination payments as relating to a buy out. (Br. 19-20.) In *Darden*, the court merely quoted *Fraver v. N.C. Farm Bureau Mut. Ins. Co.*, 801 F.2d 675, 678 (4th Cir. 1986), in which the court stated that termination benefits are “in the nature of a buy-out.” 922 F.2d at 208. In *Darden*, there was no factual analysis of whether post-termination payments were paid in exchange for the purchase of property. Moreover, in *Fraver*, the court analyzed North Carolina Farm Bureau Mutual Insurance Company’s termination plan and determined that it did not come within the provisions of ERISA. While the court did state that the benefits are “in the nature of a buy-out,” the court did not characterize the termination plan

⁷ We note that the term “buy out” is not used in the Internal Revenue Code. I.R.C. § 1001 states the method by which gain or loss is computed from the “sale or other disposition of property.” To the extent non-tax cases refer loosely to a “buy out,” for taxpayers to derive any benefit from such cases, they must identify, for purposes of applying I.R.C. § 1001, the property being disposed.

as the sale of a business and made no mention of the sale or transfer of any property.

Indeed, the *Fraver* court also stated that the post-termination benefits “are like a final commission, paid over an extended term.” 801 F.2d at 678.

In addition, that the successor agent in the present case was assigned most of taxpayer’s policies, established an office close to taxpayer’s office, hired two of taxpayer’s employees and retained taxpayer’s telephone number is irrelevant. Taxpayer was neither compensated under the Agreement nor required under its terms to allow State Farm or the successor agent to take any of these actions. Similarly, taxpayers’ argument that the successor agent essentially bought taxpayer’s business by accepting reduced commissions on assigned policies is without merit. (Br. 19.) Taxpayers point to no evidence in the record to support this but rather base this contention on hypothesizing dictum from the concurring opinion in *Jackson*. In addition, taxpayers ignore taxpayer’s testimony at trial that State Farm agents do not pay one another for assigned policies. (JA 156.) This argument also ignores the fact that agents receive reduced commissions on policies that are assigned to them when policyholders move into their geographic region from another agent’s region and when State Farm acquires new business through a merger, purchase, governmental action or insurance industry agreement. (JA 60-61, 156-57.)

In conclusion, because there is no evidence in the record and, particularly, in the Agreement that taxpayer sold his agency business to State Farm, the Tax Court’s finding that taxpayers failed to satisfy their burden of proving that the termination payments were made in consideration of a sale or exchange of taxpayer’s business is not clearly erroneous.

3. *Because the Termination Payments Do Not Result From the Sale or Exchange of a Capital Asset, They Are Ordinary Income*

Taxpayers make much of the fact that some courts have opined that termination payments do not constitute deferred compensation, commissions or payments for services for purposes of the self-employment tax, I.R.C. § 1401 et seq. (Br. 9, 10, 15, 24-25, 29.) They conclude, therefore, that “the only logical explanation is that they were designed to compensate [taxpayer] for something he developed during the 34 years he operated his business,” although they did not present any evidence below to support this “explanation.” (Br. 15.) In addition, they assert that taxpayer had an “absolute and indefinite right to continue to market to the customers he developed,” that “[a]t termination, he surrendered this right,” and, thus, there was a sale of taxpayer’s contract rights. (Br. 22.) However, taxpayers ignore the long line of cases holding that not all contract rights constitute capital assets and that payments made in consideration of the cancellation of a contract for personal services, such as the Agreement, are ordinary income.

“[I]t has long been settled that a taxpayer does not bring himself within the capital gains provision merely by fulfilling the simple syllogism that a contract normally constitutes ‘property,’ that he held a contract, and that his contract does not fall within a specified exclusion [listed in I.R.C. § 1221].” *Vaaler*, 454 F.2d at 1122; *see also Gillette Motor Transp.*, 364 U.S. at 134-135. In addition, in an opinion adopted by this Court, it was held that “courts have quite uniformly held that contracts for performance of personal services are not capital assets and the proceeds from their transfer or termination will not

be accorded capital gains treatment.” *Lozoff v. United States*, 266 F. Supp. 966, 970 (E.D. Wis. 1967), *aff’d*, 392 F.2d 875 (7th Cir. 1968) (Court explicitly adopted opinion of district court); *see also Md. Coal & Coke Co. v. McGinnes*, 350 F.2d 293 (3d Cir. 1965); *Holt v. Commissioner*, 303 F.2d 687 (9th Cir. 1962); *Gordon v. Commissioner*, 262 F.2d 413 (5th Cir. 1958).

With respect to payments made upon the termination of insurance agency contracts, numerous courts have held that the former insurance agents received consideration for the relinquishment of their rights to perform services and receive ordinary income and, consequently, the payments were a substitute for the future income the agents would have received. As such, the payments were ordinary income. *See Vaaler*, 454 F.2d at 1122-1123; *Elliott*, 431 F.2d at 1154, 1156; *Deal*, 32 T.C.M. (CCH) 216; *Brown*, 28 T.C.M. (CCH) 1330; *Foxe*, 53 T.C. at 26-27. For example, in *Vaaler*, a case regarding the tax treatment of a payment made to a general insurance agent upon termination of his agency contract, discussed on pages 18-19, *supra*, the Eighth Circuit stated that --

[the taxpayer’s] right under the contract to future commissions (earnings) thereby came to an end. Such commissions had they been earned would have constituted ordinary income. Thus, we hold that the lump sum paid for the extinguishment of the right to render such services and to earn such commissions constituted ordinary income. * * * [The taxpayer] testified that over the 14 year period he built up an “agency plant” The short answer is that [the taxpayer] transferred nothing to [the insurance company]. On February 28, 1961, his services as general agent came to an end. The General Agency contract was not sold or exchanged but was cancelled, and terminated.

454 F.2d at 1123.

Similarly, as taxpayers state in their brief, prior to termination, taxpayer had an absolute right to sell policies to his customers and derive commissions from the sales. (Br. 23.) Upon termination of the Agreement, taxpayer “surrender[ed] his right to solicit business from his customers in exchange for termination payments.” (Br. 22.) As in the preceding cases, there was no sale or exchange of his contract rights; instead, the Agreement was terminated pursuant to its terms. (JA 52.) Consequently, the termination payments constitute ordinary income.

CONCLUSION

Based on the foregoing, the Tax Court's ruling that the termination payments are ordinary income is not clearly erroneous and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

I certify that this brief complies with the type volume limitation set forth in Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a). This brief contains 9,169 words.

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on counsel for the appellants by mailing two hard copies of this brief and one copy of this brief in diskette form on this 19th day of December, 2002, in an envelope properly addressed as follows:

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