No. 05-1271

In the Supreme Court of the United States

CRESTMARK BANK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a notice of federal tax lien filed by the Internal Revenue Service adequately identified the taxpayer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-10a) is reported at 412 F.3d 653. The opinion of the district court (Pet. App. 11a-23a) is reported at 302 B.R. 351, and the opinion of the bankruptcy court (Pet. App. 24a-33a) is reported at 292 B.R. 579.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2005. A petition for rehearing was denied on December 30, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 30, 2006. The

[1] The caption of the bankruptcy court's opinion as set forth in the appendix to the petition erroneously denominates the opinion as an opinion of the district court. Pet. App. 24a.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In April 1998 and April 2001, Spearing Tool and Manufacturing Co. (Spearing) entered into loan agreements with petitioners Crestmark Bank and Crestmark Financial Corp. Petitioners perfected their security interests in Spearing's property by filing financing statements with the Michigan Secretary of State. Pet. App. 4a-5a.

On October 15, 2001, after Spearing had failed to make certain federal employment tax payments, the Internal Revenue Service (IRS) filed notices of federal tax lien against Spearing with the Michigan Secretary of State. The notices identified the taxpayer as "SPEARING TOOL & MFG COMPANY INC," the name Spearing had used on its quarterly federal tax return for the third quarter of 2001, as well as on its return for the fourth quarter of 1994, the first quarter for which it was delinquent. Pet. App. 5a, 25a.

Petitioners periodically submitted lien search requests to the State of Michigan using the exact name under which Spearing was registered with the Michigan Secretary of State, "Spearing Tool and Manufacturing Co." Pet. App. 5a. That name differed from the name used in the IRS notices of federal tax lien in that the notices used "&" instead of "and" and abbreviated "Manufacturing" to "MFG." Because Michigan's electronic search technology retrieves only liens for debtors whose name matches the precise characters searched (other than "noise words" such as "Co." and "Inc.," which the search technology ignores), the searches submitted by petitioners failed to reveal the

federal tax liens. A search result in February 2002, however, included a hand-written note stating, "[y]ou may wish to search Spearing Tool & Mfg. Company Inc." Petitioners nonetheless failed at that time to submit a search using the suggested name, and they made additional advances of funds to Spearing between October 15, 2001, and Apri1 6, 2002. *Id.* at 5a-6a & n.2.

2. On April 16, 2002, Spearing filed a petition in bankruptcy under Chapter 11. After the bankruptcy filing, petitioners for the first time requested a search under the name "Spearing Tool & Mfg. Company Inc.," and the ensuing search revealed the existence of the notices of federal tax lien. Pet. App. 6a.

Petitioners then brought this suit in the bankruptcy court to determine their lien priority against the United States. Pet. App. 6a. Petitioners moved for summary judgment, contending that their security interests in Spearing's personal property took priority over the federal tax liens. *Id.* at 25a. Petitioners argued that the notices of federal tax lien were invalid because they failed to adhere to Michigan law in using a name other than Spearing's exact registered name. *Id*. at 26a, 30a-31a. The government opposed petitioners' motion, contending that federal law was controlling, and that the lien notices validly identified Spearing because they used common abbreviations and the name shown on recent tax returns. *Id*. at 20a, 27a.

The bankruptcy court denied petitioners' motion for summary judgment and granted summary judgment to the government *sua sponte*. Pet. App. 24a-33a. The court observed that, although state law controls the place a federal tax lien is to be filed, federal law controls the form and content of the notice. *Id*. at 31a. The court noted that Treasury Regulations require a notice of

federal tax lien to "identify the taxpayer," *ibid.* (citing 26 C.F.R. 301.6323(f)-1(d)(2)), and that here, the notices did "identify the taxpayer," *ibid.* The court explained that "[t]he IRS used the accepted abbreviation for the word 'Manufacturing';" that Spearing "frequently used the 'Mfg.' and 'MFG.' abbreviations in identifying itself"; and that the bank "itself referred to the debtor as 'Spearing Tool and Mfg.' in credit narratives prepared by a Crestmark employee." *Id.* at 32a-33a.

3. The district court reversed and granted summary judgment to petitioners, concluding that their security interests took priority over the federal tax lien. Pet. App. 11a-23a. In the district court's view, it would be unreasonable to require a lender "to conduct separate, multiple searches under the debtor's multiple possible names for a possible federal tax lien," and "[t]he burden on the government to include corporate taxpayers' [exact] registered names seems slight by comparison." *Id.* at 21a.

4. The court of appeals reversed the district court and affirmed the bankruptcy court's grant of summary judgment for the government. Pet. App. 3a-10a. The court noted that the form and content of a notice of federal tax lien is a matter of federal law, and that a notice validly identifies the taxpayer if a "reasonable and diligent search" would reveal the existence of the lien. *Id.* at 7a. The court concluded that petitioners should have submitted searches of Spearing's name using "Mfg." and "&," which are "most common abbreviations" that petitioners "had notice that Spearing sometimes used." *Id.* at 8a. The court observed that policy considerations also supported its conclusion because "[a] requirement that tax liens identify a taxpayer with absolute precision would be

unduly burdensome to the government's tax-collection efforts." *Id.* at 9a. The court made clear that it intended to "express no opinion about whether creditors have a general obligation to search name variations," and that its "holding [was] limited to these facts." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. It is fundamental that federal law controls the form and content of a notice of federal tax lien. *United States* v. *Union Cent. Life Ins. Co.*, 368 U.S. 291, 296 (1961). Under 26 U.S.C. 6323(f)(3), "[t]he form and content of the notice" of lien "shall be prescribed by the Secretary," and "shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien." To be valid, a notice of lien must "identify the taxpayer." 26 C.F.R. 301.6323(f)-1(d)(2). It is well-settled that a notice "need not perfectly identify the taxpayer." Pet. App. 7a. Rather, a notice is valid if a "reasonable and diligent search" would reveal the tax lien's existence, even if the notice contains some manner of error in identifying the taxpayer. *Tony Thornton Auction Serv., Inc.* v. *United States*, 791 F.2d 635, 639 (8th Cir. 1986); see *Kivel* v. *United States*, 878 F.2d 301, 303, 305 (9th Cir. 1989).

The court of appeals correctly held that the notices of tax lien at issue in this case were valid under those standards, and the court's fact-bound conclusion warrants no further review. The notices used the name submitted by Spearing itself on certain of its employment tax returns. Although that name varied

slightly from the company's exact name in the Michigan registry by using an ampersand in place of "and" and by abbreviating "Manufacturing" as "MFG," those abbreviations are "most common," and petitioners "had notice that Spearing sometimes used these abbreviations." Pet. App. 8a. Petitioners were in possession of documents that identified Spearing using variations of the exact registered name, including use of "&" instead of "and" and "Mfg." instead of "Manufacturing," and petitioners themselves referred to Spearing as "Spearing Tool and Mfg." in credit narratives. Gov't C.A. Br. 6; Pet. App. 8a, 33a. And a hand-written note on one search result specifically recommended that petitioners submit an alternative search using the precise name that appeared on the notices of federal tax lien. *Id.* at 5a. In those circumstances, the court of appeals correctly held that a reasonable and diligent search would have revealed the existence of the tax liens.[2]

There is no merit to petitioner's contention (Pet. 23-26) that the IRS's notices, to be valid, were required to comply with revised Article 9 of the U.C.C. Under revised Article 9, an error or omission in listing the name of a debtor renders a financial statement (including a notice of lien) invalid if a search of the records under the debtor's "correct name," using the "standard search logic" of the filing office, would fail to retrieve the notice. See Mich. Comp. Laws Ann. § 440.9506(3) (West 2003).

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[2] As the government explained in the court of appeals, Gov't C.A. Br. 51, a search, using the terms "Spearing Tool," of the databases of tax liens and financing statements contained in the commonly-used Lexis and Westlaw legal research services would have disclosed the notices of federal tax lien at issue.

The validity of a notice of federal tax lien is a matter of federal law, not state law such as the U.C.C. provisions adopted by Michigan. See *Union Cent. Life Ins. Co.*, 368 U.S. at 296; Pet. App. 6a-7a. Although the federal rule could incorporate state law, the court of appeals correctly concluded that the interests in uniformity and in avoiding interfering with the collection of federal tax obligations compel adhering to the established reasonable-and-diligent-search rule rather than adopting the standards set forth in revised U.C.C. Article 9. Pet. App. 9a-10a. Cf. *Union Cent.*, 368 U.S. at 294 (noting the "principle of uniformity which has long been the accepted practice in the field of federal taxation"). While all states have elected to adopt revised Article 9, the validity of a notice under Article 9 ultimately depends on a particular State filing office's standard computer search logic. See Mich. Comp. Laws Ann. § 440.9506(3) (West 2003). And the States' computer search logic criteria, to the extent they have been developed and are identifiable, can vary in material respects. Gov't C.A. Br. 43-44.

Additionally, the IRS, as an involuntary creditor, stands in a substantially different position from voluntary private lenders like petitioners. Article 9 of the U.C.C. applies only to consensual liens, not statutory liens such as federal tax liens. See Mich. Comp. Laws Ann. § 440.9109(1)(a) (West 2003); Pet. App. 9a. Voluntary lenders have the ability and incentive to demand financial information and disclosures from borrowers as part of the process of extending credit. Petitioners thus were aware that Spearing was behind in its federal tax payments, had directed their employees to keep a close watch on the situation, and should have expected that a tax lien would be filed.

Gov't C.A. Br. 5-6. In that context, it is fully reasonable to expect a lender who is attempting to identify the existence of competing liens (including tax liens that petitioners should have expected would be filed) to do more than rely on a single, exact-name search of the type conducted by petitioners.

The IRS, as an involuntary creditor, lacks any relationship with a debtor comparable to that of voluntary creditors such as petitioners, and thus lacks the sorts of information about the debtor that are ordinarily possessed by voluntary creditors. The IRS's lien preparation process is partially automated and reasonably uses the name submitted by the taxpayer itself, an efficient process that would be significantly compromised if the IRS were required to manually verify a taxpayer's exact name under the standards of revised Article 9. See Gov't C.A. Br. 40-42.[3]

Petitioners suggest (Pet. 15) that, under the court of appeals' decision, a lender is required "to search all names which might, only theoretically, be used by a debtor," and can "never be certain that it has searched the name used by the IRS to identify the taxpayer." The

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[3] Petitioners, relying on a Senate Committee Report, S. Rep. No. 1708, 89th Cong., 2d Sess. (1966), suggest that Congress intended to incorporate the U.C.C. rules concerning notices of federal tax lien. Pet. 21-22. The Committee Report, however, suggests only that Congress may have wished to adopt certain aspects of the U.C.C. in the law governing tax liens, and does not speak specifically to the question in this case concerning the standards for identifying the taxpayer. In any event, the Committee Report was issued in 1966, when the U.C.C. standard governing the adequacy of notice was one of "substantial compliance" rather than strict compliance, and resembled the standard applied here by the court of appeals. See Gov't C.A. Br. 34-35. The new standards in revised Article 9 were not promulgated until 1998. *Id.* at 34.

court of appeals, however, explicitly stated that it was "express[ing] no opinion about whether creditors have a general obligation to search name variations," and that its "holding [was] limited to these facts." Pet. App. 9a. That fact-specific holding warrants no further review.

2. There is no merit to petitioners' contention (Pet. 16-18, 21-22) that the court of appeals' decision conflicts with this Court's decision in *United States* v. *Kimbell Foods*, 440 U.S. 715 (1979). In that case, the Court held that the priority of federal liens arising from certain federal lending programs was a matter of federal law, and the Court incorporated state U.C.C. provisions concerning priority of private and consensual liens as the governing federal standard. The rationale for adopting state law as the federal rule of decision in *Kimbell Foods* was that the affected federal agencies' consensual loans resembled loans made by commercial lenders. See *id.* at 733-738. The Court specifically distinguished the federal agency liens at issue in the case from federal tax liens. See *id.* at 734 (noting the "significant differences between federal tax liens and consensual liens"). The Court explained that, whereas the affected agencies were acting "voluntarily" as "a lender or guarantor," with "detailed knowledge of the borrower's financial status," in the tax context the "United States is an involuntary creditor of delinquent taxpayers, unable to control the factors that make tax collection likely." *Id.* at 736. *Kimbell Foods* therefore is of no assistance to petitioners.

There likewise is no merit to petitioners' contention (Pet. 19, 25) that the court of appeals' decision conflicts with *Wallin* v. *Commissioner*, 744 F.2d 674 (9th Cir. 1984), and *McPartlin* v. *Commissioner*, 653 F.2d 1185 (7th Cir. 1981). Neither case concerned or addressed a

notice of federal tax lien, or the standards for identifying the taxpayer on such a notice. Instead, both cases involved the IRS's failure properly to address a notice of deficiency to a taxpayer's last known address.[4]

3. There is no merit to petitioner's fact-bound contention (Pet. 26-29) that the bankruptcy court abused its discretion when it entered summary judgment against petitioners notwithstanding that the government had not moved for summary judgment. Petitioners filed a motion for summary judgment, and "there is a difference between simply granting summary judgment *sua sponte* and doing so in favor of an opposing party when one party has made a motion for summary judgment." *Employers Ins.* v. *Petroleum Specialities, Inc.*, 69 F.3d 98, 105 (6th Cir. 1995). Contrary to petitioner's argument, "the fact that the nonmoving party has not filed its own summary judgment motion does not preclude the entry of summary judgment if otherwise appropriate." *In re Century Offshore Mgmt. Corp.*, 119 F.3d 409, 412 (6th Cir. 1997). Where, as here, "the parties fully briefed the determinative issue," and the moving party "concede[d] that there [were] no facts at issue," *ibid.*, it was no abuse of discretion for the

[4] Petitioners similarly err in alleging a conflict (Pet. 25) with two district court decisions: *Kennedy* v. *United States*, 403 F. Supp. 619 (W.D. Mich. 1975), which likewise involved a failure to send a deficiency notice to the taxpayer's last known address, and *Davis* v. *United States*, 728 F. Supp. 513 (C.D. Ill. 1989), which required the IRS to refile a notice of lien under a taxpayer's new name when the revenue officer knew of the name change and the taxpayer had filed subsequent tax returns under the new name.

bankruptcy court to grant summary judgment against petitioners.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioners assert (Pet. 7-8) that the court of appeals incorrectly assumed that the Michigan Secretary of State was the author of the hand-written note on petitioner's search result suggesting that petitioners submit a search using the name that appeared on the notices of federal tax lien. See Pet. App. 8a. Even if, as petitioners now suggest, the note was written by one of petitioners' own "employee[s] or agent[s]," Pet. 8, that would only reinforce petitioners' own awareness that it would be prudent to conduct a broader search.