IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. TRICARICHI,

Appellant,

v.

COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO. and SEYFARTH SHAW LLP,

Respondents.

Supreme Court Case No. 73175

District Court Case No. A-16-735910-B

APPEAL

From the Eighth Judicial District Court, Department XV
Clark County, Nevada
Hon. Joe Hardy, District Court Judge

APPELLANT'S OPENING BRIEF

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Todd W. Prall (9154)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
702-385-2500
702-385-2086 (fax)
mhutchison@hutchlegal.com
mwall@hutchlegal.com
tprall@hutchlegal.com

Scott F. Hessell
Thomas D. Brooks
(Admitted *Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603
312-641-3200
312-641-6492 (fax)
shessell@sperling-law.com
tdbrooks@sperling-law.com

Attorneys for the Appellant, Michael A. Tricarichi

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL A. TRICARICHI, Appellant, v. COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO. and SEYFARTH SHAW LLP, Respondents.	Supreme Court Case No. 73175 District Court Case No. A-16-735910-B

APPEAL

From the Eighth Judicial District Court, Department XV
Clark County, Nevada
Hon. Joe Hardy, District Court Judge

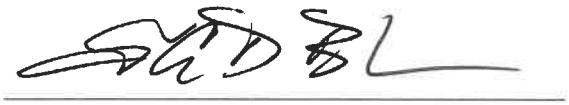
NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Since Appellant Michael A. Tricarichi is an individual, there are no parent corporations or publicly held companies owning 10 percent or more of the party's stock.

Since the inception of this case, Appellant has been represented only by the firms listed below, who are expected to appear in this court.

Dated this 18th day of September, 2017.



Mark A. Hutchison (4639)
Michael K. Wall (2098)
Todd W. Prall (9154)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
702-385-2500
702-385-2086 (fax)
mhutchison@hutchlegal.com
mwall@hutchlegal.com
tprall@hutchlegal.com

Scott F. Hessell
Thomas D. Brooks
(Admitted *Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603
312-641-3200
312-641-6492 (fax)
shessell@sperling-law.com
tdbrooks@sperling-law.com

Attorneys for the Appellant, Michael A. Tricarichi

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

APPELLANT'S OPENING BRIEF

I. JURISDICTIONAL STATEMENT

This appeal is from a final order – certified pursuant to NRCP 54(b) and entered May 1, 2017 – dismissing the three respondents from the case below on personal jurisdiction grounds and denying Appellant jurisdictional discovery. (App. Vol. 9 at APP 1947)[1]

The basis for the Supreme Court's appellate jurisdiction is NRAP 3A(b)(1) regarding final judgments. Pursuant to NRAP 4(a)(1), "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." The Notice of Entry of Order was filed and served on May 2, 2017. (App. Vol. 9 at APP 1952-54) Appellant filed his Notice of Appeal on May 25, 2017. (*Id.* at APP 1960)

II. ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7), because this case originated in business court; however, Appellant submits that this matter should be retained by the Supreme Court as one raising a question of statewide public importance under NRAP 17(a)(11). In particular, this matter, which arises from the grant of two motions for dismissal on personal

[1] Citations to "App. _____" are to the Joint Appendix submitted in this matter.

jurisdiction grounds, raises the question of whether the United States Supreme Court's decision in *Walden v. Fiore*, 134 S.Ct. 1115 (2014), redefined the permissible scope of specific personal jurisdiction for this State's courts in intentional tort cases, and in so doing overruled prior precedent of the Nevada Supreme Court, including *Davis v. Eighth Jud. Dist.,* 97 Nev. 332 (1981) (holding that there is personal jurisdiction in Nevada over defendants who participate in a civil conspiracy that targets, defrauds and injures a Nevada resident). This issue was raised in the briefing and oral argument below and resolved in the District Court's orders dismissing Respondents from the case. (*See, e.g.*, App. Vol. 1 at APP 0181, Vol. 7 at APP 1417-22, 1479-82, Vol. 8 at APP 1842-45, Vol. 9 at APP 1893-96, 1914-16.)

The reach of the judicial authority of this State is a significant question that is best resolved in a conclusive manner before this Court. All Nevadans would be affected by an appellate decision regarding the District Court's rulings, which, if allowed to stand, would severely limit the ability of Nevada residents to seek a judicial remedy in Nevada when a foreign person or entity, either directly or via participation in an illegal conspiracy, reaches into Nevada and intentionally causes them harm here. Such a result would seem to run counter to the jurisprudence of both this Court and the U.S. Supreme Court. *See, e.g., Trump v. Eighth. Jud. Dist. Ct.*, 109 Nev. 687, 703, 857 P.2d 740, 750 (1993) ("Where possible, a Nevada

resident should be able to obtain judicial redress in the most convenient, cost-effective manner....") (finding Nevada to be the appropriate jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors."). Either way, though, it is important for all of the State to have a clear and decisive resolution of the reach of this State's jurisdiction. This Court, rather than the Court of Appeals, is the appropriate forum to reach such a decisive resolution.

III. STATEMENT OF THE ISSUES

1. Whether defendants who purposefully reached out to, interacted with and injured a Nevada resident in Nevada are subject to the specific personal jurisdiction of the Nevada courts in a case brought by the Nevada resident arising from those actions.

2. Whether defendants who participated in a civil conspiracy that targeted, defrauded and injured a Nevada resident are subject to the specific personal jurisdiction of the Nevada courts in a case brought by the Nevada resident arising from that conspiracy.

3. In the alternative, whether the District Court erred in denying Appellant jurisdictional discovery.

IV. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff/Appellant Michael Tricarichi, a Nevada resident and sole shareholder of a cellular telephone business, sold all his shares in that company to a third party, Fortrend International, LLC ("Fortrend"), which represented, among other things, that the transaction would have certain legitimate tax benefits. Unbeknownst to Mr. Tricarichi, those representations were false. Defendant/Respondent Coöperatieve Rabobank U.A. ("Rabobank") and its affiliate, defendant/respondent Utrecht-America Finance Co. ("Utrecht") – knowingly concealing from Appellant that the transaction was improper for tax purposes – reached out to Appellant in Nevada and induced him to agree to certain conditions so that the transaction could close. Further participating in the fraud upon Appellant, Rabobank and Utrecht – in return for a substantial fee – also loaned Fortrend the lion's share of the purchase price and served as the key conduit for the tens of millions of dollars that changed hands when the transaction closed. Defendant/Respondent Seyfarth Shaw LLP ("Seyfarth"), a law firm, took part in the fraud committed upon Appellant by providing Fortrend an opinion letter blessing certain illegal steps that Fortrend would take in effectuating the fraudulent scheme. Seyfarth knew these steps to be illegitimate for tax purposes but blessed them regardless – also in return for a substantial fee. As a result of Respondents'

actions, Appellant was forced to defend himself before the IRS and in Tax Court, and was found liable for millions of dollars in back taxes, penalties and interest. As alleged in Appellant's complaint, Respondents' actions constitute aiding and abetting fraud, conspiracy and violations of Nevada's racketeering statute. Respondents all moved to dismiss for lack of personal jurisdiction. Appellant opposed these motions and, in the alternative, also sought jurisdictional discovery. The district court denied Appellant jurisdictional discovery, granted Respondents' motions, and certified its orders as final pursuant to NRCP 54(b).

B. Course of the Proceedings

Appellant filed his Complaint against Respondents (and two other defendants not party to this appeal) on April 29, 2016. (App. Vol. 1 at APP 0001) Seyfarth accepted service of the Summons and Complaint on May 16, 2016. (*Id.* at APP 0042) Rabobank and Utrecht accepted and acknowledged service of the Summons and Complaint on August 26, 2016. (*Id.* at APP 0158)

Seyfarth moved to dismiss the Complaint on July 5, 2016, arguing that the Nevada district court did not have personal jurisdiction over Seyfarth. (App. Vol. 1 at APP 0043) Appellant responded to Seyfarth's motion on August 26, 2016, arguing, *inter alia*, that there was specific personal jurisdiction over Seyfarth in Nevada in light of Seyfarth's participation in a civil conspiracy from which this case arises and which targeted, defrauded and injured Appellant, a Nevada

resident. (*Id.* at APP 0160) In the alternative, Appellant sought jurisdictional discovery. (*Id.* at APP 0182) After Seyfarth filed a reply on September 28, 2016, the District Court heard oral argument on November 16, 2016. (App. Vol. 5 at APP 1131, Vol. 7 at 1409)

Rabobank and Utrecht moved to dismiss the Complaint on October 19, 2016, also arguing that the Nevada district court did not have personal jurisdiction over them. (App. Vol. 6 at APP 1146) Appellant responded to Rabobank and Utrecht's motion on December 7, 2016, arguing that there was specific personal jurisdiction over these Respondents in Nevada in light of their intentionally reaching out to Nevada and Appellant by, among other things, insisting that Appellant open multiple Rabobank accounts for himself and his company, and corresponding with Appellant in order to accomplish this; and in light of these Respondents' participation in the broader civil conspiracy from which this case arises, which targeted, defrauded and injured Appellant in Nevada. (App. Vol. 7 at APP 1463) In the alternative, Appellant counter-moved for jurisdictional discovery. (*Id.* at APP 1463) After Rabobank and Utrecht filed a reply on January 13, 2017, the District Court heard oral argument on January 18, 2017. (App. Vol. 9 at APP 1862, 1874)

C. Disposition Below

The District Court denied Appellant jurisdictional discovery and granted Seyfarth's motion to dismiss on December 16, 2016. (App. Vol. 8 at APP 1840-48) Thereafter the District Court also denied Appellant jurisdictional discovery and granted Rabobank and Utrecht's motion to dismiss on February 7, 2017.[2] (App. Vol. 9 at APP 1908-19) After Appellant moved for certification and the certification motion was briefed and argued, the District Court certified both rulings as final orders pursuant to NRCP 54(b) on May 1, 2017.[3] (*Id.* at APP 1935-59)

V. STATEMENT OF FACTS

A. Appellant Tricarichi and Respondents Rabobank, Utrecht and Seyfarth

Appellant, Michael A. Tricarichi, has been a resident of Las Vegas, Nevada since May 2003. (Cmplt. ¶ 9 – App. Vol. 1 at APP 0005); Tricarichi Aff. ¶ 3 – App. Vol. 1 at APP 0188) After moving to Nevada, Mr. Tricarichi, the sole shareholder of Westside Cellular, Inc. ("Westside"), sold his Westside shares in

---

[2] Rabobank and Utrecht also moved for dismissal on alternative grounds, but the District Court denied this portion of their motion without prejudice as moot. (App. Vol. 6 at APP 1161-65, Vol. 9 at APP 1917)

[3] In addition to ruling that there was no specific or conspiracy jurisdiction over Seyfarth, the District Court also found that there was no general jurisdiction over that party. Appellant is not appealing the ruling as to general jurisdiction. Appellant did not contend below that there was general jurisdiction over Rabobank or Utrecht.

what is now known as a "Midco" transaction. (Cmplt. ¶¶ 24-54 – App. Vol. 1 at APP 0009-21) Defendants' wrongdoing in connection with the transaction caused Mr. Tricarichi to suffer millions of dollars in tax and other liabilities that he otherwise would not have faced. (*Id.* ¶¶ 9, 75-80 – APP 0009, 0028-30)

Respondent Rabobank, formerly known as Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., is a multinational banking and financial services company organized as a Dutch cooperative, with principal branches in New York, New York and Utrecht, Netherlands. (Cmplt. ¶ 11 – App. Vol. 1 at APP 0005; App. Vol. 7 at APP 1578) Rabobank and its consolidated subsidiaries (which include Utrecht) serve more than 10 million customers in 48 countries including the U.S., and as of December 31, 2015, had total assets of €670 billion ($712 billion). (App. Vol. 7 at APP 1567, 1578) Rabobank has numerous offices throughout the U.S. (*Id.* at APP 1568-75)

During the period relevant to the complaint, Rabobank's business included financing and facilitating Midco transactions promoted by third parties including Fortrend International, LLC ("Fortrend") and Midcoast Credit Corp. ("Midcoast"). (Cmplt. ¶ 11 – App. Vol. 1 at APP 0005) Rabobank purposefully did business with Appellant in Las Vegas, Nevada in connection with such a transaction. (*Id.*; Tricarichi Aff. ¶¶ 13-19 – App. Vol. 7 at APP 1495-96) Rabobank and Utrecht promoted and made the transaction possible by moving

funds through Appellant's and other accounts and by loaning Fortrend the lion's share of the purchase price for Appellant's company, in return for a substantial fee – all along knowing that the transaction was improper for tax purposes. (Cmplt. ¶¶ 4, 11-12, 44-52, 54, 97-123 – App. Vol. 1 at APP 0004-06, 0015-21, 0033-38)

Respondent Utrecht, a wholly-owned subsidiary of Rabobank, is a Delaware corporation with its principal place of business in New York. (Cmplt. ¶ 12 – App. Vol. 1 at APP 0006) Utrecht was a subsidiary via which Rabobank financed transactions promoted by Fortrend, Midcoast and related entities. (*Id.*) Utrecht loaned Fortrend the vast majority of the purchase price for Appellant's stock. (Cmplt. ¶¶ 4, 11-12, 44-52, 54, 97-123 – APP 0004-06, 0015-21, 0033-38) Utrecht's subsidiaries include Rabobank, N.A., a national banking association based in California, and Rabo AgriFinance, LLC, which is registered to do business in Nevada. (App. Vol. 7 at APP 1578, 1585) Utrecht is the Manager of Rabo AgriFinance, LLC. (*Id.* at APP 1585)

Respondent Seyfarth is a law firm that facilitated the Midco transaction into which Appellant was drawn by issuing – as it did numerous other times – a bogus tax opinion letter to an affiliate of Fortrend which purchased the Westside shares. (Cmplt. ¶¶ 5, 13, 59-72 – App. Vol. 1 at APP 0004, 0006, 0023-28) By doing so,

Seyfarth conspired with its co-defendants and others, aided and abetted fraud, and engaged in racketeering. (*Id.* ¶¶ 97-121 – APP 0033-38)

B. Midco Transactions, Respondents and Notice 2001-16

"Midco" or "intermediary" transactions, a type of abusive tax shelter, were widely promoted during the late 1990s and early 2000s. (Cmplt. ¶ 24 – App. Vol. 1 at APP 0009) The IRS has listed Midco transactions as "reportable transactions" for federal income tax purposes, meaning that the IRS considers them, and substantially similar transactions, to be improper and abusive tax-avoidance mechanisms. (*Id.*) Fortrend was a leading promoter of Midco-type transactions, actively marketing and soliciting numerous such transactions that were, years later, rejected by the tax courts. (*Id.*)

Midco-type transactions were generally marketed and promoted to shareholders – like Mr. Tricarichi – of closely held C corporations with potentially large taxable gains. (Cmplt. ¶ 25 – App. Vol. 1 at APP 0009) Promoters of Midco transactions targeted such shareholders and offered a purported solution to "double taxation," that is, the taxation of gains at both the corporate and individual shareholder levels. (*Id.*) Generally speaking, Midco transactions proceeded as follows: First, an "intermediary company," or "midco," affiliated with the promoter – typically a shell company, often organized offshore – purchased the shares of the target company, and thus its tax liability. (*Id.*) After acquiring the

shares and the imbedded tax liability, the intermediary company engaged in a second step that was supposed to offset the target's realized gains and eliminate the corporate-level tax. (*Id.*) This second step, unbeknownst to the selling shareholder(s), was itself an improper tax-avoidance maneuver, frequently a "distressed asset/debt," or "DAD," tax shelter. (*Id.*) This was the case with the deal that Mr. Tricarichi was drawn into, where Seyfarth made the DAD scheme possible, as further discussed below.

To draw Mr. Tricarichi and others like him into such transactions, Midco promoters like Fortrend (which is now defunct) represented to the target company's shareholders that they could legitimately net more for their shares than would otherwise be the case absent the intermediary transaction. (Cmplt. ¶¶ 15, 25 – App. Vol. 1 at APP 0007, 0009) As happened with Appellant's transaction, however, such representations often proved, years later, to be false. (*Id.* ¶ 26 – APP 0009-10) As set forth in the Complaint, Appellant later found himself "holding the bag" in late 2015 after what was promoted to him by Fortrend and facilitated by Respondents and the other Defendants resulted in substantial tax liabilities and penalties for Appellant personally. (*Id.* ¶¶ 75-80 – APP 0028-30)

Rabobank, in particular, frequently partnered with Fortrend in executing Midco deals, and had done dozens of transactions with Fortrend prior to Appellant's transaction. (Cmplt. ¶ 44 – App. Vol. 1 at APP 0014; App. Vol. 7 at

APP 1543 (Rabobank document noting that "We have entered into various acquisition financing transactions with Fortrend over the past five years, all of which have been concluded satisfactorily.")) From 1996 to 2003, Fortrend promoted almost one hundred Midco transactions, and worked closely with Rabobank to obtain financing for many of those transactions. (Cmplt. ¶ 45 – App. Vol. 1 at APP 0015-16) In Appellant's case, of the $34.6 million agreed purchase price for Westside's stock, $29.9 million came from Rabobank, via Utrecht. (*Id.*) (The remainder was loaned by another Fortrend affiliate, Moffat.) (*Id.*)

During the years 1998 – 2002, Rabobank (via subsidiaries including Utrecht) financed a total of 88 Midco transactions, at the pace of about 18 transactions per year. (Cmplt. ¶ 49 – App. Vol. 1 at APP 0017-18) Rabobank earned considerable and attractive fees via the loans, which ranged in amount between $6 million and $260 million, and were mostly for terms of only one to three days. (*Id.*) At the time, Rabobank was experiencing difficulty in other areas of its business, and opportunistically looked at the Midco financing transactions as "easy money" – short term loans with high yield and no credit risk. (*Id.*)

Notwithstanding multiple representations to Appellant that the Fortrend transaction was proper under the tax laws, Fortrend, Rabobank, Utrecht and the other defendants actually knew that, on January 18, 2001, the IRS had issued Notice 2001-16. (Cmplt. ¶ 56 – App. Vol. 1 at APP 0022) The Notice describes

transactions where a corporation disposes of substantially all of its assets and then the corporation's shareholders sell their stock to another party who seeks favorable tax treatment. (*Id.*) Notice 2001-16 states that any transactions that are the same as, or substantially similar to, those described in the Notice are "listed transactions." (*Id.*) Listed transactions are deemed by the IRS to be abusive tax shelters that may result in penalties and other consequences. (*Id.*) Fortrend, Rabobank, Utrecht and the other defendants failed to properly advise Appellant about the 2001 Tax Notice and its significance for the transaction promoted to him. (*Id.* ¶¶ 57-58 – APP 0022-23)

Rabobank and the other defendants thus failed despite the fact that, in or about October 2002 – that is, almost a year before the transaction involving Appellant closed – Rabobank determined that many if not all of the Midco transactions in which it previously participated were listed transactions as defined by the IRS. (Cmplt. ¶ 51 – App. Vol. 1 at APP 0020) As a result, the number of Midco transactions executed by Rabobank after October 2002 decreased significantly. (*Id.*) Rabobank took part in only five Midco financing transactions in 2003, one of those being Appellant's. (*Id.*) In 2004, Rabobank undertook only one Midco financing transaction, its last. (*Id.*) A Rabobank internal audit further found in 2005 that Rabobank's internal controls were inadequate in numerous respects with respect to the Midco transactions. (*Id.*) The audit found, among

other things, that it was at least "questionable" whether Midco promoters like Fortrend could be described as "reputable" companies with which Rabobank should be doing business. (*Id.*) Rabobank would have stopped financing Midco transactions entirely after October 2002 were it not for the fact that it did not want to harm its existing relationships with Midco promoters like Fortrend. (*Id.*)

C. The Remaining Defendants and Third Parties

Respondents' co-defendants, and a brief summary of their respective roles in the case, are as follows:

- **PricewaterhouseCoopers LLP ("PwC")** is an accounting firm with expertise in tax matters that Mr. Tricarichi retained to review the proposed transaction. PwC advised Mr. Tricarichi that the proposed Midco transaction was legitimate for tax purposes, and that Mr. Tricarichi had no ongoing exposure related to Westside once the transaction with Fortrend was completed. Unbeknownst to Mr. Tricarichi at the time, PwC's advice in this regard was, at minimum, grossly negligent. (Cmplt. ¶¶ 3, 10, 37-43, 53, 56-58, 81-96 – App. Vol. 1 at APP 0003-04, 0012-15, 0021-23, 0030-32)

- **Graham R. Taylor:** Taylor was disbarred for his involvement in illegal tax shelters. He was a Seyfarth partner who took part in the fraud upon Mr. Tricarichi by issuing a bogus tax opinion letter to the affiliate of Fortrend which promoted the transaction at issue to Appellant and purchased the Westside shares. (Cmplt. ¶¶ 5, 13, 59-72 – App. Vol. 1 at APP 0004, 0006, 0022-28)

While not named as defendants here, several third parties (in addition to Fortrend) also played a role in the fraud that ensnared Appellant. They include:

- **Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu"):** Conn Vu worked at Fortend promoting and facilitating various tax-shelter transactions, including the transaction promoted to

Appellant. He managed various companies acquired by Fortrend, including Westside. Conn Vu is the subject of a federal criminal investigation in New York with respect to such conduct, and his indictment has been anticipated. (Cmplt. ¶¶ 16, 41, 55, 72 – App. Vol. 1 at APP 0007, 0014, 0021-22, 0027-28; App. Vol. 9 at APP 1967, 1970-71, 1984-85, 2013 *et seq.*, 2024 etc. at ¶¶ 1, 7-9, 53-57, 193 *et seq.*, 242 etc.; App. Vol. 3 at APP 0639-40)

- **John P. McNabola:** McNabola was an agent of Fortrend and the president of the Fortrend affiliates involved in defrauding Appellant. The U.S. Department of Justice has identified McNabola a co-promoter, along with Conn Vu, Seyfarth's Taylor and others, of unlawful Midco and "DAD" tax shelter transactions during the period 2003-2010. (Cmplt. ¶¶ 17, 42, 47, 60-62, 69, 72 – App. Vol. 1 at APP 0007, 0014-16, 0023-24, 0026-28; App. Vol. 9 at APP 1971-72 *et seq.*, 2001 etc. at ¶¶ 9, 12-14 *et seq.*, 140 etc.)

- **John E. Rogers:** Rogers was a Seyfarth partner from July 2003 until May 2008. In early 2003, shortly before he joined Seyfarth, Rogers conceived of and created the illegal DAD tax shelter that was used in connection with the Fortrend transaction and numerous other such transactions. In 2010, the U.S. Department of Justice sought to enjoin Rogers from engaging in such fraudulent conduct; Rogers agreed to a permanent injunction in September 2011. (Cmplt. ¶¶ 19, 64-68 – App. Vol. 1 at APP 0008, 0023-25; App. Vol. 4 at 0856-60, 0869 (¶¶ 6, 12-13, 20-22, 63); Vol. 5 at APP 0928)

- **Midcoast Credit Corp. ("Midcoast")** is a now-defunct Florida corporation that, in 2003, along with Fortrend, was promoting tax-shelter transactions to Appellant and others. In October 2013, the principals of Midcoast were indicted and charged with criminal conspiracy to commit fraud and other offenses for designing and implementing fraudulent tax schemes. (Cmplt. ¶¶ 18, 29-35 – App. Vol. 1 at APP 0007-08, 0011-12)

D. Appellant Becomes Ensnared in the Midco Transaction

Prior to 2003, Appellant was the president and sole shareholder of Westside, which purchased network access from major cellular service providers and resold that access to its cell-phone customers. (Cmplt. ¶ 27 – App. Vol. 1 at APP 0010)

Over time, Appellant learned that certain of these providers were price discriminating against Westside. (*Id.*) Westside sued those providers for anticompetitive trade practices; prevailed on liability after nearly a decade of litigation; and reached a settlement regarding damages, pursuant to which Westside ultimately netted, in April / May 2003, proceeds of about $40 million. (*Id.* ¶¶ 27-28 – APP 0010) In exchange, Westside was required to terminate its business as a retail provider of cell phone service and to end all service to its customers in June 2003 – effectively relinquishing its assets in return for the settlement proceeds. (*Id.* ¶ 28 – APP 0010)

Appellant was then introduced to both Fortrend and Midcoast, who each represented that they were involved in the distressed debt receivables business and wanted to purchase Appellant's Westside stock as part of this business. (Cmplt. ¶¶ 29-32 – App. Vol. 1 at APP 0011) Fortrend and Midcoast each made competing offers proposing essentially the same transaction: An intermediary company would borrow money to purchase the stock. (*Id.* ¶ 32 – APP 0011) After the sale closed, the intermediary company would merge into Westside, and the purchaser would employ Westside in its distressed-debt collection business. (*Id.*) The purchaser would fund its operations with Westside's remaining cash (Fortrend represented that financing for its distressed-debt recovery business was otherwise difficult to obtain), and employ

Westside's tax liabilities to legitimately offset tax deductions associated with this business. (*Id.*)

Fortrend and Midcoast represented to Appellant that the proposed transactions would result in legitimate tax benefits and thus a greater net return to Appellant than he would otherwise realize. (Cmplt. ¶ 33 – App. Vol. 1 at APP 0012) These representations included the assurance that the acquiring party had successfully undertaken numerous other transactions like the one being proposed to Appellant and that such transactions were proper under the tax laws. (*Id.*) Neither party told Appellant that the IRS was scrutinizing and challenging similar transactions as improper tax shelters. (*Id.*) Absent Respondents' and the other Defendants' improper actions, Appellant would have left the settlement proceeds in Westside, paid the corporate-level tax and invested in other business ventures through Westside, thereby avoiding any shareholder-level tax on a distribution from Westside. (*Id.* ¶ 34 – APP 0012)

Because Appellant thought Midcoast and Fortrend were competitors, he began negotiating with both in the hope of stirring up a bidding war. (Cmplt. ¶ 35 – App. Vol. 1 at APP 0012) Rather than continue to compete, though, Midcoast and Fortrend secretly agreed that Midcoast would step away from the transaction in exchange for a kickback of $1,180,000. (*Id.*) As a result of this bid-rigging,

Midcoast's final offer was intentionally unattractive, and Appellant chose to proceed with Fortrend. (*Id.*)

As set forth further below, Rabobank knowingly reached out to Nevada and a Nevada resident when it required Appellant to open accounts as part of the Fortrend transaction. Via these and other accounts, Rabobank was the key conduit for the funds that changed hands in order to close the transaction. (Cmplt. ¶ 44 – App. Vol. 1 at APP 0015) Rabobank and Utrecht also financed the vast majority of the purchase price of the transaction, which Respondents knew to be an improper tax-avoidance mechanism. (*Id.*) Without such participation by Rabobank and Utrecht, the transaction could not have proceeded, and Appellant would not have been injured. (*Id.*)

1. Appellant's Nevada Residency

Appellant has been a resident of Las Vegas, Nevada, since May 2003. (Tricarichi Aff. ¶ 3 – App. Vol. 7 at APP 1494) Mr. Tricarichi purchased and (with his family) moved into a home in Las Vegas in May 2003. (*Id.* at APP 1494 ¶ 4, 1504-09) He obtained a Nevada driver's license and registered to vote in Nevada in June 2003; and also updated his vehicle registration and insurance to reflect his Nevada address that summer. (*Id.* at 1494 (¶¶ 5-7), 1510-17) He also, for example, changed his mailing address to his Nevada address and opened bank and utility accounts in Nevada. (*Id.* at 1494 ¶ 8) Since moving to Nevada in

May 2003, including during the period May – September 2003, he has spent most of his time physically present in Nevada. (*Id.* at ¶ 9)

2. Rabobank and Utrecht Knowingly Reach Out to Nevada

In July 2003, Fortrend's Mr. Conn Vu (via a Fortrend affiliate, Nob Hill Holdings, Inc.) sent Appellant – in Nevada – a letter of intent regarding the proposed purchase of Appellant's Westside stock. (Cmplt. ¶ 41 – App. Vol. 1 at APP 0014; App. Vol. 7 at APP 1494-95 ¶ 10, APP 1518-24) The parties proceeded to discuss and negotiate a proposed stock purchase agreement. (Cmplt. ¶ 41 – App. Vol. 1 at APP 0014)

On August 13, 2003, Fortrend asked Rabobank for a $29.9 million short-term loan to finance the purchase of Appellant's Westside stock. (Cmplt. ¶ 46 – App. Vol. 1 at APP 0016; App. Vol. 7 at APP 1525-27, 1498 ¶ 4) Fortrend's request – which was produced by Rabobank during proceedings in the U.S. Tax Court – notes that Mr. Tricarichi is the shareholder of Westside, and lists his address in Las Vegas, Nevada. (App. Vol. 7 at APP 1527)

During the negotiation of the stock purchase, Mr. Tricarichi was informed that the purchaser of his Westside stock – another Fortrend affiliate, Nob Hill, Inc. ("Nob Hill") would be financing most of the purchase price via Rabobank; and that Westside would need to open a Rabobank escrow account in order to facilitate the closing if the transaction went forward. (Tricarichi Aff. ¶ 11 – App. Vol. 7 at APP

1495) At Rabobank's request, Appellant completed and signed account opening documents for that Westside account, dated August 19, 2003, reflecting a Nevada address. (*Id.*; App. Vol. 7 at APP 1528-36) With financing from Rabobank still outstanding, on August 28, 2003 Nob Hill sent to Appellant, in Nevada, an amendment of the letter of intent to extend the period for negotiations. (Tricarichi Aff. ¶ 12 – App. Vol. 7 at APP 1495; APP 1537-39)

The next day, August 29, 2003, Rabobank considered and approved a credit application for Nob Hill to borrow the $29.9 million in order to purchase the shares of Westside from Appellant. (App. Vol. 7 at APP 1540-48, 1498-99 ¶¶ 5, 6; Cmplt. ¶¶ 46-47 – App. Vol. 1 at APP 0016-17) The loan would be provided by Utrecht, Rabobank's subsidiary. (Cmplt. ¶ 12 – App. Vol. 1 at APP 0006) Rabobank understood Westside would have cash in excess of $29.9 million on deposit with Rabobank when the stock purchase closed and therefore considered the loan to be fully cash collateralized. (Cmplt. ¶¶ 46-47 – APP 0016-17)

During the stock-purchase negotiations, Appellant asked that Nob Hill, as part of the closing, transfer the purchase price for his stock to his account at Pershing bank. (Tricarichi Aff. ¶13 – App. Vol. 7 at APP 1495) Nob Hill did not object to this request. (*Id.*) As the closing approached, however, ***Rabobank*** said that it would not proceed with the transaction if the purchase price was going to be transferred directly to Mr. Tricarichi's Pershing account. (*Id.* ¶ 14)

Rabobank said that, in order for the purchase funds to be released to Appellant, it wanted to make sure that he resigned as a director and officer of Westside. (*Id.*) Rabobank said that it wanted Appellant to resign so that he would not have control over the Westside account at Rabobank post-closing. (*Id.*) Appellant was reluctant to resign, however, without first knowing that he had received the purchase price. (*Id.*)

Knowing he was a Nevada resident, Rabobank then told Appellant that Rabobank needed him to open *another* account, in his name, at Rabobank. (Tricarichi Aff. ¶ 15 – App. Vol. 7 at APP 1495) Rabobank said that the purchase price it was loaning Nob Hill would be placed into this account by Nob Hill while Appellant submitted his resignation as a Westside director and officer into escrow; and that Rabobank would then release the purchase funds in the account to Appellant per his instructions. (*Id.*)

So Rabobank sent Appellant documents to open this account, which Appellant signed and returned. (Tricarichi Aff. ¶ 16 – App. Vol. 7 at APP 1496; APP 1551-58) The documents reflect Appellant's residence in Nevada, and internal Rabobank documents further reflect the account being opened in Appellant's name, and Appellant's address in Nevada. (*Id.*; App. Vol. 7 at APP 1593-97, 1499 ¶ 12)

Before the closing of the stock purchase, Appellant sent his resignation to Rabobank, noting that the resignation was not effective until such time as the purchase price was credited to his account at Rabobank. (Tricarichi Aff. ¶ 17 – App. Vol. 7 at APP 1496; APP 1559-62) At this time, Appellant also sent instructions to Rabobank for the subsequent release of the purchase price from his Rabobank account to his account at Pershing. (Tricarichi Aff. ¶ 18 – APP 1496; APP 1563-65)

In the transaction's final structure, Fortrend used its affiliate Nob Hill (of which McNabola was the president) as the intermediary company to purchase the Westside stock. (Cmplt. ¶ 42 – App. Vol. 1 at APP 0014-15) Nob Hill's sole shareholder was Fortrend affiliate Millennium Recovery Fund, LLC ("Millennium"). (*Id.*) Appellant and Fortrend / Nob Hill executed the stock purchase agreement, and the transaction closed, on September 9, 2003. (Cmplt. ¶ 54 – APP 0021; App. Vol. 2 at APP 0219-427)

In the stock purchase agreement, which McNabola signed, Nob Hill represented that Westside would remain in existence for at least five years after the closing and "at all times be engaged in an active trade or business." (Cmplt. ¶ 42 – App. Vol. 1 at APP 0014-15; Vol. 2 at APP 0241 § 5.2(b)) Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause … [Westside] to satisfy fully all United States … taxes, penalties and

interest required to be paid by ... [Westside] attributable to income earned during the [2003] tax year." (Cmplt. ¶ 42 – App. Vol. 1 at APP 0014-15; Vol. 2 at APP 0241 § 5.2(a)) Nob Hill agreed to indemnify Appellant in the event of liability arising from breach of its representation to satisfy Westside's 2003 tax liability, and represented that it had sufficient assets to cover this indemnification obligation. (Cmplt. ¶ 42 – App. Vol. 1 at APP 0014-15; Vol. 2 at APP 239 § 4.1(i), 247 § 10.3) Nob Hill further warranted that it had no intention of causing Westside to engage in an IRS reportable transaction. (App. Vol. 2 at APP 0239 § 4.1(n))

Appellant relied on these material representations and warranties in deciding to proceed with the Fortrend transaction. (Cmplt. ¶ 43 – App. Vol. 1 at APP 0015) Unbeknownst to Appellant, however, these representations and warranties were false when made; and they were not subsequently fulfilled. (*Id.*) Such provisions were without any value because the indemnitor/purchaser had insufficient assets with which to satisfy them when they were made and going forward, and simply intended to misappropriate Westside's funds, offset its tax liabilities with a bogus deduction via a reportable transaction, and conduct no business of substance. (*Id.*)

The stock purchase closed on September 9, 2003. (Tricarichi Aff. ¶ 19 – App. Vol. 7 at APP 1496; APP 1598 *et seq.*) As part of the closing, Nob Hill's

Rabobank account was credited with the $29.9 million Rabobank loan proceeds; Nob Hill transferred the purchase price from its Rabobank account into the Rabobank account that Appellant was required to open; Nob Hill acquired Appellant's Westside stock; Rabobank released the purchase price to Mr. Tricarichi's Pershing account per his instructions, and his resignation from Westside became effective. (Cmplt. ¶¶ 54-55 – App. Vol. 1 at APP 0021-22; Tricarichi Aff. ¶ 20 – App. Vol. 7 at APP 1496) Nob Hill also repaid the Rabobank loan and paid Rabobank a $150,000 fee; and Nob Hill merged into Westside. (Cmplt. ¶¶ 54-55 – App. Vol. 1 at APP 0021-22)

Thereafter, Westside's remaining funds, rather than being used to facilitate Fortrend's debt-collection business as represented, were drained by Fortrend's owners. (Cmplt. ¶ 55 – App. Vol. 1 at APP 0021-22) Westside – with Fortrend's Conn Vu now at the helm – proceeded over the next seven months to siphon those funds from Westside's bank account. (*Id.*) Westside did not engage in the debt-collection business as Fortrend represented to Appellant it would. (*Id.*)

E. Seyfarth's Role in the Fraud Upon Appellant

In the meantime, in early 2003, Rogers, who would soon join Seyfarth, was inventing what has become known as the "DAD" scheme. (Cmplt. ¶ 64 – App. Vol. 1 at APP 0024-25) A "DAD" – or distressed asset/debt – scheme uses purportedly high-basis, low-value distressed debt acquired from foreign entities

that are not subject to United States taxation. (*Id.* ¶¶ 62-63 – APP 0024) The distressed debt is passed through one or more U.S. entities that fail to claim the proper basis for that debt. (*Id.* ¶ 63) The U.S. taxpayer that finally ends up holding the debt then claims the significant tax loss that has passed through in order to offset other U.S. income or gain. (*Id.*) The effect is that the U.S. taxpayer is seeking to benefit from the built-in economic losses in the foreign party's distressed asset when the U.S. taxpayer did not incur the economic costs of that asset. (*Id.*)

When Rogers devised the DAD strategy, he and Taylor were partners together at another firm; they would both join Seyfarth in July 2003 after that other firm went bankrupt. (Cmplt. ¶¶ 64-65 – App. Vol. 1 at APP 0024-25) Seyfarth, Rogers and Taylor would go on to promote, facilitate and participate in numerous DAD and other illegal tax shelters with Fortrend and others. (*Id.* ¶ 64) Numerous clients of Seyfarth, Taylor and Rogers were – like Fortrend – themselves tax shelter promoters who used the purported losses from DAD and similar schemes as part of abusive Midco transactions. (*Id.* ¶¶ 64, 72 – APP 0024-25, 0027-28) As the U.S. Tax Court noted in Appellant's case, Seyfarth "gained notoriety for issuing bogus tax-shelter opinions," and the opinion it would issue in connection with Appellant's transaction was "par for the course." (*Id.* ¶ 64 – APP 0024-25)

With respect to Appellant's transaction, Fortrend affiliate Millennium (which was formed in the Cayman Islands) previously obtained a portfolio of distressed Japanese debt for a cost of $137,000. (Cmplt. ¶ 60 – App. Vol. 1 at APP 0023-24) In connection with Appellant's transaction, Fortrend/Millennium would go on to claim – based on a Seyfarth opinion letter – that its tax basis in that portfolio was actually more than $314 million. (*Id.*)

In particular, on or about August 21, 2003 – a day after Appellant received documents to open an account for Westside at Rabobank – Seyfarth sent McNabola at Millennium an opinion letter supporting use of a DAD scheme to write off the Japanese loans that Fortrend planned to contribute to Westside in order to "offset" the taxable gain on Westside's settlement proceeds. (Cmplt. ¶¶ 42, 60-61 – App. Vol. 1 at APP 0014-15, 0023-24; APP 0089-152) Without a good-faith basis, the Seyfarth opinion letter stated that it was appropriate for Millennium to claim a $314 million basis for distressed debt that it had acquired for a tiny fraction of that amount. (*Id.*) On information and belief, Seyfarth and Taylor received a substantial fee in return for the Seyfarth Opinion Letter. (Cmplt. ¶ 70 – APP 0027)[4]

[4] The Seyfarth Opinion Letter in this case was not the only time that Seyfarth and Taylor were involved in similar transactions with McNabola, Conn Vu and Fortrend. (Cmplt. ¶ 72 – App. Vol. 1 at APP 0027-28) The U.S. Department of Justice, based on its investigation, has stated that McNabola, with the assistance

Unbeknownst to Appellant, after the closing of the Westside stock purchase, the DAD aspect of the transaction proceeded. (Cmplt. ¶ 69 – App. Vol. 1 at APP 0026-27) On November 6, 2003, Millennium contributed to Westside a subset of the Japanese debt portfolio, consisting of two defaulted loans (the "Aoyama Loans"). (*Id.*) The Aoyama Loans had a purported tax basis of $43,323,069. (*Id.*) Between November 6 and December 31, 2003, Westside wrote off the Aoyama Loans as worthless. (*Id.*) On its Form 1120, U.S. Corporation Income Tax Return, for 2003, Westside claimed a bad debt deduction of $42,480,622 on account of that write-off. (*Id.*) Westside did not pay any amount of taxes. (*Id.*)

F. Appellant Is Left Holding the Bag as a Result of the Foregoing Events

The IRS audited Westside's 2003 tax return. (Cmplt. ¶ 75 – App. Vol. 1 at APP 0028-29) At the conclusion of the audit, the IRS disallowed the $42,480,622

---

of Seyfarth's Taylor, structured and/or assisted with setting up a DAD transaction by which First Active Capital Inc. ("First Active"), in or about August 2005, acquired distressed Chinese debt with a supposed basis of more than $57 million. (*Id.*; App. Vols. 4-5 at APP 0858 ¶ 16, APP 0909-10 ¶¶ 201-203) First Active, which was incorporated in August 2005, and of which McNabola was the sole officer and director until 2006, then used this distressed debt to offset gains in connection with other transactions in which it participated in 2005, 2006, 2008, 2009 and 2010. (*Id.*) In each of these transactions, Conn Vu, who replaced McNabola as an officer and director of First Active, used the distressed debt that First Active had obtained to offset gains otherwise incurred. (*Id.*) First Active had no legitimate business purpose and was used solely to facilitate such illegal tax avoidance schemes. (*Id.*)

bad-debt deduction that Fortrend had claimed based on the Seyfarth opinion letter. (*Id.*) The IRS sent a notice of deficiency to Westside determining a deficiency of $15,186,570 and penalties totaling $6,012,777 under the tax code, but Westside – which had no assets or resources by that point as a result of Fortrend's actions – did not pay these amounts and did not petition the U.S Tax Court for relief. (*Id.* ¶¶ 75-76)

The IRS then proceeded with a transferee liability examination concerning Westside's 2003 tax liabilities. (Cmplt. ¶ 77 – App. Vol. 1 at APP 0029) Transferee liability is a method of imposing tax liability on a person (here, Appellant) other than the taxpayer (here, Westside) that is directly liable for the tax. (*Id.*) As a result of its examination, the IRS determined that Appellant had transferee liability for Westside's tax deficiency and penalties. (*Id.* ¶ 78) (Years before, Appellant had timely paid the taxes on the long-term gain incurred in 2003 as a result of the sale of his Westside stock.) (*Id.*)

Appellant petitioned the U.S. Tax Court for review of the IRS notice of liability. (Cmplt. ¶ 79 – App. Vol. 1 at APP 0029-30) The matter was litigated and proceeded to trial. (*Id.*) After trial, the Tax Court found in October 2015 that – contrary to what Defendants and Fortrend had led Appellant to believe – the Fortrend transaction was an improper Midco transaction, and Appellant was liable under transferee liability principles for Westside's tax deficiency and penalties

totaling about $21.2 million, plus interest and interest penalties.[5] (*Id.*) As a further result of Respondents' actions, Appellant has been required to spend millions more in fees and expenses. (*Id.* ¶ 80) All told, Appellant has suffered tens of millions of dollars in damages as a result of Respondents' actions. (*Id.*)

VI. SUMMARY OF THE ARGUMENT

In granting Respondents' motions and denying Appellant any jurisdictional discovery, the District Court relied heavily on the U.S. Supreme Court's decision in *Walden v. Fiore*, 134 S.Ct. 1115 (2014), where the Court held that there was no personal jurisdiction in Nevada over a Georgia security officer who interacted with (and took money from) two Nevada residents as they passed through the Atlanta airport. In so ruling, the District Court ignored the factually distinguishable nature of the present case – which other courts in similar circumstances have recognized while finding personal jurisdiction – and also decreed that *Walden* had effectively overruled the Nevada Supreme Court's decision in *Davis v. Eighth Jud. Dist.*, 97

[5] In deciding the motions below, the District Court erroneously adopted a misleading characterization of the Tax Court's ruling put forth by Respondents, generally stating that Appellant "had constructive knowledge that Fortrend intended to implement an illegitimate tax shelter." (App. Vol. 9 at APP 1910; *see also* App. Vol. 6 at APP 1156) This statement omits the reason for the Tax Court's finding, namely, the *post hoc* imputation of PwC's knowledge to Appellant. (App. Vol. 7 at APP 1485-86) Of course, as reflected in the Complaint, Appellant is suing PwC in this litigation for being grossly negligent in advising Appellant and failing to make him *actually* aware of the illegitimate nature of the Fortrend transaction. (*See, e.g.*, App. Vol. 1 at APP 0030-31.)

Nev. 332 (1981), which held that there is personal jurisdiction in Nevada over defendants who participate in a civil conspiracy that targets, defrauds and injures a Nevada resident. In doing so, the District Court committed reversible error on both points. Unlike the security officer in *Walden*, who interacted with the Nevada plaintiffs only as they passed through Atlanta and thus did not reach out to Nevada, Respondents Rabobank and Utrecht made a point of reaching out to Appellant in Nevada and requiring him to agree to certain conditions before it would allow the multimillion dollar Fortrend transaction – in which Rabobank and Utrecht served as the lender and settlement bank – to proceed. Absent Respondents' actions, the Fortrend transaction would not have closed, and Appellant would not have been injured by the fraud that Rabobank, Utrecht and others perpetrated upon him. As such, Rabobank and Utrecht purposefully availed themselves of Nevada, Appellants' claims arise from Rabobank and Utrecht's actions and, as discussed further below, it is reasonable for Rabobank and Utrecht to answer Appellant's claims in Nevada. In short, in light of these factors, there is specific personal jurisdiction over Rabobank and Utrecht in Nevada.

There is also personal jurisdiction over Rabobank and Utrecht – and Seyfarth – in light of their participation in the conspiracy to defraud Appellant, and this Court's holding in *Davis*. As set forth above in the factual background, these Respondents all knowingly participated in the concerted effort to draw Appellant

into, and effectuate, a tax shelter transaction that they knew to be illegal. Under *Davis*, their actions subject them to the jurisdiction of the Nevada courts. *Walden* – which had nothing to do with a conspiracy – does not change this analysis, and it did not overrule *Davis*. Accordingly, there is personal jurisdiction over all Respondents for this reason, as well.

VII. ARGUMENT

A. The Standard

Nevada's long-arm statute allows courts to exercise personal jurisdiction in civil matters "on any basis not inconsistent with the Constitution of [Nevada] or the Constitution of the United States." NRS § 14.065. The Fourteenth Amendment constrains a State's authority to bind a nonresident defendant to a judgment of its courts. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980). Thus, to be subject to jurisdiction in a particular state, a nonresident defendant must have "certain minimum contacts … such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

"Once a defendant challenges personal jurisdiction, the plaintiff may … make a *prima facie* showing of personal jurisdiction prior to trial and then prove jurisdiction by a preponderance of evidence at trial." *Trump v. Eighth. Dist. Ct.*, 109 Nev. 687, 692, 857 P.2d 740, 743 (1993). "The plaintiff must produce some

evidence in support of all facts necessary for a finding of personal jurisdiction.... In determining whether a *prima facie* showing has been made, the district court is not acting as a fact finder. It accepts properly supported proffers of evidence by a plaintiff as true." *Id.* at 692-93, 857 P.2d at 744 (citations omitted).

"Where possible, a Nevada resident should be able to obtain judicial redress in the most convenient, cost-effective manner...." *Id.* at 703, 857 P.2d at 750 (finding Nevada to be the appropriate jurisdiction). "In determining whether specific personal jurisdiction over a nonresident is proper, Nevada courts consider (1) whether the defendant purposefully availed itself of the privilege of acting in Nevada or causing important consequences in Nevada, (2) whether the cause of action arises out of the defendant's Nevada-related activities, and (3) whether the exercise of jurisdiction over the defendants is reasonable." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 10 (2015).

B. There Is Personal Jurisdiction Over Rabobank and Utrecht in Nevada.

1. Respondents Directed Their Actions Toward Appellant in Nevada, and Appellant's Claims Arise From Such Actions.

As reflected in Appellant's affidavit and accompanying documents submitted below, Mr. Tricarichi moved to Nevada in May 2003, two months before even receiving a letter of intent from Fortrend. (App. Vol. 7 at APP 1494-95, 1503-24) Thus, Mr. Tricarichi resided in Nevada well before the Fortrend transaction closed in September 2003, and was here while it was being negotiated.

It was during these negotiations that Rabobank reached out to Nevada and Mr. Tricarichi. By no later than August 13, 2003, Respondents knew Appellant resided in Nevada. On that date, Fortrend asked Rabobank to finance the purchase of Plaintiff's stock. (Cmplt. ¶ 46 – App. Vol. 1 at APP 0016; App. Vol. 7 at APP 1525-27, 1428 ¶ 4) Fortrend's loan request identifies Appellant as the shareholder of Westside, and lists his address in Las Vegas, Nevada. (App. Vol. 7 at APP 1527) Rabobank approved the loan, to be made by its subsidiary Utrecht to Fortrend's affiliate Nob Hill. During this process, Rabobank and Utrecht reached out to Nevada and Appellant:

- First, within a week of receiving the loan request, Rabobank asked Appellant to complete documents to open a Rabobank escrow account for Westside; the documents list a Nevada address. (Tricarichi Aff. ¶ 11 – App. Vol. 7 at APP 1495; APP 1529)

- Then, as the closing of the stock purchase approached, Rabobank again went to Appellant and required him to open another Rabobank account.

- In particular, during the stock-purchase negotiations, Appellant asked that Nob Hill, as part of the closing, transfer the purchase price for his stock to his account at Pershing bank. (Tricarichi Aff. ¶13 – App. Vol. 7 at APP 1495) But Rabobank would not proceed with the transaction if the purchase price was going to be transferred directly to Mr. Tricarichi's Pershing account. (*Id.* ¶¶ 13, 14)

- Rabobank instead insisted that Appellant himself open another account at Rabobank to be used at closing. (*Id.* ¶ 15) Rabobank sent Appellant documents to open this account; those documents – along with internal Rabobank documents – again reflect Appellant's residence in Nevada. (*Id.* ¶ 16 – APP 1496; App. Vol. 7 at APP 1551-58, 1593-97)

By acting as they did, Rabobank and Utrecht purposefully availed themselves of the privilege of acting in Nevada, and at the very least of causing important consequences in Nevada, and Appellant's cause of action arises out of their Nevada-related activities. Jurisdiction over these parties is thus appropriate here.

This Court's decision in *Peccole v. Eighth Jud. Dist. Ct.*, 111 Nev. 968, 899 P.2d 568 (1995), firmly supports this conclusion. In *Peccole*, which involved fraud and other claims, the Court held that there was specific personal jurisdiction over out-of-state defendants who, by telephone from Colorado, initially solicited Nevada plaintiffs to purchase property in Colorado and also misrepresented the nature of that property:

> [P]etitioners contend that [defendants] committed a tortious act aimed at Nevada residents by misrepresenting, in a telephone conversation with [petitioners] in Nevada, that it would take very little to make the property suitable for gaming. Petitioners assert that Anthony was acting on behalf of [defendants] when he made the initial telephone call into Nevada soliciting their purchase of the property. Petitioners further contend that [defendants] availed themselves of the privilege of acting in Nevada and causing important consequences in Nevada, thereby subjecting themselves to Nevada's personal jurisdiction.... We agree with these contentions.... It is not necessary for a defendant to physically enter the forum.... Where, as here, "a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." ... [Defendants] have not presented such considerations.

111 Nev. at 970-71; 899 P.2d at 570 (citations omitted). Like defendants in *Peccole*, Respondents here reached out to Appellant in Nevada to enter into a

business relationship, insisting that he open two bank accounts with Respondents – the second of which, at least, was for the sole benefit of Respondents. In the process, Respondents knowingly participated in a fraud upon Appellant that caused important consequences in Nevada for Appellant. As such, jurisdiction in Nevada is proper.

The decisions of other courts further support that Respondents are subject to Nevada jurisdiction. For example, following *Peccole*, the Nevada district court in *PDL Biopharma, Inc. v. Genentech, Inc.*, which involved a tortious interference claim, held that there was specific personal jurisdiction over an out-of-state corporate defendant which, via a subsidiary, sent a letter to plaintiff in Nevada:

> [T]his Court concludes PDL has made a prima facie showing of specific personal jurisdiction through Roche's alleged tortious conduct aimed at a Nevada resident. By allegation, Roche intentionally aimed a tortious act through Genentech that caused important consequences and harm in Nevada. Like the telephone call in *Peccole* ..., this Court concludes a letter is sufficient to create jurisdictional effects.

2011 WL 4433687 (Nev. Dist. Ct. July 7, 2011). Likewise, in a case factually very similar to this one, the court in *Chipping v. Fleming Law Firm*, 2012 WL 1188467 at *3 (D.Utah 2012), held that an out-of-state firm subjected itself to personal jurisdiction in Utah by arranging for the Utah plaintiff's money to be transferred to the firm's escrow account in order to facilitate plaintiff's investment with a third party. The same result should hold for Rabobank and Utrecht, which insisted that

a Nevada resident use a Rabobank escrow account to transfer the proceeds due him from third party Fortrend's purchase of his Westside shares.

Peccole and these other decisions are consistent with the U.S. Supreme Court's "effects test," which originated with *Calder v. Jones*, 465 U.S. 783 (1984). As the court in *PDL Biopharma* explained, in *Calder* the high court "concluded a nonresident defendant who engaged in intentional actions expressly aimed at the forum, causing harm, the brunt of which is suffered (and which the defendant knows is likely to be suffered in the forum state) should reasonably anticipate being haled into court there." *PDL Biopharma,* 2011 WL 4433687 (further citing *Peccole* as applying the effects test). In *Walden v. Fiore*, 134 S.Ct. 1115 (2014), the U.S. Supreme Court expressly noted that *Calder* is still the law, applying the principles of that case to the facts before it in *Walden*. 134 S.Ct. at 1123-24. While the Court found no specific personal jurisdiction in *Walden*, the facts of that case – which involved a Georgia defendant who happened to interact with the Nevada plaintiffs while they were passing through the Atlanta airport – are readily distinguishable from Mr. Tricarichi's case, in which Rabobank, knowing that Tricarichi resided in Nevada, purposefully reached out to him on multiple occasions to open accounts and take steps Rabobank wanted to be taken as part of a transaction which Rabobank knew to be improper under the tax laws, and which Rabobank thus knew were likely to cause harm to Tricarichi in Nevada. *Cf.*

Walden, 134 S.Ct. at 1119. Utrecht, as the wholly-owned Rabobank subsidiary putting up the money to buy Tricarichi's stock, also knew about and participated in these actions. Absent the involvement of Rabobank and Utrecht, including insisting that Appellant open not just a corporate but an individual account with Rabobank, the transaction that harmed Appellant (in Nevada) could not have closed, and Appellant would not have needed to bring the causes of action that he has.

Numerous courts have recognized the particular factual scenario in *Walden* and found those facts to be distinguishable from the cases before them, thus proceeding to find specific personal jurisdiction pursuant to *Calder* and the effects test. In *Exobox Tech. Corp. v. Tsambis*, 2015 WL 82886 (D. Nev. Jan. 6, 2015), for example, the court held there was jurisdiction in Nevada over a Pennsylvania resident who "posted online messages and filed a Texas lawsuit against [plaintiff], which he knew to be a Nevada corporation, and in doing so expressly aimed his conduct into Nevada." 2015 WL 82886 at *4. As Respondents do here, defendant in *Exobox* argued that *Walden* overturned prior precedent holding that "contact with a resident in Nevada is sufficient to find conduct expressly aimed." *Id.* at *5. The court rejected this argument:

> *Walden* is factually distinguishable from this case.... In *Walden,* it was "undisputed that no part of petitioner's course of conduct occurred in Nevada." [*Walden*, 134 S.Ct.] at 1124. In contrast, here ... the Plaintiffs do not rely on the "random, fortuitous, or attenuated

> contacts" or the "unilateral activity" of a plaintiff to establish contact with the forum state. *Id.* at 1123. Exobox points to the unilateral actions of Tsambis directed to the forum state. In *Walden,* Defendant directed his activities at an entity that incidentally happened to be going to Nevada. In this case, Tsambis chose to direct his activities to an entity known to be in Nevada.... [T]he Supreme Court's opinion in *Walden* stops well short of overturning [prior precedent]. Rather, the Supreme Court decided *Walden* narrowly on the facts before it.

Id. at *5-6. Similarly, the Minnesota Supreme Court has also held that *Walden* did not do away with the effects test. *See Rilley v. MoneyMutual, LLC*, 884 N.W.2d 321 (Minn. 2016). Faced with an argument like the one the District Court here erroneously accepted, the Minnesota court found that argument overreaching:

> MoneyMutual and its amici rely heavily on ... *Walden* to argue that its interactions with known Minnesota *residents* are per se insufficient to establish minimum contacts with a Minnesota *forum.* But *Walden*'s holding is not as broad as MoneyMutual contends, and its facts are easily distinguishable. *Walden* merely held that a defendant's "random, fortuitous, or attenuated" contact with a forum resident in an airport—while the resident was outside of the forum—was insufficient to support personal jurisdiction. ___ U.S. at ___, 134 S.Ct. at 1122-23.... *Walden* does not disturb numerous, long-established precedents allowing courts to exercise personal jurisdiction over defendants based in part on commercial contacts with businesses or residents that are located inside the forum.... Indeed, even *Walden* explained that in some cases "a defendant's contacts with the forum State may be *intertwined* with his transactions or interactions with the plaintiff." ___ U.S. at ___, 134 S.Ct. at 1123 (emphasis added).

884 N.W.2d at 329. The court accordingly held there was personal jurisdiction over a defendant finance company that emailed plaintiffs whom the defendant knew to be Minnesota residents. *Id.* at 329-33. *See also Leibman v. Prupes*, 2015

WL 898454 (C.D.Cal. 2015) (distinguishing *Walden* and finding personal jurisdiction over New Jersey defendant who emailed California plaintiff); *Cook v. McQuate*, 2016 WL 5793999 at *6 (W.D.Va. 2016) (distinguishing *Walden* and finding personal jurisdiction; "[Plaintiff] did not travel through Ohio, interact with [defendants] there, and then suffer harm while residing in Virginia. [Defendants] instead reached out to a Virginia resident and engaged in significant correspondence through which they convinced [plaintiff] to wire money to Ohio.").

2. The Exercise of Jurisdiction Over Respondents Is Reasonable.

"Where, as here, 'a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" *Peccole*, 111 Nev. at 971, 899 P.2d at 570. In considering reasonableness, courts may look to "[1] 'the burden on the defendant,' [2] 'the forum State's interest in adjudicating the dispute,' [3] 'the plaintiff's interest in obtaining convenient and effective relief,' [4] 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and [5] the 'shared interest of the several States in furthering fundamental substantive social policies.'" *Exobox*, 2015 WL 82886 at *6 (citing *Burger King Corp. v. Rudewicz*, 471 U.S. 462, 476-77 (1985)). Regarding the second factor, "'A State generally has a "manifest interest" in providing its residents with a convenient forum for

redressing injuries inflicted by out-of-state actors.'" *Id.* at *7 (quoting *Burger King*, 471 U.S. at 473). Moreover, "[t]he mere fact that local litigation is inconvenient—or some other forum may be more convenient—is not enough; rather [defendant] 'must show that jurisdiction in [Nevada] would make the litigation "so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent."' *Id.* (quoting *Burger King*, 471 U.S. at 478) (further noting "[r]emote litigation is even more convenient in the era of electronic filing and telephonic hearings.")

In light of these factors, Respondents fail to present any case, let alone a compelling one, that exercising jurisdiction over them in Nevada would be unreasonable. Respondents purposefully reached out to Nevada, causing harm, the brunt of which was suffered (and which Respondents knew was likely to be suffered) by Appellant in Nevada, such that they should reasonably anticipate being haled into court here. Nevada has a manifest interest in providing Mr. Tricarichi, a Nevada resident, a convenient forum to seek relief for his injuries. Respondents will experience no undue burden from defending their actions here. Rabobank, a multinational banking and financial services company, has numerous offices throughout the U.S. (*see* App. Vol. 7 at APP 1566 *et seq.*) Moreover, Utrecht's subsidiaries include Rabo AgriFinance, LLC – which is registered to do business in Nevada, and of which Utrecht is the Manager – and Rabobank, N.A., a

national banking association based in neighboring California. (App. Vol. 7 at APP 1578, 1584 *et seq.*) It is hardly unreasonable for entities with such a presence to appear and defend themselves in Las Vegas, Nevada. Indeed, Appellant's related claims against defendant PwC are already proceeding here, making it all the more efficient for the claims against Respondents to proceed here, too. *See, e.g., Oklahoma v. Cifelli*, 2017 WL 149990 (W.D.Okla. 2017) (holding that "judicial system's interest in the most efficient resolution" was best served by hearing claims against co-defendants together).

3. Rabobank and Utrecht are Further Subject to the Specific Personal Jurisdiction of the Nevada Courts Because They Participated in a Conspiracy that Targeted, Defrauded and Injured a Nevada Resident.

While the foregoing is sufficient basis for finding personal jurisdiction over Rabobank and Utrecht, these Respondents are also subject to Nevada jurisdiction for participating in the conspiracy that targeted Appellant.

In *Davis v. Eighth Jud. Dist.*, 97 Nev. 332 (1981), this Court held that Nevada courts have personal jurisdiction over out-of-state defendants who participate in a conspiracy to injure a Nevada resident. In *Davis*, the administrators of the estate of Howard Hughes sued a "group of aides, physicians, attorneys, and business executives who had attended the late Hughes during the last years of his life. The complaint alleged essentially that the group conspired to seize control of the Hughes empire for their own financial gain by taking advantage of the trust and

confidence Hughes had placed in them." *Id.* at 334. Certain out-of-state defendants filed motions arguing that there was no personal jurisdiction over them in Nevada. *Id.* This Court rejected that argument, holding:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects.... We conclude that it is reasonable and constitutionally permissible to require the respondent-defendants to appear and defend their activities in Nevada where the alleged injuries occurred.

Id. at 338-39 (citation and internal quotations omitted). As the Court noted, its decision in *Davis* abides by the "traditional notions of fair play and substantial justice" articulated by the U.S. Supreme Court's personal jurisdiction jurisprudence. *Id.* at 338 (citing *World Wide Volkswagen*, 444 U.S. at 292; *Int'l Shoe*, 326 U.S. at 316). As the Court further noted, "[T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, ... the plaintiff's interest in obtaining convenient and effective relief, [and] the interstate judicial system's interest in obtaining the most efficient resolution of controversies...." *Id.* at 339 (quoting *World Wide Volkswagen, supra*).

Consistent with *Davis*, numerous courts find that out-of-state defendants subject themselves to the jurisdiction of the forum state's courts when they participate in a conspiracy aimed at a plaintiff in the forum state. *See, e.g.,*

Emerald Asset Advisors, LLC v. Schaffer, 895 F.Supp. 2d 418, 433 (E.D.N.Y. 2012) ("At the core of this alleged conspiracy was that [defendant] facilitated it by accepting and then disbursing the $200,000.00 through his attorney trust account. Hence, [defendant's] supposed role in this conspiracy was to supply a critical and necessary part of the scheme to defraud.") (finding Nevada resident subject to personal jurisdiction in New York); *Cleft of the Rock Foundation v. Wilson*, 992 F.Supp. 574, 583-84 (E.D.N.Y. 1998) (denying motion to dismiss by defendant who was alleged to have "facilitated the conspiracy by laundering the proceeds of the scheme through his attorney trust account;" defendant argued that he "neither knew nor had any contacts with any plaintiff," but court found that "plaintiffs have alleged facts sufficient to establish [defendant's] co-conspirator status for purposes of conferring personal jurisdiction"); *Olson v. Jenkens & Gilchrist*, 461 F.Supp. 2d 710, 724-26 (N.D.Ill. 2006) (finding personal jurisdiction over law firm that participated in tax shelter conspiracy); *Madanes v. Madanes*, 981 F.Supp. 241, 261 (S.D.N.Y. 1997) (finding jurisdiction over foreign corporation whose role in conspiracy was to conceal funds); *Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869, 887 (Kan. 2012) ("[E]ven if TIC did not purposefully avail itself of the protection of Kansas laws by requiring Filardo to work in Kansas, it purposefully availed itself by joining in and acting in furtherance of a conspiracy even after it knew that one actor had chosen to act in Kansas in furtherance of the conspiracy."); *Gibbs v.*

PrimeLending, 381 S.W.3d 829, 832 and n.1 (Ark. 2011) (holding that there was personal jurisdiction over defendants who received kickbacks from, and participated in conspiracy with, third party that defrauded plaintiffs of mortgage loan proceeds; compiling citations to decisions of the "many courts [that] have adopted" conspiracy jurisdiction doctrine).

Rabobank and Utrecht, like the out-of-state defendants in *Davis*, were active participants in a conspiracy aimed at defrauding and injuring Appellant, a Nevada resident. Rabobank and Utrecht financed and facilitated numerous Midco transactions promoted by Fortrend and others, earning millions of dollars in fees in the process. But well before Fortrend, Rabobank and Utrecht first contacted Appellant about the sale of his Westside shares via a Midco, Respondents and Fortrend all knew that such transactions were illegal for tax purposes. Nonetheless, they joined together to induce Appellant into, and to effectuate, a Midco transaction, knowing that it would cause Appellant serious damage. Starting in July 2003, months after Appellant had become a Nevada resident, Fortrend's Mr. Conn Vu sent Appellant – in Nevada – a letter of intent regarding the proposed purchase of Appellant's Westside stock via a Midco transaction, and the parties proceeded to discuss and negotiate a proposed stock purchase agreement, with Fortrend falsely assuring Appellant that the transaction was valid for tax purposes. Shortly thereafter, in mid-August 2003,

Fortrend asked Rabobank for a $29.9 million loan to finance the purchase of Appellant's Westside stock. (Fortrend's loan request identifies Mr. Tricarichi as a Las Vegas resident. (App. Vol. 7 at APP 1527)) At about the same time, at Rabobank's request, Appellant completed and signed account opening documents reflecting a Nevada address for an escrow account to facilitate the transaction's closing. (*Id.* at APP 1529-36) Later that month, Rabobank approved Fortrend's loan, which would be made by Utrecht. Then, as the transaction's closing date neared, Rabobank insisted that Appellant open another escrow account in connection with the transaction, again reaching out to Appellant in Nevada. With this last piece in place, the transaction closed, sealing Appellant's fate. Nowhere along the way – despite their knowledge of the fact – did Rabobank or Utrecht warn Appellant that the Midco structure being employed was illegal.

Given their knowing participation in this concerted course of action targeting Appellant in Nevada, Respondents are subject to personal jurisdiction in this state. As with the actions of a party's agents, the actions of a party's co-conspirators (here including Fortrend and its agents and affiliates such as Conn Vu and McNabola) are imputed to the party (here, Respondents) for jurisdictional purposes. *See, e.g., Trump*, 109 Nev. at 695, 857 P.2d at 745 (plaintiff "needed only to make a *prima facie* case … that Ribis acted as Trump's … agent and therefore that Ribis' contacts with Nevada were attributable to Trump. We

conclude that [plaintiff] made the required showing."); *First Community Bank, N.A. v. First Tennessee Bank, N.A.*, 2015 WL 9025241 at *16 (Tenn. 2015) (conspiracy personal jurisdiction is based in part on the "principle … that the acts of one coconspirator are attributable to all co-conspirators"); *Khan v. Gramercy Advisors, LLC*, 2016 IL App (4th) 150435 ¶ 190 (2016) ("Minimum contacts do not have to be direct. A person can purposefully make minimum contacts with the forum state through someone else.") (citing *Asahi Metal Ind. Co. v. Super. Ct. of Calif.*, 480 U.S. 102, 112 (1987), and finding personal jurisdiction over participants in tax-shelter conspiracy). Accordingly, as in *Davis* and the foregoing cases, a finding of personal jurisdiction is appropriate here.

The District Court, however, took it upon itself to conclude that *Davis* does not survive the ruling in *Walden*. (App. Vol. 8 at APP 1815-16) This was error. *Walden* does not even mention *Davis* and is readily distinguishable. *Walden* had nothing to do with a calculated conspiracy among various parties to defraud plaintiff, but dealt rather with a chance meeting between plaintiff and defendant at an airport. Accordingly, numerous courts hold conspiracy personal jurisdiction to be alive and well notwithstanding the February 2014 decision in *Walden*. *See, e.g., Tadayon v. DATTCO, Inc.,* 178 F.Supp. 3d 12, 21 (D.Conn. 2016) ("When the complaining party has made a sufficient showing that a conspiracy existed, a court may exercise jurisdiction based on the actions of alleged co-conspirators."); *Byrd*

v. Aaron's, Inc., 14 F.Supp. 3d 667, 686 (W.D.Pa. 2014) ("Under Pennsylvania law personal jurisdiction of a non-forum co-conspirator may be asserted ... where a plaintiff demonstrates that substantial acts in furtherance of the conspiracy occurred in Pennsylvania and that the non-forum co-conspirator was aware or should have been aware of those acts.") (citations omitted); *First Community Bank,* 2015 WL 9025241 at *11, 12, 14, 15, 27 (citing *Walden* and finding conspiracy personal jurisdiction exists); *Cifelli*, 2017 WL 149990 (same); *Mansfield Heliflight, Inc. v. Freestream Aircraft USA, Ltd.*, 2016 WL 7176586 at *8-11 (D.Vt. 2016) (same); *BeoCare Group, Inc. v. Morrissey*, 124 F.Supp. 3d 696, 701-02 (W.D.N.C. 2015) (same); *Best Chairs Inc. v. Factory Direct Wholesale, LLC*, 121 F.Supp. 3d 828, 837, 839-40 (S.D. Ind. 2015) (same); *Khan, supra*, at ¶¶ 77 *et seq.*, 155-160 (same). This Court should follow the rationale of these cases and hold accordingly.

Indeed, policy interests support the teaching of *Davis* and the continuation of conspiracy personal jurisdiction in Nevada. As noted above, this Court has held that "[w]here possible, a Nevada resident should be able to obtain judicial redress in the most convenient, cost-effective manner...." *Trump,* 109 Nev. at 703 (finding Nevada to be the appropriate jurisdiction). *See also Exobox*, 2015 WL 82886 at *7 ("'A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'")

(quoting *Burger King*, 471 U.S. at 473); *Davis*, 97 Nev. at 339 ("[T]he burden on the defendant ... will in an appropriate case be considered in light of ... the forum State's interest in adjudicating the dispute....). Allowing Appellant's claims against all Defendants to proceed together serves that interest, whereas affirming the District Court and requiring Appellant to chase Respondents to the Netherlands and other parties elsewhere does not. *See, e.g., Gibbs*, 381 S.W.3d at 834 ("If through one of its members a conspiracy inflicts an actionable wrong in one jurisdiction, the other members should not be allowed to escape being sued there by hiding in another jurisdiction.") (citing *Stauffacher v. Bennett*, 969 F.2d 455, 459 (7th Cir. 1992)). As noted by the Arkansas Supreme Court, the District Court's reasoning undermines the very notion of civil conspiracy liability:

> [T]he conspiracy theory [of jurisdiction] follows plainly from the very definition of conspiracy and the meaning of co-conspirator liability.... If due process does not prevent that co-conspirator from being held civilly or criminally responsible based on the principle of imputed conduct, it is difficult to see why it should prevent the exercise of jurisdiction based on that same principle.

Gibbs, 381 S.W.3d at 834 (citing *Chenault v. Walker*, 36 S.W.3d 45, 53-54 (Tenn. 2001)). Moreover, the fact that Appellant's claims all arise under Nevada law further weighs in favor of allowing those claims to proceed in Nevada. *See Aeroflex Wichita*, 275 P.3d at 890 ("[E]ach state has an interest in resolving disputes that involve its own laws."). In short, it is reasonable for Respondents to defend their actions in Nevada.

C. There Is Personal Jurisdiction Over Seyfarth in Nevada.

For similar reasons, Seyfarth is also subject to the jurisdiction of the Nevada courts. Seyfarth, like Rabobank, Utrecht and the out-of-state defendants in *Davis*, was an active participant in a conspiracy aimed at defrauding and injuring a party in Nevada. As set forth above in the Statement of Facts:

- Shortly before joining Seyfarth in July 2003, Rogers invented the DAD ("distressed asset/debt") scheme. Seyfarth, Rogers and fellow Seyfarth partner Taylor proceeded to promote, facilitate and participate in numerous DAD and other illegal tax shelters with Fortrend and others, with Seyfarth later gaining notoriety for issuing bogus tax-shelter opinions like the one issued in connection with Appellant's transaction.

- In July 2003, Fortrend sent Appellant (in Nevada) a letter of intent regarding the proposed stock purchase. Fortrend proceeded to negotiate the proposed purchase with Appellant, misrepresenting to him the tax consequences of the proposed transaction.

- On or about August 20, 2003, Appellant received the documents to open the second escrow account at Rabobank, which he subsequently returned to Rabobank.

- The next day, on or about August 21, 2003, Seyfarth sent Fortrend affiliate Millennium (via Mr. McNabola) the opinion letter supporting the DAD scheme that Fortrend planned to employ to write off certain Japanese loans Fortrend planned to contribute to Westside in order to "offset" the taxable gain on Westside's settlement proceeds. Seyfarth received a substantial fee for the letter.

- On September 9, 2003, Fortrend (again via Mr. McNabola) and Appellant executed a stock purchase agreement; the purchase price changed hands via the parties' Rabobank accounts; and the deal closed.

- After the closing, Fortrend drained Westside of its funds and did not engage in the distressed-debt business in which it had told Plaintiff it would engage.

- In late 2003, with Westside now a stripped-out shell, Fortrend – relying on Seyfarth's opinion letter – contributed the Japanese loans to Westside; wrote off those loans as worthless; claimed a bad debt deduction for the loans on Westside's tax return; and failed to pay any amount of taxes – despite its prior promises to the contrary.

Pursuant to *Davis*, such activity subjects Seyfarth to Nevada jurisdiction.

The District Court erroneously held to the contrary. The District Court's error is twofold. First, the District Court premised its ruling on a misunderstanding of the underlying facts. Second, the District Court also misconstrued the law.

Regarding the facts, the District Court mistakenly found that Seyfarth's opinion letter was "unrelated both to this case and to [Appellant] Tricarichi." (App. Vol. 8 at APP 1842) But as the foregoing chronology, the record in the Appendix, and the Complaint reflect, this is not so. The chronology shows that Seyfarth issued its opinion letter on August 21, 2003, while the Westside stock purchase was still being negotiated and less than three weeks before the transaction closed. The Seyfarth opinion was addressed to Mr. McNabola at Millennium, which is an affiliate of the Midco promoter, Fortrend. (Vol. 1 at APP 0014-15, 0089) It was also McNabola who signed the purchase agreement on behalf of Nob Hill (another Fortrend affiliate). (Vol. 4 at APP 0676) Millennium, the recipient of the Seyfarth opinion letter, was the sole shareholder of Nob Hill, the purchaser of Plaintiff's Westside stock. (Vol. 1 at APP 0014-15) Millennium also owned the distressed debt that was the subject of the Seyfarth opinion letter. (Vol. 1 at APP

0023-24) After transferring a portion of that debt to Westside post-closing, and in order to claim a loss when writing off the debt, based on the Seyfarth opinion it claimed a high basis despite having purchased the debt for a fraction of that claimed basis. (*Id.* at APP 0024-27) The reasonable inference – contrary to the District Court's erroneous holding – is that the Seyfarth opinion was an integral part of the Midco transaction / conspiracy, which was directed at Appellant and Nevada. Contrary to what the District Court found, the facts put forth here do make out a *prima facie* case for jurisdiction under the applicable authority.[6]

Regarding the law, the District Court again erroneously held that "*Walden* … appears to overrule *Davis*." (App. Vol. 9 at APP 1916) As discussed above with respect to Rabobank and Utrecht, however, this is not the case. *Walden* did not address conspiracy jurisdiction in any way; involved very different facts than the case at bar; and expressly noted that the effects test of *Calder v. Jones* – with which this Court's holding in *Davis* is consistent – remains the law. For the reasons already discussed, the District Court's interpretation of and reliance upon *Walden* were erroneous, and this error also calls for reversal of the court's dismissal of Seyfarth.

---

[6] The District Court held that the facts of this case were distinguishable from the facts of *Davis* and other conspiracy-jurisdiction cases, but that holding was in the alternative to its holding (discussed immediately below) that *Walden* had overruled *Davis*. (App. Vol. 8 at APP 1845)

In granting Seyfarth's motion, the District Court additionally and erroneously relied on two Nevada federal district court cases for the proposition that "personal jurisdiction cannot be based on the actions of co-conspirators." (App. Vol. 9 at APP 1917) But in *In re W. States Wholesale Natural Gas Antitrust Litig.*, 605 F. Supp. 2d 1118, 1140 (D.Nev. 2009), the court applied Wisconsin, not Nevada, law concerning conspiracy jurisdiction. Nothing in this case suggests that Nevada does not recognize conspiracy jurisdiction. And in *Menalco FZE v. Buchan*, 602 F. Supp. 2d 1186 (D.Nev. 2009), the court found no Nevada jurisdiction because plaintiffs were not Nevada residents at all. (While defendants in that case had been seeking to complete a transaction with a different entity that was a Nevada resident, that transaction was never consummated or completed.) The court in *Menalco* actually recognized that the conspiracy theory of jurisdiction was valid as a matter of law but simply held, on different facts, that there was no evidence to show the conspiracy was "expressly aimed at a known forum resident because Plaintiffs are not Nevada residents." *Id.* at 1194-95.

Here, by contrast, in light of Seyfarth's participation in the conspiracy that targeted Appellant, and its other contacts with Nevada, it is reasonable for this Respondent to defend its actions in Nevada. In addition to its actions in connection with the conspiracy here, Seyfarth has for years conducted ongoing business in this State. This business includes Seyfarth's representation of clients

in significant Nevada matters; regular attendance by Seyfarth lawyers at professional events in Nevada; Seyfarth publications addressing Nevada law; and the admission of various Seyfarth lawyers in Nevada courts. A simple search of Seyfarth's website and of other information publicly available online (App. Vol. 1 at APP 0191-93), gives an indication of the scope of Seyfarth's activities in Nevada, including:

- Seyfarth's involvement in a "blockbuster" real estate transaction where it represented TIAA-CREF in the purchase of the Grand Canal/Palazzo in Las Vegas for $725 million. (App. Vol. 5 at APP 0936)

- Seyfarth's representation of a Fortune 100 financial services company in the acquisition of a 50 percent interest in a $1.5 billion retail center in Las Vegas, as well as negotiation of related property management and leasing agreements. (*Id.* at APP 0938)

- Seyfarth's representation of various parties in numerous cases in the United States District Court for the District of Nevada. (App. Vol. 5 at APP 0954, 0963, 1049, 1061, 1074, 1080, 1087-88, 1096)

- The admission of several Seyfarth partners to the bar of the United States District Court for the District of Nevada. (*Id.* at APP 1107-15)

- Seyfarth counsel Heath A. Havey's maintaining admission to the Nevada bar. (*Id.* at APP 1104-55)

- Seyfarth's various publications regarding Nevada law and/or court rulings. (*Id.* at APP 1116-30)

- Seyfarth attorneys making presentations and/or receiving awards at numerous conferences and trade shows in Las Vegas. (App. Vol. 5 at APP 0940-52)

As a practical matter, then, Seyfarth's ongoing business in Nevada undercuts the notion that it would somehow be unduly burdensome or unfair for Seyfarth to defend this case in Nevada – where, in addition, both Appellant and Seyfarth co-defendant PwC are resident, and where, at a minimum, the claims against PwC are already proceeding.

D. In the Alternative, the District Court Erred in Denying Appellant Jurisdictional Discovery.

As to all three Respondents, the District Court denied Appellant's alternative request for jurisdictional discovery, on the basis of the court's erroneous finding that Appellant had not made a *prima facie* case for personal jurisdiction. (App. Vol. 9 at APP 1916) As set forth above, however, Appellant made such a *prima facie* case. At a minimum, then, the District Court should have granted Appellant leave to take jurisdictional discovery. *See, e.g., PDL Biopharma,* 2011 WL 4433687 (allowing jurisdictional discovery when plaintiff "demonstrated ... a possibility it can produce facts through jurisdictional discovery" to support finding of personal jurisdiction); *Consipio Holding, BV v. Private Media Group, Inc.*, 2011 WL 6015547 (Nev. Dist. Ct. June 14, 2011) (denying motion to dismiss without prejudice pending completion of jurisdictional discovery); *Trintec Inds., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275 (Fed. Cir. 2005) (jurisdictional discovery appropriate where party can supplement jurisdictional allegations

through said discovery); *GTE New Media Svcs. Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C.Cir. 2000) (same).

With respect to Rabobank and Utrecht, the information available thus far indicates that these Respondents (and others) may possess additional information, currently unavailable to Appellant, regarding the specific Midco transaction that targeted Appellant in Nevada, and Respondents' role therein, including further potential evidence regarding Respondents' purposeful direction of their activities toward the Nevada forum. Similarly, Respondents (and others) may possess further information (again unavailable to Appellant at this early juncture) regarding the scope of their Midco promotions with Fortrend and others – and the scope of such activity directed toward Nevada. Regarding the reasonableness factor, Rabobank and Utrecht may also possess more information – unavailable to Appellant – regarding the scope of their business dealings in Nevada. In light of the showing Plaintiff has already made, discovery – written, oral and documentary – will likely shed even more light on these subjects. (Contrary to what the District Court found, Appellant did not have "the benefit of extensive discovery from Rabobank and Utrecht in the Tax Court proceeding." (App. Vol. 9 at APP 1917) As Appellant noted at oral argument below, he only received, in connection with the Tax Court trial, copies of documents subpoenaed from Rabobank by the IRS – which was not focused on the question of whether Respondents should be subject

to personal jurisdiction in a Nevada civil suit. (App. Vol. 9 at APP 1898)) Accordingly, if this Court deems further information is needed in order to determine whether Rabobank and Utrecht are subject to personal jurisdiction in Nevada, Appellant asks that the matter be remanded to the District Court with instructions to proceed with such discovery.

With respect to Respondent Seyfarth, the Complaint's factual allegations and documentation available thus far indicate that this Respondent was a participant in the conspiracy that targeted and injured Appellant in Nevada. This further suggests that there is additional evidence establishing personal jurisdiction over Seyfarth to be found if discovery proceeds on the subject. Should the Court deem further information necessary to support a finding of conspiracy/specific jurisdiction, Appellant submits that such discovery would include (1) depositions of Taylor, Rogers, at least one Seyfarth representative, and potentially others, such as Fortrend; (2) document discovery from Seyfarth, Taylor, Rogers and potentially others, such as Fortrend; and (3) interrogatories, and possibly requests to admit, to Seyfarth and possibly the other parties. This discovery would focus on subjects including (a) further detail regarding the conspiracy that harmed Appellant, particularly Seyfarth's involvement in it; (b) creation of the DAD scheme and how that Seyfarth scheme became an integral part of the fraud in which Appellant was ensnared; (c) Seyfarth's relationship with, and/or retention by, Fortrend, including

Seyfarth's knowledge of Fortrend's promotion of tax shelters in, *e.g.*, Nevada; and (d) the genesis of the Seyfarth opinion letter and Seyfarth's knowledge regarding how that opinion fit into the broader scheme. Accordingly, to the extent the Court finds Appellant's present showing inadequate to establish personal jurisdiction, Appellant requests an opportunity to proceed with jurisdictional discovery.

VIII. CONCLUSION

For the reasons set forth above, this Court should reverse the decisions of the District Court dismissing Respondents Rabobank, Utrecht and Seyfarth, and remand the case to the District Court for further proceedings as to these Respondents. Alternatively, if the Court determines that additional evidence is needed to resolve the jurisdictional question, this Court should reverse the District Court's denial of jurisdictional discovery and remand the matter to the District Court for such discovery.

Dated this 18th day of September, 2017.

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Todd W. Prall (9154)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
702-385-2500
702-385-2086 (fax)
mhutchison@hutchlegal.com

Scott F. Hessell
Thomas D. Brooks
(Admitted *Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603
312-641-3200
312-641-6492 (fax)
shessell@sperling-law.com

mwall@hutchlegal.com
tprall@hutchlegal.com
tdbrooks@sperling-law.com

Attorneys for the Appellant, Michael A. Tricarichi

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point font, Times New Roman style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more and contains 13,972 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of September, 2017

Mark A. Hutchison (4639)
Michael K. Wall (2098)
Todd W. Prall (9154)
HUTCHISON & STEFFEN, LLC
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
702-385-2500
702-385-2086 (fax)
mhutchison@hutchlegal.com
mwall@hutchlegal.com
tprall@hutchlegal.com

Scott F. Hessell
Thomas D. Brooks
(Admitted *Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603
312-641-3200
312-641-6492 (fax)
shessell@sperling-law.com
tdbrooks@sperling-law.com

Attorneys for the Appellant, Michael A. Tricarichi

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC and that on this 19th day of September, 2017, I caused the document entitled APPELLANT'S OPENING BRIEF to be served on the following by Electronic Service to:

Dan Waite
Ryan Lower
Steve Morris

Service by regular U.S. Mail as follows:

Chris Paparella
(*Pro Hac Vice*)
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004-1482
Telephone: (212) 837-6644
Facsimile: (212) 299-6644
chris.paparella@hugheshubbard.com

Attorneys for Respondents Coöperatieve Rabobank U.A. and Utrecht-America Finance Co.

An employee of HUTCHISON & STEFFEN, LLC