T.C. Memo.2011–277, *aff'd,* 728 F.3d 673 (7th Cir.2013); *Sterling Trading, LLC v. United States,* 553 F.Supp.2d 1152 (C.D.Cal.2008).

10 Petitioner disputes his liability for the penalties principally on the ground that the penalties for which West Side is liable cannot be collected from him as its transferee. We address this argument *infra* pp. 61–63.

11 Ohio Supreme Court opinions considering the treatment of uniform acts by courts of other States include *Al Minor & Assoc., Inc. v. Martin,* 117 Ohio St.3d 58, 881 N.E.2d 850 (Ohio 2008) (Uniform Trade Secrets Act); *Cruz v. Cumba–Ortiz,* 116 Ohio St.3d 279, 878 N.E.2d 620 (Ohio 2007) (Uniform Interstate Support Act and Uniform Reciprocal Enforcement of Support Act); *Erie Ins. Grp. v. Fisher,* 15 Ohio St.3d 380, 474 N.E.2d 320 (Ohio 1984) (Uniform Declaratory Judgments Act); *Levi v. Levi,* 170 Ohio St. 533, 166 N.E.2d 744 (Ohio 1960) (Uniform Reciprocal Enforcement of Support Act).

12 Respondent advances the "economic substance" and "substance over form" doctrines as additional theories to support his position, contending that the Ohio courts would disregard the form of the Midco transaction because it was not a true multiparty transaction, had no business purpose, and was engineered for the sole purpose of avoiding West Side's Federal and Ohio tax liabilities. The Ohio courts have recognized and employed both doctrines. *See, e.g., First Banc Grp., Inc. v. Lindley,* 68 Ohio St.2d 81, 428 N.E.2d 427, 428 (Ohio 1981) (affirming decision of Ohio Board of Tax Appeals and agreeing that "[t]o hold otherwise would allow form to control over substance"); *Bloomingdale v. Stein,* 42 Ohio St. 168 (Ohio 1884) (concluding in fraudulent transfer case that equity "look[s] through the form to the substance of the transaction"); *Macior v. Limbach,* 86 Ohio App.3d 204, 620 N.E.2d 227, 229 (Ohio Ct.App.1993) (citing *Humana, Inc. v. Commissioner,* 881 F.2d 247, 255 (6th Cir .1989), *aff'g in part, rev'g in part* 88 T.C. 197, 1987 WL 49269 (1987)) (employing Federal "economic substance" doctrine). The "business purpose" petitioner now alleges for the Midco transaction—to generate greater after-tax profit for West Side's sole shareholder—is not cognizable under these two doctrines because it is simply a corollary of the tax-avoidance scheme. And the facts we find to support respondent's position on the "sham loan" and "de facto liquidation" theories also show that the Midco transaction lacked economic substance. In view of our disposition, however, we need not address these alternative theories as an independent justification for respondent's submission that petitioner is liable as a transferee under Ohio law.

13 Petitioner argues that Ohio law does not permit transactions to be collapsed, citing *Official Comm. of Unsecured Creditors of Grand Eagle Cos. v. Asea Brown Boveri, Inc.,* 313 B.R. 219, 230 (N.D.Ohio 2004) (declining to collapse a leveraged buyout where there was "no evidence of knowledge on the part of the Lenders that the acquisition would harm future creditors"). This case is inapposite because petitioner had at least constructive knowledge that Fortrend's tax-avoidance scheme would harm two creditors, the United States and Ohio.

14 Under regulations in effect during 2003, "[a] position * * * [was] considered to have a realistic possibility of being sustained on its merits" if a well-informed tax professional would conclude that it had "approximately a one in three, or greater, likelihood of being sustained on its merits." Sec. 1.6694–2(b)(1), Income Tax Regs. Stating that "a position can be taken" suggests a lower level of confidence than this. Virtually any position "can be taken."

15 In the stock purchase agreement, Nob Hill represented that it would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side]." This representation was not

worth the paper it was printed on. Petitioner and his advisers knew that Nob Hill was a shell corporation, that West Side would have virtually no assets left after the closing, and that neither would have the wherewithal to pay a $16.9 million tax liability. And because Nob Hill and Millennium (its parent) were offshore companies with no U.S. assets, this representation was completely unenforceable. The language in the stock purchase agreement allocating West Side's 2003 tax obligation to Nob Hill did not relieve petitioner of his duty to inquire. *See Diebold Found., Inc.*, 736 F.3d at 189 ("[T]he knowledge requirement for collapsing a transaction was designed to 'protect[ ] innocent creditors or purchasers for value.' * * * It was not designed to allow parties to shield themselves, when having knowledge of the scheme, by simply using a stock agreement to disclaim any responsibility." (quoting *HBE Leasing Corp.*, 48 F.3d at 636)).

16 As the Second Circuit explained in *Diebold Found., Inc.*, "collapsing" the transactions in this way requires, not only that the ultimate transferee have "constructive knowledge of the entire scheme," but also that the debtor's property "be reconveyed * * * for less than fair consideration." 736 F.3d at 186. We address the absence of "fair consideration" below in discussing the requirements of OUFTA section 1336.05. *See infra* pp. 58–59.

17 *See, e.g.*, sec. 302(b)(4)(B), (e) (defining "partial liquidation"); *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 513 N.E.2d 776 (Ohio 1987) (noting that corporation was considering complete or partial liquidation to prevent hostile takeover); *Cleveland Tr. Co. v. Hickox*, 32 Ohio App. 69, 167 N.E. 592, 595–596 (Ohio Ct.App.1929) ("If there is liquidation of a corporation, partial or complete, the determining element of the transaction is whether the stockholders surrender and cancel the stock which is given in exchange[.]"); 18B Am.Jur.2d Corporations sec. 1064 (noting that shareholders' right to receive accumulated dividends on liquidation applies identically in partial and complete liquidations).

18 Respondent advances the alternative contention that Nob Hill was a direct transferee of West Side and that petitioner has transferee-of-transferee liability as a subsequent transferee of Nob Hill. *See* sec. 6901(c)(2); *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo.2014–59 (finding transferee-of-transferee liability). Because we find that petitioner is liable as a direct transferee of West Side, we need not consider respondent's alternative position.

19 The result would be the same if the IRS' claim were thought to have arisen after West Side's assets were transferred to petitioner. OUFTA section 1336.04(A)(2) provides that a transfer is fraudulent with respect to a present *or future* creditor if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and if (among other things) the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." As discussed in the text, West Side did not receive "a reasonably equivalent value in exchange" for its transfer to petitioner. And if the IRS claim were regarded as arising after, rather than before, this transfer, West Side knew that it would incur tax debts "beyond * * * [its] ability to pay as they became due." *Ibid.* In view of our disposition, however, we need not discuss in any detail petitioner's liability under this alternative provision. We likewise need not decide whether petitioner would be liable under the OUFTA's "actual fraud" provision.

20 In *Frank Sawyer Trust of May 1992 v. Commissioner*, T.C. Memo. 2014128, at *10–*11, this Court cited *Stanko*, 209 F.3d. at 1088, in holding that a transferee was not liable for accuracy-related penalties assessed against the

transferors. The facts of the instant case, which must be evaluated under Ohio law, differ substantially from those of *Frank Sawyer Trust,* which involved Massachusetts law. The First Circuit accepted our "factual finding that the Trust lacked knowledge—actual or constructive—of the new shareholders' tax avoidance intentions." *Frank Sawyer Trust of May 1992,* 712 F.3d at 599. Here, we have found that petitioner had at least constructive knowledge that West Side's tax liabilities would not be satisfied.

21 At least two other Circuits have previously ruled similarly. *See Feldman,* 779 F.3d at 454–457 (7th Cir.2015); *Owens v. Commissioner,* 568 F.2d 1233 (6th Cir.1977) ("[T]he law does not permit a taxpayer * * * to cast transactions in forms when there is no economic reality behind the use of the forms. 'The incidence of taxation depends on the substance of a transaction.' " (quoting *Commissioner v. Court Holding Co.,* 324 U.S. 331, 334, 65 S.Ct. 707, 89 L.Ed. 981 (1945))), *aff'g in part, rev'g in part,* 64 T.C. 1, 1975 WL 3075 (1975).

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EXHIBIT 2

T.C. Memo. 2016-132
United States Tax Court.

Michael A. Tricarichi, Transferee, Petitioner
v.
Commissioner of Internal Revenue, Respondent *

Docket No. 23630-12.
|
Filed July 18, 2016.

Attorneys and Law Firms

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SUPPLEMENTAL MEMORANDUM OPINION

LAUBER, Judge:

***1** In our prior opinion, we found that petitioner is a transferee of West Side Cellular, Inc. (West Side), under the Ohio Uniform Fraudulent [*2] Transfer Act and section 6901.[1] We accordingly held that petitioner is liable "for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith." Tricarichi v. Commissioner, T.C. Memo. 2015-201, at *68. Although the notice of liability issued by the Internal Revenue Service (IRS or respondent) determined that petitioner's liability included "interest as provided by law," we noted that the parties in their briefs "h[ad] not addressed the proper computation of interest." Id. at *29 n.7. We accordingly directed that decision would be entered under Rule 155. Id. at *69.

The parties have submitted competing Rule 155 computations. They agree that, under the Court's prior opinion, petitioner is liable for West Side's 2003 income tax deficiency, in the amount of $15,186,570, and for the section 6662 penalties assessed against West Side, in the aggregate amount of $6,012,777. They also agree that, under the Court's prior opinion, petitioner is liable, in an amount to be determined, for "post-notice interest"—that is, interest that has accrued on West Side's liability under section 6601 since June 25, 2012, the date on which the IRS issued the notice of liability to petitioner.

[*3] The parties disagree, however, on whether petitioner is liable for "pre-notice interest," that is, interest that accrued on West Side's liability between March 15, 2004, when its 2003 corporate income tax return was due to be filed and its tax was due to be paid, and June 25, 2012. Respondent contends that petitioner's liability for pre-notice interest must be determined under Federal law and computed under section 6601; respondent has calculated this amount as $13,887,090. Petitioner contends that his liability (if any) for pre-notice interest must be determined under State law and that, under Ohio judicial decisions interpreting that State's rules governing pre-judgment interest, his liability for pre-notice interest is zero. We agree with respondent and will enter decision accordingly.

Background

Petitioner owned 100% of West Side's stock. On September 9, 2003, in a "Midco" transaction engineered by Fortrend International, Inc., he received $35,199,372 in exchange for his West Side shares. Petitioner resided in Ohio when the Midco transaction was consummated. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

West Side's corporate income tax return for 2003 was due to be filed on March 15, 2004. Following an examination of that return, the IRS issued to West [*4] Side a notice of deficiency determining a deficiency of $15,186,570 and penalties under section 6662 in the aggregate amount of $6,012,777. After West Side failed to petition this Court, the IRS in July 2009 assessed against West Side the deficiency and penalties determined in the notice of deficiency, plus accrued interest.

***2** Finding West Side bereft of assets, the IRS performed a transferee liability examination of petitioner. On June 25, 2012, the IRS mailed petitioner a Letter 902-T, Notice of Liability, determining that he is liable for West Side's unpaid 2003 deficiency and assessed penalties "plus interest as provided by law." In our prior opinion we upheld that determination and directed the parties to file computations for entry of decision under Rule 155. We subsequently directed them to file, and they did file,

supplemental memoranda addressing petitioner's liability vel non for pre-notice interest.

Discussion

Interest in transferee liability cases is calculated for two separate periods-the pre-notice period and the post-notice period—and under certain circumstances it may be calculated at different rates. The post-notice interest period begins on the date when the notice of liability is issued and ends on the date when the liability is fully paid. See Patterson v. Sims, 281 F.2d 577, 580 (5th Cir. 1960). In-[*5] terest accruing during this period is determined under sections 6601 and 6621. Because the parties agree that petitioner would be liable for post-notice interest under the Court's prior opinion, we need not discuss that subject further.

Pre-notice interest presents additional questions. Depending on the value of the assets received by the transferee and the aggregate tax liability owed by the transferor, the calculation of pre-notice interest may involve Federal and/or State law. These variables may also affect the rate at which interest is calculated and the date on which interest begins to accrue. Most State laws refer to the interest that may accrue during this period as "pre-judgment interest." We will use the term "pre-judgment interest" to refer to interest that may accrue under State law during the pre-notice period.

Our first comprehensive discussion of these issues appeared in Lowy v. Commissioner, 35 T.C. 393 (1960). In that case the corporate transferor's liability for tax and penalties was $186,748, and the taxpayer, its sole stockholder, received as transferee corporate assets worth more than $1 million. Id. at 394. We held that where (as there) the value of the assets distributed to the transferee substantially exceeded the transferor's aggregate liability for deficiencies, penalties, and interest, the transferee's liability for interest is governed by, and must be computed in accordance with, the Internal Revenue Code. Id. at 397.

[*6] Speaking for the Court, Judge Raum recognized that, under Commissioner v. Stern, 357 U.S. 39 (1958), "the liability of the transferee as such must arise under applicable State law." Lowy v. Commissioner, 35 T.C. at 395; see id. at 396 (noting that State law determines "the existence and extent of transferee liability"). He continued:

> [B]ut the quantum of the creditor's right—i.e., the amount of tax due, the additions to tax for negligence or fraud, and the amount of interest applicable thereto—must, of necessity, be determined in accordance with the Federal statute. Certainly, it is the Internal Revenue Code and not New York law which fixes the amount of deficiency in tax. And it is similarly the Internal Revenue Code, rather than State law, which spells out the right of the Government to the so-called penalties and interest. These amounts in the aggregate constitute the claim of the United States against the taxpayer-transferor and they similarly measure the claim against the transferred assets. [Id. at 395.]

The taxpayer in Lowy cited earlier cases in which courts had applied State law to calculate pre-judgment interest; he urged that, under New York law, "he * * * [was] not liable for any interest" before the date on which the notice of liability was mailed to him. Id. at 394, 396. Judge Raum distinguished those cases as involving "a situation where the amount of the transferred assets * * * [wa]s less than the amount of the creditor's claim." In those cases, he explained, the courts properly considered the availability of pre-judgment interest "in order to [*7] make the creditor whole." Id. at 395. He noted that pre-judgment interest by its very nature

> ***3** can arise only under State law, and must comply in every respect with applicable State law not only as to rate, but also as to the starting point. Thus, if the transferred assets herein had been equal to only $100,000, substantially less than the amount of the basic deficiencies, they would plainly have been insufficient to satisfy the Government's claim. However, in such circumstances, the transferee

> would have had the use of the transferred assets over a period of time, and it is quite possible that he would be liable, under State law, for interest, not on the Government's claim against the transferor, but on the amount of the transferred assets, measured from a point of time that would be not earlier than the date of transfer. [Ibid.]

Surveying cases dating back to Cappellini v. Commissioner, 16 B.T.A. 802 (1929), we concluded in Lowy that "the quantum of the underlying claim that the * * * [IRS] is seeking to enforce against the transferee must be determined by the law which created that claim," namely, the Internal Revenue Code. 35 T.C. at 396. Because the transferor's liability for tax, penalties, and interest is determined by the Federal statute, we deemed it "wholly inappropriate * * *, where the transferred assets are more than ample to discharge the full Federal liability of the transferor (including interest), to look to State law for the creation of any right to interest." Id. at 397. On the other hand, "where the transferred assets are insufficient" to satisfy the IRS' claim against the transferor, "the creditor may have a further right to collect interest from the transferee, based upon the wrongful use of [*8] those assets by the transferee prior to payment." Ibid. "The latter right is one that is founded on State law, and it is only in such circumstances that it becomes appropriate to investigate State law to determine the rate of interest, [and] the date from which it runs." Ibid.

We employed the same analysis two years later in Estate of Stein v. Commissioner, 37 T.C. 945 (1962). In that case the transferee had received assets with a value less than the transferors' aggregate liabilities for tax, penalties, and interest. We held that where (as there) "a transferee receives assets insufficient to satisfy the transferor's tax liabilities, determination of the existence, starting date, and rate of interest upon retention of those assets prior to demand therefor is controlled by State law." Id. at 961 (fn. ref. omitted). The distinction between that case and Lowy, we explained, hinged on the nature of the interest being charged.

> In cases where the transferred assets exceed the total liability of the transferor, the interest being charged is upon the deficiency, and is therefore a right created by the Internal Revenue Code. However, where, as here, the transferred assets are insufficient to pay the transferor's total liability, interest is not assessed against the deficiencies because the transferee's liability * * * is limited to the amount actually transferred to him. Interest may be charged against the transferee only for the use of the transferred assets, and since this involves the extent of transferee liability, it is determined by State law. [Ibid. (citing Commissioner v. Stern, 357 U.S. 39).]

[*9] During the ensuing 50 years, the analysis set forth in Lowy and Estate of Stein has been employed consistently both by this Court and by the Courts of Appeals that have considered the question. In Schussel v. Werfel, 758 F.3d 82 (1st Cir. 2014), aff'g in part, rev'g in part, and remanding T.C. Memo. 2013-32, the transferee had received assets worth $8.9 million, whereas the transferor's total Federal tax liability exceeded $13.6 million: roughly $2.8 million of tax, $2.1 million of penalties, and $8.7 million of pre-notice interest. Id. at 87. The First Circuit explicitly adopted the reasoning set forth in this Court's precedents. See id. at 89, 92 ("We therefore accept the IRS's invitation to follow Lowy and Estate of Stein[.]").

***4** Describing the rule derived from this Court's precedents as a "simple" one, 758 F.3d at 92, the court of appeals offered an example to illustrate the principle for which Lowy stands: "[I]f the taxpayer owes $100 in taxes, upon which $30 in interest accrues, and the taxpayer then fraudulently transfers $150 to a transferee, the IRS can certainly recover a judgment of no less than $130 against the transferee." Id. at 89 & n.12 (citing Lowy, 35 T.C. at 394). The First Circuit accordingly held:

> The IRS may recover from * * * [the transferee] all amounts * * * [the transferor] owes to the IRS (including section 6601 interest accruing on * * * [the transferor's] tax debt), up to the limit of the [*10] amount transferred to

> * * * [the transferee], with any recovery of prejudgment interest above the amount transferred to be determined in accordance with Massachusetts law. [Schussel, 758 F.3d at 92-93; emphasis added.]

The First Circuit in Schussel thus held the transferee liable for pre-notice interest, computed in accordance with Federal law, in the amount of approximately $4 million. That is the amount by which the assets the transferee received (roughly $8.9 million) exceeded the transferor's liability for tax and penalties (approximately $4.9 million). In remanding the case to our Court, the First Circuit disagreed with the IRS only in holding, consistently with Estate of Stein, that Massachusetts law, rather than Federal law, governed the transferee's liability for prejudgment interest above and beyond the value of the assets the transferee received. See Schussel, 758 F.3d at 92-93.

Other appellate authority is consistent with Schussel. In United States v. Holmes, 727 F.3d 1230 (10th Cir. 2013), the court found that the issue of pre-notice interest was not properly preserved for appeal. However, it stated in dictum that the District Court had supplied an appropriate "nutshell explanation" of the governing principles:

> It appears to be fairly well established that where the value of the assets transferred exceeds the transferor's total tax liability, including penalties and interest, the transferee is liable for the entire amount of the deficiency and the amount of interest is prescribed by [F]ederal [*11] law * * *. If the transferee receives less than the transferor's tax liability, state law determines the calculation of interest. [Id. at 1236 n.6].

In Edelson v. Commissioner, 829 F.2d 828 (9th Cir. 1987), aff'g T.C. Memo. 1986-223, the transferee received assets with a value less than the transferor's total Federal tax liability. Citing Estate of Stein with approval, the Ninth Circuit ruled: "Where transferee liability is found to exist but the transferred assets are insufficient to satisfy the transferor's total tax liability, a transferee's liability for interest is controlled by state law." Id. at 834. [2]

***5** We addressed this subject recently in Shockley v. Commissioner, T.C. Memo. 2016-8. Reviewing the relevant case law, including Lowy and Estate of Stein, we summarized the applicable legal principles as follows:

> [*12] If the transferee received assets in excess of the transferor's liability, then the [pre-notice interest] period would run from the date that the transferor's tax payment was due up to the date the notice of liability was issued, and interest would * * be determined under Federal law. * * * If, as in these cases, the transferee received assets less than the creditor's claim against the transferor, then * * * [prejudgment] interest, including its applicable rate, is determined under State law. * * *

Id. at *7-*8; accord, e.g., Stansbury v. Commissioner, 104 T.C. 486, 491-493 (1995) (applying State law to compute pre-judgment interest where transferor's tax debt exceeded value of transferred assets), aff'd, 102 F.3d 1088 (10th Cir. 1996); Rubenstein v. Commissioner, T.C. Memo. 2010-274, 100 T.C.M. (CCH) 542, 542-543 & n.3 (same); Upchurch v. Commissioner, T.C. Memo. 2010-169, 100 T.C.M. (CCH) 85, 90-91 (applying Federal law to compute pre-notice interest where value of transferred assets exceeded transferor's tax debt); Borg v. Commissioner, T.C. Memo. 1987-596, 54 T.C.M. (CCH) 1243, 1248-1249 (same).

In the instant case West Side's total Federal tax liability for 2003, including tax, penalties, and pre-notice interest computed thereon, is $35,086,437 (that is, $15,186,570 of tax + $6,012,777 of penalties + $13,887,090 of pre-notice interest as determined by respondent). In our prior opinion we found that petitioner received, as West Side's transferee, cash and cash equivalents with an aggregate value of $35,199,372. See Tricarichi, at *58. Because petitioner received assets [*13] with a value in excess of West Side's total Federal tax liability (including pre-notice interest), his liability for pre-notice interest is determined by Federal law.

Section 6621 specifies the interest rate(s) governing the computation of pre-notice interest. Under Federal law, the starting date for computing pre-notice interest is March 15, 2004, the date on which West Side's 2003 income tax return was due to be filed and tax payment was due, and the ending date is June 25, 2012, when the notice of liability was mailed. See Bos Lines, Inc., v. Commissioner, 354 F.2d 830, 839 (8th Cir. 1965), affg T.C. Memo. 1965-71; Estate of Stein, 37 T.C. at 961; Lowy, 35 T.C. at 394-395; Shockley, at *7. Respondent determined that petitioner's liability for pre-notice interest, computed using these parameters, is $13,887,090. Petitioner has raised no question about the accuracy of this calculation, and we find no error in it.

Petitioner does not dispute that the law governing pre-notice interest has evolved in the manner described above. However, emphasizing the Supreme Court's ruling in Stern that State law controls "the existence and extent" of transferee liability, 357 U.S. at 45, petitioner contends that pre-notice interest should be determined under State law because it goes to "the extent" of such liability. Asserting that the First Circuit's Schussel opinion "highlights the continued uncer[*14] tainty regarding computation of pre-notice [interest]," petitioner urges that the Lowy line of cases "should be revisited" in order to ensure adherence to the Supreme Court's mandate concerning the proper role of State law.

***6** We do not find these arguments persuasive. The Supreme Court issued its opinion in Stern almost 60 years ago, and the principal cases discussed above all post-date Stern. In developing the law concerning pre-notice interest, the courts have been fully conscious of, and properly faithful to, the Supreme Court's mandate. Far from manifesting uncertainty, the law that has evolved since Lowy appears quite stable and clear. Schussel is hardly a poster child for uncertainty: The IRS there urged that Lowy and Estate of Stein provided the critical guideposts, and the First Circuit explicitly followed the reasoning of both cases. We have no reason to suspect that the Ninth Circuit, to which this case would be appealable absent stipulation to the contrary, see sec. 7482(b)(2), would take a different stance, see supra p. 11 and note 2.

Contrary to petitioner's view, the logic of these cases is sound and fully consistent with Stern. The transferor's total Federal tax liability includes the tax deficiency, applicable penalties, and statutory interest computed thereon; all three components are necessarily determined under the Internal Revenue Code. The Government may recover the full amount of this liability from a transferee, but its [*15] recovery is capped at the value of the assets that the transferee actually received. If the transferee received assets with a value exceeding the transferor's total Federal tax liability, the Government's claim can be satisfied in full from the transferred assets. There is thus no need to consult State law.

On the other hand, if the transferee has received assets with a value less than the transferor's total Federal tax liability, the Government's claim will not be fully satisfied. The question then arises whether, as an equitable matter, the Government should be entitled to pre-judgment interest to compensate it for the transferee's wrongful possession and use of the funds during the interim period. A claim for pre-judgment interest is not created by the Internal Revenue Code, but by State law. State law thus necessarily governs "the existence and extent" of the creditor's right (if any) to pre-judgment interest. Stern, 357 U.S. at 45.

In short, the courts have consulted State law to ascertain whether the Government may recover from the transferee, in the form of pre-judgment interest, an amount larger than the value of the assets the transferee received. Petitioner has cited, and our own research has discovered, no case in which a court has invoked State law governing pre-judgment interest as a basis for reducing the Government's recovery to an amount smaller than the value of the assets the [*16] transferee received. That is what petitioner seeks to do here, and there is simply no precedent for it. [3]

To implement the foregoing,

Decision will be entered in accordance with respondent's computation.

All Citations

T.C. Memo. 2016-132, 2016 WL 3931121, 112 T.C.M. (CCH) 33, T.C.M. (RIA) 2016-132, 2016 RIA TC Memo 2016-132

Footnotes

* This opinion supplements our prior opinion, Tricarichi v. Commissioner, T.C. Memo. 2015-201.

1 Unless otherwise noted, all statutory references are to the Internal Revenue Code as in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all monetary amounts to the nearest dollar.

2 Absent stipulation to the contrary, appeal of the instant case would lie to the Ninth Circuit. See sec. 7482(b)(2). Although the Ninth Circuit in Edelson explicitly followed Estate of Stein, that court does not appear to have addressed the fact pattern presented by Lowy, Schussel, and the instant case, where the transferee receives assets with a value exceeding the transferor's liability for tax and penalties, such that the transferred assets are available to discharge at least part (if not all) of the Government's claim for interest. However, in a recent transferee liability case, Salus Mundi Found. v. Commissioner, 776 F.3d 1010 (9th Cir. 2014), rev'g and remanding T.C. Memo. 2012-61, the Ninth Circuit stated: "As a general rule, the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." Id. at 1019 (quoting Beecher v. Commissioner, 481 F.3d 717, 720 (9th Cir. 2007), aff'g T.C. Memo. 2004-99). We believe that the Ninth Circuit would likely follow the First Circuit's holding in Schussel on the fact pattern presented here.

3 In contending that Ohio law would immunize him from liability for prejudgment interest, petitioner relies chiefly on Millstone Dev. Ltd. v. Berry, No. 03AP-531, 2004 WL 503926 (Ohio Ct. App. Mar. 16, 2004) (holding that the interest provisions of Ohio Rev. Code sec. 1343.03 do not apply with respect to a judgment granting a lien). Respondent disputes petitioner's interpretation of Ohio law. Given our disposition, we need not resolve this State law question.

EXHIBIT 3

as

IN THE UNITED STATES TAX COURT

In the Matter of:	)	
MICHAEL A. TRICARICHI, TRANSFEREE,	)	
Petitioner,	)	
v.	)	Docket No: 23630-12
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

Volume: 2
Pages: 101 through 201
Place: Washington, DC
Date: June 9, 2014

IN THE UNITED STATES TAX COURT

In the Matter of:

MICHAEL A. TRICARICHI, TRANSFEREE,

Petitioner,

v. Docket No: 23630-12

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

U.S. Tax Court
400 Second Street NW
Washington, DC 20217

June 9, 2014

The above-entitled matter came on for trial, pursuant to notice at 10:00 a.m.

BEFORE: HONORABLE ALBERT LAUBER
JUDGE

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C O N T E N T S

E X H I B I T S

EXHIBITS:	IDENTIFIED	RECEIVE
(None)		

P R O C E E D I N G S

(Direct examination continued from Volume I.)

BY MR. DESMOND:

Q And how did Pricewaterhouse come to you?

A My brother Jim is friends with a guy by the name of Rich Stovsky, who was a senior partner in Cleveland at Pricewaterhouse. I couldn't have my brother Tony's firm do it, which would have been my preference, so that was the next best thing.

Q Okay. And so PWC was not suggested to you by Midcoast or Fortrend, then?

A No. They came in totally independently through Jim through his relationship.

Q Were you aware at the time of any relationship between PWC and Midcoast and Fortrend?

A No.

Q Do you know if Mr. Stovsky had ever worked with Midcoast or Fortrend at the time?

A No, he didn't. I do know that he did not.

Q You've mentioned a couple of times your brother Jim Tricarichi. What's -- what's his background?

A He's an accountant. He's primarily an M and A guy. He does business planning and things like that. He's not a CPA. He has done work for

Westside. He's done Westside's -- some of Westside's tax returns. He's done balance sheets, financial reporting, stuff like that.

Q Okay. If I can have you look at what's been marked as Exhibit 24-J in your binder and tell me if you recognize that document.

A This is the retention agreement with PricewaterhouseCoopers.

Q Is that your signature back on page 4 of 5?

A I believe so.

Q Hopefully those pages are in better order. The document's on your screen there, as well, Mr. Tricarichi.

A Oh, yeah. That is my signature. Sorry.

Q And this document's dated, I think on the first page, April 10th. Do you see that?

A Right. That was be- -- as I said, that was before Midcoast dropped out.

Q Okay. And several months before this offer letter we just looked at, 26-J?

A Yes.

Q How much money were you going to pay PricewaterhouseCoopers to do this work for you?

A We asked Mr. Stovsky how much he thought it would cost to look into this particular transaction.

He gave us an initial price of about 20,000. So I wrote on here that if he was going to go over 20,000 to call me basically to get my authorization before he went over 20,000.

Q And were Mr. Stovsky's fees or PWC's fees fixed or contingent? How was the fee structure?

A It was just whatever they needed to do.

Q Do you recall how much you ended up paying PWC?

A I do not remember, but I think it was more than 20,000.

Q Okay. What specifically did you ask PWC to do, then? Why did you bring them in?

A Well, we didn't know that much about this type of transaction so we basically said, Hey, we have two companies that are looking to buy the stock of Westside. They're looking to buy it for more than what we would have realized had we just had Westside pay the straight up tax out of the -- out of the company and we want to make sure that that's okay. You know, that there's no problem with doing that.

Q Who was dealing with PWC? Were you dealing with them personally on a regular basis?

A No. My brother Jim was the conduit between me and Stovsky.

Q Okay. And you have talked this morning, almost this afternoon a lot about --

THE COURT: Counsel, are you through with this document now?

MR. DESMOND: Yes, sir. I'm through with this document.

THE COURT: Yeah. I have one question about it.

MR. DESMOND: Sure.

THE COURT: I see there are two different versions of page 1 of the letter. And there's a sentence in the original letter that says: You agree to advise us if you determine that any matter covered by this agreement is a reportable transaction that is required to be disclosed under Section 16011-4.

Then I see that's crossed out.

MR. DESMOND: Yeah.

THE COURT: And why is that?

THE WITNESS: Well, initially we -- I crossed it out.

THE COURT: Did you write no in the line -- line there in the corner?

THE WITNESS: I'm sorry?

THE COURT: Who wrote no?

THE WITNESS: Those were -- no? I don't

see no.

THE COURT: If you look at the next page, you'll see that sentence is crossed out and no is written in the --

MR. DESMOND: I think those might be Mr. Tricarichi's initials.

THE WITNESS: I -- that's my initials, M.A.T.

THE COURT: Okay.

THE WITNESS: Those are my initials there. Why is it crossed out?

THE COURT: You initialed crossing out this sentence.

THE WITNESS: Yeah. Because that was something that Hahn Loesure was going to do. But ultimately we decided to leave it in, and I guess that's the reason why there's two different versions of this.

MR. DESMOND: There'll be some more explanation of that, Your Honor.

BY MR. DESMOND:

Q So we were shifting gears a little bit to talk again about Hahn Loesure, their role. We talked earlier about their role in the provider litigation. Were they working with you at all in connection --

how were they working with you in connection with these -- the two offers that you were considering?

A I'm sorry. Can you ask that question again?

Q Sure. Hahn Loesure, what was their role, if any, in considering the stock -- the offers to purchase your stock?

A Their offers were legal ramification -- or their role was to define any legal ramifications of doing the deals.

Q Okay. And who specifically at Hahn Loesure were you --

A Jeff Folkman.

Q Was Randy Hart involved in that?

A Randy Hart was not involved. He was peripherally involved, but he -- he's not a tax guy so he knew nothing about the --

Q Okay.

A -- underlying allegations.

Q Moving forward, then, we talked about the letter of intent that came into play in Exhibit 26-J back in later in July of 2003. And I don't have any specific questions on that.

But how did the negotiations move forward, then, with Fortrend? What did you do --

A Well, I don't know when I got the go ahead or the lack of don't go ahead from Pricewaterhouse and Hahn Loesure, but I did get that at some point. And that's when we decided to go forward with the transaction with Fortrend.

So we had negotiated back and forth. They -- Jeff Folkman was still negotiating terms of the stock purchase agreement pretty much up to the day we signed it.

Q Okay. And as that is going on, that process is going on, what are you thinking about? What are your concerns, if any, with respect to the stock?

A Well, my concerns, number one, were how am I going to get paid; how am I going to get paid? They're offering to pay me $35 million roughly. Do they have the money to pay? Okay. That was concern number one.

Concern number two was were there any problems with this deal? Any kind of bounce back at all? Any kind of -- any kind of problems with the IRS, any kind of problems with anyone as far as doing this deal? Will this deal implode?

Q And did you talk to your advisers about those concerns?

A Correct, yes. That's why I hired them in the first place was I didn't -- I would not have done this deal straight up. I had to get opinions from people as far as whether this deal was a good deal or a bad deal.

Q And you talked earlier this morning about the $65 million and your knowledge of the tax issues, potential tax issues on that. How were those being considered by you at the time this stock purchase offer is being negotiated?

A How were the tax?

Q Yeah. What did you -- what did you talk to your advisers about in connection with the taxes?

A Well, we obviously were looking for ways to pay less tax than what the straight up, you know, 35 percent or whatever the corporate tax rate was. That's what we charged them to do.

And, like I said, ultimately, if this deal hadn't come along, we would have left the money in Westside and we would have just bought the real estate under Westside.

Q Was the tax issue disclosed to Fortrend as a potential buyer; do you know?

A Oh, absolutely. Absolutely. As a matter of fact, it's highlighted in the stock purchase

agreement. They knew exactly what the tax obligations of Westside were when they decided to go ahead and buy the stock.

Q And I have a few questions for you on that. If you can just turn back to Exhibit 1-J and just tell us if you recognize that document.

A Yeah. That's the stock purchase agreement.

Q Okay. The final stock purchase agreement?

A Yeah.

Q Dated September 9th you see there --

A September 9th.

Q -- on page 1?

A Right.

Q And I'll come back to that in just a minute. Let me shift gears, though, and go back to Westside. So we've got the negotiations going on. And you talked earlier about the customer base at Westside trying to be sure that that's addressed.

Was there anything else in terms of housekeeping issues at Westside that had to be taken care of in anticipation of the stock sale?

A Not really. I mean, we paid our debts, you know, whatever we owed. Part of the -- part of the settlement agreement was that we were going to pay the carriers the money that we owed them for service.

So we basically paid whatever we owed to whoever we owed it to.

Q Okay. Were there any issues of excise taxes Westside --

A Yeah. There was a continuing question mark on excise taxes. They're -- initially we were told that we had to collect and remit excise taxes. And then at some point, our attorneys told us that we didn't have to do that, that there were some cases out there that didn't require excise tax to be charged on cellular service.

And so we collected some of it, but we didn't pay it. We kept -- we held the money. And I got an opinion from Randy who basically said you don't have to pay it. That there's -- there's enough case law out there that says that it's not legal to collect excise tax from -- on cellular service. So we -- so he said don't pay it.

When we did the stock purchase agreement, one of the terms of the stock purchase agreement was I was personally responsible for anything -- any taxes or anything owed prior to January 1st, of 2003. And the excise tax issue would have been prior to January 1st, of 2003.

So I decided that it was to err on the side

of caution and pay the tax rather than leave it out there and then have it come up once Fortrend owned the company and then they were going to come back to me and say, Hey, what's this?

So we paid the tax. I paid the tax, and I also paid the interest on whatever when we filed the returns. I paid the interest and the tax at the same time.

Q And you say I. Is that you, personally?

A No. Westside paid it before we sold it. Westside owed the money. I didn't pay -- I didn't.

Q How much was that; do you recall?

A It was about $3.1 million excise tax plus interest.

Q And do you recall had Westside previously filed excise tax returns and not paid the tax or didn't have to file the returns --

A No. We didn't file -- we did not file the returns.

Q Were they ultimately filed?

A They were filed when we made the payment.

Q And when was that payment made, that $3 million eventually?

A It was made twice actually. It was paid once in August of 2003. We actually hired a guy who

was a tax guy who was computing interest and he's the one who did the interest calculations for us. And then he told us how much interest to pay.

He did the returns and then we sent all the returns and a check to the IRS in August of 2003.

Q Okay. And you mentioned you paid it twice. What's that about?

A Well, the IRS lost it. They never cashed the check. They never acknowledged receiving the tax returns. They basically did nothing.

So the money was still sitting in the Westside account, and it was sitting in the Westside account even after the Fortrend transaction had taken place.

So we're sitting now with a 3.1 something million dollar balance in a Westside bank account. So I said, Let's contact them.

We contacted them. They said they had no record of receiving anything.

I said, Okay. Fine. Let's send it to them again. So we wrote a new check for the same amount and sent them the tax returns a second time. And that would have been in November of 2003.

Q So if you can look at what's been marked as Exhibit 88-J toward the end of your binder there and

tell us if you recognize that document.

A Yeah. 88-J is the check that Cellnet wrote -- Westside wrote to the IRS on November 18th, of 2003 --

Q So that's --

A -- for $3.1 million.

Q -- the second payment you wrote?

A The second time we paid it. It's the same payment, but we stopped payment on the first check and sent them this one.

Q Fair enough. Okay.

A Okay.

Q And I'll come back with a couple of questions on that. But let me just go back and still talk about kind of housekeeping at Westside as you're getting ready for the stock sale.

Did Westside have any receivables on its balance sheet during this kind of summer of '03 time period?

A It did have receivables, yes.

Q What happened to those?

A Well, initially Fortrend was interested in buying the receivables as well as the company as well as the stock. And at some point, they decided that they really didn't want to pay us anything for the

receivables, anything, you know, substantial for the receivables.

So we decided when we formed LXV -- decided to put the receivables into LXV.

Q And what was -- what were they offering to pay you? Why didn't you want to take that?

A Nothing. Like a penny, a penny a dollar or something like that, or half a penny a dollar or something like that.

Q And you thought they were worth more than that?

A Oh, yeah. We actually collected a lot more than that.

Q We being?

A We being LXV.

Q Okay. But there were discussions with Fortrend about that issue?

A Yeah. That's when we first started with that.

Q And did those discussions tell you or inform you in any way about Fortrend and its business?

A No. I mean, other than they were in the business of buying receivables cheap. That -- that didn't tell me anything else.

Q Okay. So you had some understanding they knew what they were talking about when they were talking to you about buying --

A Oh, yeah. Absolutely.

MR. DESMOND: How are we doing on time, Your Honor? I'm fine to keep going through.

THE COURT: I thought we might break for lunch maybe 12:30, quarter of 1. Whenever would be a good breaking point for you.

MR. DESMOND: Okay. I may even be done with Mr. Tricarichi by then so.

THE COURT: Ms. Lampert, would it be okay to --

MS. LAMPERT: Yes, Your Honor.

THE COURT: -- run a little bit late and then try to finish up before lunch?

MS. LAMPERT: To finish up his direct and then --

THE COURT: Yeah.

MS. LAMPERT: -- do cross after lunch, Your Honor?

THE COURT: Yeah.

MS. LAMPERT: That would work for us.

THE COURT: Okay. Well, let's shoot for that.

MR. DESMOND: Okay.

BY MR. DESMOND:

Q Going back, then, to the Fortrend offer, Mr. Tricarichi, we've talked about the $65 million and the tax consequences surrounding that consideration between PWC.

Did you have any understanding as to what was going to happen to the taxes, whatever that amount might be, that Westside might owe?

A Fortrend was going to make sure that the taxes got satisfied.

Q Do you know how they were going to make sure the taxes got satisfied?

A No. That was why I hired the outside experts.

Q Okay. Did your advisers look into that for you?

A I believe they did. To some -- to some degree I think PWC did.

Q Okay. And you mentioned earlier this -- well, let me come back to that in just a second. But were the specific terms in Exhibit 1-J, the stock purchase agreement, that addressed the taxes that you recall?

A The only term that addressed the taxes was

that they were taking -- they took the tax obligation for anything -- any income that came in after the 1st of January of 2003.

Q Okay. And if I could have you look at page 23 of Exhibit 1-J. And in particular I'm looking at Section 5.2. Are you familiar with that particular --

A Yes.

Q -- agreement? And what is Section 5.2? It's got two subparts. But starting with Subpart A, what does that provision tell us?

A Subpart A is basically what I just said. That they, being Fortrend, were responsible for preparing -- I'm sorry.

We were responsible for preparing a pre -- a pretax whatever you want to call it and they were responsible for anything -- here. I'll read the line.

It says: Subject to Section such and such, buyer shall cause company to prepare and file timely at their own cost and expense all returns for taxes required to be filed by a company in respect to periods ending after closing date. Buyer shall cause company to satisfy all United States federal, state, local, and franchise taxes, penalties, and interest

required to be paid by a company attributable to income earned during the tax year January 1st, 2003, and for all tax years thereafter.

So Fortrend was committing to us that they were responsible for making sure that anything -- any income that was triggered from January 1st, 2003, forward, they were going to take care of the tax on that.

Q Does this agreement say anywhere how they're going to do that?

A No, it doesn't.

Q Does it say anywhere that they have to take some specific steps or any transactions? Does it tell them --

A Like a specific strategy or something?

Q Correct.

A No. There's nothing like that.

Q Okay. So as far as you knew, they could have cut a check to pay for the tax?

A If that was what they wanted to do, sure.

Q Okay. But it's their responsibility?

A Either way this agreement provided that they would satisfy whatever taxes were due.

Q And read it if you want to, but Subparagraph (b) of that Section 5.2, what does that

tell us?

A That says that they agree to stay in business for at least five years following the transaction and have a minimum net worth -- they being Westside Cellular. Stay in business at least five years after the transaction and maintain a net worth -- minimum net worth of no less than $1 million.

Q And do you know, are those terms in there?

A Jeff Folkman put those in there.

Q Do you know why?

A Off the top of my head, no.

Q Okay. Do you know if Westside stuck around for another five years? Do you know now, sitting here today?

A I know at that time and now that they were around for five years.

Q Do you know now if they maintained that covenant there about maintaining a net worth of $1 million?

A I'm pretty sure they did.

Q And what about the covenant above that, they shall satisfy fully all your in-state and federal taxes, did they meet that contractual obligation?

A I don't think they did. If they did, we wouldn't be sitting there.

Q We wouldn't be here.

A No.

Q Fair enough. Fair enough. Okay. You'd mentioned a little bit earlier you were concerned about getting paid. You were selling your stock for a significant amount of cash, and you were concerned about getting paid.

What was done by you or your advisers to make sure that you got paid?

A Well, that's when we were introduced to Rabobank. And Rabobank was the company that they had, they being Fortrend, had brought to the table to basically pay us the money.

Q So in terms of getting paid, were you concerned about Fortrend paying you or who was going to pay you?

A Rabobank was going to pay us. The Fortrend -- my understanding of the situation was that Fortrend was borrowing money from Rabobank. They had put up some of their own money, and they were borrowing money from Rabobank. And that that money, they were going to pay us that money and it was going to be deposited into our bank account by

Rabobank.

Q And did you have a prior banking relationship with Rabobank?

A No.

Q Do you know if Fortrend did?

A I believe Fortrend did, but I don't have direct knowledge of that.

Q Okay. And in terms of getting comfortable that you were going to get paid, how did the whole control situation work? Westside's got a bunch of cash in the bank account.

A Well, Fortrend -- Fortrend wanted the officers of Westside to resign. And we said that we wouldn't allow the officers to resign until such time as we got paid.

So one thing we didn't want was we didn't want the money to get away from us. So Rabobank acted as the escrow agent. We signed a bunch of resignations, gave them to Rabobank to hold until such time as Rabobank funded this transaction.

And then once Rabobank funded the transaction, they were free to invoke the resignations, give them to Fortrend.

Q And take control of the company?

A And take control of the company, correct.

Q If you can turn to what's been marked as Exhibit 87-J and take a look at that document -- I'm sorry, it's 49-J. I apologize. Tell me what that document is if you know.

A 49-J is my letter to Chris Kortlandt at Rabobank saying that we were giving them the resignations, but they were not to be relied on until such time as they deposited $34 million into my bank account.

Q Did Rabobank have any problem with this resignation -- with this mechanism that's referred here?

A No.

Q Did Fortrend have any problem with it?

A I don't think so.

Q Did you ever open an account at Rabobank?

A I opened two accounts. I opened one personally, which is what this letter speaks to, and we opened one corporate one.

Q And why did you do that?

A That was part of the Rabobank escrow situation.

Q I'm going to have you look at Exhibits 29-J and 31-J briefly and just tell me if you recognize those.

A 29-J is the signature card signed by me. This is my personal escrow account at Rabobank. And 31-J is Westside's account at Rabobank, Westside's escrow account at Rabobank.

Q So we've talked about the financing and the role of Rabobank. What was the date, I think it's in these documents, the date the transaction actually closed?

A I can't tell you that.

Q It may not -- it's not on these documents. If you look back at Exhibit 1-J.

A I think it was September 9th, but I'm not sure.

Q And that's on page 1 of Exhibit 1-J there.

A Well, that's the date of the document.

Q Right. Of the -- of the stock --

A Of 1-J.

Q -- stock purchase agreement.

A September 9th, yeah.

Q Okay. What was the final purchase price for your stock in Westside?

A It was 34-plus million dollars. It's whatever that amount was on the letter to Kortlandt.

Q And how was that price determined, do you know? How did Fortrend come up with that number?

A We negotiated that number.

Q Could you look on that Exhibit 1-J, let's just kind of look at the finances of the company at the time this end of August, beginning of September.

Exhibit 1-J, page 40, 41. Tell me when you have those.

A Page 41?

Q 40 and 41, yeah.

A Yeah. I got it.

Q And I think you told us you don't have any formal training in accounting, right?

A I do not.

Q Okay. But you're familiar with a balance sheet and income statement?

A Yes.

Q So you do recognize these documents, then, pages 40 and 41?

A Yeah. These were pro forma balance sheet and income statements that were prepared.

Q And what does pro forma mean in your understanding?

A It means they weren't real. They were just from information.

Q Okay. And if you can turn -- well, first of all, do you see the -- we talked about taxes. The

tax that you've referred to a couple of times or potential tax for Westside, how much was that?

A The federal tax was about 14 million and then there was about 2 million in state and local.

Q And do you see that number or those numbers on the balance sheets or income statement on 40 or 41?

A Not on this one, no.

Q And do you know why those aren't on there?

A I don't know.

Q If you can turn to page 42. Tell us what you recognize with that -- that page of the stock purchase agreement is.

A 42 is an analysis of looks like a -- looks like an income statement with $16.8 million worth of tax on it. It also has the Fortrend deal factored in here.

Q And Fortrend deal, is it referenced in the bottom left-hand column the Fortrend premium; do you see that?

A Yes.

Q What is that in your understanding?

A That was the way they took the difference between what we were paid and what was in the bank at the company at the time. So the company had $41

million in it; they were paying us 5.3 -- or, I'm sorry, they were paying us 35-something. So that's the difference between the numbers.

Q Does that have anything to do with this $15 million in tax that you mentioned a moment ago --

A No.

Q -- in your understanding? Okay.

A It doesn't have anything to do with the tax as far as I'm concerned -- as far as I know.

Q Okay. But this -- you understood this to be?

A The difference between the cash in the company and what they were willing to pay for the company assuming the tax liability.

Q With their assumption of the tax liability?

A Correct.

Q Okay. When we first started talking this morning, you mentioned you moved to Las Vegas at some point. Now I want to come back to a discreet point on that.

Did you buy a house when you moved to Las Vegas in 2003?

A Yes.

Q And how was that financed?

A I borrowed 570-some-thousand dollars from

Westside in May of 2003.

Q If you can look at Exhibit 13-J in your binder and tell me if you recognize that.

A That's the -- that's a promissory note for $500,000 that I signed with Westside.

Q Whatever happened to that promissory note?

A I paid it back.

Q When and how?

A There was a check that was given to me that I endorsed back to Westside.

Q And at what time? When was that?

A I don't know exactly. It was right around the time we did the Fortrend deal.

Q So in connection with the Fortrend deal, that issue was addressed?

A Correct.

Q Okay. Fair enough. Shifting gears, then, to your own, personal, tax situation. This -- well, just an introductory question. Were you actually paid the $35 million for your stock in Westside?

A Yes.

Q Did you report that on your personal income tax return?

A Yes.

Q You can turn to Exhibit 97-J and tell me if

you recognize that document.

A 97-J is my personal tax return for 2003.

Q Okay. Toward the bottom of the second page, is that your signature there?

A It is.

Q Okay. And is that your wife's signature, as well?

A Yes.

Q If you can look toward the middle of that page, does this show how much you paid in tax in 2003?

A Yeah. $5.3 million.

Q If you can look back to -- I'm going to ask you what's that about -- Schedule D of this tax return. And I know you're not a tax guy.

Schedule D is, I believe, page 9 of 19.

A I got it.

Q Okay. Do you see the Westside sale there?

A Yeah. That's showing the $35 million that we got for the sale -- that I got for the sale of Westside stock.

Q Was your personal income tax return from 2005 ever audited?

A No.

Q I want to talk a little bit more about the

excise tax issue that you told us about and the $3 million that was also paid in November of 2003. I think that was Exhibit 88-J, that check we looked at. Do you recall that?

A Yes.

Q Okay. Was that the last you heard from the IRS and with the IRS on the excise tax issue?

A No.

Q What else did you hear from the IRS on excise taxes?

A Sometime about a year later they came knocking on the door looking for $1.1 million in penalties.

Q What was that all about? Penalties for what?

A Penalties for not remitting the excise tax.

Q And whose responsibility was that?

A That would have been my responsibility under the stock purchase agreement because it was after the transaction.

Q So coming to Westside but it's your contractual responsibility?

A That would have been my contractual obligation. It was incurred prior to January 1st of 2003.

Q Did you pay the million dollars to the IRS in penalties?

A No. I hired a law firm; I think it was Swidler Berlin. And they went to the IRS and basically filed a protest against the penalties because --

Q Was that on your behalf personally?

A On behalf of -- well, that's a good question. I think they did it on behalf of Westside, but I paid them to do it.

Q Okay. If you can look at what's been marked as Exhibit 89-J and tell us if you recognize that document.

A Yeah. This is the protest that Swidler filed on the penalties on the excise tax.

Q And on page 10 of that document, do you see your signature there, penalties of perjury statement?

A Yeah. Let me get there. Yeah. That's my signature.

Q And going back to page 1, does this refresh your recollection at all about who this was filed on behalf of?

A Yeah. It was filed on behalf of Westside Cellular.

Q And during this -- this is what's it -- the

day now, September 30th, of 2004, you'd sold your stock in Westside at this time?

A I had, yes.

Q Did you tell the IRS when you filed this that you'd sold your stock in Westside?

A Absolutely.

Q If you can turn to page 2, and you don't need to read this whole page or this paragraph. But that second full paragraph there, do you see that?

A Yes.

Q Do you see there where you've told the IRS that you'd sold your stock in Westside?

A Correct.

Q Did IRS ever question the fact that you'd sold your stock and that your signature's on this document?

A No.

Q What ever happened with this protest? What was the consequence of --

A They abated the penalties.

Q How long did that take?

A I want to say probably another year.

Q And is that the last word on excise taxes with Westside Cellular?

A No.

Q What else happened with the IRS?

A Well, sometime after this, I told you before that it was a hit and miss as far as the outcomes of various different suits against the government for excise -- excise tax.

Well, I believe the Service gave up on trying to collect the excise tax sometime in late '04, early '05.

And so when they did that, we went back -- I and Randy Hart went back to Westside and said, Hey, this excise tax, you know we paid over $3 million in excise tax on behalf of Westside. The Service has now said that it's not required to be paid. We think you've got a refund case there.

And Randy talked to, I believe, Tim Conn who was running Westside at the time and got permission to do a contingent fee refund case.

Q Was that --

A To try to get the $3 million back.

Q Okay. Working for who?

A Working for Westside.

Q Okay. Did you have any communications with Mr. Conn at the time?

A I never had any communications with Mr. Conn.

Q If I can ask you to look at what's been marked as Exhibit 93-J and tell us if you recognize that document.

A 93 is the complaint that was filed by Westside again, well, the United States of America. This is the excise tax complaint.

Q And when was that filed, do you recall? There's a date at the very top if that refreshes your recollection.

A It was filed in September of '06, 9/18 of '06.

Q Whatever happened with this complaint; do you know?

A Ultimately it was dismissed; we lost on summary judgment.

Q Do you know why?

A I don't. Off the top of my head I don't.

Q Okay. So there was never any payment of re- -- of excise --

A I know the IRS never refunded the money.

Q Okay. What was the amount if you can maybe say or how much was at issue --

A It was $3.1 million.

Q So we talked a moment ago about around $1 million in potential penalties and this potential

claim for $3.1 million in refund.

Going back to Exhibit 1-J, and talked about page 40 of that, that balance sheet.

A I'm sorry, 1-J, which page?

Q Page 40 of 209. Just looking at those numbers at the bottom.

A Got it.

Q Do you see that million dollar penalty, potential penalty I should say, referenced anywhere on that balance sheet?

A No.

Q And what about the $3 million of potential refund claim, whatever you want to call it; is that referenced anywhere there?

A It is not.

Q The -- just briefly on this -- the audit that we're here as far as the case we're a part of, when did you first learn that Westside hadn't paid its income taxes for 2003?

A In November of 2007.

Q How did you learn that?

A I believe Ms. McCaskill told me that.

Q In what context? Where did you have an occasion to meet Ms. McCaskill?

A I was subpoenaed for deposition in Las

Vegas by Ms. McCaskill.

Q And was that in your own -- I think you said you'd never been audited. So what's the context for that? Why were you being -- what were they asking you --

A They were asking me questions about Westside and about Fortrend.

Q Did -- we talked a moment ago about the telephone excise tax refund claim. Did that come up at all in that interview, that discussion?

A It did.

Q In what context?

A They asked -- I think they asked if there was any litigation pending against Westside, if I knew of any litigation pending. I don't know if it was against or with or whatever, but the question came up.

And I answered the question that yes, there was this $3 million federal excise tax case that was probably going to be filed or was going to be filed or had been filed. It had been filed at that time.

Q Okay. Did you ever hear anything more about that from Ms. McCaskill or anyone in that about that excise tax refund claim?

A No.

Q One other topic I should have covered a moment ago, but when you talked about the Rabobank loan, the finances for the stock purchase, do you recall that discussion?

A I do.

Q Okay. Your understanding, so prior to the stock sale you owned the company, right?

A Correct.

Q And while you owned the company, you were the officer and director; did you ever give Rabobank any kind of security interest? Did you ever sign anything over to Rabobank on behalf of Westside?

A No.

Q Did you ever give them a pledge of any kind, if you know what that means, of Westside's assets?

A No. I signed no -- the only paperwork that I ever signed with Rabobank were those two -- those two signature cards that we saw and the letter that I wrote to them.

Q I'll just find those quickly and make sure I'm on the same page as you. Well, that's fine.

So the account opening documents we looked at earlier, that's the only paper you signed with Rabobank?

A That's correct.

Q Okay. Did anybody else on behalf of Westside sign any pledge while you were with the company, while you owned the company, pledge security agreement of any kind?

A No. No one was authorized to do that other than me.

Q It would have been only you?

A It would have been only me.

MR. DESMOND: I think that's all the questions I have for Mr. Tricarichi.

THE COURT: Okay. So we will then take 45 minutes for lunch. Will that -- when do you expect we will want to finish today?

MS. LAMPERT: Your Honor, can we take an hour --

THE COURT: Okay.

MS. LAMPERT: -- for lunch and then come back and begin our cross-examination? And then it's my understanding from The Court's information systems gentleman that we need to actually make the connection around 3:15 for Mr. Bittner this afternoon.

THE COURT: Right.

MS. LAMPERT: So maybe if we could do our

cross when we get back until three o'clock and take a brief break and then make the connection for Mr. Bittner. Would that work for Your Honor?

THE COURT: And then will he take the rest of the day or --

MS. LAMPERT: I anticipate that he should -- that he should take approximately an hour to an hour and a half, possibly two hours.

THE COURT: And then maybe resume cross of Mr. Tricarichi if you're still --

MS. LAMPERT: Yes, Your Honor.

THE COURT: -- at that point? Okay. Let's break for one hour. And I think we'll probably plan to finish at 5:30 or six today. Plan on that, okay?

Very good.

MR. DESMOND: Thank you, Your Honor.

THE CLERK: All rise.

(Whereupon, at 12:29 p.m., The Court was in recess until 1:37 p.m.)

THE COURT: Ms. Lampert?

MS. LAMPERT: Good afternoon, Your Honor. If Mr. Desmond has no further questions on direct for Mr. Tricarichi, we're prepared to start our cross-examination.

MR. DESMOND: Nothing further from

Petitioner, Your Honor.

THE COURT: Okay. Thank you. Please proceed.

CROSS-EXAMINATION

BY MS. LAMPERT:

Q Mr. Tricarichi, can you hear me from where I'm seated today?

A Yes.

Q Is it okay if I do your questioning from this position?

A I can hear you fine.

Q Great. Thank you. And please bear with me a little bit. I'm going to probably be jumping around a little bit. I have some questions for you about some of the testimony that you've just recently given to The Court.

Numerous times during your testimony you referred to your relationships with Hahn Loesure, the attorneys at Hahn Loesure, and other advisers. And through what form of communication did you -- did you speak with Hahn Loesure or your PWC advisers or any other advisers?

A Well, I spoke more to Hahn Loesure than I did to PWC. I don't think I spoke to PWC that much. I think I spoke mostly to PWC through my brother Jim

who had the relationship with Rich Stovsky.

Hahn Loesure, I talked to Randy Hart and I talked to Jeff Folkman. But, again, I didn't have that much contact with them.

Q And did you speak directly with them? Did you -- did you speak directly with Mr. Hart and Mr. Folkman?

A I would have spoken directly with them, yes.

Q And did you ever communicate via e-mail?

A I -- it wasn't my practice to communicate with them via e-mail.

Q So you didn't send e-mails or receive e-mails?

A There might have been -- I might have been copied on some e-mails; I might have sent an e-mail. I don't know. But my general practice was, with Hahn Loesure anyway, to speak face to face.

Q Okay. And the e-mail addresses that you used during 2003, do you remember which e-mail address you used during 2003?

A Yeah. I think I used Tricarichi@aol.com.

Q Did you use any other e-mail address during 2003?

A During 2003, no.

Q Do you recognize the e-mail address MTricarichi@cellnetohio.com?

A Yeah. That would have been one of my e-mails.

Q That would have been one of --

A Yeah. That was a Cellnet e-mail address. The other one was my personal e-mail address.

Q Did Westside make estimated tax payments during 2003 when you were a shareholder of Westside?

A I -- honestly, I don't know.

Q And you stated that all debts of Westside had been paid, correct?

A To the best of my knowledge had been paid at some point, yeah.

Q But that didn't include the corporate-level income tax, correct?

A It did not include the corporate-level income tax because not -- well, first of all, when we sold Westside, the tax wasn't due yet. And Fortrend made the promise in the document to pay it, so it was their obligation to pay it.

Q Earlier you stated -- you testified that VCI Communications was an entity that you owned; is that correct?

A Yes.

Q And that initially when the litigation started with the cellular wholesale providers that VCI Communications was the entity that initially started that litigation; is that correct?

A Honestly, I don't remember that either. I think VCI for sure intervened in the PUC case that got us the resale deal.

Q Okay.

A I don't know whether it was Westside or whether it was -- I'm sure it was Westside that sued the carriers in 2000- -- or, I'm sorry, 1993.

Q And VCI Communications you said -- you testified that they initially hired Hahn Loesure to assist -- to represent VCI; is that correct?

A That's my recollection.

Q I'm sorry?

A That's my recollection, yes.

Q So the Hahn Loesure billing statements that were made to -- addressed to you care of VCI Communications, that would have included any -- any services performed on behalf of you or Westside as well; is that correct?

A That's most likely correct, yes. I can't speak to their billing, but I think that's right.

Q There are on Exhibit -- give me just one

minute. I'll come back to that.

Can you turn to Exhibit 102-J? It would be in the second volume of the witness binders.

MS. LAMPERT: Your Honor, may I approach the witness to hand him --

THE COURT: Yes, you may.

THE WITNESS: Thank you.

MS. LAMPERT: You're welcome.

THE WITNESS: Your Honor, my knees are not the greatest so if I could avoid going up and down these stairs --

THE COURT: Okay.

THE WITNESS: -- as much as possible, that would be great. That'd be great.

BY MS. LAMPERT:

Q Could you please turn to Exhibit 104-J -- I'm sorry, 102-J. And these are the billing statements for Hahn Loesure. Have you turned to 102-J?

A I'm there.

Q Okay. Can you see that it says Michael A. Tricarichi, VCI Communications?

A I do.

Q I just want to confirm that these are the services that were provided either to Westside or to

yourself from Hahn Loesure even though it's says VCI?

A Well, I can look at the bills. But yeah, I'm sure they are.

Q Could you look through the bills?

A Yeah. These are -- that's what this is.

Q Okay. Thank you. So you testified earlier that you negotiated the purchase price for the sale of your Westside stock for Fortrend; is that correct?

A That's correct.

Q And can you -- I'd like to talk about the negotiation process. Initially, you said that in the initial Fortrend meeting that you were there, your brother Jim Tricarichi was there, that Scott Ginsburg was there.

Who else was at that meeting?

A I think Larry was there, too, Larry Dubin was there.

Q Okay. Was Jeff Folkman there?

A I don't believe so.

Q And --

A And I don't think -- go ahead.

Q Sorry.

A I said I don't believe so.

Q And Randy Hart was not there either?

A I don't believe so, no.

Q Did you have any other meetings with Fortrend?

A That's the only one that I can remember that I was personally involved in other than the one where we did the signing of the deal in San Francisco.

Q So who was there on behalf of Fortrend?

A I think Gary Zwick was there. He's the lawyer that I told you was a friend of the accountant that my brother knew that brought them in. And there was another guy there, too, and I'm trying to remember what his name was. He was another attorney. Block maybe, Steven Block.

Q And what was discussed at that initial meeting with Fortrend?

A Just what they did.

Q And what did they -- what was your impression of what they did?

A They did the same thing as what we were told Midcoast did. They bought companies that had tax liabilities.

Q Did you ask them why?

A No. That was their business.

Q And you said you didn't have any other face-to-face meeting with Fortrend; is that correct?

A Not that I can recall.
Q Did you have any conference calls with Fortrend?
A There might have been.
Q There might have been. And who -- who did you have conference calls with?
A I would have -- it was 11 years ago, 12 years ago. I have no idea. You'd have to give me some --
Q So --
A -- give me some stuff to look at.
Q So I'm trying to figure out how you negotiated the purchase price with Fortrend. Was the negotiation of the purchase price done during the initial meeting with Fortrend?
A No. I don't think we discussed price initially at the initial meeting.
Q So when did you start discussing price with Fortrend?
A I think we told them to make us an offer.
Q So they made you an offer. Did you counteroffer?
A I don't remember exactly. I think that we had an offer from Midcoast at that time and I think we said, Look, we've got this offer from Midcoast.

You'll have to do better than what your offer is.

Q So they just did better than Midcoast and you didn't counter?

A I don't think I ever gave them a specific number. I think that we always relied on their number, but we got them to reduce their number.

Q Okay. I guess I'm a little bit confused. You relied on their number, but you got them to reduce their number? What --

A If they gave me a number and I said, I have a competing bid from someone else that's more, you have to come up to that number, that -- and they come up to that number or they come up above that number, that's on them. That's not on me. I didn't give them the number. I gave them the number of the competitor.

Q So you gave them the number that Midcoast gave you?

A That's my recollection.

Q Okay. And then they came back with an offer?

A Correct.

Q And that offer was higher than the Midcoast offer and there was no further negotiation?

A I don't recollect there being any further

negotiation.

Q Were you the only person involved in the negotiation of the purchase price?

A No. I think Folkman was involved in it, too.

Q So Mr. Folkman was also involved --

A I think so.

Q -- in the negotiation of the purchase price?

A I believe so.

Q Was anyone else involved in the negotiation of the purchase price?

A Possibly Scott and possibly my brother, but I don't -- I don't know for sure.

Q To your knowledge did any of the three gentlemen that you've just talked about -- Mr. Folkman, your brother Jim Tricarichi, or Scott -- I'm assuming that means Mr. Ginsburg?

A Correct.

Q Did any of those three gentlemen provide Fortrend with a counteroffer?

A I don't believe so, no. I mean, we may -- we probably discussed offers amongst ourselves. But, again, how we got to that number I can't tell you.

Q So you don't -- you don't remember?

A Eleven years ago, no. I don't remember how we got to that number.

Q And when you -- and you said that at the initial meeting -- you testified that at the initial meeting with Fortrend there was a gentleman Gary Zwick and then maybe Steve Block, is that --

A I know there was a guy named Block. I may have the -- I might have the first name wrong.

Q Mr. Block? Okay.

A Mr. Block --

Q Mr. Block.

A -- we'll call him.

Q And did you talk with either one of those gentlemen after the initial meeting?

A Possibly. I don't have a direct recollection of that. I know that -- I know that the first guy that I mentioned I didn't have any further contact with. And I don't think I had any contact with Block either.

I think the only person that I ever talked to from Fortrend was Charles Klink.

Q Charles Klink?

A Yeah.

Q And who was Mr. Klink?

A He was representing them in some way.

Q Did you participate in negotiations with Mr. Klink on the purchase price?

A I may have. I don't really recollect.

Q Did you take any notes or anything with respect to any negotiations that you did with respect to the purchase price?

A No.

Q Let's talk a little bit about the Fortrend premium. Did you negotiate the Fortrend premium with Fortrend?

A Well, again, my recollection of the Fortrend premium is it's the difference between the cash that Westside had and what Fortrend was offering for the stock.

So to say did I negotiate that, I -- I negotiated the final stock price. Whatever -- and whatever it took to do that --

Q Okay.

A -- I wanted that difference to be as small as possible.

Q Okay. So you negotiated the purchase price. The Fortrend premium was a function of the amount of cash that Westside had minus the amount of cash that was paid to you for the purchase of your stock; is that correct?

A That's my understanding of what it was.
Q And do you know why that was called the Fortrend premium?
A That's what they called it.
Q And when you say they, you mean Fortrend?
A Fortrend.
Q Mr. Klink, Mr. --
A Fortrend.
Q Okay. And your primary contact with Fortrend was Mr. Klink?
A He was the guy that I remember talking to at Fortrend. I don't know if he was the primary contact or not.
Q Isn't it true that Fortrend's premium was based on a tax liability that was going to be not paid?
A That was not my understanding.
Q Okay. Let's turn to Exhibit 23-J.
MS. LAMPERT: Your Honor, may I approach the witness and hand him --
THE COURT: Yes, you may.
THE WITNESS: I'll give you that one for this one. 23-J, got it.
BY MS. LAMPERT:
Q I'm sorry?

A I'm here.
Q 23-J. If you can look at page 2.
A Got it.
Q This looks substantially similar to the exhibit that Mr. Desmond put on the screen earlier when you were testifying; is that correct?
A Yeah.
Q The exhibit that was contained in the closing binder for the stock purchase agreement?
A If you say so.
Q Okay. So can you look over at the right-hand side of this document where it says 16 million original tax calc, 5.1 million Fortrend premium, and 31.88 percent Fortrend premium.
A Got it.
Q That 31.88 percent, it looks like to me that the net taxes of 16.8 million approximately, that the Fortrend premium of 5.3 million is 31.88 percent of the net taxes. Is that your understanding?
A If I -- you give me the calculator I'll be happy to do the math. It looks close to that.
Q Did you discuss that with Mr. Klink or anyone else from Fortrend?
A No. That's a pretty odd percentage, 31.88.

I mean, that would -- that would lead me to believe that the way I said it was more correct than the way you said it.

Q The way that you negotiated the purchase price --

A Correct.

Q -- of the stock?

A Yeah. I mean, if it -- if they would have said it's 33 percent, you know, we're going to charge you 33 percent of the tax, then it would have been 33 percent. It wouldn't have been 31.88. Do you understand what I'm saying?

Q And so the back-and-forth negotiations that -- there were no back-and-forth negotiations, correct? It was that they came to you with an offer; is that correct?

A They came to us with a couple of offers.

Q Couple of offers?

A Yes.

Q Okay. Yeah. Which offer did they come to you with first?

A I don't recollect. It wasn't this one.

Q It wasn't this one?

A No. It was a higher -- it was a lower payout to us.

Q A lower payout to you and a higher --
A Premium.
Q -- premium for them?
A Whatever you want to call it, yeah.
Q Okay. So was the purchase price actually -- was it actually that the Fortrend premium was being negotiated? Isn't that what was happening is that you were negotiating what Fortrend would receive and then actually what the balance is what you received? The balance of the cash from Westside was what you received for your purchase price?
A No.
Q Let's talk for a minute about the excise tax that you were talking about earlier, the $3.1 million approximately that you paid to the Service -- the IRS.
A That Westside paid.
Q It was separate?
A Right.
Q Okay. And I want to make sure that I have my facts straight here. I want to make sure that I'm clear. You stated that in August of 2003 that you filed excise tax returns along with a check for approximately $3.1 million, correct?
A Yeah. Before the Fortrend deal closed.

Q Okay. And the IRS did nothing with that. There was no acknowledgement of that. So then in November of 2003, you refiled the tax returns and you reissued a new check for $3.1 million; is that correct?

A Yes, that's correct.

Q Okay. Which account did the $3.1 million that you initially wrote the check for, the August 2003 check, which account from Westside did that $3.1 million come from?

A The same account the second check came from. You have a picture of the second check there.

Q Okay. So Exhibit 88-J, can you turn to Exhibit 88-J? And I'm not sure that they --

A I don't have that in front of me. But I'll -- if that's a picture of the second check from November of '03, then I think it was on our Key Bank account. I think it was on Westside's Key Bank account.

Q It is.

MS. LAMPERT: Your Honor, may I approach?

THE COURT: Yes, you may.

MS. LAMPERT: Just to make sure we don't have any ambiguity.

THE WITNESS: I don't know that I have --

oh, you have another book. Okay. Which one aren't you going to be using? 88. Yeah. That's the -- that's the Cellnet ACH account.

THE COURT: Counsel, what exhibit are you looking at now?

MS. LAMPERT: I'm sorry?

THE COURT: What exhibit are we looking at?

MS. LAMPERT: 88-J.

THE COURT: 88-J. And it's a Cellnet account on which bank?

MS. LAMPERT: Cellnet account on Key Bank.

THE COURT: Key Bank.

MS. LAMPERT: In Ohio.

BY MS. LAMPERT:

Q And it's your testimony that this check for the November 2003 check actually came out of the same account that you wrote the August 2003 account from; is that correct?

A Yeah. We stopped payment on the August check --

Q Okay.

A -- and then reissued this check in November.

Q And were there any other funds in the Key Bank account for Westside?

A Other than this?
Q Other than this?
A Not that I recollect.
Q Is that because all of the -- the remainder of the cash for Westside had been transferred to the Rabobank account for Westside?
A By November of -- by November of 2003, that's correct.
Q Okay. So at the time that the stock purchase closed -- okay, so on September 9th -- there was $3.1 million in the Key Bank account, correct, and then 39.9 million in the Westside bank account at Rabobank, correct?
A Well, that's the practicality of it. We didn't know that at the time because we assumed the IRS was going to cash the check and there wouldn't be any money in the Key account.
Q Okay. Okay. But in practicality that's what happened?
A In practicality, that's correct.
Q All right. And did -- and this account obviously remained open after the stock purchase, correct?
A It remained open because it had $3.1 million in it and an outstanding check on it.

Q And you remained the authorized signature -- signatory on that account; is that correct?

A Well, there were a couple of authorized signatories. But that was --

Q Okay.

A -- I was one of them. But I didn't sign this check. I think that's Scott Ginsburg's signature.

Q Oh, okay. I'm sorry, Scott Ginsburg you said?

A Yeah.

Q Okay. You testified earlier that Randy Hart has represented you for a number of years; is that correct?

A Since '89.

Q That is a number of years. And he has represented you in matters other than just the wholesale provider litigation and this matter; is that correct?

And by this matter, I mean your sale of stock from Westside.

A Give me a time period.

Q In the time period that you have known Mr. Hart, since 1989 --

A Starting in '89 and ending today?
Q Yes.
A Yes. He's represented me in several matters.
Q Okay. And, in fact, you and Mr. Hart have been business partners in at least one transaction; is that correct?
A We own a building in Cleveland together.
Q When did you first meet Jeff Folkman?
A Sometime in early 2003 or late 2002.
Q And did you meet him in connection with the receipt of settlement proceeds or do you -- did you meet him in connection with another matter?
A My recollection is that Jeff approached Randy and said I see that you're probably -- I think it was right after the Supreme Court decision came in. And Jeff approached Randy and said, I see you guys are going to be getting some money. We should talk about tax consequences.
And then he -- Randy approached me with that and we set up a meeting with Jeff.
Q Okay. Since Mr. Folkman's representation of you with respect to the sale of your Westside stock, has he represented you in any other matters?
A No. This is the only representation that

Jeff Folkman ever did.

Q And I apologize, I do not recall your testimony on this. So if it's already been asked, I'm just wanting to make sure that I understood.

Did you have a previous relationship with PricewaterhouseCoopers before you hired them to assist you with the sale of your stock?

A No. My brother Jim had a relationship with Rich Stovsky who was a partner at PricewaterhouseCoopers. But I personally did not have a relationship with anybody over there and Westside did not have a relationship with anybody over there.

Q And have you had any ongoing relationship with PricewaterhouseCoopers after the sale of your stock?

A I don't think so.

Q I don't think so? Is there --

A It's possible we may have used them for something -- for something else, but I can't think of it off the top of my head.

Q Okay. Did -- do you recall if you've had any additional dealings with Mr. Stovsky or Mr. Loenes from Pricewaterhouse?

A I didn't know who Tim Loenes was until this

case.

Q Okay.

A So I can tell you I didn't have any dealings with him.

Q Okay. So --

A If I had dealings with PWC, they would probably have been through Rich Stovsky at some point.

Q And you testified that your brother Jim Tricarichi introduced you to Fortrend through a third party, Gary Zwick; is that correct?

A That's my understanding, that's my recollection, yes.

Q And did your brother Jim Tricarichi assist you with this transaction in any way?

A He was kind of like a conduit, a go-between. He was doing some accounting work for Westside. I don't think he was employed at the time and he was doing some accounting work for Westside and he was doing financial statements and things like that.

And he was in contact with Stovsky so he was for sure our conduit to Stovsky. And I believe that he was supplying documents to Fortrend in terms of financial statements and things that they were

asking for.

Q Now, when your brother, Jim Tricarichi -- I'm sorry, I'm going to use his name so that we can make sure --

A Say Jim if you want. That's fine.

Q -- we're clear on which brother I'm talking about.

A Okay.

Q When your brother, Jim Tricarichi, provided documents to Fortrend, do you know who he dealt with at Fortrend?

A I don't.

Q When he gave Fortrend documents, did he run them by you before he gave them to Fortrend?

A Usually not.

Q Did he ever come to you and say Fortrend has asked for a document of some sort and asked for your permission before he gave it to Fortrend?

A Occasionally.

Q So if Fortrend asked for information, he would come to you for permission before he would give it to Fortrend; is that correct?

A That's my recollection. He didn't always do that if it was something minor. If it was something major that had like confidential

information or something like that, he would generally ask me beforehand.

Q And whose discretion would it be whether or not the document was major or minor?

A His.

Q His. But he -- you said that he had an ongoing relationship with Westside and he was an employee of Westside. So he --

A He was a consultant to Westside. He wasn't a W-2 employee.

Q A consultant to Westside. And in his capacity as a consultant to Westside, did you and your brother Jim Tricarichi work closely together; did you regularly discuss the business matters of Westside?

A No. We discussed whatever he was doing, whatever we had him doing.

Q And what -- what did you have him do?

A Various different things depending on timeframe. I know that we were implementing a new billing system so we were running what we call parallels.

Which meant we would run the same billing period on the old system and then the new system and then we'd have to reconcile them together to figure

out whether the new billing system was billing the same as the old billing system or more or less.

And then if we found out it was picking up things the old billing system didn't pick up, then he would investigate as to why that was. I know that was one thing he was doing. Go ahead.

Q I didn't mean to interrupt you.

A That's all right. Go ahead.

Q So as a consultant to Westside, did he get paid for his services that he rendered?

A Sometimes he did and sometimes he didn't.

Q So what -- where was the line of demarcation from when he did get paid for his services as opposed to when he did not get paid?

A When he asked.

Q So when he asked for payment --

A We'd give it to him.

Q -- you would give it to him?

A Correct.

Q If -- but he would render services sometimes without asking for payment?

A Yeah. He was my brother. I mean, I would give him services without asking him for payment. I don't think he ever paid for his cell phone.

Q Okay. So he got free cell phone service?

A Well, like I said, I don't think he ever -- let me put it this way, I don't think he ever paid for it.

Q Did you talk to your brother Jim Tricarichi about the negotiation of the purchase price of Fortrend?

A I think he -- he -- I think that sheet that you showed me he did, that spreadsheet that you showed me. So I'm sure we discussed it.

Q So he prepared that sheet, the spreadsheet?

A I think he did. I'm not 100 percent sure, but I think he did.

Q And so --

THE COURT: Counsel, will you clarify what spreadsheet we're discussing here?

MS. LAMPERT: 40 --

THE COURT: The one attached to the e-mail; is that correct?

MS. LAMPERT: Yes, Your Honor.

THE COURT: Which one was that?

MS. LAMPERT: 23-J, Your Honor. Page --

THE COURT: So am I right in understanding that the spreadsheet as page 2 of that exhibit was an attachment to this e-mail?

BY MS. LAMPERT:

Q Mr. Tricarichi, is it your understanding that page 2 of this -- we're at 23-J. Do you have that in front of you?

A Honestly, I couldn't tell you. This is a Hahn Loesure document. It's got a Hahn Loesure stamp on it, and I don't know who Margaret Johnson is. So I don't honestly know.

I don't know if this was an original attachment to this particular -- to this particular e-mail or not. I have no way of knowing.

Q Okay. Mr. Tricarichi, could you turn to Exhibit 1-J, page 42? This is the document that Mr. Desmond referred to you to earlier, I believe.

A 42?

Q Yes.

A Got it.

Q This is a substantially similar calculation to what we just saw that was attached to that e-mail.

A It doesn't have any of the stuff on the right-hand side of the page that the other one did.

Q Correct. But other than that, the types of --

A It looks similar. It's a similar document, yeah.

Q Is it your recollection that your brother

Jim Tricarichi prepared this calculation?

A I'm pretty sure he did; although, I'm not 100 percent sure.

Q Okay. Earlier you were testifying regarding the claim for refund for the excise taxes; is that correct?

A That's correct.

Q And I believe there was some testimony on this point. Again, I wasn't clear on what your answer was.

So who -- who paid the attorney who prepared and filed the claim for refund for the excise taxes for Westside?

A I don't believe anybody did. I think it was a contingent -- let's -- which one are we talking about? Let's go back.

Q The claim for refund.

A You're talking about the case that was filed against the --

Q Yes.

A -- Government?

Q Yes.

A My understanding of that was that it was a contingent fee case that Mr. Hart brought on behalf of Westside. And I don't think since there was no

recovery, I don't think anybody paid for the filing of it.

Q And so if Westside had been successful in that litigation, what was your understanding would happen to the refund that was received by Westside?

A Excellent question. Honestly, I don't know. What we -- what we thought was going to happen was that since we -- we being me -- was responsible for the -- was responsible for the paying of taxes before 2003, I should have gotten any refunds that were due for the period before 2003.

But, unfortunately, in our infinite wisdom, the stock purchase agreement didn't speak to that. So the conversation I think -- Randy had a couple of conversations with Tim Conn and I think what we agreed to do was just see if we got the money first. And if we got the money, then we would try to figure out who got what.

Q And it was your position that the money should be delivered to you?

A That was my position, yeah. But that wasn't -- that wasn't necessarily Westside's position.

Q Okay. You testified earlier that it was your understanding that Fortrend was going to pay

Westside's corporate income tax liability; is that correct?

A That's correct. That's contractual in the purchase agreement.

Q But according to the various sales calculations spreadsheets that we've been looking at, the one in Exhibit J (sic), page 42, and the one on Exhibit 23-J, the Fortrend premium, the amount of cash that Fortrend received was approximately $5.3 million, correct?

A The amount of cash they received was approximately $40 million. If you're trying to net that out, I don't -- I'm not following you.

Q They received -- okay. So there was $40 million is what you're saying and then they paid back Rabobank, correct, for 29 --

A I can't speak to that. I don't -- I'm not privy to whether they paid back Rabobank or not. I think they did, but that wasn't my respon- -- I was out of the -- I was out of the deal by the time that that happened.

Q How did you think was -- how did you think Fortrend was going to pay for the taxes of Westside?

A Well, my understanding was they had some tax reduction process that they were going to do.

Q A tax reduction process?

A Yeah. They were -- that was their thing. They were going to reduce the tax to the point where they would pay it.

Q That was -- when you say that was their thing, what do you --

A It was never my understanding that they were going to pay $16 million in tax. It was my understanding that they were going to pay some number between $5 million or less in tax.

But how they got to that point, I had no understanding of how they were getting to that point. Their business was bad debt. And my understanding was that they were going to somehow use bad debt to lower the tax obligation. And that's the extent of my knowledge as to how they did whatever they did.

That's why I hired Hahn Loesure and that's why I hired PWC was to figure that out, to look into that and figure it out.

Q Okay. And did you talk to Hahn Loesure and PWC, the advisers that you had at Hahn Loesure and PWC, about what they thought about the plan that Fortrend had to minimize the tax?

A Yes.

Q And what did they say?

A Well, part of it was proprietary. They weren't telling us what they were going to do as far as minimizing the tax goes. They had a couple of options. I think -- I think PWC looked at one of them.

But we had nothing in the purchase agreement that spoke to a specific thing that they were going to do after they purchased the company. There was nothing -- all -- the only thing we had in the agreement was they were going to satisfy the tax obligation of Westside.

Q Okay.

A Okay. They didn't say how they were going to do it. They just said they were going to do it. And we had a lot of reps and warrants to that effect.

Q Thank you. Can you turn to Exhibit 26-J, please?

A 26-J, got it.

Q This is the letter of intent from Nob Hill Holdings to you.

A Yes.

Q And Nob Hill Holdings is the acquisition company that Fortrend used; is that correct?

A That's my understanding.

Q And if you'll turn to -- let's first turn

to page 3 of that exhibit, please.

A Okay.

Q And if you'll look down at Paragraph 5, it says: Purchaser will have secured financing for the stock purchase price.

What was your understanding of that condition precedent?

A They were borrowing money.

Q And when you say they were borrowing money, who are you referring to?

A Well, whoever the purchaser was. If it was Fortrend or if was Nob Hill --

Q Okay.

A -- whoever it was was borrowing the money, securing the financing to be able to pay me the money for my stock.

Q Okay. So Fortrend was securing the money for financing?

A That's what Paragraph 5 says, yeah.

Q Okay. And can you turn to page 4 of the letter of intent where it says Indemnifications?

A Yeah.

Q This paragraph talks about different indemnifications that will be given, but it specifically excludes the tax liability for the

current fiscal year or the taxes due for the current fiscal year.

Did you have any concern that there was no indemnification provisions for the corporate tax liability?

A I think you're reading that paragraph wrong.

Q Okay. Earlier you testified that Fortrend used some of the -- the loan that it received from Rabobank, correct, to purchase your stock in Westside but that they also used some of their own money. Is that what you testified to?

A That's my understanding based on what I know from gleaning it in this case.

Q Okay.

A My understanding originally was they were going to borrow all the money.

Q Okay.

A My understanding in 2003 was they were borrowing all the money.

Q Okay.

A My understanding from reading documents in this case was that they didn't borrow all the money. They put up $5 million of their own money and they borrowed the rest of it.

Q Okay. So when you're talking about the $5 million of your own money, you're talking about the $5 million from moffit (phonetic), is that what you're referring to?

A That's what I'm talking about.

Q Okay. Earlier you said that -- I believe that you testified that if you hadn't sold the stock in Westside that it was your intention to use the money that Westside received to purchase real estate since you could no longer be in the cellular service; is that correct?

A Yes.

Q And you were going to do that after you paid the corporate-level income tax; is that correct?

A That's correct. Well, whether we did it before or after, it didn't matter. The tax wasn't due on the day -- on the day we got the money. So whenever the tax would have been due we would have paid it. Whether we would have bought in real estate tax before the tax was due or after the tax was due, I can't speak to that. But at some point, yeah.

Q You would have paid the corporate-level income tax --

A When it was due.

Q Okay. And so how would that have been

different than a liquidation of Westside?

A How would paying the corporate tax be different than a liquidation?

Q Well, earlier --

A It would be like night and day.

Q Okay. Will you please explain?

A A liquidation of Westside means Westside doesn't exist anymore. Westside paying its corporate tax means that it does exist. I don't under- -- I guess I don't understand your question.

Q Okay. You were saying earlier that you didn't want to liquidate because then you would have to pay double taxation, correct?

A Only if I took the money out myself.

Q Okay.

A If I didn't take the money out myself, meaning Mike Tricarichi, and the money was all left in Westside and Westside was the acquirer of the real estate, there would be no double-tax situation.

Q Okay. So --

A Westside would own the real estate.

Q Okay. Okay. Earlier also you testified about the accounts at Rabobank, correct, the various accounts that you opened up for yourself and for Westside?

A Two.

Q Correct. Who -- whose requirement was that that you and Westside open accounts at Rabobank?

A That was Rabobank's requirement because they did the escrow on the deal. So that's how they accomplished the escrow on the deal.

MS. LAMPERT: Your Honor, may I have a moment?

THE COURT: Yes, you may.

(Brief pause.)

MS. LAMPERT: No further questions for this witness at this time, Your Honor.

THE COURT: Okay. Why don't we -- let's take a five-minute break before we do the redirect, okay?

MS. LAMPERT: Thank you, Your Honor.

THE CLERK: All rise.

(Whereupon, a brief recess was taken.)

THE COURT: Be seated.

MR. DESMOND: May I proceed, Your Honor?

THE COURT: Yes, you may.

REDIRECT EXAMINATION

BY MR. DESMOND:

Q Good afternoon, Mr. Tricarichi. I put the binder back in front of you. I just have a couple

quick follow-up questions for you.

You were asked during cross-examination about the excise tax refund claim that came after the stock sale. Do you recall that testimony?

A Yes.

Q If you could turn to Exhibit -- we talked about this this morning -- 93-J in the binder in front of you.

A I'm there.

Q And that refund complaint.

A Yes.

Q This says at the top there, do you see it was filed on September 18th, of 2006?

A That's correct.

Q Remind me again or if you can tell us again, when did you learn that there might be a problem with Westside's unpaid federal income tax for 2003?

A In November of '07.

Q So more than a year after this complaint was filed?

A That's correct.

Q Okay. And when this complaint was filed, did you have any idea that Westside owed unpaid income taxes?

A None whatsoever.

Q Okay. And did you have an understanding as to what would have happened if you'd gotten $3 million back and Westside owed income taxes?

A My guess is the Government would have probably applied the money toward the tax that was owed.

Q Is that an issue you thought about back in 2006?

A No.

Q And, again, did you have any idea that there was a problem with Westside's unpaid taxes?

A No idea at all.

Q Just one other question, Mr. Tricarichi. You were asked about indemnification on cross-examination. You recall that testimony?

A Yes.

Q I think we looked at Exhibit 26-J. You don't need to look at it now.

A Okay.

Q The letter of intent?

A Yes.

Q The ultimate agreement that you signed with Fortrend and Nob Hill, did that have any indemnification provisions in it?

expenses of every kind incurred in respect thereof or incidental to the care or safekeeping of any of the Collateral or to any way relating to the Collateral or the rights of UAFC hereunder, including, without limitation, reasonable attorneys' fees and disbursements of counsel to UAFC, to the payment in whole or in part of the Obligations, in such order as UAFC may elect, and only after such application and after the payment by UAFC of any other amount required by any provision of law, including, without limitation, the Code, need UAFC account for the surplus, if any, to the Borrower. To the extent permitted by applicable law, the Borrower waives all claims, damages and demands it may acquire against UAFC arising out of the exercise by them of any rights hereunder. If any notice of a proposed sale or other disposition of Collateral shall be required by law, such notice shall be deemed reasonable and proper if given at least 10 days before such sale or other disposition. The Borrower shall remain liable for any deficiency if the proceeds of any sale or other disposition of Collateral are insufficient to pay the Obligations and the fees and disbursements of any attorneys employed by UAFC or any UAFC to collect such deficiency.

9. Private Sales. (a) The Borrower recognizes that UAFC may be unable to effect a public sale of any or all the Pledged Stock, by reason of certain prohibitions contained in the Securities Act and applicable state securities laws or otherwise, and may be compelled to resort to one or more private sales thereof to a restricted group of purchasers which will be obliged to agree, among other things, to acquire such securities for their own account for investment and not with a view to the distribution or resale thereof. The Borrower acknowledges and agrees that any such private sale may result in prices and other terms less favorable than if such sale were a public sale and, notwithstanding such circumstances, agrees that any such private sale shall be deemed to have been made in a commercially reasonable manner. UAFC shall be under no obligation to delay a sale of any of the Pledged Stock for the period of time necessary to permit the Issuer thereof to register such securities for public sale under the Securities Act, or under applicable state securities laws, even if the Issuer would agree to do so.

(b) The Borrower further agrees to use its best efforts to do or cause to be done all such other acts as may be necessary to make such sale or sales of all or any portion of the Pledged Stock pursuant to this Section valid and binding and in compliance with any and all other applicable requirements of Law. The Borrower further agrees that a breach of any of the covenants contained in this Section will cause irreparable injury to UAFC, that UAFC has no adequate remedy at law in respect of such breach and, as a consequence, that each and every covenant contained in this Section shall be specifically enforceable against the Borrower, and the Borrower hereby waives and agrees not to assert any defenses against an action for specific performance of such covenants except for a defense that no Event of Default has occurred under the Note.

10. Irrevocable Authorization and Instruction to Issuer. The Borrower hereby authorizes and instructs the Issuer to comply with any instruction received by it from UAFC in writing that (a) states that an Event of Default has occurred and (b) is otherwise in accordance with the terms of this Agreement, without any other or further instructions from the Borrower, and the Borrower agrees that the Issuer shall be fully protected in so complying.

[illegible] WITNESS WHEREOF, THE PARTIES HERETO HAVE EXECUTED THIS PLEDGE AGREEMENT [illegible]

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11. UAFC's Appointment as Attorney-in-Fact. (a) The Borrower hereby irrevocably constitutes and appoints UAFC and any officer or agent of UAFC, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Borrower and in the name of the Borrower or in UAFC's own name, from time to time in UAFC's discretion, for the purpose of carrying out the terms of this Agreement, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary or desirable to accomplish the purposes of this Agreement, including, without limitation, any financing statements, endorsements, assignments or other instruments of transfer.

(b) The Borrower hereby ratifies all that said attorneys shall lawfully do or cause to be done pursuant to the power of attorney granted in paragraph 11(a). All powers, authorizations and agencies contained in this Agreement are coupled with an interest and are irrevocable until this Agreement is terminated and the security interests created hereby are released.

12. Duty of UAFC. UAFC's sole duty with respect to the custody, safekeeping and physical preservation of the Collateral in its possession, under the Code or otherwise, shall be to deal with it in the same manner as UAFC deals with similar securities and property for its own account, except that UAFC shall have no obligation to invest funds held in any Collateral Account and may hold the same as demand deposits. Neither UAFC, nor any of their respective directors, officers, employees or agents shall be liable for failure to demand, collect or realize upon any of the Collateral or for any delay in doing so or shall be under any obligation to sell or otherwise dispose of any Collateral upon the request of the Borrower or any other Person or to take any other action whatsoever with regard to the Collateral or any part thereof.

13. Continuing Security Interest; Transfer of Note. This Agreement shall create a continuing security interest in the Pledged Stock and shall (i) remain in full force and effect until the payment in full of the Obligations, whether before, on or after the Maturity Date, (ii) be binding upon the Borrower, its successors and assigns and (iii) inure to the benefit of and be binding on UAFC and its successors, transferees and assigns. Without limiting the generality of the foregoing clause (iii), UAFC may assign or otherwise transfer the Note held by it to any other person or entity, and such other person or entity shall thereupon become vested with all the benefits in respect thereof granted to UAFC herein or otherwise. Upon the payment in full of the Obligations, the security interest granted hereby shall terminate and all rights to the Pledged Stock shall automatically revert to the Borrower without any further action on the part of any party hereto. Upon any such termination, UAFC will, at the Borrower's expense, execute and deliver to the Borrower such documents as the Borrower shall reasonably request to evidence such termination.

15. Notices. All notices, requests and demands to or upon UAFC or the Borrower to be effective shall be in writing, addressed to UAFC or the Borrower at its address for notices provided in the Note and shall be effective upon receipt.

16. Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

17. Amendments in Writing; No Waiver; Cumulative Remedies. (a) None of the terms or provisions of this Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the Borrower and UAFC, provided that any provision of this Agreement may be waived by UAFC in a letter or agreement executed by UAFC or by telex or facsimile transmission from UAFC.

(b) UAFC shall not by any act (except by a written instrument pursuant to paragraph 17(a) hereof), delay, indulgence, omission or otherwise be deemed to have waived any right or remedy hereunder or to have acquiesced in any Event of Default or in any breach of any of the terms and conditions hereof. No failure to exercise, nor any delay in exercising, on the part of UAFC, any right, power or privilege hereunder shall operate as a waiver thereof. No single or partial exercise of any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power or privilege. A waiver by UAFC of any right or remedy hereunder on any one occasion shall not be construed as a bar to any right or remedy which UAFC would otherwise have on any future occasion.

(c) The rights and remedies herein provided are cumulative, may be exercised singly or concurrently and are not exclusive of any other rights or remedies provided by law.

18. Section Headings. The section headings used in this Agreement are for convenience of reference only and are not to affect the construction hereof or be taken into consideration in the interpretation hereof.

19. Successors and Assigns. This Agreement shall be binding upon the successors and assigns of the Borrower and shall inure to the benefit of UAFC and its successors and assigns.

20. GOVERNING LAW; WAIVER OF JURY TRIAL; SUBMISSION TO JURISDICTION; ETC.

(A) THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK. THE BORROWER HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY NEW YORK STATE OR FEDERAL COURT SITTING IN NEW YORK CITY OVER ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT. PROCESS, PLEADINGS AND OTHER LEGAL PAPERS SHALL BE SERVED UPON THE BORROWER AT THE ADDRESS FOR NOTICE SET FORTH ABOVE. THE BORROWER

HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO, THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING.

(B) THE BORROWER HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER INSTRUMENT OR DOCUMENT DELIVERED IN RELATION HERETO.

(C) THE BORROWER IRREVOCABLY CONSENTS TO THE SERVICE OF COPIES OF THE SUMMONS AND COMPLAINT AND ANY OTHER PROCESS WHICH MAY BE SERVED IN ANY SUCH ACTION OR PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. NOTHING IN THIS PARAGRAPH SHALL AFFECT LENDER'S RIGHT TO SERVE LEGAL PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR AFFECT LENDER'S RIGHT TO BRING ANY ACTION OR PROCEEDING AGAINST THE BORROWER'S PROPERTY IN THE COURTS OF OTHER JURISDICTIONS.

IN WITNESS WHEREOF, the undersigned has caused this Agreement to be duly executed and delivered as of the date first above written.

NOB HILL HOLDINGS, INC.

By: [illegible]
Name: [illegible]
Title: President

EXHIBIT 6

CONTROL AGREEMENT

This CONTROL AGREEMENT (as amended, supplemented or otherwise modified from time to time, the "Control Agreement") dated as of September 9, 2003, is made by and among NOB HILL HOLDINGS, INC., a Delaware corporation ("Grantor"), UTRECHT-AMERICA FINANCE CO. ("UAFC") and COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH, as securities intermediary (in such capacity, "Bank").

WHEREAS, the Bank maintains for the Grantor securities accounts and deposit accounts, including without limitation, the account listed on Schedule 1 hereto (the "Account"), in the name of the Grantor.

WHEREAS, the Grantor has granted to UAFC a security interest in the Account, all cash, instruments, financial assets carried therein, all security entitlements with respect thereto, all cash, checks, instruments and other items of value of the Grantor now or hereafter paid, deposited, credited, held or otherwise in the possession or under the control of, or in transit to, the Bank or any agent, bailee or custodian thereof, and all additions thereto and substitutions and proceeds thereof (collectively, the "Collateral") pursuant to a Security and Assignment Agreement, dated as of the date hereof (as amended, supplemented, replaced or otherwise modified from time to time, the "Security Agreement"), among the Grantor and UAFC.

WHEREAS, the following terms which are defined in Articles 8 and 9 of the Uniform Commercial Code in effect in the State of New York on the date hereof (the "UCC") are used herein as so defined: adverse claim, bank's jurisdiction, control, deposit account, entitlement order, financial asset, instruction, investment property, proceeds, securities account, securities intermediary, securities intermediary's jurisdiction, and security entitlement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

SECTION 1. Notice of Security Interest. The Grantor, UAFC and the Bank are entering into this Control Agreement to perfect, and to confirm the priority of, UAFC's security interest in the Collateral. The Bank acknowledges that this Control Agreement constitutes written notification to the Bank of UAFC's security interest in the Collateral. The Bank agrees to promptly make all necessary entries or notations in its books and records to reflect UAFC's security interest in the Collateral. The Bank acknowledges that UAFC has control over the Account, all cash, instruments, and financial assets contained therein from time to time, and all security entitlements with respect thereto. UAFC hereby appoints the Bank as UAFC's bailee and pledgee in possession for the Account and the Bank hereby accepts such appointment and agrees to be bound by the terms of this Agreement.

SECTION 2. Collateral Account. (a) The Grantor hereby represents and warrants to, and agrees with UAFC and the Bank that, all cash, instruments and investment property held by the Bank for the Grantor is and shall be credited to the Account.

(b) The Bank hereby represents and warrants to, and agrees with the Grantor and UAFC that (i) the Bank is a securities intermediary with respect to the Grantor and, to the extent permitted by applicable law, the Account is a securities account, (ii) to the extent permitted by applicable law, all assets, property and items from time to time carried in the Account, including, without limitation, any investment property, are, and will continue to be, financial assets, (iii) the securities intermediary's jurisdiction is, and during the term of this Control Agreement shall remain, the State of New York, (iv) the Bank's jurisdiction is, and during the term of this Control Agreement shall remain, the State of New York, (v) no financial asset included in the Collateral is registered in the name of, payable to the order of, or specially indorsed to, the Grantor, which has not been indorsed to the Bank or in blank, and (vi) the Account is and shall remain a cash account, and the Bank will not extend, directly or indirectly, any "purpose credit" (within the meaning of such term under Regulation T of the Board of Governors of the Federal Reserve System of the United States) to the Grantor in respect of the Account.

(c) UAFC hereby instructs the Bank, and the Bank hereby confirms and agrees that, unless UAFC shall otherwise direct the Bank in writing, any cash, instruments or investment property from time to time held by the Bank for the Grantor shall be credited only to, and carried only in, the Account.

SECTION 3. Control. The Bank hereby agrees, at any time that an Event of Default (as defined in the Security Agreement) exists and is continuing, upon written direction from UAFC and without further consent from the Grantor, (a) to comply with all instructions, entitlement orders and directions of any kind originated by UAFC concerning the Collateral, to liquidate or otherwise dispose of the Collateral as and to the extent directed by UAFC and to pay over to UAFC all cash Collateral and proceeds without any setoff or deduction, and (b) except as otherwise directed by UAFC, not to comply with the instructions, entitlement orders or directions of any kind originated by the Grantor or any other person until such time as UAFC sends written notice to the Bank that such Default has been cured or waived.

SECTION 4. Statements and Other Information. Upon UAFC's request, the Bank shall send to UAFC copies of all the regular monthly account statements provided to the Grantor and such other information relating to the Account as shall be reasonably requested by UAFC. The Bank shall also deliver to UAFC a copy of all notices and statements required to be sent to the Grantor pursuant to any agreement governing or related to the Account to UAFC at such times as any such notice is sent to the Grantor.

SECTION 5. Other Agreements; Termination; Successor Banks. The Bank shall notify promptly UAFC and the Grantor if any other person asserts any lien, encumbrance, claim (including any adverse claim) or security interest in or against any of the Collateral. As long as the Security Agreement remains in effect, neither the Grantor nor the Bank shall terminate the Account without 30 days' prior written notice to the other party and UAFC. In the event of any conflict between the provisions of this Control Agreement and any other agreement governing the Account or the Collateral, the provisions of this Control Agreement shall control. In the event the Bank no longer serves as bank for the Collateral, the Account and the cash, instruments and financial assets carried therein or held with respect thereto shall be transferred to a successor bank or custodian satisfactory to UAFC, provided, that prior to such transfer, such successor

bank or custodian shall execute an agreement that is substantially in the form of this Control Agreement or is otherwise in form and substance reasonably satisfactory to UAFC.

SECTION 6. Protection of Bank. The Bank may rely and shall be protected in acting upon any notice, instruction or other communication that it reasonably believes to be genuine and authorized.

SECTION 7. Termination. This Control Agreement shall terminate automatically upon receipt by the Bank of written notice executed by UAFC that (i) all of the obligations (excluding unmatured contingent reimbursement and indemnification obligations) secured by the Collateral have been paid in full in immediately available funds, or (ii) all of the Collateral has been released, whichever is sooner, and the Bank shall thereafter be relieved of all duties and obligations hereunder.

SECTION 8. Waiver; Priority of Collateral Agent's Interests. Other than with respect to its fees and customary commissions with respect to the Account, the Bank hereby waives its right to set off any obligations of the Grantor to the Bank against any or all of the Collateral, and hereby agrees that any and all liens, encumbrances, claims or security interests which the Bank may have against the Collateral, either now or in the future in connection with the Account are and shall be subordinated and junior to the prior payment in full in immediately available funds of all obligations of the Grantor now or hereafter existing under the Production Payment (as defined in the Security Agreement), the Security Agreement, and all other documents related thereto, however arising, indemnities, fees, premiums, expenses or otherwise. Except for the foregoing and claims and interests of UAFC and the Grantor in the Collateral, the Bank does not know of any claim to or security interest or other interest in the Collateral.

SECTION 9. Miscellaneous. (a) Irrevocable Agreement. The Grantor acknowledges that the agreements made by it and the authorizations granted by it in Sections 1, 2 and 3 hereof are irrevocable and that the authorizations granted in Sections 1, 2 and 3 hereof are powers coupled with an interest.

(b) Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered, or three days after being deposited in the mail, postage prepaid, or, in the case of telecopy notice, when received, to (i) in the case of the Grantor or UAFC, the address set forth in the Security Agreement , (ii) in the case of the Bank, 345 Park Avenue, New York, New York 10167, Attention: Chris Kortlandt Telecopy: (212) 929-0969 or (iii) to such other address as any party may give to the others in writing for such purpose.

(c) Amendments in Writing. None of the terms or provisions of this Control Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the parties hereto.

(d) Entire Agreement. This Control Agreement and the Security Agreement constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

(e) Execution in Counterparts. This Control Agreement may be executed in any number of counterparts (including by telecopy), each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

(f) Successors and Assigns This Control Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, except that the Grantor may not assign, transfer or delegate any of its rights or obligations under this Control Agreement without the prior written consent of UAFC.

(g) Governing Law and Jurisdiction. This Control Agreement has been delivered to and accepted by UAFC and will be deemed to be made in the State of New York. THIS CONTROL AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK WITHOUT REGARD TO ITS CONFLICTS OF LAW PRINCIPLES (OTHER THAN SECTION 5-401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK). Each of the parties hereto submits for itself and its property in any legal action or proceeding relating to this Control Agreement, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the Supreme Court of the State of New York sitting in the Borough of Manhattan, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof.

(h) WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS CONTROL AGREEMENT AND FOR ANY COUNTERCLAIM THEREIN.

IN WITNESS WHEREOF, each of the undersigned has caused this Control Agreement to be duly executed and delivered as of the date first above written.

NOB HILL HOLDINGS, INC

By: _____
Name:
Title:

UTRECHT-AMERICA FINANCE CO.

By: _____
Name: Nancy J. Mclver
Title: Vice President

By: _____
Name:
Title:

COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH

By: _____
Name:
Title: Barbara A. Hyland
Managing Director

By: _____
Name:
Title:

SCHEDULE I

Account No. 802-6002-533 (Further Credit To: Nob Hill Holdings, Inc., Account No. 21568), at The Bank of New York , ABA No. 021-000-018.

EXHIBIT 7

SECURITY AND ASSIGNMENT AGREEMENT

SECURITY AND ASSIGNMENT AGREEMENT dated as of September 9, 2003, made by WEST SIDE CELLULAR, INC., a corporation organized under the laws of Ohio ("Guarantor"), in favor of UTRECHT-AMERICA FINANCE CO. ("UAFC"), with an office at 245 Park Avenue, New York, New York 10167.

PRELIMINARY STATEMENTS.

1. Nob Hill Holdings, Inc., a Delaware corporation (the "Borrower") has issued that certain Promissory Note, dated as of the date hereof (said Promissory Note, as it may be amended, supplemented, extended, renewed, restated or otherwise modified from time to time, being the "Note", the terms defined therein and not otherwise defined herein being used herein as therein defined) in favor of UAFC.

2. Guarantor has executed and delivered to UAFC the Guaranty, dated as of the date hereof, made by Guarantor in favor of UAFC (the "Guaranty").

3. The Borrower owns 100% of the capital stock of the Guarantor and the Guarantor will derive substantial direct and indirect benefits from UAFC making the Advance.

4. As additional consideration for the execution and delivery of this Agreement and the Guaranty, the Borrower has paid to the Guarantor the Guaranty Fee (as defined in the Guaranty).

5. In order to secure the obligations of the Guarantor under the Guaranty, Guarantor has agreed to grant to UAFC the security interest contemplated by this Agreement.

NOW, THEREFORE, in consideration of the premises, in order to induce the Borrower to pay the Guaranty Fee to the Guarantor, in order to induce UAFC to make the Advance under the Note and for other good and valuable consideration, the Guarantor hereby agrees as follows:

SECTION 1. Grant of Security. The Guarantor hereby pledges and assigns to UAFC, and hereby grants to UAFC a first priority security interest in, all of the Guarantor's right, title and interest, direct or indirect, in and to the following, whether now owned or hereafter acquired (the "Collateral"):

(a) the Collateral Accounts;

(b) all other accounts, contract rights, chattel paper, general intangibles and other obligations of any kind, now or hereafter existing and all rights now or hereafter existing in and to all security agreements, leases, and other contracts securing or otherwise relating to any such accounts, contract rights, chattel paper, general intangibles or obligations;

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(c) All other personal property, now or hereafter existing; and

(d) All proceeds (as defined in the Uniform Commercial Code as in effect in the State of New York on the date hereof (the "Code")) of any and all of the foregoing Collateral.

SECTION 2. Security for Obligations. This Agreement secures the payment of all obligations of the Guarantor now or hereafter existing under the Guaranty, whether for principal, interest, fees, expenses or otherwise, and all obligations of the Guarantor now or hereafter existing under this Agreement (all such obligations being the "Obligations").

SECTION 3. Guarantor Remains Liable. Anything herein to the contrary notwithstanding, (a) the Guarantor shall remain liable under the contracts and agreements included in the Collateral to the extent set forth therein to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed, (b) the exercise by UAFC of any of the rights hereunder shall not release the Guarantor from any of its duties or obligations under the contracts and agreements included in the Collateral, and (c) UAFC shall not have any obligation or liability under the contracts and agreements included in the Collateral by reason of this Agreement, nor shall UAFC be obligated to perform any of the obligations or duties of the Guarantor thereunder or to take any action to collect or enforce any claim for payment assigned hereunder.

SECTION 4. Representations and Warranties. The Guarantor represents and warrants as follows:

(a) The Guarantor owns its interest in the Collateral free and clear of any lien, security interest, charge or encumbrance except for the security interest created by this Agreement. No effective financing statement or other instrument similar in effect covering all or any part of the Collateral is on file in any recording office, except such as may have been filed in favor of UAFC relating to this Agreement.

(b) This Agreement creates a valid and perfected first priority security interest in the Collateral, securing the payment of the Obligations, and all filings and other actions necessary or desirable to perfect and protect such security interest have been duly taken.

(c) No authorization, approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required either (i) for the grant by the Guarantor of the security interest granted hereby, or for the execution, delivery or performance of this Agreement by the Guarantor or (ii) for the perfection of or the exercise by UAFC of its rights and remedies hereunder, except for such financing statements as may be filed in favor of UAFC relating to this Agreement.

(d) (i) The full and correct legal name, type of organization, jurisdiction of organization, organizational ID number (if applicable) and mailing address of the Guarantor as of the date hereof are correctly set forth on Annex I hereto.

(ii) Annex I correctly specifies the place of business the Guarantor or, if the Guarantor has more than one place of business, the location of the chief executive office of the Guarantor.

(c) The Guarantor has not (i) within the period of four months prior to the date hereof, changed its location (as determined in accordance with Section 9-307 of the Code), (ii) heretofore changed its name, or (iii) heretofore become a "new debtor" (as defined in Section 9-102(a)(56) of the UCC) with respect to a currently effective security agreement previously entered into by any other Person.

SECTION 5. Further Assurances. (a) The Guarantor agrees that from time to time, at the expense of the Guarantor, the Guarantor will promptly execute and deliver, or cause to be executed and delivered, all further instruments and documents, and take all further action, that may be necessary or desirable, or that UAFC may reasonably request, in order to perfect and protect any security interest granted or purported to be granted hereby or to enable UAFC to exercise and enforce its rights and remedies hereunder with respect to any Collateral. Without limiting the generality of the foregoing, the Guarantor will execute and file such financing or continuation statements, or amendments thereto, and such other instruments or notices, as may be necessary or desirable, or as UAFC may request, in order to perfect and preserve the security interest granted or purported to be granted hereby.

(b) The Guarantor hereby authorizes UAFC to file one or more financing or continuation statements, and amendments thereto, relative to all or any part of the Collateral without the signature of the Guarantor where permitted by law. A carbon, photographic or other reproduction of this Agreement or any financing statement covering the Collateral or any part thereof shall be sufficient as a financing statement where permitted by law.

(c) The Guarantor will furnish to UAFC from time to time statements and schedules further identifying and describing the Collateral and such other reports in connection with the Collateral as UAFC may reasonably request, all in reasonable detail.

SECTION 6. Transfers and Other Liens. The Guarantor shall not:

(a) Sell, assign (by operation of law or otherwise) or otherwise dispose of any of the Collateral.

(b) Create or suffer to exist any lien, security interest or other charge or encumbrance upon or with respect to any of the Collateral to secure indebtedness of any person or entity, except for the security interests created by this Agreement.

(c) Without at least 30 days' prior written notice to UAFC, the Guarantor shall not take any action which would cause the information on Annex 1 to be inaccurate.

SECTION 7. UAFC Appointed Attorney-in-Fact. The Guarantor hereby irrevocably appoints UAFC, upon the occurrence of an Event of Default, the Guarantor's attorney-in-fact, with full

authority in the place and stead of the Guarantor and in the name of the Guarantor, UAFC or otherwise, from time to time in UAFC's discretion, to take any action and to execute any instrument which UAFC may deem necessary or advisable to accomplish the purposes of this Agreement, including, without limiting:

(i) to ask, demand, collect, sue for, recover, compromise, receive and give acquittance and receipts for moneys due and to become due under or in respect of any of the Collateral;

(ii) to receive, endorse, and collect any drafts or other instruments, documents and chattel paper, in connection with clause (i) above; and

(iii) to file any claims or take any action or institute any proceedings which UAFC may deem necessary or desirable for the collection of any of the Collateral or otherwise to enforce the rights of UAFC with respect to any of the Collateral.

SECTION 8. UAFC May Perform. If the Guarantor fails to perform any agreement contained herein, UAFC may itself perform, or cause performance of, such agreement, and the expenses of UAFC incurred in connection therewith shall be payable by the Guarantor under Section 11(b).

SECTION 9. UAFC's Duties. The powers conferred on UAFC hereunder are solely to protect its interest in the Collateral and shall not impose any duty upon it to exercise any such powers. Except for the safe custody of any Collateral in its possession and the accounting for moneys actually received by it hereunder, UAFC shall have no duty as to any Collateral or as to the taking of any necessary steps to preserve rights against prior parties or any other rights pertaining to any Collateral.

SECTION 10. Remedies. If any Event of Default shall have occurred and be continuing:

(a) UAFC may exercise in respect of the Collateral, in addition to other rights and remedies provided for herein or otherwise available to it, all the rights and remedies of a secured party on default under the Code (whether or not the Code applies to the affected Collateral) and also may (i) require the Guarantor to, and the Guarantor hereby agrees that it will at its expense and upon request of UAFC forthwith, assemble all or part of the Collateral as directed by UAFC and make it available to UAFC at a place to be designated by UAFC which is reasonably convenient to both parties and (ii) without notice except as specified below, sell the Collateral or any part thereof in one or more parcels at public or private sale, at any of UAFC's offices or elsewhere, for cash, on credit or for future delivery, and upon such other terms as UAFC may deem commercially reasonable. The Guarantor agrees that, to the extent notice of sale shall be required by law, at least ten days' notice to the Guarantor of the time and place of any public sale or the time after which any private sale is to be made shall constitute reasonable notification. UAFC shall not be obligated to make any sale of Collateral regardless of notice of sale having been given. UAFC may adjourn any public or private sale from time to time by announcement at the time and place fixed therefor, and such sale may, without further notice, be made at the time and place to which it was so adjourned.

(f) All cash proceeds received by UAFC in respect of any sale of, collection from, or other realization upon all or any part of the Collateral (including but not limited to all amounts on deposit in the Collateral Account) may, in the sole discretion of UAFC, be held by UAFC as Collateral for and/or then or at any time thereafter applied (after payment of any amounts payable to UAFC pursuant to Section 10) in whole or in part by UAFC against, all or any part of the Obligations in such order as UAFC shall elect. Any surplus of such cash or cash proceeds held by UAFC and remaining after payment in full of all the Obligations shall be paid over to the Guarantor or to whomsoever may be lawfully entitled to receive such surplus.

SECTION 11. Indemnity and Expenses. (a) The Guarantor agrees to indemnify UAFC from and against any and all claims, losses and liabilities growing out of or resulting from this Agreement (including, without limitation, enforcement of this Agreement), except claims, losses or liabilities resulting from UAFC's gross negligence or willful misconduct.

(b) The Guarantor will upon demand pay to UAFC the amount of any and all reasonable expenses, including the reasonable fees and disbursements of its counsel and of any experts and agents, which UAFC may incur in connection with (i) the administration of this Agreement, (ii) the custody, preservation, use or operation of, or the sale of, collection from, or other realization upon, any of the Collateral, (iii) the exercise or enforcement of any of the rights of UAFC hereunder or (iv) the failure by the Guarantor to perform or observe any of the provisions hereof.

SECTION 12. Continuing Security Interest. This Agreement shall create a continuing security interest in the Collateral and shall (i) remain in full force and effect until the payment in full of the Obligations, (ii) be binding upon the Guarantor, its successors and assigns and (iii) inure to the benefit of and be binding on UAFC and its successors, transferees and assigns. Without limiting the generality of the foregoing clause (iii), UAFC may assign or otherwise transfer its rights under the Guaranty to any other person or entity, and such other person or entity shall thereupon become vested with all the benefits in respect thereof granted to UAFC herein or otherwise. Upon the termination hereof, the security interest granted hereby shall automatically terminate and all rights to the Collateral shall revert to the Guarantor without any further action on the part of any party hereto. Upon any such termination, UAFC will, at the Guarantor's expense, execute and deliver to the Guarantor such documents as the Guarantor shall reasonably request to evidence such termination.

SECTION 13. Notices. All notices, requests and demands to or upon UAFC or Guarantor to be effective shall be in writing, addressed to such party at the address set forth in the Guaranty.

SECTION 14. Governing Law; Terms. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, except to the extent that the validity or perfection of the security interest hereunder, or remedies hereunder, in respect of any particular Collateral are governed by the laws of a jurisdiction other than the State of New York. Unless otherwise defined herein or in the Note, terms used in Article 9 of Code are used herein as therein defined.

SECTION 15. Entire Agreement. This Agreement and the Guaranty represent the agreement of the Guarantor and UAFC with respect to the subject matter hereof, and there are no promises, undertakings, representations or warranties by the Guarantor or UAFC relative to the subject matter hereof.

IN WITNESS WHEREOF, the Guarantor has caused this Agreement to be duly executed and delivered by its officer thereunto duly authorized as of the date first above written.

WEST SIDE CELLULAR, INC.

By: [signature]
Name: [illegible]
Title: President

ANNEX I

Legal name:	West Side Cellular, Inc.
Type of organization:	Corporation
Jurisdiction of Organization:	Ohio
Organizational ID number (if applicable):	[redacted]
Mailing Address:	As set forth in the Guaranty
Place of business the Guarantor or, if more than one place of business, the location of the chief executive office:	Mailing Address

EXHIBIT 8

CONTROL AGREEMENT

This CONTROL AGREEMENT (as amended, supplemented or otherwise modified from time to time, the "Control Agreement") dated as of September 9, 2003, is made by and among WEST SIDE CELLULAR, INC. ("Grantor"), a corporation organized under the laws of Ohio, UTRECHT-AMERICA FINANCE CO. ("UAFC") and COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH, as securities intermediary (in such capacity, "Bank").

WHEREAS, the Bank maintains for the Grantor securities accounts and deposit accounts, including without limitation, the account listed on Schedule I hereto (the "Account"), in the name of the Grantor.

WHEREAS, the Grantor has granted to UAFC a security interest in the Account, all cash, instruments, financial assets carried therein, all security entitlements with respect thereto, all cash checks, instruments and other items of value of the Grantor now or hereafter paid, deposited, credited, held or otherwise in the possession or under the control of, or in transit to, the Bank or any agent, bailee or custodian thereof, and all additions thereto and substitutions and proceeds thereof (collectively, the "Collateral") pursuant to a Security and Assignment Agreement, dated as of the date hereof (as amended, supplemented, replaced or otherwise modified from time to time, the "Security Agreement"), among the Grantor and UAFC.

WHEREAS, the following terms which are defined in Articles 8 and 9 of the Uniform Commercial Code in effect in the State of New York on the date hereof (the "UCC") are used herein as so defined: adverse claim, bank's jurisdiction, control, deposit account, entitlement order, financial asset, instruction, investment property, proceeds, securities account, securities intermediary, securities intermediary's jurisdiction, and security entitlement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

SECTION 1. Notice of Security Interest. The Grantor, UAFC and the Bank are entering into this Control Agreement to perfect, and to confirm the priority of, UAFC's security interest in the Collateral. The Bank acknowledges that this Control Agreement constitutes written notification to the Bank of UAFC's security interest in the Collateral. The Bank agrees to promptly make all necessary entries or notations in its books and records to reflect UAFC's security interest in the Collateral. The Bank acknowledges that UAFC has control over the Account, all cash, instruments, and financial assets contained therein from time to time, and all security entitlements with respect thereto. UAFC hereby appoints the Bank as UAFC's bailee and pledgee in possession for the Account and the Bank hereby accepts such appointment and agrees to be bound by the terms of this Agreement.

SECTION 2. Collateral; Account. (a) The Grantor hereby represents and warrants to, and agrees with UAFC and the Bank that, all cash, instruments and investment property held by the Bank for the Grantor is and shall be credited to the Account.

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(b) The Bank hereby represents and warrants to, and agrees with the Grantor and UAFC that (i) the Bank is a securities intermediary with respect to the Grantor and, to the extent permitted by applicable law, the Account is a securities account, (ii) to the extent permitted by applicable law, all assets, property and items from time to time carried in the Account, including, without limitation, any investment property, are, and will continue to be, financial assets, (iii) the securities intermediary's jurisdiction is, and during the term of this Control Agreement shall remain, the State of New York, (iv) the Bank's jurisdiction is, and during the term of this Control Agreement shall remain, the State of New York, (v) no financial asset included in the Collateral is registered in the name of, payable to the order of, or specially indorsed to, the Grantor, which has not been indorsed to the Bank or in blank, and (vi) the Account is and shall remain a cash account, and the Bank will not extend, directly or indirectly, any "purpose credit" (within the meaning of such term under Regulation T of the Board of Governors of the Federal Reserve System of the United States) to the Grantor in respect of the Account.

(c) UAFC hereby instructs the Bank, and the Bank hereby confirms and agrees that, unless UAFC shall otherwise direct the Bank in writing, any cash, instruments or investment property from time to time held by the Bank for the Grantor shall be credited only to, and carried only in, the Account.

SECTION 3. Control. The Bank hereby agrees, at any time that an Event of Default (as defined in the Security Agreement) exists and is continuing, upon written direction from UAFC and without further consent from the Grantor, (a) to comply with all instructions, entitlement orders and directions of any kind originated by UAFC concerning the Collateral, to liquidate or otherwise dispose of the Collateral as and to the extent directed by UAFC and to pay over to UAFC all cash Collateral and proceeds without any setoff or deduction, and (b) except as otherwise directed by UAFC, not to comply with the instructions, entitlement orders or directions of any kind originated by the Grantor or any other person until such time as UAFC sends written notice to the Bank that such Default has been cured or waived.

SECTION 4. Statements and Other Information. Upon UAFC's request, the Bank shall send to UAFC copies of all the regular monthly account statements provided to the Grantor and such other information relating to the Account as shall be reasonably requested by UAFC. The Bank shall also deliver to UAFC a copy of all notices and statements required to be sent to the Grantor pursuant to any agreement governing or related to the Account to UAFC at such times as any such notice is sent to the Grantor.

SECTION 5. Other Agreements; Termination; Successor Banks. The Bank shall notify promptly UAFC and the Grantor if any other person asserts any lien, encumbrance, claim (including any adverse claim) or security interest in or against any of the Collateral. As long as the Security Agreement remains in effect, neither the Grantor nor the Bank shall terminate the Account without 30 days' prior written notice to the other party and UAFC. In the event of any conflict between the provisions of this Control Agreement and any other agreement governing the Account or the Collateral, the provisions of this Control Agreement shall control. In the event the Bank no longer serves as bank for the Collateral, the Account and the cash, instruments and financial assets carried therein or held with respect thereto shall be transferred to a successor bank or custodian satisfactory to UAFC, provided, that prior to such transfer, such successor

bank or custodian shall execute an agreement that is substantially in the form of this Control Agreement or is otherwise in form and substance reasonably satisfactory to UAFC.

SECTION 6. Protection of Bank. The Bank may rely and shall be protected in acting upon any notice, instruction or other communication that it reasonably believes to be genuine and authorized.

SECTION 7. Termination. This Control Agreement shall terminate automatically upon receipt by the Bank of written notice executed by UAFC that (i) all of the obligations (excluding unmatured contingent reimbursement and indemnification obligations) secured by the Collateral have been paid in full in immediately available funds, or (ii) all of the Collateral has been released, whichever is sooner, and the Bank shall thereafter be relieved of all duties and obligations hereunder.

SECTION 8. Waiver; Priority of Collateral Agent's Interests. Other than with respect to its fees and customary commissions with respect to the Account, the Bank hereby waives its right to set off any obligations of the Grantor to the Bank against any or all of the Collateral, and hereby agrees that any and all liens, encumbrances, claims or security interests which the Bank may have against the Collateral, either now or in the future in connection with the Account are and shall be subordinated and junior to the prior payment in full in immediately available funds of all obligations of the Grantor now or hereafter existing under the Production Payment (as defined in the Security Agreement), the Security Agreement, and all other documents related thereto, however arising, indemnities, fees, premiums, expenses or otherwise. Except for the foregoing and claims and interests of UAFC and the Grantor in the Collateral, the Bank does not know of any claim to or security interest or other interest in the Collateral.

SECTION 9. Miscellaneous. (a) Irrevocable Agreement. The Grantor acknowledges that the agreements made by it and the authorizations granted by it in Sections 1, 2 and 3 hereof are irrevocable and that the authorizations granted in Sections 1, 2 and 3 hereof are powers coupled with an interest.

(b) Notices. All notices, requests and demands to or upon the respective parties hereto to be effective shall be in writing (including by telecopy), and, unless otherwise expressly provided herein, shall be deemed to have been duly given or made when delivered, or three days after being deposited in the mail, postage prepaid, or, in the case of telecopy notice, when received, to (i) in the case of the Grantor or UAFC, the address set forth in the Security Agreement , (ii) in the case of the Bank, 245 Park Avenue, New York, New York 10167, Attention: Chris Kortlandt Telecopy: (212) 929-0969 or (iii) to such other address as any party may give to the others in writing for such purpose.

(c) Amendments in Writing. None of the terms or provisions of this Control Agreement may be waived, amended, supplemented or otherwise modified except by a written instrument executed by the parties hereto.

(d) Entire Agreement. This Control Agreement and the Security Agreement constitute the entire agreement and supersede all other prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

(e) Execution in Counterparts. This Control Agreement may be executed in any number of counterparts (including by telecopy), each of which when so executed shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

(f) Successors and Assigns. This Control Agreement will be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns, except that the Grantor may not assign, transfer or delegate any of its rights or obligations under this Control Agreement without the prior written consent of UAFC.

(g) Governing Law and Jurisdiction. This Control Agreement has been delivered to and accepted by UAFC and will be deemed to be made in the State of New York. THIS CONTROL AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK WITHOUT REGARD TO ITS CONFLICTS OF LAW PRINCIPLES (OTHER THAN SECTION 5-401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK). Each of the parties hereto submits for itself and its property in any legal action or proceeding relating to this Control Agreement, or for recognition and enforcement of any judgment in respect thereof, to the non-exclusive general jurisdiction of the Supreme Court of the State of New York sitting in the Borough of Manhattan, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof.

(h) WAIVER OF JURY TRIAL. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS CONTROL AGREEMENT AND FOR ANY COUNTERCLAIM THEREIN.

IN WITNESS WHEREOF, each of the undersigned has caused this Control Agreement to be duly executed and delivered as of the date first above written.

WEST SIDE CELLULAR, INC.

By: _____
Name: [illegible]
Title: President

UTRECHT-AMERICA FINANCE CO.

By: _____
Name: Nancy J. Bicher
Title: Vice President

By: _____
Name:
Title:

COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH

By: _____
Name: Barbara A. Hyland
Title: Managing Director

By: _____
Name:
Title:

SCHEDULE 1

Account No. 802-6002-533 (Further Credit To: West Side Cellular, Inc., Account No. 21577), at The Bank of New York , ABA No. 021-000-018.

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EXHIBIT 9

GUARANTY

GUARANTY, dated as of September 9, 2003, made by WEST SIDE CELLULAR, INC., a corporation organized under the laws of Ohio (the "Guarantor"), in favor of UTRECHT-AMERICA FINANCE CO. ("UAFC").

WHEREAS, pursuant to the Promissory Note, dated as of the date hereof, made by Nob Hill Holdings, Inc., a Delaware corporation (the "Borrower") to the order of UAFC (the "Note" the terms defined therein and not otherwise defined herein being used herein as therein defined), UAFC has made an Advance to the Borrower upon the terms and subject to the conditions set forth therein;

WHEREAS, the Borrower owns 100% of the capital stock of the Guarantor and Guarantor will derive substantial direct and indirect benefits from UAFC making the Advance;

WHEREAS, as additional consideration for the execution and delivery of this Guaranty, the Borrower has paid to the Guarantor a fee in the amount equal to the product of (i) the amount of the Advance and (ii) 50% (the "Guaranty Fee"), the receipt and sufficiency of which the Guarantor hereby acknowledges;

WHEREAS, it is a condition to UAFC making the Advance that the Guarantor shall have executed and delivered this Guaranty;

NOW, THEREFORE, in consideration of the premises and in order to induce UAFC to make the Advance, the Guarantor hereby agrees as follows:

SECTION 1. Guaranty. (a) The Guarantor hereby unconditionally guarantees the punctual payment when due, whether at stated maturity, by acceleration or otherwise, of all obligations and liabilities of the Borrower to UAFC now or hereafter existing, including without limitation under the Note, whether for principal, interest, fees, expenses or otherwise (such obligations being the "Obligations"), and agrees to pay any and all expenses (including counsel fees and expenses) incurred by UAFC in enforcing any rights under this Guaranty.

(b) The Guarantor agrees that UAFC shall not be required to resort first for payment to the Borrower or any other persons or corporations, including without limitation, any other guarantors, their properties or estates, or to any collateral or security, property, liens or other rights or remedies whatsoever. This Guaranty is a continuing guaranty and all of the Obligations of the Borrower to UAFC shall be conclusively presumed to have been created in reliance on this Guaranty.

(c) The obligations of the Guarantor and those of any other guarantor who may have guaranteed or who later guarantees the Obligations, are and will be joint and several, and UAFC may release or settle with one of more of such guarantors at any time without affecting the continuing liability of the remaining guarantor or guarantors.

SECTION 2. Guaranty Absolute. The Guarantor guarantees that the Obligations will be paid strictly in accordance with the terms of the Note and the other applicable agreements, notes or other instruments under which the Obligations arise, regardless of any law, regulation or order now or hereafter in effect in any jurisdiction affecting any of such terms or the rights of UAFC with respect thereto. The liability of the Guarantor under this Guaranty shall be absolute and unconditional irrespective of

(i) any lack of validity or enforceability of the Note or any such other agreement, note or other instrument;

(ii) any change in the time, manner or place of payment of, or in any other term of, all or any of the Obligations, or any other amendment or waiver of or any consent to departure from the Note or any such other agreement, note or other instrument;

(iii) any exchange, release or non-perfection of any collateral, or any release or amendment or waiver of or consent to departure from any other guaranty, for all or any of the Obligations; or

(iv) any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Borrower or a guarantor.

This Guaranty shall continue to be effective or be reinstated, as the case may be, if at any time any payment of any of the Obligations is rescinded or must otherwise be returned by UAFC upon the insolvency, bankruptcy or reorganization of the Borrower or otherwise, all as though such payment had not been made.

SECTION 3. Waiver. The Guarantor hereby expressly waives promptness, diligence, notice of acceptance and any other notice with respect to any of the Obligations and this Guaranty and any requirement that UAFC protect, secure, perfect or insure any security interest or lien or any property subject thereto or exhaust any right or take any action against the Borrower or any other person or entity or any collateral.

SECTION 4. Subrogation. The Guarantor hereby expressly waives any claim, right or remedy which it may now have or hereafter acquire against the Borrower that arises hereunder and/or from the performance by the Guarantor hereunder, including without limitation, any claim, remedy or right of subrogation, reimbursement, exoneration, contribution, indemnification or participation in any claim, right or remedy of UAFC against the Borrower, or any collateral which UAFC now has or hereafter acquires, whether or not such claim arises in equity, under contract, by statute, under common law or otherwise. If any amount shall be paid to the Guarantor on account of any claimed subrogation rights at any time, such amount shall be held in trust for the benefit of UAFC and shall forthwith be paid to UAFC to be credited and applied upon the Obligations, whether matured or unmatured, in accordance with the terms of the agreement, note or other instrument under which the Obligations arise.

SECTION 5. Representations and Warranties. The Guarantor hereby represents and warrants as follows:

(a) It is a corporation duly incorporated, validly existing and in good standing under the laws of Ohio.

(b) The execution, delivery and performance by it of this Guaranty are within its powers, have been duly authorized by all necessary action, and do not contravene (i) the Guarantor's organizational documents or (ii) law or any contractual restriction binding on the Guarantor.

(c) No authorization or approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery and performance by the Guarantor of this Guaranty.

(d) This Guaranty is a legal, valid and binding obligation of the Guarantor enforceable against it in accordance with its terms, and such obligation is the direct, unconditional and general obligation of the Guarantor ranking at least pari passu in priority of payment and in all other respects with all of the obligations of the Guarantor.

(f) The Guarantor is Solvent and will be Solvent after giving effect to the transactions contemplated hereby and in the other documents executed in connection herewith. For the purposes hereof, "Solvent" shall mean, on a particular date, that on such date (a) the fair value of the property of the Guarantor is greater than the total amount of liabilities, including, without limitation, contingent liabilities, of the Guarantor, (b) the present fair salable value of the assets of the Guarantor is not less than the amount that will be required to pay the probable liability of the Guarantor on its debts as they become absolute and matured, (c) the Guarantor does not intend to and does not reasonably believe that it will incur debts or liabilities beyond its ability to pay such debts and liabilities as they mature and (d) the Guarantor is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which its property would constitute an unreasonably small capital. The amount of contingent liabilities at any time shall be computed as the amount that, in the light of all the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability.

SECTION 6. Covenants. So long as any part of the Obligations shall remain unpaid or UAFC shall have any commitments under any agreement, note or other instrument to extend credit, the Guarantor will, unless UAFC shall otherwise consent in writing, comply, and cause each of its subsidiaries to comply, in all material respects with all applicable laws, rules, regulations and orders, such compliance to include, without limitation, paying before the same become delinquent all taxes, assessments and governmental charges imposed upon it or upon its property, except to the extent contested in good faith.

SECTION 7. Amendments, Etc. No amendment or waiver of any provision of this Guaranty nor consent to any departure by the Guarantor therefrom shall in any event be effective unless

the same shall be in writing and signed by UAFC, and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

SECTION 8. Addresses for Notices. All notices and other communications provided for hereunder shall be in writing (including telegraphic, telex or cable communication) and mailed, telegraphed, telexed, cabled or delivered, if to the Guarantor, at its address at 555 Howard Street, Suite 100, San Francisco, California 94105, if to UAFC, at its address at 245 Park Avenue, New York, New York 10167, Attention: Chris Kortlandt, or as to each party, at such other address as shall be designated by such party in a written notice to the other party. All such notices and other communications shall, when mailed, telegraphed, telexed or cabled, be effective when deposited in the mails, delivered to the telegraph company, confirmed by telex answerback or delivered to the cable company, respectively.

SECTION 9. No Waiver; Remedies. No failure on the part of UAFC to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and are exclusive of any remedies provided by law.

SECTION 10. Right of Set-off. Upon the occurrence and during the continuance of any Default or Event of Default, if any, under any agreement, note or other instrument under which the Obligations arise, UAFC is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by UAFC to or for the credit or the account of the Guarantor against any and all of the obligations of the Guarantor now or hereafter existing under this Guaranty, irrespective of whether or not UAFC shall have made any demand under this Guaranty and although such obligations may be contingent and unmatured. UAFC agrees promptly to notify the Guarantor after any such set-off and application, provided that the failure to give such notice shall not affect the validity of such set-off and application. The rights of UAFC under this Section are in addition to other rights and remedies (including, without limitation, other rights of set-off) which UAFC may have.

SECTION 11. Continuing Guaranty; Transfer of Note. This Guaranty is a continuing guaranty and shall (i) remain in full force and effect until payment in full of the Obligations and all other amounts payable under this Guaranty, (ii) be binding upon the Guarantor, its successors and assigns and (iii) inure to the benefit of and be enforceable by UAFC and their successors, transferees and assigns. Without limiting the generality of the foregoing clause (iii), UAFC may assign or otherwise transfer the Note to any other person or entity, and such other person or entity shall thereupon become vested with all the rights in respect thereof granted to UAFC herein or otherwise.

SECTION 12. Severability. Any provision of this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such

[illegible]

EXHIBIT 42-J
Docket No. 23630-12
Page 4 of 6

prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

SECTION 13. GOVERNING LAW. THIS GUARANTY AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

SECTION 14. Submission To Jurisdiction; Waivers. The Guarantor hereby irrevocably and unconditionally:

(a) submits for itself and its property in any legal action or proceeding relating to this Guaranty, or for recognition and enforcement of any judgment in respect hereof, in the non-exclusive general jurisdiction of the Courts of the State of New York, the courts of the United States of America for the Southern District of New York, and appellate courts from any thereof;

(b) consents that any such action or proceeding may be brought in such courts and waives any objection that it may now or hereafter have to the venue of any such action or proceeding in any such court or that such action or proceeding was brought in an inconvenient court and agrees not to plead or claim the same;

(c) agrees that service of process in any such action or proceeding may be effected by mailing a copy thereof by registered or certified mail (or any substantially similar form of mail), postage prepaid, to the Guarantor at its address as set forth herein or at such other address of which UAFC shall have been notified pursuant thereto;

(d) agrees that nothing herein shall affect the right to effect service of process in any other manner permitted by law or shall limit the right to sue in any other jurisdiction; and

(e) waives, to the maximum extent not prohibited by law, any right it may have to claim or recover in any legal action or proceeding referred to in this subsection any special, exemplary, punitive or consequential damages.

SECTION 15. WAIVERS OF JURY TRIAL. THE GUARANTOR AND THE BANK HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY IN ANY LEGAL ACTION OR PROCEEDING RELATING TO THIS GUARANTY OR ANY OTHER LOAN DOCUMENT AND FOR ANY COUNTERCLAIM THEREIN.

IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be duly executed and delivered by its officer thereunto duly authorized as of the date first above written.

WEST SIDE CELLULAR, INC.

By: ______________________
Name: [illegible]
Title: President

[illegible] GUARANTY

EXHIBIT 10

September 9, 2003

Utrecht-America Finance Co.
245 Park Avenue
New York, New York 10167

Coöperatieve Centrale Raiffeisen-
Boerenleenbank B.A., "Rabobank
Nederland", New York Branch
245 Park Avenue
New York, New York 10167

Reference is hereby made to (i) that certain Promissory Note dated as of the date hereof made by Nob Hill Holdings, LLC, a Delaware corporation ("Nob Hill"), in favor of Utrecht-America Finance Co. (the "Note"; the terms defined therein and not otherwise defined herein being used herein as therein defined), (ii) the Transaction Documents and (iii) the Transaction.

Nob Hill is known to, and represented by, Fortrend International LLC ("Fortrend") and Fortrend will derive investment banking fees from the Transactions. As a condition to UAFC's agreement to provide the Advance and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, Fortrend and Nob Hill hereby make the following representations:

1. The Transaction (and any component thereof) (i) is not a "tax shelter" as defined in Internal Revenue Code sections 6111(c) or (d), (ii) is not subject to the registration provisions of Internal Revenue Code section 6111(a)(1), (iii) is not a "listed transaction" as defined in Treasury Regulation section 301.6111-2T(b)(2), (iv) is not a "reportable transaction" (within the meaning of Treasury Regulation Section 1.6011-4) and (v) is not subject to the list maintenance requirements of Internal Revenue Code section 6112. For the purposes of this clause (i), "Transaction" shall mean (i) the making and repayment of the Advance and the other activities contemplated hereby, (ii) the Acquisition and (iii) the transactions entered into in connection herewith and therewith and contemplated hereby and thereby.

2. Nob Hill has received a "should" level opinion form nationally recognized counsel as the matters represented in clause (i) above.

In the event that the representations set forth in the preceding paragraph are not true and correct in all respects, Fortrend will (i) provide UAFC with the information necessary to timely register the Transaction in accordance with Internal Revenue Code Section 6111(a), (ii) provide UAFC with the information necessary to allow UAFC to perform the list maintenance requirements Internal Revenue Code Section 6112 on behalf of UAFC and (iii) will indemnify UAFC and its affiliates (each an "Indemnitee") against, and to hold each Indemnitee harmless

WSC-CC-387

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ADMIN_TRI00322

from, any and all losses, claims, damages, liabilities and related expenses, including the fees, charges and disbursements of any counsel for any Indemnitee, incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of any failure of Fortrend to comply with the terms of this loan agreement.

This letter shall be construed in accordance with, and this letter and all matters arising out of or relating in any way whatsoever to this letter (whether in contract, tort or otherwise) shall be governed by, the law of the State of New York.

This letter may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, taken together, shall be considered one and the same document.

FORTREND INTERNATIONAL LLC

By:_____
Name:
Title:

ROB HOLDINGS, INC.

By:_____
Name:
Title:

WSE-CX-388

from, any and all losses, claims, damages, liabilities and related expenses, including the fees, charges and disbursements of any counsel for any Indemnitee, incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of any failure of Fortrend to comply with the terms of this letter agreement.

This letter shall be construed in accordance with, and this letter and all matters arising out of or relating in any way whatsoever to this letter (whether in contract, tort or otherwise) shall be governed by, the law of the State of New York.

This letter may be executed in one or more counterparts, each of which shall be deemed an original, but all of which, taken together, shall be considered one and the same document.

FORTREND INTERNATIONAL LLC

By:_____
Name: JEFFREY FURMAN
Title: CO-CHAIRMAN

NOB HILL HOLDINGS, INC.

By:_____
Name:
Title:

WSC-CF- 389

EXHIBIT 11

NON-CONFIDENTIALITY CERTIFICATE

September 9, 2003

Reference is hereby made to acquisition by Nob Hill Holdings LLC, a corporation, of the capital stock of West Side Cellular, Inc., an Ohio corporation and the transactions relating thereto (collectively, the "Transactions").

Each of the undersigned hereby agrees, confirms, represents and certifies that (i) their disclosure of the structure or tax aspects of the Transactions has not been limited in any way by an express or implied understanding or agreement with or for the benefit of any third party, whether or not such understanding or agreement is legally binding, (ii) they do not know or have any reason to know that the details regarding the Transactions are protected from disclosure or use in any other manner, (iii) they have not requested from or imposed on any of the parties involved in the Transactions or any other third party any express or implied understanding or agreement of confidentiality whether or not such understanding or agreement is legally binding, (iv) they have not taken and will not take any action that would (a) cause the disclosure of the structure or tax aspects of the Transactions to be limited in any way by an express or implied understanding or agreement with or for the benefit of any third party, whether or not such understanding or agreement is legally binding or (b) cause the details regarding the Transactions to be protected from disclosure or use in any other manner, (v) they have not failed to take and will not, in the future, fail to take any action if such failure would (a) cause the disclosure of the structure or tax aspects of the Transactions to be limited in any way by an express or implied understanding or agreement with or for the benefit of any third party, whether or not such understanding or agreement is legally binding or (b) cause the details regarding the Transactions to be protected from disclosure or use in any other manner and (vi) neither Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., "Rabobank Nederland", New York Branch, Utrecht-America Finance Co. or any of their affiliates has made or provided any statement, oral or written, to such party (or to such party's knowledge, any third party) as to the potential tax consequences of the Transactions.

Notwithstanding the foregoing, the agreements, confirmations, representations and certifications set forth above shall not apply to limitations on disclosure (i) created by statute or common law, including, without limitation, (A) attorney-client privilege (including work product), (B) confidentiality requirements applicable to banks in general or (C) federal or state securities laws or (ii) applying to the financial performance or condition of any of the undersigned or any of their assets.

NOB HILL HOLDINGS, INC.

By: _____
Title:

WEST SIDE CELLULAR, INC.

By: _____
Title:

COÖPERATIEVE CENTRALE
RAIFFEISEN-BOERENLEENBANK B.A.,
"RABOBANK NEDERLAND", NEW
YORK BRANCH

By: _____
Title:

By: _____
Title:

UTRECHT-AMERICA FINANCE CO.

By: _____
Title:

By: _____
Title:

FORTREND INTERNATIONAL LLC

By: _____
Title:

KLINK & ASSOCIATES, INC.

By: _____
Title:

HAHN LOESER & PARKS

By: _____
Title:

_____
Michael Tricarichi

STRUCTURED BILL NON-CONFIDENTIALITY CERTIFICATE

NOB HILL HOLDINGS, INC.

By: _____
Title:

WEST SIDE CELLULAR, INC.

By: _____
Title:

COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH

By: _____
Title:

By: _____
Title:

UTRECHT-AMERICA FINANCE CO.

By: _____
Title:

By: _____
Title:

FORTREND INTERNATIONAL LLC

By: _____
Title:

KLINK & ASSOCIATES, INC.

By: _____
Title:

HAHN LOESER & PARKS

By: _____
Title:

_____
Michael Tricarichi

NOB HILL HOLDINGS, INC.

By: _____
Title:

WEST SIDE CELLULAR, INC.

By: _____
Title:

COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH

By: _____
Title: Barbara A. Hyland
Managing Director

By: _____
Title:

UTRECHT-AMERICA FINANCE CO.

By: _____
Title: Nancy J. McIver
Vice President

By: _____
Title:

FORTREND INTERNATIONAL LLC

By: _____
Title:

KLINK & ASSOCIATES, INC.

By: Charles J Klink
Title: President & Director

HAHN LOESER & PARKS

By: Jeffrey M Falkenstein
Title: PARTNER

Michael Tricarichi

STRUCFIN\SF\NOR HELIANON-CONFIDENTIALITY CERTIFICATE

APEN
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Attorneys for Defendants,
Coöperatieve Rabobank U.A. and Utrecht-America Finance Company

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK, U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,

Defendants.

Case No. A-16-735910-B

Dept. No. XV

APPENDIX OF EXHIBITS IN SUPPORT OF DAN R. WAITE'S AFFIDAVIT TO COÖPERATIEVE RABOBANK, U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP'S MOTION TO DISMISS

Exhibit No.	Document Name	Page No. Range
1	T.C. Memo. 2015-102 United States Tax Court	APPENDIX0001-0025
2	T.C. Memo. 2016-132 United States Tax Court	APPENDIX0026-0032
3	U.S. Tax Court – Trial Transcript June 9, 2014	APPENDIX 0033-0135

2011138538_1

DATED this 19th day of October, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Dan R. Waite*

Dan R. Waite
State Bar No. 4078
E-mail: dwaite@lrrc.com
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

HUGHES HUBBARD & REED LLP

Chris Paparella, Esq. (*pro hac vice application pending*)
E-mail: chris.paparella@hugheshubbard.com
One Battery Park Plaza
New York, NY 10004-1482

Attorneys for Defendants, Coöperatieve Rabobank U.A. and Utrecht-America Finance Company

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b), I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court and caused a true and accurate copy of the same to be served *via* the Court's E-Filing System DAP/Wiznet, upon the following counsel of record. The date and time of the electronic service is in place of the date and place of deposit in the mail.

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Attorneys for PricewaterhouseCoopers LLP

Dated this 19th day of October, 2016.

/s/ Luz Horvath
An Employee of Lewis Roca Rothgerber Christie LLP

Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

EXHIBIT 1

T.C. Memo. 2015-201
United States Tax Court.

Michael A. TRICARICHI, Transferee, Petitioner
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

No. 23630–12.
|
Oct. 14, 2015.

Synopsis

Background: Individual taxpayer petitioned for redetermination of C corporation's tax liability of $21,199,347, plus interest, for which IRS determined taxpayer to be liable as transferee of corporate assets in intermediary company, or "Midco," tax shelter transaction.

Holdings: The Tax Court, Lauber, J., held that:

[1] none of corporation's disallowed legal and professional fees deductions constituted deductible business expenses;

[2] IRS appropriately denied corporation's claimed $42,480,622 bad debt loss deduction;

[3] purported loans to finance purchase of taxpayer's stock were shams;

[4] under Ohio law, taxpayer was direct transferee of corporation's assets;

[5] transfer of assets to taxpayer was fraudulent under Ohio law;

[6] taxpayer had transferee liability for penalties; and

[7] IRS reasonably declined to take further steps to collect from corporation.

Decision for IRS.

Attorneys and Law Firms

Michael Desmond, Bradley A. Ridlehoover, and Craig D. Bell, for petitioner.

Heather L. Lampert, Julie Gasper, Katelynn Winkler, Candace Williams, and Robert Morrison, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, Judge:

***1** In a notice of liability, the Internal Revenue Service (IRS or respondent) determined that petitioner is liable for $21,199,347 plus interest as a transferee of the assets of West Side Cellular, Inc. (West Side). Petitioner was [*2] the sole shareholder of West Side, a C corporation, until he sold his shares to an affiliate of Fortrend International LLC (Fortrend) in September 2003. The type of transaction in which he sold his shares is commonly called an "intermediary company" or "Midco" transaction. The underlying tax liabilities of West Side include a tax deficiency of $15,186,570 and penalties of $6,012,777 for 2003.

Midco transactions, a type of tax shelter, were widely promoted during the late 1990s and early 2000s. MidCoast Credit Corp. (MidCoast), which plays a supporting role in this case, and Fortrend, which plays the principal role, were leading promoters of Midco transactions. Both have been involved in numerous transactions previously considered by this Court.[1] In Notice 2001–16, 2001–1 C.B. [*3] 730, *clarified by* Notice 2008–111, 2008–51 I.R.B. 1299, the IRS listed Midco transactions as "reportable transactions" for Federal income tax purposes.

Although Midco transactions took various forms, they shared several key features, well summarized by the Court of Appeals for the Second Circuit in *Diebold Found. Inc. v. Commissioner*, 736 F.3d 172, 175–176 (2d Cir.2013), *vacating and remanding* T.C. Memo.2010–238. These transactions were chiefly promoted to shareholders of closely held C corporations that had large built-in gains. These shareholders, while happy about the gains, were typically unhappy about the tax consequences. They faced the prospect of paying two levels of income tax on these gains: the usual corporate-level tax, followed by a

shareholder-level tax when the gains were distributed to them as dividends or liquidating distributions. And this problem could not be avoided by selling the shares. Any rational buyer would normally insist on a discount to the purchase price equal to the built-in tax liability that he would be acquiring.

Promoters of Midco transactions offered a purported solution to this problem. An "intermediary company" affiliated with the promoter—typically, a shell company, often organized offshore—would buy the shares of the target company. The target's cash would transit through the "intermediary company" to the selling shareholders. After acquiring the target's embedded tax liability, the "intermediary [*4] company" would plan to engage in a tax-motivated transaction that would offset the target's realized gains and eliminate the corporate-level tax. The promoter and the target's shareholders would agree to split the dollar value of the corporate tax thus avoided. The promoter would keep as its fee a negotiated percentage of the avoided corporate tax. The target's shareholders would keep the balance of the avoided corporate tax as a premium above the target's true net asset value (i.e., assets net of accrued tax liability).

***2** In due course the IRS would audit the Midco, disallow the fictional losses, and assess the corporate-level tax. But "[i]n many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek payment from other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid." *Id.* at 176.

In a nutshell, that is what happened here. Petitioner engaged in a Midco transaction with a Fortrend shell company; the shell company merged into West Side and engaged in a sham transaction to eliminate West Side's corporate tax; the IRS disallowed those fictional losses and assessed the corporate-level tax against West Side; but West Side, as was planned all along, is judgment proof. The IRS accordingly seeks to collect West Side's tax from petitioner as the transferee of [*5] West Side's cash. We hold that petitioner is liable for West Side's tax under the Ohio Uniform Fraudulent Transfer Act and that the IRS may collect West Side's tax liabilities in full from petitioner under section 6901(a)(1)[2] as a direct or indirect transferee of West Side. We accordingly rule for respondent on all issues.

FINDINGS OF FACT

The parties filed stipulations of facts with accompanying exhibits that are incorporated by this reference. At the time the Midco transactions were executed, petitioner resided in Ohio. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

Petitioner graduated from Case Western Reserve University and embarked on a career in the cellular telephone (cell phone) business. He incorporated West Side in 1988 as a C corporation. Petitioner was the president and sole shareholder of West Side, and he and his wife, Barbara Tricarichi, served as its directors.

Although petitioner had no formal tax training, he displayed familiarity with tax concepts. At trial he spoke easily about C corporations and S corporations, corporate tax rates, and other tax matters. He explained that he organized West [*6] Side as a C corporation because he thought it might ultimately have more shareholders than an S corporation would be permitted to have.

In 1991 petitioner approached Verizon and other major cellular service providers with a proposal that West Side would become a reseller of cell phone services. From 1991 through 2003 West Side engaged in various telecommunications activities in Ohio, including the resale of cell phone services. West Side had a retail presence in Ohio, customer and vendor relationships, goodwill, know-how, a workforce in place, trade names, and other tangible and intangible assets. At its peak West Side had about 15,000 subscribers throughout Ohio.

Beginning in 1991, West Side purchased network access from the major cellular service providers in order to serve its customers. Petitioner soon came to believe that certain of these providers were discriminating against West Side. In 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP (Hahn Loeser), to file a complaint with the Public Utilities Commission of Ohio (PUCO) against certain of these providers, alleging anticompetitive trade practices. The PUCO lawsuit was a "bet the company" matter for petitioner, and he took a

hands-on role in the lengthy litigation that ensued. Hahn Loeser lawyers described him as a constant presence at the firm throughout this period.

***3** [*7] The PUCO ruled in West Side's favor on the liability issue and the Ohio Supreme Court affirmed that decision. In early 2003 West Side returned to the Court of Common Pleas to commence the damages phase of the litigation. Not long thereafter a settlement was reached, pursuant to which West Side ultimately received, during April and May 2003, total settlement proceeds of $65,050,141. In exchange West Side was required to terminate its business as a retail provider of cell phone service and to end all service to its customers as of June 10, 2003.

Petitioner's "Tax Problem"

Anticipating a large settlement, petitioner began to regret his decision, 15 years earlier, to organize West Side as a C corporation. He asked Jeffrey Folkman, a Hahn Loeser tax partner, to investigate how to "maximize whatever after-tax proceeds were available" from the anticipated settlement. Petitioner's goal was to "pay less tax than what the straight up, you know, 35% or whatever the corporate tax rate was" and avoid the two-level tax on the settlement proceeds.

Mr. Folkman had experience with MidCoast and thought it might help solve petitioner's problem. He arranged a meeting on February 19, 2003, with petitioner and MidCoast representatives. In preparation for this meeting, Hahn Loeser attorneys devoted five days of research and discussion to the "sham transaction" doctrine, "reportable transactions," and Notice 2001–16. Their billing records [*8] describe Notice 2001–16 as addressing (among other things) a transaction involving a "shareholder who wants to sell stock of a target" and "an intermediary corporation." At the February 19 meeting, MidCoast's representatives explained to petitioner that it was in the "debt collection business" and that, as part of its business model, it purchased companies that "had large tax obligations."

Shortly after the meeting with MidCoast, petitioner's brother, James Tricarichi (James), introduced him to Fortrend. On February 24, 2003, petitioner received a letter from Fortrend; he subsequently had several conference calls and at least one face-to-face meeting with Fortrend representatives. Petitioner understood that Fortrend and MidCoast were both involved with "distressed debt receivables" and had basically the same business model. Fortrend told petitioner that it would purchase his West Side stock and would offset the taxable gain with losses, thereby eliminating West Side's corporate income tax liability.

MidCoast and Fortrend each expressed interest in acquiring petitioner's West Side stock, and each made an offer proposing essentially the same transactional structure. An intermediary company would borrow money to purchase the stock. The cash held by West Side would be used immediately to repay the loan. The cash petitioner received from the intermediary company would substantially exceed West Side's net asset value. The intermediary company would receive a [*9] fee equal to a negotiated percentage of West Side's tax liabilities. And after the sale closed, the intermediary company, after merging into West Side, would use bad debt deductions to eliminate those tax liabilities.

***4** Because petitioner regarded MidCoast and Fortrend as competitors, he began negotiating with both in the hope of stirring up a bidding war. James arranged further conference calls with both companies. Rather than compete, MidCoast secretly agreed with Fortrend to step away from the transaction in exchange for a fee of $1,180,000 (ultimately paid by West Side on September 14, 2003). MidCoast's final offer was adjusted to make it seem unattractive, and petitioner therefore chose to pursue discussions with Fortrend in order to "maximize" his profits.

Bringing in PricewaterhouseCoopers

James recommended that petitioner retain PricewaterhouseCoopers (PwC) to advise him about the proposed stock sale. Acting as a conduit between petitioner and PwC, James sent a letter dated April 8, 2003, to PwC partner Richard Stovsky. This letter requested advice concerning a stock sale to MidCoast or Fortrend and a fallback strategy to mitigate petitioner's tax liability if the stock sale did not occur. PwC sent petitioner a draft engagement letter on April 10, 2003.

By this time petitioner had had extensive discussions with Mr. Folkman about Notice 2001–16, and the risk that the contemplated stock sale would give [*10] rise to a "reportable transaction." Upon receipt of PwC's draft engagement letter, petitioner reacted negatively to

the following sentence: "You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed." Petitioner struck this sentence from the engagement letter, initialed the change, and sent the draft back to PwC. [3]

Petitioner testified that he struck this sentence from the draft engagement letter because he wanted to ensure that PwC would thoroughly investigate all relevant issues. The Court did not find this testimony credible. Mr. Stovsky's draft engagement letter stated that PwC would investigate the relevant issues; the sentence about "reportable transactions" was included as a matter of PwC's due diligence to ensure that the client disclosed all relevant facts to it. The Court finds that petitioner struck this sentence from the draft engagement letter because he wanted to keep the paper trail free, to the maximum extent possible, of any references to "reportable transactions."

Working with tax professionals from several PwC offices, Mr. Stovsky prepared an internal memorandum addressing the proposed sale of West Side stock to Fortrend or MidCoast. This memorandum was revised multiple times as the negotiations [*11] evolved, and various drafts were discussed with petitioner and his advisers. The first draft of the memorandum, dated April 13, 2003, stated the following assumptions about the proposed transaction:

- [Buyer will] borrow $36,000,000 and purchase 100% of the Westside shares outstanding from * * * [petitioner]. * * *
- [Buyer will] contribute to Westside * * * high basis/ low fair market value property (the assumption is that these are delinquent receivables).

*5 • Westside is now in the business of purchasing "distressed/charged-off" credit card debt * * * at pennies on the dollar and collecting on this debt.

- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purchases is apparently difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [the buyer] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock).
- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by * * * [the buyer]. The deduction offsets the taxable income created within Westside upon the receipt of the $65,000,000 from the legal verdict.
- Westside, now a charged off debt business, utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected.
- The suggested result, from a federal tax perspective, is as follows:

[*12]• [Petitioner] recognizes long-term capital gain upon the sale of his shares in Westside * * *.

- Westside offsets the taxable income from the legal verdict with the write off of high basis property.

The memorandum notes that petitioner planned to move from Ohio to a State without an income tax so that there would be no State tax on his gains.

PwC understood that Notice 2001–16 applied to Midco transactions described therein and to "substantially similar" transactions. Marginal notes on the memorandum also suggest PwC's understanding that the term "substantially similar" was to be broadly construed. But PwC concluded that "a position can be taken" that the stock sale would not be a reportable transaction. This was because "[a] typical 'Midco' transaction [has] 3 parties (this transaction only has 2), and a typical 'Midco' transaction results in an asset basis step up and the associated amortization deductions going forward (this transaction does not have these characteristics)."

The memorandum concluded that the proposed transaction was not without risk. It noted a particularly high level of risk in the "high basis/low value" debt receivable strategy that the buyer proposed to eliminate West Side's tax liabilities. PwC characterized this as a "very aggressive tax-motivated" strategy and indicated that the IRS would likely challenge the deductibility of the bad debt loss expected [*13] to be reported by West Side after the stock sale. Pointedly absent from

the memorandum is any indication that PwC believed this strategy was "more likely than not" to be successful. Regardless, the memorandum suggested that "this is not * * * [petitioner's] concern" since the result would be a corporate tax liability and not petitioner's liability. The memorandum noted that PwC had provided no formal written advice to petitioner but had discussed its conclusions orally with him.

Formation of LXV

***6** Petitioner's representatives communicated with Fortrend after meeting with PwC. During these conversations Fortrend made clear that it did not want to acquire West Side's accounts receivable or any of its other operating assets. Rather, Fortrend wanted all operating assets stripped out of West Side before the closing so that West Side would be left with nothing but cash and tax liabilities.

In order to meet Fortrend's requirements, petitioner and three West Side employees formed LXV Group, LLC (LXV), an Ohio limited liability company, on May 2, 2003, to acquire West Side's operating assets. Each contributed $25,000 for his respective 25% interest in LXV. As mandated by the PUCO settlement agreement, West Side had to discontinue providing cell phone service to its customers by June 10, 2003. On June 11, 2003, LXV purchased all of West [*14] Side's operating assets, namely, its goodwill and its "revenue producing wireless customer base, accounts receivable, Trade names, Trade marks, chattels, fixtures, software and equipment" used in the operation of West Side's business.

The purchase price that LXV paid for these assets was $100,044. That amount was substantially less than the sum of West Side's net physical assets and accounts receivable ($74,564 + $166,940 = $241,504) as stated on West Side's balance sheet.[4] The parties to this transaction thus appear to have attached a value of zero to West Side's wireless customer base, trade marks, and trade names. Mr. Stovsky voiced concern that if fair market value were not paid for these assets, petitioner might face risk because of "the transferee liability issue." Despite this warning, petitioner did not obtain a valuation of the assets thus transferred.

Petitioner testified that his motivation for this sale was to "continue to service West Side's customers." The Court did not find this testimony credible. The parties' placement of zero value on West Side's intangible assets, including its wireless customer base, trade name, and trade marks, belies any intention to serve those customers in the future. Indeed, it is not clear how LXV could continue to [*15] serve West Side's cell phone customers because West Side's principals, who were also LXV's principals, were barred after June 10, 2003, from conducting any form of cell phone business. The Court finds as a fact that petitioner arranged the sale of West Side's operating assets to LXV in order to comply with Fortrend's requirement that West Side have nothing left in it except tax liabilities and cash.

Negotiation of the Stock Purchase Agreement

The parties adopted as their working assumption that West Side's accrued tax liability resulting from the $65 million PUCO settlement would not be paid. Since West Side at closing was to have only cash and tax liabilities, and since cash has a readily ascertainable value, the major item for negotiation was how to carve up the corporate tax liability thus avoided. The parties referred to this exercise as determining the "Fortrend premium." Petitioner actively participated in the negotiation of this point. Neither Hahn Loeser nor PwC participated in the negotiation of the stock purchase price or the "Fortrend premium."

***7** The trial record sheds little light on the early stages of the negotiations, when MidCoast was still involved. During later stages of the negotiations, the dollar amount of the "Fortrend premium" varied, but each iteration of the agreement contained the same formulaic calculation. Fortrend would pay petitioner the amount of cash remaining in West Side at the closing, less 31.875% of West [*16] Side's total Federal and State tax liability for 2003. In other words, the "Fortrend premium" equaled 31.875% of West Side's accrued 2003 tax liability. This left petitioner with a premium, above and beyond West Side's closing net asset value, equal to 68.125% of its accrued 2003 tax liability.

At two points in his testimony, petitioner stated that he did not understand the "Fortrend premium" to have any correlation to West Side's tax liabilities. The Court did not find this testimony credible. Petitioner testified that he participated in negotiating Fortrend's fee, and numerous spreadsheets prepared by his brother explicitly state that Fortrend's fee was to equal 31.875% of West Side's accrued tax liabilities for 2003. Confronted with this

evidence, petitioner became visibly uncomfortable. The Court finds as a fact that petitioner knew at all times that the "Fortrend premium" would be computed as a negotiated percentage of West Side's 2003 corporate tax liability.

In preparation for the stock sale, Millennium Recovery Fund, LLC (Millennium), a Fortrend affiliate incorporated in the Cayman Islands, created Nob Hill, Inc. (Nob Hill), a shell company also incorporated in the Cayman Islands. Nob Hill was to be the "intermediary company" that would purchase the West Side stock. John McNabola was the sole officer of Millennium and Nob Hill.

[*17] The Hahn Loeser lawyers negotiated with Fortrend the technical details of the stock purchase agreement. Nob Hill provided covenants aimed at mitigating the risk that the transaction would be characterized as a "liquidation" of West Side. Nob Hill represented that West Side would remain in existence for at least five years after the closing, would "at all times be engaged in an active trade or business," and would "maintain a net worth of no less than $1 million" during this five-year period. (None of these representations was substantially honored.)

Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side] attributable to income earned during the [2003] tax year." The agreement did not specify how Nob Hill would "cause" West Side to satisfy its 2003 tax liabilities or explain the strategy it would use to offset West Side's gain from the $65 million PUCO settlement. Nob Hill agreed to indemnify petitioner in the event of liability arising from breach of its representation to "satisfy fully" West Side's 2003 tax liability. Petitioner's expert, Wayne Purcell, admitted that "there can be problems" enforcing warranties and covenants against offshore entities like Nob Hill that have no assets in the United States.

***8** [*18] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Instead, the parties negotiated a statement that Nob Hill "has no intention" of causing West Side to engage in a listed transaction.

Petitioner Accepts Fortrend's Offer

A letter of intent dated July 22, 2003, set forth the terms on which Nob Hill proposed to acquire petitioner's stock. It stated a tentative purchase price of $34.9 million, subject to fine-tuning based on West Side's final cash position. The letter indicated that West Side would deposit $50,000 in escrow to cover fees should the transaction fail to close.

After the transfer of West Side's operating assets to LXV, West Side's balance sheet reflected total assets of $40,577,151, including $39,949,373 in cash, a $577,778 loan receivable from petitioner, and the $50,000 receivable from the escrow agent. West Side's aggregate 2003 tax liabilities were estimated to be $16,853,379. West Side's net asset value as of late July—that is, its assets minus its accrued tax liability—was thus $23,723,772. Nob Hill offered to pay petitioner $34.9 million for his stock-$11.2 million more than West Side was worth—in exchange [*19] for a fee (the "Fortrend premium") comfortably in excess of $5 million. Petitioner decided to accept this offer.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with making sure he gets paid. Mr. Purcell agreed, however, that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Hahn Loeser's bankruptcy lawyers advised that petitioner needed to assure himself that Nob Hill and Fortrend would live up to their postclosing obligations. And Mr. Purcell agreed that "due diligence did require * * * [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liability. Petitioner was evasive when asked how he expected Fortrend to pull off this feat; he testified as to his belief that Fortrend "had some sort of tax reduction process" that would somehow "use bad debt to reduce tax liability." PwC specifically declined to provide assurance that Fortrend's bad debt strategy was "more likely than not" to succeed.

[*20] *Preparation for the Closing*

The stock purchase transaction was carefully structured to ensure that For-trend and its affiliates made no real outlay of cash. Fortrend planned to borrow the entire $34.9 million tentative purchase price: $5 million from Moffatt International (Moffatt), a Fortrend affiliate, and $29.9 million from Coöperatieve Centrale Raiffeisen–Boerenleenbank, B.A. (Rabobank), a Dutch bank.[5] West Side's cash would be used to repay these loans immediately, so that the nominal lenders bore no risk.

***9** The financing process began on August 13, 2003, when Fortrend mailed Chris Kortlandt of Rabobank, requesting a $29.9 million short-term loan. Two weeks later, Mr. Kortlandt requested internal approval of this loan, with Nob Hill as the nominal borrower. Mr. Kortlandt understood that West Side would be required to have cash in excess of $29.9 million on deposit with Rabobank when the stock purchase closed. He therefore considered the risk of nonpayment of the loan [*21] to be essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on collateral: R–1 (cash)." Rabobank uses the R–1 risk rating to denote a loan that is fully cash collateralized.

On August 21, 2003, petitioner received instructions to open at Rabobank an account for West Side with account number ending in 1577, to which West Side's cash would eventually be transferred. To receive the cash proceeds from the stock sale, petitioner opened an individual Rabobank account with account number ending in 1595. To shuttle cash at the closing, Nob Hill opened a Rabobank account with account number ending in 1568.

In connection with the Rabobank financing, Mr. McNabola planned to execute two sets of documents at the closing. He would sign the first set on behalf of Nob Hill as its president. He would sign the second set on behalf of West Side as its postclosing president-to-be.

The Nob Hill documents to be executed by Mr. McNabola included a promissory note for $29.9 million, a security agreement, and a pledge agreement. Pursuant to the security agreement, Nob Hill granted Rabobank a first priority security interest in West Side's Rabobank account to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, Nob Hill granted Rabobank a first [*22] priority security interest in the West Side stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation.

The West Side documents to be executed by Mr. McNabola included security and guaranty agreements in favor of Rabobank and a "control agreement." West Side unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and the security agreement granted Rabobank a first priority security interest in the West Side Rabobank account. The "control agreement" gave Rabobank control over West Side's account—including all "cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto"—to ensure that West Side did not default on its commitments.

As petitioner's UCC expert, Barkley Clark, correctly noted, Mr. McNabola as Nob Hill's president could not grant Rabobank a perfected security interest in West Side's assets until Nob Hill acquired West Side's stock. And Mr. McNabola as West Side's president could not grant Rabobank a perfected security interest in West Side's assets until he became West Side's president. At the closing, however, all of these documents were to become effective simultaneously with the funding of the Rabobank loan, the payment of the stock purchase price, and the resignation of West Side's former officers and directors. These agreements effectively gave Rabobank a "springing lien" on West Side's cash at the moment it [*23] funded the loan. For all practical purposes, therefore, the Rabobank loan was fully collateralized with the cash in West Side's Rabobank account, consistently with the R–1 risk rating that Rabobank assigned to that loan.

The Closing

***10** The closing was scheduled for September 9, 2003. The final stock purchase price was to be $34,621,594 in cash plus a $577,778 check payable to petitioner to zero out his shareholder loan. On September 8, Fortrend deposited the $5 million "loan proceeds" from Moffatt into Nob Hill's Rabobank account. Also on September 8, petitioner deposited West Side's $39,949,373 ending cash balance into West Side's Rabobank account. The funds in these accounts earned overnight interest of $135 and $1,076, respectively.

On September 9, 2003, the following events occurred. Nob Hill's Rabobank account was credited with the $29.9 million Rabobank loan proceeds and $35 million

in cash from West Side's Rabobank account. From this account, Nob Hill transferred $34,621,594 into petitioner's Rabobank account; transferred $29.9 million to repay the Rabobank loan (which bore no interest); transferred $5 million to repay the Moffatt loan (which bore no interest); transferred $150,000 to cover Rabobank's fees; and transferred $150,000 to West Side's Rabobank account. Petitioner immediately withdrew the entire balance of his Rabobank account and [*24] deposited it into a personal account at Pershing Bank. When the dust settled at the end of the day, petitioner's Rabobank account had a balance of zero; petitioner's Pershing Bank account had a balance of $34,621,594; West Side's Rabobank account had a balance of $5,100,450; and Nob Hill's Rabobank account had a balance of $78,541.

The next day, Nob Hill merged into West Side with West Side surviving. The $5,100,450 remaining in West Side's Rabobank account and the $78,541 remaining in Nob Hill's Rabobank account were later transferred into a West Side account at the Business Bank of California. West Side eventually transferred $4,766,000 out of that account to Fortrend affiliates and various promoters, including MidCoast, which on September 14, 2003, received the promised $1,180,000 for stepping away from the transaction. By late 2004, West Side's bank accounts had been drained of funds and were closed.

The Bad Debt Strategy

The background of Fortrend's strategy for eliminating West Side's 2003 tax liability begins in 2001. On March 7, 2001, United Finance Co. Ltd. (United Finance) purportedly contributed a portfolio of charged-off Japanese debt (Japanese debt portfolio) to Millennium in exchange for Millennium class B shares. (Millennium eventually became Nob Hill's, and then West Side's, parent.) The Japanese [*25] debt portfolio was valued at $137,109. Two days later, United Finance sold the Millennium class B shares it had just acquired to Barka Limited, another Cayman Islands entity, for $137,000. Although Millennium had acquired the Japanese debt portfolio with property worth only $137,000, it claimed that its tax basis in that Portfolio was $314,704,037 as of June 30, 2003.

On November 6, 2003, Millennium contributed to West Side a subset of the Japanese debt portfolio, consisting of two defaulted loans (Aoyama loans). The Aoyama loans had a purported tax basis of $43,323,069. Between November 6 and December 31, 2003, West Side wrote off the Aoyama loans as worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003, West Side claimed a bad debt deduction of $42,480,622 on account of that writeoff.

***11** There is no evidence that West Side conducted meaningful business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Although Nob Hill had represented that West Side would "maintain a net worth of no less than $1 million" during the five-year period following the closing, West Side did not do so. The following table shows West Side's asset balances as reported to the IRS:

[*26] *Tax year*	*Asset balance as of 12/31*
2003	$1,829,395
2004	313,300
2005	1,171,609
2006	942,589
2007	–0–

Petitioner offered no evidence to show that the actual value of West Side's assets corresponded to these reported amounts. Given Fortrend's track record, we do not take these reported amounts at face value.

West Side's Tax Returns and IRS Audit

West Side's Form 1120 for 2003 described it as incorporated in the Cayman Islands, doing business in Ireland, and having its address in Las Vegas, Nevada. It described its parent, Millennium, as incorporated in the Cayman Islands and doing business in Ireland. West Side reported for 2003 total income of $66,116,708 and total deductions of $67,840,521. The deductions included salaries and wages of $8,315,605, other deductions of $16,542,448, and bad debt losses of $42,480,622.

On January 9, 2006, West Side filed Form 1120X, Amended U.S. Corporation Income Tax Return, for 2003. Apart from correcting minor errors and listing a new address in Reno, Nevada, the amended return did not differ materially from the original. Both returns were prepared using the accrual method of accounting.

[*27] The IRS examined West Side's 2003 return. During the examination, the IRS was unable to find any assets or current sources of income for West Side; a March 28, 2008, memorandum details the steps the IRS took in search thereof. At the conclusion of the audit, the IRS disallowed the $42,480,622 bad debt deduction and $1,651,752 of the deduction claimed for legal and professional fees, on the ground that these fees were incurred in connection with a transaction entered into solely for tax avoidance.

West Side's authorized representative executed successive Forms 872, Consent to Extend the Time to Assess Tax, that extended to December 31, 2009, the time for assessing West Side's 2003 tax liability. On February 25, 2009, the IRS mailed a timely notice of deficiency to West Side determining a deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively. West Side did not petition this Court and, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of deficiency, plus accrued interest. On April 5, 2011, West Side's corporate charter was canceled by the Ohio secretary of state.

Notice of Transferee Liability

***12** Petitioner and Barbara Tricarichi jointly filed Form 1040, U.S. Individual Income Tax Return, for 2003 showing a Nevada address. This return reported a[*28] tax liability of $5,303,886, resulting chiefly from gain on the sale of petitioner's West Side stock. On Schedule D, Capital Gains and Losses, petitioner reported the proceeds from this sale as $35,199,357, reflecting both the cash he received and the $577,778 check, resulting in a long-term capital gain of $35,170,793.

The IRS did not audit petitioner's Form 1040, but it did open a transferee-liability examination concerning West Side's 2003 tax liabilities. Upon completion of that examination, the IRS sent petitioner a Letter 902–T, Notice of Liability. This notice of liability was timely mailed to petitioner on June 25, 2012.[6] The notice determined that petitioner is liable as transferee for the following liabilities of West Side:

[*29]*Deficiency*i	*Penalty sec. 6662(a), (d)*	*Penalty sec. 6662(h)*
$15,186,570	$61,851	$5,950,926

Petitioner timely petitioned this Court for review of the notice of liability.[7]

OPINION

I. *Legal Standard and Burden of Proof*

Petitioner resided in Nevada when he filed his petition. The parties have stipulated that any appeal of this case will lie to the U.S. Court of Appeals for the Ninth Circuit. *See* sec. 7482(b)(1)(A); *Golsen v. Commissioner*, 54 T.C. 742, 757, 1970 WL 2191 (1970), *aff'd*, 445 F.2d 985 (10th Cir.1971). That Court has held that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Popov v. Commissioner*, 246 F.3d 1190, 1195 (9th Cir.2001) (quoting *Unger v. Commissioner*, 936 F.2d [*30] 1316, 1320 (D.C.Cir.1991), *aff'g* T.C. Memo.1990–15), *aff'g in part, rev'g in part and remanding* T.C. Memo.1998–374.

Under section 6901, the Commissioner may proceed against a transferee of property to assess and collect Federal income tax, penalties, and interest owed by a transferor. Respondent contends that petitioner, as transferee, is liable for the unpaid 2003 Federal tax liabilities of West Side. Petitioner contends that Nob Hill purchased his stock moments before it received West

Side's cash; that Rabobank and Moffat were the source of the cash used to purchase his stock; and that he thus received no "transfer" from West Side that could make him liable as its "transferee."

[1] [2] Section 6901 does not impose substantive liability on the transferee but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. *Commissioner v. Stern,* 357 U.S. 39, 42, 78 S.Ct. 1047, 2 L.Ed.2d 1126 (1958). To take advantage of this procedure, the Commissioner must establish an independent basis under applicable State law for holding the transferee liable for the transferor's debts. Sec. 6901(a); *Commissioner v. Stern,* 357 U.S. at 45; *Hagaman v. Commissioner,* 100 T.C. 180, 183, 1993 WL 69243 (1993). State law thus determines the transferee's substantive liability. *Ginsberg v. Commissioner,* 305 F.2d 664, 667 (2d Cir.1962), *aff'g* 35 T.C. 1148, 1961 WL 1326 (1961). In this respect, section 6901 places the Commissioner [*31] in "precisely the same position as that of ordinary creditors under state law." *Starnes v. Commissioner,* 680 F.3d 417, 429 (4th Cir.2012), *aff'g* T.C. Memo.2011–63. The parties agree that the State law applicable here is that of Ohio, where petitioner resided, West Side did business, and the principal transactions occurred. *See Commissioner v. Stern,* 357 U.S. at 45; *Estate of Miller v. Commissioner,* 42 T.C. 593, 598, 1964 WL 1217 (1964).

***13** [3] Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. *See Diebold Found., Inc.,* 736 F.3d at 183–184; *Starnes,* 680 F.3d at 427; *Swords Trust v. Commissioner,* 142 T.C. 317, 336, 2014 WL 2218977 (2014).

[4] The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a). Under normal burden-of-proof rules, therefore, petitioner has the burden of proving that West Side is not liable for the $21,199,347 of tax and penalties that the IRS assessed against it for 2003. Rule 142(a)(1), (d); *Welch v. Helvering,* 290[*32] U.S. 111, 115 (1933); *see United States v. Williams,* 514 U.S. 527, 539, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); *L.V. Castle Inv. Grp., Inc. v. Commissioner,* 465 F.3d 1243, 1248 (11th Cir.2006).

[5] The burden of proof on factual issues may be shifted to the Commissioner if the taxpayer introduces "credible evidence" with respect thereto and satisfies other requirements. Sec. 7491(a)(1) and (2). Petitioner asked that we shift to respondent the burden of proof with respect to West Side's 2003 tax liability. We decline this request. Petitioner introduced no "credible evidence" concerning the $42,480,622 bad debt deduction that generated West Side's 2003 deficiency. In any event, it does not matter who bears the burden of proof because the preponderance of the evidence favors respondent's position as to all material facts. [8]

II. *West Side's 2003 Federal Tax Liability*

In the notice of deficiency to West Side, the IRS disallowed a deduction of $1,651,752 for legal and professional fees and a deduction of $42,480,622 for bad [*33] debts. The notice also determined an accuracy-related penalty of $61,851 and a penalty of $5,950,926 for a "gross valuation misstatement" under section 6662(h).

[6] The deduction for legal and professional fees was disallowed on the ground that these fees were incurred in connection with a tax-avoidance transaction. We conclude below that the transaction by which Nob Hill acquired petitioner's West Side stock was indeed entered into for the sole purpose of tax avoidance. Petitioner provided no evidence to establish that any of the disallowed professional fees were incurred in connection with some other, legitimate, transaction. Petitioner has thus failed to carry his burden of proving that any portion of these fees constituted deductible business expenses of West Side under section 162. *See Agro Sci. Co. v. Commissioner,* 934 F.2d 573, 576 (5th Cir.1991), *aff'g* T.C. Memo.1989–687; *Simon v. Commissioner,* 830 F.2d 499, 500–501 (3d Cir.1987), *aff'g* T.C. Memo.1986–156; *Cullifer v. Commissioner,* T.C. Memo.2014–208, at *45.

***14** [7] West Side's claimed $42,480,622 bad debt loss was based on the assertion that the two Aoyama loans had a tax basis of $43,323,069. That assertion is preposterous because those loans were a subset of a larger portfolio of loans that had [*34] a tax basis of approximately $137,000.

Petitioner introduced no credible evidence to substantiate the basis claimed. [9]

Petitioner does not seriously dispute West Side's liability for the $61,851 accuracy-related penalty. [10] For returns filed on or before August 17, 2006, a "gross valuation misstatement" exists where the basis claimed equals or exceeds 400% of the correct amount. Sec. 6662(h)(2); sec. 1.6662–5(e)(2), Income Tax Regs. Claiming a tax basis of $43,323,069 for the Aoyama loans, which had an actual basis of substantially less than $137,000, is unquestionably a "gross valuation misstatement." Apart from challenging the deficiency on which the penalty is based, petitioner introduced no evidence to show that respondent's [*35] calculation of a section 6662(h) penalty of $5,950,926 was incorrect. Petitioner has thus failed to prove that respondent erred in determining against West Side for 2003 a tax deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively.

III. *Petitioner's Liability as Transferee of West Side*

Section 6901 permits the Commissioner to assess tax liability against a person who is "the transferee of assets of a taxpayer who owes income tax." *Salus Mundi Found. v. Commissioner*, 776 F.3d 1010, 1017 (9th Cir.2014), *rev'g and remanding* T.C. Memo.2012–61. To impose that liability on a transferee, a court must first determine whether "the party [is] substantively liable for the transferor's unpaid taxes under state law," and next determine whether that party is a "transferee" within the meaning of section 6901. *Slone v. Commissioner*, — F.3d —, 2015 WL 5061315, at *2 (9th Cir. Aug.28, 2015) *vacating and remanding* T.C. Memo.2012–57; *see Commissioner v. Stern*, 357 U.S. at 44–45. The two prongs of this inquiry are independent of one another. *See Feldman v. Commissioner*, 779 F.3d 448, 458 (7th Cir.2015), *aff'g* T.C. Memo.2011–297; *Salus Mundi Found.*, 776 F.3d at 1012; *Diebold Found., Inc.*, 736 F.3d at 185; *Frank Sawyer Trust of May 1992 v. Commissioner*, 712 F.3d 597, 605 (1st Cir.2013), *aff'g* T.C. Memo.2011–298; *Starnes*, 680 F.3d at 429.

[*36] A. *Petitioner's Substantive Liability Under Ohio Law*

[8] [9] In deciding matters of State law, we are generally guided by the decisions of the State's highest court. If there is no relevant precedent from the State's highest court, but there is relevant precedent from an intermediate appellate court, "the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir.2007); *see Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (Federal court should apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); *Swords Trust*, 142 T.C. at 342; *Estate of Young v. Commissioner*, 110 T.C. 297, 300, 302, 1998 WL 235975 (1998). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." *Flintkote Co. v. Dravo Corp.*, 678 F.2d 942, 945 (11th Cir.1982) (quoting *Benante v. Allstate Ins. Co.*, 477 F.2d 553, 554 (5th Cir.1973)).

***15** In 1990 Ohio enacted the Uniform Fraudulent Transfer Act of 1984 (UFTA) as chapter 1336 of its Commercial Transactions Code. *See* Ohio Rev.Code secs. 1336.01 to 1336.12 (hereafter OUFTA; all references to the OUFTA are to the version in effect during 2003). Forty-three States and the District of Columbia [*37] have adopted the UFTA in whole or in part. The version of the UFTA that Ohio adopted corresponds almost verbatim to the uniform law.

When interpreting Ohio statutes derived from uniform or model laws, the Ohio Supreme Court has regularly consulted opinions from sister State courts interpreting parallel provisions of their own statutes. *See Stein v. Brown*, 18 Ohio St.3d 305, 480 N.E.2d 1121 (Ohio 1985) (discussing other States' treatment of the Uniform Fraudulent Conveyance Act (UFCA), the UFTA's predecessor); *Ohio Ins. Guar. Ass'n v. Simpson*, 1 Ohio App.3d 112, 439 N.E.2d 1257 (Ohio Ct.App.1981) (noting relevance of opinions from courts of other States when interpreting model or uniform laws). [11] Federal Courts of Appeals for five different Circuits, examining Midco transactions similar to that here, have recently issued opinions interpreting state laws that substantially incorporate the UFTA or its predecessor. *See supra* p. 2 and note 1. We believe that the Ohio Supreme Court would give proper regard to these decisions, and to the State court precedents on which they are based, when interpreting parallel provisions of the OUFTA.

[10] [*38] The Ohio Supreme Court has emphasized that the OUFTA is a remedial statute that should be liberally construed to protect creditors. *See Wagner v. Galipo,* 50 Ohio St.3d 194, 553 N.E.2d 610, 613 (Ohio 1990); *Locafrance United States Corp. v. Interstate Distrib. Servs., Inc.,* 6 Ohio St.3d 198, 451 N.E.2d 1222, 1225 (Ohio 1983) (interpreting the OUFTA's predecessor). The OUFTA defines "transfer" very broadly to include "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset." OUFTA sec. 1336.01(L). Respondent argues that petitioner is a liable as a "transferee" of West Side's cash under four distinct sections of the Ohio statute. *See id.* secs. 1336.04(A)(1) and (2), 1336.05(A) and (B). The first of these is an actual fraud provision; the latter three are constructive fraud provisions.

OUFTA section 1336.04(A)(1), the actual fraud provision, applies in the case of any creditor regardless of whether his "claim * * * arose before or after the transfer was made." A transfer is fraudulent under this provision if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." The statute sets forth 11 nonexclusive "badges of fraud" that may give rise to an inference of actual fraudulent intent. *See id.* sec. 1336.04(B).

[11] Two of the constructive fraud provisions apply in the case of a creditor "whose claim arose before the transfer was made." *Id.* secs. 1336.05(A) and (B). [*39] Section 1336.05(A), the provision most relevant here, provides that "[a] transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor "was insolvent at that time or * * * became insolvent as a result of the transfer." This provision applies regardless of a transferor's or transferee's actual intent. *See Sease v. John Smith Grain Co.,* 17 Ohio App.3d 223, 479 N.E.2d 284, 287 (Ohio Ct.App.1984) (holding that with respect to the OUFTA's predecessor, "[n]either the intent of the debtor nor the knowledge of the transferee need be proven"); *Nelson v. Walnut Inv. Partners, L.P.,* 2011 U.S. Dist. LEXIS 75534 (S.D.Ohio 2011) (same).

***16** **[12]** **[13]** The third constructive fraud provision applies whether the creditor's claim arose "before or after the transfer was made." OUFTA sec. 1336.04(A). "A transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer "without receiving a reasonably equivalent value in exchange" and either: (1) "[t]he debtor was engaged * * * [in a] transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (2) "[t]he debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." *Ibid.* This provision likewise applies regardless of the debtor's [*40] intent or transferee's actual knowledge. If the stated conditions of any constructive fraud provision are met, "the transfer is fraudulent as a matter of law." *See Sease,* 479 N.E.2d at 288.

1. *Petitioner's Status Under Ohio Law as a "Transferee"*

Under all four OUFTA provisions, a "transfer" of some kind must have been made from West Side as tax debtor to petitioner as transferee. This issue is the focus of the parties' dispute and its resolution affects analysis of the other OUFTA tests. We may thus conveniently discuss it first.

Petitioner insists that he was not literally a transferee of West Side's cash. According to petitioner, the cash he got came from Nob Hill, and the sources of that cash were the "loans" from Rabobank and Moffat. Nob Hill supposedly did not get West Side's cash, which it used to repay those "loans," until later that same day. For this reason, petitioner contends that he received no West Side assets that could subject him to liability as a fraudulent transferee under Ohio law.

Respondent contends that Ohio law would treat petitioner in substance as the transferee of West Side's cash. We agree with respondent for at least two reasons, each of which constitutes an alternative ground for sustaining his position. First, the "loans" from Rabobank and Moffat were shams, and West Side was the true source of the cash petitioner received. Second, the stock sale transaction would be [*41] recharacterized under Ohio law as a de facto liquidation of West Side, with petitioner receiving in exchange for his stock a $35.2 million liquidating distribution. [12]

a. *Sham Loans*

[14] In order to "finance" the purchase of West Side's stock from petitioner, Nob Hill "borrowed" $29.9 million from Rabobank and $5 million from Moffatt, a Fortrend affiliate. Ohio courts have consistently allowed finders of fact, in appropriate circumstances, to disregard transactions as shams. *See, e.g., Rowe v. Standard Drug Co.*, [*42] 132 Ohio St. 629, 9 N.E.2d 609, 613 (Ohio 1937) ("Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship."); *Selanders v. Selanders*, 2009 WL 1365226, at *11 (Ohio Ct.App.2009) (affirming the trial court's decision and agreeing that "the entire transaction was quite possibly nothing more than a sham"); *Galley v. Galley*, 1994 WL 191431, at *5 (Ohio Ct.App.1994) ("When that reason for the transfer of property * * * is disregarded as a sham, the * * * [finder of fact] could well conclude that the transfer was a fraudulent transfer[.]"); *Phillips v. Phillips*, 1994 WL 179950 (Ohio Ct.App.1994). We believe that an Ohio court would disregard as shams the "loans" purportedly extended by Rabobank and Moffat.

***17** The Rabobank "loan" should be disregarded as a sham for at least three reasons. First, this "loan" was extended and repaid the same business day, literally moments after Nob Hill received the alleged loan proceeds. The essence of a loan is an extension of credit. It is obvious that the parties to this transaction did not desire to receive from Rabobank, and that Nob Hill did not in fact receive, a true extension of credit.

[*43] Second, the "loan" by its terms did not bear interest. Instead, Rabobank received a "fee" of $150,000. This fee cannot represent interest: Since the "loan" was outstanding for less than a day, this fee would translate to annual interest of $54,750,000, almost twice the magnitude of the "loan." What Rabobank received was not interest on a loan but a fee for facilitating a tax shelter transaction. Rabobank was presumably able to charge such an outlandish fee because (1) from its vantage point, it was incurring reputational or business risks by accommodating a questionable transaction and (2) from petitioner's vantage point, the fee was being paid by the U.S. Treasury and not by him.

Third, the Rabobank "loan" was fully collateralized by the cash in West Side's Rabobank account. Nob Hill's credit application described the risk rating on this loan as "N/A, or based on collateral." ("N/A" presumably means "not applicable.") Rabobank gave the loan an R–1 risk rating, which denotes a loan that is fully cash collateralized. The documents executed at the closing gave Rabobank control over West Side's Rabobank account and a "springing lien" on West Side's cash the moment it funded the loan. Cash is fungible, and the consideration used to pay petitioner for his stock came in substance from West Side.

For essentially the same reasons, the $5 million "loan" extended by Moffat must also be disregarded as a sham. Like the Rabobank loan, it bore no interest; [*44] instead, Fortrend received a $5 million fee for assembling the entire tax shelter package. This "loan" did not represent a true extension of credit. It was simply an overnight shuffling of funds between two Fortrend entities designed to facilitate a tax-avoidance transaction.

We conclude that an Ohio court would apply the sham transaction doctrine to these loans, and we find that both loans were in fact shams. The totality of the circumstances shows that the nominal lenders provided these funds, not as bona fide extenders of credit, but simply as accommodation parties recruited by Fortrend to conceal the true nature of what was happening. What actually happened is that Rabobank electronically transferred cash from West Side's Rabobank account through Nob Hill's Rabobank account into petitioner's Rabobank account; the "loans" were utterly unnecessary and had no purpose except obfuscation. Since both loans were shams, Rabobank's transfer of funds from West Side's account into petitioner's account constituted a "direct or indirect * * * method of disposing of or parting with an asset." *See* OUFTA sec. 1336.01(L). Petitioner was thus was a "transferee" of West Side under Ohio law.

b. *De Facto Liquidation of West Side*

***18** [15] Respondent alternatively contends that the transfers among West Side, Nob Hill, and petitioner should be collapsed and recharacterized under Ohio law as a[*45] partial or complete liquidation of West Side, with petitioner receiving in exchange for his shares a $35.2 million liquidating distribution ($34.6 million of cash plus a check for $577,778). Although the Ohio courts have not addressed this precise scenario, judicial interpretations of

fraudulent transfer provisions similar to Ohio's establish that such transactions may be "collapsed" if the ultimate transferee had constructive knowledge that the debtor's debts would not be paid.

The Court of Appeals for the Ninth Circuit recently addressed the application of New York's fraudulent transfer provisions to a Midco transaction resembling that here. It concluded that multiple transfers could be collapsed under State law if the conduct of the ultimate transferees "show[ed] that they had constructive knowledge of the fraudulent scheme." *Salus Mundi Found.*, 776 F.3d at 1020. Addressing the application of New York law to that same Midco transaction in *Diebold Found., Inc.*, the Court of Appeals for the Second Circuit held that multiparty transactions can be collapsed where the debtor's property is "reconveyed * * * for less than fair consideration" and the ultimate transferee had "constructive knowledge of the entire scheme." 736 F.3d at 186.

The Court of Appeals for the Fourth Circuit, addressing the application of North Carolina's UFTA provisions to another Midco transaction, similarly ruled that multiple transfers can be collapsed if the ultimate transferee has constructive [*46] knowledge that the debtor's tax liabilities will not be paid. If the ultimate transferees are on "inquiry notice" and fail to conduct a sufficiently diligent investigation, "they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." *Starnes*, 680 F.3d at 434.

The Ohio courts have regularly consulted and followed the decisions of sister courts when interpreting the provisions of model laws, including the OUFTA's predecessor. *See supra* pp. 36–37 and note 11. The North Carolina UFTA provisions governing constructive fraud are substantially identical to Ohio's, and New York's fraudulent transfer provisions are similar in material respects. We conclude that the Ohio Supreme Court, if confronted with this question, would find persuasive and would follow these three Federal decisions and the state court precedents on which they are based. The transfers at issue here may thus be collapsed under the OUFTA if petitioner had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid. [13]

[16] [*47] Petitioner argues that he was not aware of Fortrend's "plan as a whole" to avoid West Side's income taxes. If this is true, it is irrelevant. Finding that a person had constructive knowledge does not require that he have actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 636 (2d Cir.1995).

***19** **[17]** Constructive knowledge also includes "inquiry knowledge." "Inquiry knowledge" exists where the transferee was "aware of circumstances that should have led * * * [him] to inquire further into the circumstances of the transaction, but * * * [he] failed to make such inquiry." *HBE Leasing Corp.*, 48 F.3d at 636. Some cases define constructive knowledge as the knowledge that ordinary diligence would have elicited, while other cases require more active avoidance of the truth. *Diebold Found., Inc.*, 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioner had "constructive knowledge" under either standard.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with ensuring that he [*48] gets paid. But he agreed that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Specifically, echoing the contemporaneous advice of Hahn Loeser's bankruptcy lawyers, Mr. Purcell testified that "due diligence did require [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into For-trend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liabilities. Petitioner and his advisers were clearly suspicious about Fortrend's scheme. But instead of digging deeper, they engaged in willful blindness and actively avoided learning the truth.

Petitioner and his advisers knew that the transaction Fortrend was proposing was likely a "reportable" or "listed transaction." Before meeting with Fortrend, Hahn Loeser lawyers spent several days researching Notice 2001–16, "reportable transactions,"

"sham transactions," and transactions involving "an intermediary corporation." PwC insisted on including in its engagement letter a requirement that petitioner advise it if he determined "that any matter covered by this Agreement is a reportable transaction." Petitioner attempted to strike this sentence from the engagement letter, evidencing his active avoidance of learning the truth.

[*49] PwC advised petitioner orally that "a position can be taken" that the proposed stock sale would not be a reportable transaction. In tax-speak, this translates to a low level of confidence on PwC's part. [14] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Any reasonably diligent person would infer from this refusal that a "listed transaction" was very likely what Fortrend, a tax shelter promoter, had in mind.

Though alerted by these warning signs, petitioner and his advisers failed to conduct a diligent inquiry into the "high basis/low value" debt strategy that Fortrend proposed for eliminating West Side's tax liabilities. PwC had advised that this appeared to be "a very aggressive tax-motivated strategy" that was "subject to IRS challenge." PwC specifically declined to give "more likely than not" assurance on this point. Petitioner turned his back on this red flag. He testified that [*50] Fortrend's tax-elimination strategy was of no concern to him because "that was their business."

***20** Mr. Purcell testified that petitioner could not have sought an opinion from PwC concerning Fortrend's bad debt strategy because, as of the closing date, Fortrend had put no specific high-basis/low-value plan on the table. The Court did not find this testimony persuasive. If ordinary diligence required petitioner and his advisers to investigate Fortrend's plan, as Mr. Purcell admitted, ordinary diligence required them to dig more deeply into what Fortrend's bad-debt strategy was. Fortrend obviously had to know, as of September 9, 2003, how it envisioned eliminating a $16.9 million corporate tax liability in fewer than 12 weeks. Reasonable diligence required petitioner and his advisers to insist that Fortrend explain its debt reduction strategy in sufficient detail to enable PwC to evaluate it.

Numerous other features of Fortrend's proposal raised red flags that demanded further inquiry. Fortrend offered to pay petitioner $11.2 million more than the net book value of West Side—representing a premium of 47%—while insisting that West Side's assets be reduced to cash. Petitioner was a sophisticated entrepreneur who had built a company and knew how to value a business. It should have provoked tremendous skepticism to discover that Fortrend was [*51] willing to pay a 47% premium to acquire cash, which by definition cannot be worth more than its face value.

The business purpose alleged for the transaction, moreover, made absolutely no sense. Petitioner and his advisers were told that Fortrend intended to put West Side into the "distressed debt" business. "[T]he business purpose for the acquisition," according to PwC's memo, was "based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purposes is apparently difficult."

This explanation demanded further inquiry from any reasonably diligent person. In order to purchase West Side's stock, Fortrend needed to have cash or be able to borrow cash. If Fortrend had cash or could easily borrow cash, why would it want to acquire West Side in order to get cash? Moreover, as PwC noted in a parenthetical, "most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [Fortrend] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock." Since there was going to be precious little cash left in West Side after the deal closed, the "business purpose" alleged for the transaction did not pass the straight-face test.

The icing on the cake was the manner in which the purchase price was determined. Numerous spreadsheets prepared by petitioner's brother explicitly [*52] state that the purchase price would equal West Side's closing cash balance plus 68.125% of its accrued tax liabilities. A sophisticated businessman like petitioner should have been curious as to why the purchase price for his company was being computed as a percentage of its tax liabilities, and why this was the only number that Fortrend seemed to care about. In effect, Fortrend was offering to assume a $16.9 million tax liability in exchange for a $5 million fee. Because the economics of the deal made it obvious that Fortrend was not going to pay West Side's tax liabilities, this fact alone put petitioner on "inquiry knowledge." [15]

***21** Petitioner testified that he had no contemporaneous understanding that the "Fortrend premium" was correlated to West Side's accrued tax liabilities. The Court did not find this testimony credible. Petitioner actively participated in negotiating [*53] Fortrend's fee. When confronted with his brother's spreadsheets that invariably compute Fortrend's fee as 31.875% of West Side's tax liabilities, petitioner became visibly uncomfortable. Petitioner's evasive testimony is further evidence that he had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West Side's tax liability.

To conclude that the totality of these circumstances did not give rise to constructive knowledge on petitioner's part "would do away with the distinction between actual and constructive knowledge." *Diebold Found., Inc.*, 736 F.3d at 189. And to relieve petitioner and his advisers of the duty to inquire, when the surrounding circumstances cried out for such inquiry, "would be to bless the willful blindness the constructive knowledge test was designed to root out." *Ibid.* We find as a fact that petitioner had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities. The various steps of the Midco transaction may thus be "collapsed" in determining whether petitioner was a "transferee" of West Side under Ohio law. [16]

[*54] The remaining question is whether these steps, once collapsed, yield a de facto "liquidation" of West Side from which petitioner received a $35.2 million liquidating distribution. Petitioner appears to believe that, for this to occur, there must have been a *complete* liquidation of West Side. We do not see the logic of this position: under state corporate law, as well as under Federal tax law, a corporation can be the subject of either a partial or a complete liquidation. [17] In either event, petitioner received a $35.2 million liquidating distribution upon surrendering his stock. We fail to see how it matters which kind of liquidation it was.

In any event, we find as a fact that West Side was in substance completely liquidated. There is no evidence that West Side conducted any bona fide business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed [*55] "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Those loans were not operational assets of a business; they were simply tools for implementing a sham tax-avoidance scheme. In reality, West Side was nothing but a shell company immediately after the Midco deal closed.

At the insistence of petitioner's lawyers, West Side was kept in formal existence for several years. It filed tax returns; it cut checks to Fortrend affiliates; and it maintained a nominal cash balance. But keeping West Side in notional existence was simply a charade designed to create a defense to the precise argument the IRS is advancing here, an argument that petitioner and his attorneys knew the IRS would advance if this Midco transaction came to its attention. Such lawyerly stratagems cannot hide the fact that West Side had been liquidated in substance. It continued as a Potemkin village intended to deceive the IRS, just as the original was designed to fool Catherine the Great.

***22** In sum, we find that petitioner had constructive knowledge of Fortrend's tax-avoidance scheme; that the multiple steps of the Midco transaction must be collapsed; and that collapsing these steps yields a partial or complete liquidation of West Side from which petitioner received in exchange for his stock a $35.2 million liquidating distribution. *See Salus Mundi Found.*, 776 F.3d at 1019–1020[*56] (following the Second Circuit's analysis to the same effect in *Diebold Found., Inc.*). Under the OUFTA, petitioner is thus a direct transferee of West Side's assets under respondent's "de facto liquidation" theory as well as under the "sham loan" theory discussed previously. [18]

2. Petitioner's Liability Under Ohio Law as a "Transferee"

OUFTA section 1336.05(A) provides that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor became insolvent as a result of the transfer. We find that all three of these elements are satisfied here. Petitioner is thus liable as a transferee of West Side under Ohio law.

a. *When the IRS Claim Arose*

[18] During April and May 2003, West Side received proceeds of $65 million from the PUCO settlement. This yielded a large gain that generated a tax liability of approximately $16.9 million. West Side thus had an accrued tax liability of [*57] approximately $16.9 million before September 9, 2003, the day the Midco deal closed.

The OUFTA defines the term "claim" expansively to mean "a right to payment." *Id.* sec. 1336.01(C). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Ibid.* A "creditor" is any person who has a "claim." *Id.* sec. 1336.01(D). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. *See Zahra Spiritual Tr. v. United States,* 910 F.2d 240, 248 (5th Cir.1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim' " in the UFTA. *Stuart v. Commissioner,* 144 T.C. ——, ——, (slip op. at 15) (Apr. 1, 2015).

Petitioner does not seriously dispute that the IRS had a "claim" against West Side before the stock sale. Rather, he argues that the IRS had no claim against *Nob Hill* when his stock was purchased because West Side had not yet transferred its cash into Nob Hill's Rabobank account. The precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various [*58] transactions must be collapsed for purposes of determining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, it is irrelevant in what order the subsidiary transfers are thought to have occurred.

***23** West Side's Federal tax liability had accrued by late May 2003. The IRS had a claim against West Side at that time. The transfer of West Side's assets to petitioner occurred on September 9, 2003. Respondent's claim thus "arose before the transfer was made." OUFTA sec. 1336.05(A).

b. "*Reasonably Equivalent Value*"

[19] OUFTA section 1336.05(A) imposes, as a second condition of liability, that the debtor not have received "a reasonably equivalent value in exchange for the transfer." Whether the debtor received "reasonably equivalent value" is a question of fact. *See Shockley v. Commissioner,* T.C. Memo.2015–113, at *50.

[20] On September 9, 2003, West Side consisted of nothing but cash and tax liabilities. The value of petitioner's stock thus equaled West Side's net asset value, which was about $23.7 million (cash equivalents of $40.6 million minus accrued tax liabilities of $16.9 million). West Side transferred $35.2 million to petitioner in exchange for his shares. Since his shares were worth only $23.7 million, West [*59] Side did not receive "a reasonably equivalent value in exchange for the transfer." OUFTA sec. 1336.05(A).

The only other thing West Side got at the closing was a representation from Nob Hill that it would "cause" West Side to pay its 2003 tax liabilities in full. As we have found previously, this representation was not worth the paper it was printed on. Nob Hill was a shell company, incorporated offshore, with no assets in the United States (or anywhere else). Nob Hill's parent, Millennium, was also a Cayman Islands company with no assets in the United States. Both were affiliates of a tax shelter promoter. The value of Nob Hill's promise was zero.

c. *West Side's Insolvency*

[21] OUFTA section 1336.05(A) imposes, as a third condition of liability, that the debtor making the transfer "was insolvent at that time or * * * became insolvent as a result of the transfer." Petitioner asserts that West Side was solvent when he received Nob Hill's cash because, at that moment, West Side had not yet transferred its cash to Nob Hill. Thus, West Side supposedly had assets in excess of its tax liabilities when the transfer to petitioner occurred.

As with petitioner's argument about when the IRS claim arose, the precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that

the various transactions must be collapsed for purposes of determining [*60] the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, West Side's solvency must be judged on that basis.

Under OUFTA sections 1336.02 and .05, solvency is measured at the time of the transfer. A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. *Id.* sec. 1336.02(A)(1). Following the transfer of $35.2 million to petitioner, West Side was left with tax liabilities of $16.9 million and assets of $5.1 million (consisting of a Rabobank account soon to be emptied by payments to tax shelter promoters). West Side thus "became insolvent as a result of the transfer." *Id.* sec. 1336.05(A).

***24** In sum, we find that the IRS claim arose before West Side's assets were transferred to petitioner; that West Side made this transfer without having received "a reasonably equivalent value in exchange"; and that this transfer caused West Side to become insolvent. Petitioner is thus liable for West Side's tax debts under OUFTA section 1336.05(A). [19]

[*61] 3. *Petitioner's Liability Under Ohio Law For Penalties*

[22] Even if he can be held liable for West Side's unpaid tax, petitioner contends that the penalties assessed against West Side cannot be collected from him as its "transferee" under Ohio law. According to petitioner, "the distressed debt transaction giving rise to those penalties was not entered into until after petitioner sold his stock and petitioner had nothing whatsoever to do with that transaction." In support of this proposition he relies on *Stanko v. Commissioner*, 209 F.3d 1082 (8th Cir.2000), *rev'g* T.C. Memo.1996–530.

In *Stanko*, the Eighth Circuit interpreted Nebraska law in effect before 1989, when Nebraska adopted the UFTA. *See id.* at 1084 n. 1. The Court reasoned that "penalties for negligent or intentional misconduct by the transferor that occurred many months after the transfer * * * are not * * * existing at the time of the transfer." *Id.* at 1088. The Eighth Circuit concluded that "[a] creditor whose debt did not exist at the date of the * * * [transfer] cannot have the conveyance [*62] declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time." *Id.* at 1087 (quoting *U.S. Nat'l Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474, 476 (Neb.1980)).

[23] We find the *Stanko* case to have no application here. The instant case is governed by Ohio law, and the governing Ohio law differs from the pre-UFTA Nebraska statute that the Eighth Circuit was construing. The OUFTA defines "claim" expansively to include any "right to payment" even if it is "unliquidated" and "unmatured." OUFTA sec. 1336.01(C). The IRS may thus have a "claim" for the penalties whether or not they are thought to have been "existing at the time of the transfer." *Stanko*, 209 F.3d at 1088. The OUFTA, moreover, does not require proof that the transfer was made to defraud specific creditors; nor does it require proof that the debts in question "were in contemplation at the time" the assets were conveyed. *Id.* at 1087.

[24] Finally, the OUFTA provides that a transfer may be held fraudulent as to future as well as present creditors. Liability as to future creditors exists if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became [*63] due." OUFTA sec. 1336.04(A)(2)(b). Thus, even if respondent's claim for the penalties were regarded as not being "in existence" on the date of the transfer, petitioner would have transferee liability to the IRS under OUFTA section 1336.04(A)(2) in its capacity as a "future creditor" with respect to those penalties. *See supra* pp. 60–61 and note 19.

***25** For these reasons, we conclude that petitioner is liable under Ohio law as a transferee both with respect to West Side's unpaid tax deficiency and with respect to the penalties properly assessed against it. We have reached the same conclusion concerning transferee liability for penalties under the fraudulent transfer laws of other States. *See, e.g., Kreps v. Commissioner*, 42 T.C. 660, 670, 1964 WL 1376 (1964) (New York law), *aff'd*, 351 F.2d 1 (2d Cir.1965); *Cullifer*, T.C. Memo.2014–208, at *30, *74 (Texas law); *Feldman v. Commissioner*, T.C. Memo.2011–297, 102 T.C.M. (CCH) 613, 623 (Wisconsin law). [20]

[*64] B. *Petitioner's Status as a "Transferee" Under Federal Law*

Whether a person is a "transferee" within the meaning of section 6901 is "undisputedly [a question] of federal law." *Starnes,* 680 F.3d at 427; *see Slone,* ----- F.3d ------, 2015 WL 5061315; *Feldman,* 779 F.3d at 458. "Transferee" *is* an expansive term that includes a "donee, heir, legatee, devisee, and distributee." Sec. 6901(h). The term also includes "the shareholder of a dissolved corporation," "the successor of a corporation," and "the assignee * * * of an insolvent person." Sec. 301.6901–1(b), Proced. & Admin. Regs.

In determining "transferee" status for Federal law purposes, the Ninth Circuit has recently held that a court must consider whether to disregard the form of the transaction by which the transfer occurred. *See Slone,* ----- F.3d at ——, 2015 WL 5061315, at *5. "[F]or purposes of transferee liability under § 6901," the Ninth Circuit ruled, relevant precedent requires that the court "look through the form of a transaction to consider its substance." *Id.* at ——, 2015 WL 5061315, at *4. Analyzing a transaction similar to that here, the Ninth Circuit explained in *Slone:*

> [W]hen the Commissioner claims a taxpayer was "the shareholder of a dissolved corporation" for purposes of 26 C.F.R. § 301.6901–1(b), but the taxpayer did not receive a liquidating distribution if the form of the transaction is respected, a court must consider the relevant subjective and objective factors to determine whether the formal transaction "had any practical economic effects other than the creation of income tax losses."

[*65] *Id.* at ——, 2015 WL 5061315, at *5 (quoting *Reddam v. Commissioner,* 755 F.3d 1051, 1060 (9th Cir.2014), *aff'g* T.C. Memo.2012–106).[21]

In performing this "substance over form" inquiry, the Ninth Circuit does not engage in a rigid two-step analysis. Rather, it focuses "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." *Id.* (quoting *Reddam,* 755 F.3d at 1060). Following a commonsense review of the transaction, if the court concludes that the transaction lacks a nontax business purpose, has no economic substance, and was entered into solely to generate illegitimate tax benefits, the Commissioner may disregard the form the parties have selected and tax the transaction on the basis of its underlying economic substance. *Id.* at ------, 2015 WL 5061315, at *5–*6.

***26** [25] For the reasons discussed previously, we find that the transaction by which Nob Hill "purchased" petitioner's West Side stock relied on sham transactions, had no economic substance, had no bona fide business purpose, and was entered into solely to evade West Side's Federal and Ohio tax liabilities. *See supra* p. 40[*66] and note 11 and pp. 41–55. We therefore disregard the form of the transaction and find that petitioner in substance was a direct recipient of West Side's cash, i.e., as a "distributee," "the shareholder of a dissolved corporation," or "the assignee * * * of an insolvent person." Sec. 6901(h); sec. 301.6901–1(b), Proced. & Admin. Regs. In any of those capacities, he was a "transferee" of West Side within the meaning of section 6901.

IV. *Respondent's Collection Efforts*

[26] In certain circumstances the IRS may be required to show that it exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferee. *See Sharp v. Commissioner,* 35 T.C. 1168, 1175, 1961 WL 1287 (1961); *Shockley v. Commissioner,* T.C. Memo.2015–113, at *54; *Kardash v. Commissioner,* T.C. Memo.2015–51, at *22–*24; *Zadorkin v. Commissioner,* T.C. Memo.1985–137, 49 T.C.M. (CCH) 1022, 1028 (1985). The reasonableness of the IRS' collection efforts against the tax debtor must be assessed in the light of the facts of the particular case. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." *Zadorkin,* 49 T.C.M. (CCH) at 1028.

[27] In 2008, during the course of its examination of West Side, the IRS searched for any existing West Side assets upon which to levy. Unsurprisingly, it [*67] found none. In 2008, as in late September 2003, West Side had no meaningful assets. What little cash it had post closing was quickly dissipated by payments to Fortrend, MidCoast, and their tax shelter promoter affiliates. Millennium, West Side's postclosing parent, was likewise immune from IRS collection efforts because it was a Cayman Islands company with no assets in the United States. We find that the IRS acted completely reasonably in declining to take further, useless, steps to collect this liability from West Side.

Petitioner also argues that the IRS failed to make collection efforts against Moffatt, whose $5 million "loan" was allegedly repaid with some of West Side's cash. We have already determined that the Moffatt loan was a sham. In substance, West Side's cash went directly to petitioner, and the Moffatt "loan" was simply an overnight shuffling of funds between two Fortrend affiliates. Under these circumstances, it is not certain that Moffatt was a transferee of West Side.

[28] Even if Moffatt were thought to be a transferee of West Side, collection efforts against it would almost certainly have been futile. As far as the trial revealed, Moffatt was a shadowy entity that appeared and quickly disappeared. There is no evidence in the record about what assets Moffatt had or where they were. It is a fair assumption that Fortrend established this affiliate, like Nob Hill, [*68] Millennium, and its other affiliates, in a manner that effectively immunized them from the reach of U.S. tax authorities.

*27 [29] In any event, the IRS is not required to pursue collection efforts against Transferee A before seeking to collect from Transferee B. "Transferee liability is several" under section 6901. *Alexander v. Commissioner,* 61 T.C. 278, 295, 1973 WL 2542 (1973); *Cullifer v. Commissioner,* T.C. Memo.2014–208, at *74 (same). "It is well settled that a transferee is severally liable for the unpaid tax of the transferor to the extent of the assets received and other stockholders or transferees need not be joined." *Estate of Harrison v. Commissioner,* 16 T.C. 727, 731, 1951 WL 126 (1951) (citing *Phillips v. Commissioner,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (construing predecessor statute)). "In the event that one transferee is called upon to pay more than his pro rata share of the tax, he is left to his rights of contribution from the other transferees." *Id.* Petitioner is free to pursue against Moffat any right of contribution he may have.

We accordingly conclude (1) that petitioner is liable under Ohio law for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith and (2) that the IRS may collect this aggregate liability from petitioner as a "transferee" under section 6901. *See* OUFTA sec. 1336.08(B); *Shussel v. Werfel,* 758 F.3d 82 (1st Cir.2014) (discussing the calculation of [*69] prejudgment interest on transferee liability), *aff'g in part, rev'g in part and remanding* T.C. Memo.2013–32. To reflect the foregoing,

Decision will be entered under Rule 155.

All Citations

T.C. Memo. 2015-201, 2015 WL 5973214, 110 T.C.M. (CCH) 370, T.C.M. (RIA) 2015-201, 2015 RIA TC Memo 2015-201

Footnotes

1 For Fortrend, see *Slone v. Commissioner,* T.C. Memo.2012–57, *vacated and remanded,* —— F.3d ——, 2015 WL 5061315 (9th Cir. Aug.28, 2015); *Salus Mundi Found. v. Commissioner,* T.C. Memo.2012–61, *rev'd and remanded,* 776 F.3d 1010 (9th Cir.2014); *Frank Sawyer Trust of May 1992 v. Commissioner,* T.C. Memo.2011–298, *rev'd and remanded,* 712 F.3d 597 (1st Cir.2013); *Diebold v. Commissioner,* T.C. Memo.2010–238, *vacated and remanded sub nom. Diebold Found., Inc. v. Commissioner,* 736 F.3d 172 (2d Cir.2013). For MidCoast, see *Stuart v. Commissioner,* 144 T.C. ——, (Apr. 1, 2015); *Cullifer v. Commissioner,* T.C. Memo.2014–208; *Hawk v. Commissioner,* T.C. Memo.2012–259; *Feldman v. Commissioner,* T.C. Memo.2011–297, *aff'd,* 779 F.3d 448 (7th Cir.2015); *Starnes v. Commissioner,* T.C. Memo.2011–63, *aff'd,* 680 F.3d 417 (4th Cir.2012); *Griffin v. Commissioner,* T.C. Memo.2011–61. Samyak Veera, a principal of MidCoast, has been indicted for his role in promoting these arrangements. *United States v. Veera,* No. 12–444 (E.D.Pa. Oct. 1, 2013) (superseding indictment alleging Veera's involvement in MidCoast schemes to evade taxes by using fraudulent losses to eliminate target's gains).

2 Unless otherwise noted, all statutory references are to the Internal Revenue Code as in effect at all relevant times, and all Rule references are to the Tax

Court Rules of Practice and Procedure. We round all dollar amounts to the nearest dollar.

3 Petitioner's effort to strike this language from the engagement letter was ultimately unsuccessful. Mr. Stovsky insisted on retaining this language and, after further negotiations, petitioner acquiesced.

4 West Side's balance sheet at the relevant time listed $302,357 in assets (less $227,793 in accumulated depreciation) and accounts receivable of $50,936 and $116,004. The assets consisted of computers, software, furniture/fixtures, office equipment, shop equipment, and leasehold improvements. LXV did not assume any of the liabilities reflected on West Side's balance sheet.

5 The $29.9 million loan was provided through a Rabobank subsidiary, Utrecht–America Finance Co. For simplicity, we will refer to these entities collectively as Rabobank. Rabobank frequently partnered with Fortrend in executing Midco deals. It has been involved in numerous transactions previously considered by this Court. *See, e.g., Salus Mundi Found.,* T.C. Memo.2012–61; *Slone,* T.C. Memo.2012–57; *Frank Sawyer Trust of May 1992,* T .C. Memo.2011–298; *Diebold,* T.C. Memo.2010–238; *LR Dev. Co. LLC v. Commissioner,* T.C. Memo.2010–203.

6 In his petition, petitioner challenged the timeliness of the notice of liability. The Commissioner generally must assess transferee liability within one year after expiration of the period of limitations on the transferor, but the applicable period of limitations may be extended by agreement. *See* sec. 6901(c) and (d). Petitioner executed successive Forms 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, extending to June 30, 2012, the time for assessing transferee liability against him, and the notice of liability was timely issued on June 25, 2012. Petitioner abandoned in his posttrial briefs any challenge to the timeliness of the notice of liability, and that argument is thus deemed conceded.

7 In addition to the amounts listed in the notice of liability, petitioner proposed as a finding of fact (to which respondent did not object) that respondent determined "assessed interest" of $8,475,655 as well as "accrued interest and penalties" of $12,362,425. In their posttrial briefs the parties have not addressed the proper computation of interest or the existence of penalties other than those determined by respondent under section 6662(a), (d), and (h). We will accordingly enter decision in this case under Rule 155.

8 Whether the burden has shifted matters only in the case of an evidentiary tie. *See Polack v. Commissioner,* 366 F.3d 608, 613 (8th Cir.2004), *aff'g* T.C. Memo.2002–145. In this case, we discerned no evidentiary tie on any material issue of fact. *See Payne v. Commissioner,* T.C. Memo.2003–90, 85 T.C.M. (CCH) 1073, 1077 (2003).

9 Petitioner argues that a memorandum solicited by Millennium from the Seyfarth Shaw law firm was sufficient to substantiate the bad-debt deduction. We give no weight to that memorandum. It was based on assumed facts provided by Mr. McNabola; those assumed facts are contradicted by the record evidence in this case; and the memorandum explicitly states that no one but Millennium can rely upon it. Seyfarth Shaw gained notoriety for issuing bogus tax-shelter opinions, and this document seems par for the course. *See, e.g., Kenna Trading, LLC v. Commissioner,* 143 T.C. 322, 2014 WL 5471973 (2014), *aff'd,* 728 F.3d 676 (7th Cir.2013); *Superior Trading, LLC v. Commissioner,* 137 T.C. 70, 2011 WL 3875649 (2011); *Rogers v. Commissioner,* T.C. Memo.2014–141; *Rogers v. Commissioner,*

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

JOINT APPENDIX
Volume VI

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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 JOINT APPENDIX VOLUME VI to be served on the following by Electronic Service to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK, U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,

Defendants.

Case No. A-16-735910-B

Dept. No. XV

MOTION TO DISMISS

Defendants Coöperatieve Rabobank, U.A. and Utrecht-America Finance Company, by and through their undersigned attorneys of record, hereby move this Court to dismiss Plaintiff Michael A. Tricarichi's Complaint with prejudice pursuant to Rules 12(b)(2) and 12(b)(5) of the Nevada Rules of Civil Procedure. This motion is based on the attached points and authorities and accompanying affidavits, as well as matters of judicial notice.

DATED this 19th day of October, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

BY: _____

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NOTICE OF MOTION

PLEASE TAKE NOTICE that the the foregoing Motion to Dismiss filed on behalf of Defendants Coöperatieve Rabobank, and U.A. Utrecht-America Finance Company will be brought on for hearing before the above-entitled Court on the 23rd day of NOVEMBER, 2016 at the hour of 9:00 am/~~pm~~, or as soon thereafter as counsel can be heard.

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MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Plaintiff Michael A. Tricarichi is attempting in this action to hold Rabobank and Utrecht liable for taxes Mr. Tricarichi owes on a $65 million payment received by his company, West Side. The Tax Court's decision in *Michael A. Tricarichi v. Commissioner of Internal Revenue*, No. 23630-12, 110 T.C.M. (CCH) 370, 2015 WL 5973214 (Oct. 14, 2015) is fatal to Mr. Tricarichi's claims. The Tax Court rejected Mr. Tricarichi's attempt to avoid taxes by selling West Side to a promoter called Fortrend in September 2003 and siphoning off West Side's cash. The Tax Court found "[Mr. Tricarichi] had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities." (*Id.* at *53.) The Tax Court also found Mr. Tricarichi had not moved to Nevada until after the Fortrend transaction.[1]

The Tax Court's finding that Mr. Tricarichi did not move to Nevada until after the Fortrend transaction supports dismissal for lack of personal jurisdiction and *forum non conveniens*. Rabobank and Utrecht simply had no contact with Nevada in connection with the Fortrend transaction. Utrecht lent money to a Fortrend subsidiary in New York and Rabobank accepted deposits for the transaction in New York. Neither Rabobank nor Utrecht is otherwise doing business in Nevada. Their witnesses and documents are in New York, and New York law governs Mr. Tricarichi's claims.

Moreover, because the Tax Court found Mr. Tricarichi had, before the September 2003 Fortrend transaction, constructive knowledge of the conduct of Rabobank and Utrecht that he now alleges is wrongful, the statutes of limitations have expired and Mr. Tricarichi cannot, in any event, plead valid claims against Rabobank and Utrecht.

[1] *See* Affidavit of Dan R. Waite, filed herewith ("Waite Aff."), Ex. 1 ("Tax Court Decision") at *5; *see also* Waite Aff. Ex. 2 ("Suppl. Tax Court Decision") at *3.

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FACTS

Mr. Tricarichi's Previous Attempt to Avoid Taxes

In Spring 2003, Mr. Tricarichi, who was then an Ohio resident, owned an Ohio corporation called West Side Cellular, Inc. that was about to receive a $65 million settlement payment from a lawsuit. (Compl. ¶¶ 27-29.)[2] Mr. Tricarichi is a highly-educated, sophisticated businessman who had familiarity with tax concepts. (Tax Court Decision at *50-52.)

Mr. Tricarichi and Ohio lawyers at the Hahn Loeser firm began searching for ways to avoid paying all the tax due on the $65 million payment. (*Id.* at *7-8.) Mr. Tricarichi decided to engage in a "midco" transaction with a San Francisco-based promoter called Fortrend. (*Id.* at *15-19.) The transaction involved the sale by Mr. Tricarichi of West Side to an offshore Fortrend subsidiary called Nob Hill. Mr. Tricarichi would receive most of West Side's cash and Fortrend would receive a $5 million promotion fee. (*Id.* at *18-19.) Nob Hill would offset West Side's tax liabilities with tax deductions from distressed debt. (*Id.* at *8.) Mr. Tricarichi also decided to move to Nevada to avoid state tax.[3] Mr. Tricarichi hired PricewaterhouseCoopers' Cleveland, Ohio branch to advise him on the Fortrend transaction. PwC's Engagement Letter provided for New York governing law.

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[2] The facts relied on in this memorandum of points and authorities are drawn from Mr. Tricarichi's Complaint, the documents referred to therein, and the public record, including the Tax Court's findings of fact in *Tricarichi* and the underlying exhibits. The Tax Court decision and exhibits may be considered on this motion to dismiss because they are integral to Mr. Tricarichi's claims and incorporated by reference into his Complaint and are a matter of public record. *See, e.g.,* Compl. ¶ 47; *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 5-9, 357 P.3d 927, 930 (Nev. 2015). Mr. Tricarichi is collaterally estopped from re-litigating the Tax Court's factual findings in his case. *See Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. Adv. Op. 3, 5-11, 293 P.3d 869, 872-873 (2013) (noting that federal common law on collateral estoppel applies to determine the preclusive effect of a federal court judgment having federal question jurisdiction); *see also Blum v. KPMG LLP*, No. SACV 11-01885-CJC(RNBx), 2012 WL 8704117, at *5-6 (C.D. Cal. July 17, 2012) (Tax Court's finding that plaintiff knowingly executed tax shelter precluded re-litigation of issues of plaintiff's knowledge and reliance); *In re Carey*, 326 B.R. 816, 821 (Bankr. E.D. Cal. 2005) (holding that Tax Court decision concerning debtors' use of sham trusts and income tax liability had preclusive effect).

[3] The Tax Court found as fact that "The [PwC] memorandum notes that petitioner planned to move from Ohio to a State without an income tax so that there would be no State tax on his gains." (Tax Court Decision at *12.)

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Mr. Tricarichi Was Warned the Fortrend Transaction was Likely Illigal

PwC and Hahn Loeser warned Mr. Tricarichi there was a high risk that the IRS would find that the proposed Fortrend transaction was illegal. PwC advised Mr. Tricarichi that the "high basis/low value" debt strategy that Fortrend proposed for eliminating West Side's tax liabilities appeared to be "a very aggressive tax-motivated strategy" that was "subject to IRS challenge." (Tax Court Decision at *48-50.) PwC also told Mr. Tricarichi only that "a position can be taken" that the proposed stock sale would not be a reportable transaction. (*Id.* at 49.) In tax-speak, "a position can be taken" meant PwC had a low level of confidence that the position would be accepted by the IRS. (*Id.*)[4]

Mr. Tricarichi had extensive discussions with Hahn Loeser about IRS Notice 2001-16, and the risk that the Fortrend transaction would be a "reportable transaction." (*Id.* at *7-10, 48.)[5] Hahn Loeser spent days researching Notice 2001-16, "reportable transactions," "sham transactions," and transactions involving "an intermediary corporation." PwC insisted in its engagement letter that Mr. Tricarichi was obligated to advise PwC if he determined any matter covered by PwC's engagement letter was a reportable transaction. (*Id.* at 9-10, 48.) Mr. Tricarichi attempted to strike this requirement from the engagement letter, which the Tax Court found evidenced his active avoidance of learning the truth. (*Id.* at 48.) When Mr. Tricarichi's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side

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[4] "Under regulations in effect during 2003, '[a] position * * * [was] considered to have a realistic possibility of being sustained on its merits' if a well-informed tax professional would conclude that it had 'approximately a one in three, or greater, likelihood of being sustained on its merits.' Sec. 1.6694-2(b)(1), Income Tax Regs. Stating that 'a position can be taken' suggests a lower level of confidence than this. Virtually any position 'can be taken.'" (*Id.* at n. 14 (citing 26 C.F.R. § 1.6694-2(b)(1) (2003)).

[5] IRS Notice 2001-16 (cited in part at Compl. ¶ 56) provides that "The Service may challenge certain transactions in which the assets of a corporation are sold following the purported sale of the corporation's stock to an intermediary. Such transactions are designated as 'listed transactions' for purposes of sections 1.6011-4T(b)(2) and 301.6111-2T of the regulations . . . The Service and Treasury are issuing this notice to alert taxpayers and their representatives of certain responsibilities that may arise from participation in these transactions . . . Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds . . . The Service may impose penalties on participants in these transactions . . . including the accuracy-related penalty . . . . Transactions that are the same as or substantially similar to those described in the Notice 2001-16 are identified as 'listed transactions' . . . ." 2001-9 I.R.B. 730 (Feb. 26, 2001).

from engaging in a "listed transaction" after Fortrend acquired West Side, Fortrend refused to agree to this provision. (*Id.* at *49.)

Mr. Tricarichi ignored the many warnings that he was entering into an illegal tax shelter. Mr. Tricarichi sold West Side to Nob Hill on September 9, 2003, and received $34.6 million in cash. (*Id.* at *23.) After the September 9, 2003 sale, Mr. Tricarichi relocated to Nevada. (*See* n. 1, 3 above.)

Rabobank and Utrecht's Services were Rendered Entirely in New York

Defendants Rabobank and Utrecht provided certain financial services in New York in connection with the subject transaction. (*See* Kortlandt Affidavit, filed herewith ¶ 5.) Mr. Tricarichi, West Side and Nob Hill set up accounts at Rabobank's New York branch before the closing. (*Id.*; *see also* Compl. ¶ 11.) Mr. Tricarichi signed a Non-Confidentiality Certificate in which he agreed Rabobank and Utrecht had not made any statement to Mr. Tricarichi about the potential tax consequences of the subject transaction. (Kortlandt Aff. Ex. 11.) In connection with the Fortrend transaction, on September 9, 2003, Utrecht lent Nob Hill $29.9 million in New York, which Nob Hill transferred to Mr. Tricarichi's New York Rabobank escrow account, along with the balance of the $34.6 million purchase price. (Kortlandt Aff. ¶ 5.) Mr. Tricarichi transferred the $34.6 million to another bank account he controlled in New York. That same day, Nob Hill repaid Utrecht the $29.9 million loan, along with a $150,000 transaction fee, in New York (Tax Court Decision at *23-24; *see also* Compl. ¶ 54.) Fortrend received $5 million of West Side's cash as a promotion fee. (Tax Court Decision ¶¶ 23-25.)

Mr. Tricarichi and West Side's account agreements with Rabobank and Nob Hill's loan documents with Utrecht use their New York addresses. The agreements and loan documents provide they are governed by New York law, and several of them provide for a New York forum for disputes (the others are silent on forum).[6] None of the agreements and loan documents provide for Nevada law or a Nevada forum.

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[6] *See* Kortlandt Aff. Exs. 3 (Tax Court Ex. 36-J) at 7-8; 4 (Tax Court Ex. 37-J) at §§ 13-14; 5 (Tax Court Ex. 38-J) §§ 15, 20(a); 6 (Tax Court Ex. 39-J) § 9(b), (g); 7 (Tax Court Ex. 40-J) §§ 13-14; 8 (Tax Court Ex. 41-J) § 9(b), (g); 9 (Tax Court Ex. 42-J) §§ 8, 13-14.

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Rabobank and Utrecht Are Not Doing Business in Nevada

Rabobank is a cooperative organized under Dutch law with its principal place of business in the Netherlands and a branch in New York, New York. (Kortlandt Aff. ¶ 3; Compl. ¶ 11.) Utrecht is a subsidiary of Rabobank that is incorporated in Delaware and has its principal place of business in New York, New York. (Kortlandt Aff. ¶ 3.) Rabobank and Utrecht (i) are not licensed to conduct business in Nevada, (ii) do not maintain any offices or branches in Nevada, (iii) do not have any employees in Nevada, (iv) are not required to and do not pay taxes in Nevada, and (v) do not have registered agents in Nevada. (*Id.* ¶ 4.) All of Rabobank and Utrecht's witnesses and documents relevant to this action are in New York. (*Id.* ¶ 5.)

The Tax Court Found Mr. Tricarichi Had Constructive Knowledge that the Fortrend Transaction was Illegal

West Side failed to pay 2003 federal income taxes on the $65 million settlement payment. The IRS sought payment of those taxes, plus penalties and interest from Mr. Tricarichi. (Compl. ¶¶ 75-78.) Mr. Tricarichi commenced a proceeding in Tax Court to challenge the IRS' decision. (*Id.* ¶ 79.)

The Tax Court found after extensive discovery and a trial "that [Mr. Tricarichi] had constructive knowledge [before September 9, 2003] that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities." (Tax Court Decision at *53; *see also id.* at *55.) The Tax Court determined that West Side's federal tax liability with respect to the settlement had accrued by late May 2003, and the IRS had a claim against West Side at that time. (Tax Court Decision at *58.) The Tax Court found that at the time of the transaction, Mr. Tricarichi was an Ohio resident and that he moved to Nevada after the transaction closed. (*See* n. 1, 3 above.) Indeed, in the Tax Court proceeding, Mr. Tricarichi conceded that Ohio law applied in the Tax Court because Ohio was where "[*he*] *resided, West Side did business, and the principal transactions occurred.*" (Tax Court Decision at *31 (emphasis added).) The Tax Court found that Mr. Tricarichi was fully

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aware of the 2001 Tax Notice and had sought advice regarding its meaning from his advisors in order to evade his tax obligations.[7]

The Tax Court upheld the IRS's determination that Mr. Tricarichi was liable for over $21 million in unpaid taxes, penalties, fees, and pre-judgment interest. (*Id.* at *1-2, 5, 68-69.) This left Mr. Tricarichi with $13.6 million of the $34.6 million he had siphoned out of West Side.[8]

This Action is Groundless

Mr. Tricarichi's Complaint asserts claims against Rabobank and Utrecht for aiding and abetting fraud, civil conspiracy, violations of Nevada Revised Statutes Section 207.400, and unjust enrichment. (Compl. Counts III-VIII.) All of Mr. Tricarichi's claims are based on his contention that Rabobank, Utrecht and the other defendants defrauded him into believing that the tax shelter was legitimate. This contention is untenable because the Tax Court found that Mr. Tricarichi had constructive knowledge that his tax shelter was illegal.

ARGUMENT

I. THERE IS NO PERSONAL JURISDICTION OVER RABOBANK AND UTRECHT

A. There Is No General Jurisdiction Over Rabobank And Utrecht

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." NEV. REV. STAT. § 14.065 (2015). "When a nonresident defendant challenges personal jurisdiction, the plaintiff bears the burden of showing that jurisdiction exists." *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 5, 7, 342 P.3d 997, 1001 (2015) (internal citation omitted). "In so doing, the plaintiff must satisfy the requirements of Nevada's long-arm statute and show that jurisdiction does not offend principles of due process." *Id.*; *see also Walden*

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[7] "[Mr. Tricarichi] and his advisers knew that the transaction Fortrend was proposing was likely a 'reportable' or 'listed transaction.' Before meeting with Fortrend, Hahn Loeser lawyers spent several days researching Notice 2001-16, 'reportable transactions,' 'sham transactions,' and transactions involving 'an intermediary corporation.' PwC insisted on including in its engagement letter a requirement that [Mr. Tricarichi] advise it if he determined 'that any matter covered by this Agreement is a reportable transaction.' [Mr. Tricarichi] attempted to strike this sentence from the engagement letter, evidencing his active avoidance of learning the truth." (Tax Court Decision at *48.)

[8] By contrast, Utrecht received $150,000 in fees.

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v. Fiore, 134 S. Ct. 1115, 1121, 188 L. Ed. 2d 12, 19 (2014) ("[T]he Fourteenth Amendment "constrains a State's authority to bind a nonresident defendant to a judgment of its courts.") (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564 (1980)). 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, 66 S. Ct. 154, 158 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 342-43 (1940)).

The Supreme Court in *Daimler AG v. Bauman*, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014), announced a new, stricter standard for the exercise of general jurisdiction over non-resident companies like Rabobank and Utrecht under a long-arm statute. A non-resident company's continuous and systematic contacts with the forum state are no longer enough for general jurisdiction. The proper question is "whether a foreign corporation's 'affiliations with the State are so "continuous and systematic" as to render [it] essentially at home in the forum State,'" and that "the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" *Id.* at 760, 187 L. Ed. 2d at 639-40 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 2854 (2011)).

Rabobank and Utrecht are incorporated and have their principal places of business outside Nevada. (Kortlandt Aff. ¶ 3.) They are not licensed to conduct business in Nevada. (*Id.* ¶ 4.) They do not maintain offices or branches in Nevada. (*Id.*) They do not have any employees or agents in Nevada. (*Id.*) They do not pay taxes in Nevada. (*Id.*) Hence, Rabobank and Utrecht are not at home in Nevada and are not subject to general jurisdiction here under *Daimler* and the other applicable cases.

B. <u>There Is No Specific Jurisdiction Over Rabobank And Utrecht</u>

The exercise of "specific jurisdiction is proper only where the cause of action arises from the defendant's contacts with the forum." *Fulbright & Jaworski*, 131 Nev. Adv. Op. at 10, 342 P.3d at 1002 (internal citations omitted). 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,

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(2) whether the cause of action arises out of the defendant's Nevada-related activities, and (3) whether the exercise of jurisdiction over the defendant is reasonable. *Id.*

This inquiry "focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 134 S. Ct. at 1121, 118 L. Ed. 2d at 19-20 (internal quotations omitted). For specific jurisdiction to comport with due process, "the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* Two aspects of this necessary relationship are relevant here.

"First, the relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 1122, 118 L. Ed. 2d at 20 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 2284 (1985)) (emphasis in original). "Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Id.* (citing *World-Wide Volkswagen Corp.*, 444 U.S. at 291-292, 100 S. Ct. at 564-65). "[C]ontacts between the plaintiff (or third parties) and the forum State" do not suffice. *Id.* (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1863, 1873 (1984)). "Put simply, however significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Id.* (quoting *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S. Ct. 571, 579 (1980)).

Second, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* (citing *Int'l Shoe*, 326 U.S. at 319, 66 S. Ct. at 159-60.) Thus, "the plaintiff cannot be the only link between the defendant and the forum." *Id.* at 1122, 188 L. Ed. 2d at 21. "Rather, it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 1122-23, 188 L. Ed. 2d at 21. (citing *Burger King*, 471 U.S. at 478, 105 S. Ct. at 2178). Instead, "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Id.* at 1123, 188 L. Ed. 2d at 21 (citing *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183).

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The same principles apply to intentional torts, as to which "it is likewise insufficient to rely on a defendant's 'random, fortuitous, or attenuated contacts' or on the 'unilateral activity' of a plaintiff." *Id.* at 1123, 188 L. Ed. 2d at 21 (internal citation omitted). Therefore, "[a] forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.*

These principles support dismissal here. Rabobank and Utrecht had no meaningful jurisdictional contact with Nevada in connection with Mr. Tricarichi's tax shelter. The Tax Court found that Mr. Tricarichi did not move to Nevada until after the tax shelter was created in September 2003.[9] Moreover, Rabobank and Utrecht's services occurred in New York, where they were headquartered, and those services ended on September 9, 2003. Rabobank and Utrecht had no ongoing obligations or continuing contacts with Mr. Tricarichi in Nevada (or elsewhere). Rabobank and Utrecht's actions in connection with the subject transaction did not create the required "substantial connection with" Nevada.

Even if Rabobank and Utrecht did somehow direct conduct at Mr. Tricarichi in Nevada and he was injured in Nevada, jurisdiction is still lacking under *Walden* and the other applicable cases. Rabobank and Utrecht's New York activity "did not create sufficient contacts with Nevada simply because [they may have] directed [their] conduct at [Mr. Tricarichi] whom [they allegedly] knew had Nevada connections." *Walden*, 134 S. Ct. at 1125, 118 L. Ed. 2d at 23. "Such reasoning improperly attributes a plaintiff's forum connections to the defendant and makes those connections 'decisive' in the jurisdictional analysis . . . [and] obscures the reality that none of [Rabobank or Utrecht]'s conduct had anything to do with Nevada itself." *Id.* (internal citation omitted).

The mere act of contracting with a Nevada resident "is not enough to establish specific personal jurisdiction, even if the contract is partially performed in Nevada." *Affinity Network*, No. 60355, 2013 WL 7155071, at *2 (Nev. Oct. 31, 2013). For example, in *Affinity Network*, the

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[9] *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994) (affirming dismissal for lack of personal jurisdiction because "[t]he unilateral act of an insurer in relocating its corporate headquarters does not create the necessary minimum contacts between the state of the insurer's relocation and its insureds" (internal citation omitted)).

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Nevada Supreme Court affirmed the district court's dismissal of claims against a foreign debt negotiating company and its employees for lack of personal jurisdiction because the defendants' acts "only would have involved sending money into Nevada," which did not establish the requisite "substantial connection" with the forum. *Id.* at *3.

In a case directly on point here, the court in *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429 (5th Cir. 2014), held that wire transfers and telephone calls by a Cayman Islands bank to a plaintiff in Texas did not establish sufficient contacts for specific jurisdiction in Texas.

Accordingly, Mr. Tricarichi's "claimed injury does not evince a connection between [him] and Nevada" because "it is not the sort of effect that is tethered to Nevada in any meaningful way." *Walden v. Fiore*, 134 S. Ct. at 1125, 118 L. Ed. 2d at 23. The fact that Mr. Tricarichi now has to repay the IRS from Nevada the amounts he wrongfully sought to evade paying is not due to anything that independently occurred in Nevada—in fact, as stated above, the Tax Court found that the relevant actions happened in Ohio—rather Mr. Tricarichi must pay the IRS from Nevada "because Nevada is where [he] chose to be at a time when [the IRS sought to recover the funds at issue]." *Id.* (noting that "Respondents would have experienced this same lack of access in California, Mississippi, or wherever else they might have traveled and found themselves wanting more money than they had."); *see also Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015); *Olivine Int'l Mktg. v. Texas Packaging Co.*, No. 2:09-CV-02118-KJD, 2010 WL 4024232, at *4 (D. Nev. Sept. 27, 2010). Mr. Tricarichi would be liable to the IRS for his tax obligations wherever he moved in the United States. The fact that he chose Nevada is, by itself, insufficient to establish specific jurisdiction. *Picot*, 780 F.3d at 1126.

II. NEVADA IS *FORUM NON CONVENIENS*

Rabobank and Utrecht are subject to jurisdiction in New York. Mr. Tricarichi voluntarily opened bank accounts in New York and received payment from Nob Hill in New York. Mr. Tricarichi agreed to have New York law govern the account agreements he entered into with Rabobank and the engagement letter he signed with PwC. Rabobank and Utrecht's documents and witnesses are in New York. Nevada has no connection with this case aside from the fact that Mr. Tricarichi moved there after the Fortrend transaction to avoid state income taxes. These

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circumstances fully support dismissal on *forum non conveniens* grounds. *See, e.g.*, *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254 n.22, 257, 102 S. Ct. 252, 265 n.22, 266-67 (1981); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001).

III. THE STATUTES OF LIMITATIONS HAVE RUN

The New York and Nevada statutes of limitations applicable to Mr. Tricarichi's claims are as follows:[10]

Claim	Nevada	New York
Aiding & Abetting Fraud (Count III)	**Three years**, accruing "upon the discovery by the aggrieved party of the facts constituting the fraud." NEV. REV. STAT. § 11.190(3)(d) (2015).	**The later of:** (a) **six years** from the date of the fraud, or (b) **two years** from the time the plaintiff discovered the fraud, or with reasonable diligence could have discovered it. N.Y. C.P.L.R. 213(8) (McKinney 2016).
Civil Conspiracy (Count IV)	**Four years**, "after the cause of action shall have accrued." *See* NEV. REV. STAT. § 11.220 (2015).	**The later of:** (a) **six years** from the date of the fraud, or (b) **two years** from the time the plaintiff discovered the fraud, or with reasonable diligence could have discovered it. *See* N.Y. C.P.L.R. 213(8); *see also Schlotthauer v. Sanders*, 545 N.Y.S.2d 197, 199 (N.Y. App. Div. 1989) ("conspiracy is not an independent tort, and is time-barred when the substantive tort underlying it is time-barred").
Nevada Racketeering Statute (Counts V-VII)	**Five years** after the violation occurs or after the injured person sustains the injury, whichever is later. NEV. REV. STAT. § 207.520 (2015).	N/A
Unjust Enrichment (Count VIII)	**Four years**, accruing upon discovery. *See* NEV. REV. STAT. § 11.190(2)(c) (2015).	**Six years**, accruing "upon the occurrence of the wrongful act giving rise to a duty of restitution." *See* N.Y. C.P.L.R. 213(1) (McKinney 2016); *Elliott v. Qwest Commc'ns Corp.*, 808 N.Y.S2d 443, 444-45 (N.Y. App. Div. 2006) (internal citation omitted).

All of Mr. Tricarichi's claims are based on his allegation that Defendants induced him to enter into an illegal tax shelter. The Tax Court found that Mr. Tricarichi had constructive

[10] New York law governs because Rabobank and Utrecht's actions with respect to the subject transaction occurred in New York and Mr. Tricarichi agreed to have New York law govern the account agreements that he and West Side entered into with Rabobank. *See Tesoro Gold Co. v. Johnston*, No. 3:05-CV-00051-LRH-RAM, 2009 WL 736017, at *5-6 (D. Nev. Mar. 20, 2009); *see also HDAV Outdoor, LLC v. Elite Mobile Advert. LED Billboards, Inc.*, No. 67437, 2015 WL 9594650, at *1 (Nev. Ct. App. Dec. 29, 2015).

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knowledge that the tax shelter was illegal in September 2003, at the latest. Yet Mr. Tricarichi did not commence this action until April 29, 2016. Mr. Tricarichi's constructive knowledge of Rabobank and Utrecht's alleged fraud precludes him from invoking any tolling or discovery principles. *See USACM Liquidating Tr. v. Deloitte & Touche*, 754 F.3d 645, 649 (9th Cir. 2014). Courts assessing statutes of limitations involving unlawful tax shelters have found that the statutes of limitations accrue when the plaintiff is on notice of the alleged fraud—before tax liability is actually imposed on the plaintiff. For example, in *Curtis Investment Co., LLC v. Bayerische Hypo-Und Vereinsbank, AG*, 341 F. App'x 487 (11th Cir. 2009), involving a loan-based tax shelter known as a "CARDS" transaction, the plaintiff argued that it could not have brought its suit earlier because, among other things, (a) the IRS did not begin pursuing the plaintiff for unpaid taxes until four years after the transaction, and (b) the defendant bank did not enter into a deferred prosecution agreement with the Justice Department, in which it admitted that CARDS transactions were intended to generate fraudulent tax benefits, until shortly after the IRS prosecution. The court rejected this argument, concluding that the date of the IRS prosecution did not obviate the plaintiff's knowledge about the basic facts of the alleged fraud at the time it signed the contract and at the time it had to repay the loan to the defendant bank. *Id.* at 495-96.

In *Malone v. Ahrens & DeAngeli, PLLC*, 445 F. App'x 940 (9th Cir. 2011), the Ninth Circuit held that the plaintiffs were on notice that the tax shelter lacked economic substance when the IRS warned that the particular type of investments were abusive tax shelters and certain defendants warned the plaintiffs that the IRS was likely to challenge the transaction's tax benefits. *Id.* at 943. The court also held that the plaintiffs were on notice at the same time that the loan from the defendant bank itself might lack substance and therefore be a sham, because the loan was central to the transaction. *Id.*

The statutes of limitations applicable to Mr. Tricarichi's claims have expired. Under New York law, Mr. Tricarichi's aiding and abetting and conspiracy claims expired on September 9, 2005, or, at the latest, on September 9, 2009. Under Nevada law, Mr. Tricarichi's aiding and abetting claim expired on September 9, 2006, and his conspiracy claim expired on September 9, 2007. Under New York law, Mr. Tricarichi's unjust enrichment claim expired on September 3,

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2009. Under Nevada law, the claim expired on September 9, 2007. Mr. Tricarichi's claims under the Nevada Racketeering Statute expired on September 9, 2008.

IV. THE COMPLAINT FAILS TO STATE AIDING AND ABETTING AND CONSPIRACY CLAIMS

Mr. Tricarichi's aiding and abetting and conspiracy claims against Rabobank and Utrecht suffer from a fatal defect. Mr. Tricarichi bases these claims on his allegation that he was fraudulently induced to enter into an illegal tax shelter. However, the Tax Court found that Mr. Tricarichi had advance constructive knowledge that his tax shelter was an illegal tax avoidance scheme. Mr. Tricarichi cannot therefore plead that he was induced to believe that the tax shelter was lawful. He is collaterally estopped from re-litigating the Tax Court's determination. *See In re Agribiotech, Inc.*, No. CV S 02 0537 PMP (LRL), 2005 WL 4122738, at *12 (D. Nev. Apr. 1, 2005) (in granting defendant's motion for summary judgment on fraud claims, holding that "because [the debtor] knew of and participated in the fraud, it could not have justifiably relied on [defendant's] audits to uncover a fraud of which it already was aware"). (*See also* n. 2 above.)

V. THE COMPLAINT FAILS TO STATE RACKETEERING CLAIMS

Mr. Tricarichi cannot plead a valid RICO claim because the Tax Court found that he participated in the alleged predicate acts. *See Stoddart v. Miller*, 124 Nev. 1499, Nos. 42133, 42234, 2008 WL 6070835, at *6 (Nev. Aug. 22, 2008) (explaining that one of the required elements to recover damages under the Nevada RICO statute is that "the plaintiff must not have participated in the commission of the predicate act.") (citation omitted). Where a Nevada RICO claim is predicated on a claim of fraud, the dismissal of the fraud claim will compel dismissal of the RICO claim. *See Montes v. Bank of Am.*, No. 2:13-CV-00660-RCJ-VCF, 2014 WL 1494234, at *11, 13 (D. Nev. Apr. 15, 2014). Here, as discussed above, the Complaint fails to allege a fraud claim against anyone.

Mr. Tricarichi's RICO claims also fail to meet the threshold statutory requirement that the alleged wrongful conduct have occurred in Nevada or involve defendants who reside in Nevada. NEV. REV. STAT. § 207.470(3) (2015). Mr. Tricarichi's Complaint does not allege any wrongdoing by Rabobank and Utrecht in Nevada. Rabobank and Utrecht do not reside in Nevada.

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VI. THE COMPLAINT FAILS TO STATE AN UNJUST ENRICHMENT CLAIM

The elements of an unjust enrichment claim under New York law are: " (1) that "the other party was enriched"; (2) "at that party's expense"; and (3) "that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Georgia Malone & Co. v. Rieder*, 976 N.E.2d 743, 746 (N.Y. 2012) (affirming dismissal of unjust enrichment claim because the plaintiff did not have a "sufficiently close relationship" with the defendant). For the reasons stated above, New York law applies here, but the elements under Nevada law are similar: "(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant (4) in circumstances where it would be inequitable to retain the benefit without payment." *In re Zappos.com*, No. 3:12-cv-00325-RCJ-VPC, 2013 WL 4830497, at *4 (D. Nev. Sept. 9, 2013); *see also Leasepartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 754, 942 P.2d 182, 187 (1997).

None of these elements are met by the Complaint. Mr. Tricarichi individually is the sole plaintiff here. Mr. Tricarichi has not and cannot show that he conferred any benefit on Rabobank and Utrecht. Rabobank merely provided depository services and Utrecht lent Nob Hill part of the funds it used to buy West Side. Mr. Tricarichi did not pay anything to Rabobank and Utrecht. Rather, he seeks to recover the $29.9 million payment that Nob Hill made to Utrecht to repay the loan that Utrecht made to Nob Hill in that same amount.

Moreover, unjust enrichment is an equitable substitute for a contract. Therefore, an action for unjust enrichment cannot lie where, like here, there are express written agreements governing the relationship at issue. *See Goldman v. Metro. Life Ins. Co.*, 841 N.E.2d 742, 746 (N.Y. 2005); *Donenfeld v. Brilliant Techs. Corp.*, 948 N.Y.S.2d 18, 20 (N.Y. App. Div. 2012) (holding that unjust enrichment claim should have been dismissed "because such a claim can exist only when there is no contract, and there are contracts (the loan agreement and its amendments) in the case at bar"). The result would be the same under Nevada law. *See In re Zappos.com*, 2013 WL 4830497, at *4; *Goodwin v. Exec. Tr. Servs., LLC*, 680 F. Supp. 2d 1244, 1255 (D. Nev. 2010) (dismissing claim for unjust enrichment, where the basic premise was that plaintiffs were targeted and lured into their mortgages, because the mortgages were express and written contracts).

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CONCLUSION

WHEREFORE for the foregoing reasons, Rabobank and Utrecht respectfully request that the Court grant this Motion and dismiss all claims against them with prejudice, and to award them their costs and attorneys' fees incurred in defending this action.

DATED this 19th day of October, 2016.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b), I hereby certify that on this date, I electronically filed the foregoing document entitled Motion to Dismiss with the Clerk of the Court and caused a true and accurate copy of the same to be served *via* the Court's E-Filing System DAP/Wiznet, upon the following counsel of record. The date and time of the electronic service is in place of the date and place of deposit in the mail.

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Attorneys for Defendant Seyfarth Shaw LLP

Dated this 19th day of October, 2016.

An Employee of Lewis Roca Rothgerber Christie LLP

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AFFT
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Attorneys for Defendants,
Coöperatieve Rabobank U.A. and Utrecht-America Finance Co.

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK, U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,

Defendants.

Case No. A-16-735910-B

Dept. No. XV

AFFIDAVIT OF DAN R. WAITE IN SUPPORT OF COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO.'S MOTION TO DISMISS

I, Dan R. Waite, having first been duly sworn upon oath, hereby depose and state as follows:

1. I am over 18 years of age and fully competent to execute this affidavit. I submit this affidavit on behalf of Defendants Coöperatieve Rabobank U.A. ("Rabobank") and Utrecht-America Finance Co. ("Utrecht"). I am one of the attorneys for Rabobank and Utrecht in this action. I have personal knowledge of the facts stated herein.

2. True and correct copies of the following documents are attached hereto as exhibits:

- The Memorandum Findings of Fact and Opinion of the United States Tax Court, No. 23630-12, 110 T.C.M. (CCH) 370 (T.C. 2015), issued in the matter of *Michael A. Tricarichi v. Commissioner of Internal Revenue* (the "Tax Court Action") on October 14, 2015 (Exhibit 1);
- The Supplemental Memorandum Opinion of the United States Tax Court, issued in the Tax Court Action on July 18, 2016 (Exhibit 2);
- A portion of the transcript from a June 9, 2014 Tax Court Action hearing (Exhibit 3).

Further affiant sayeth not.

Dan R. Waite

Subscribed and sworn to before me
this 19th day of October, 2016

Notary Public
for State of Nevada
in Clark County

GABRIELA MERCADO
Notary Public, State of Nevada
Appointment No. 12-8423-1
My Appt. Expires Feb 24, 2020

Lewis Roca
ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

CERTIFICATE OF SERVICE

Pursuant to Rule 5(b), I hereby certify that on this date, I electronically filed the foregoing document with the Clerk of the Court and caused a true and accurate copy of the same to be served *via* the Court's E-Filing System DAP/Wiznet, upon the following counsel of record. The date and time of the electronic service is in place of the date and place of deposit in the mail.

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Los Angeles, CA 90071
Attorneys for PricewaterhouseCoopers LLP

Dated this 19th day of October, 2016.

An Employee of Lewis Roca Rothgerber Christie LLP

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Attorneys for Defendants,
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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK, U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,

Defendants.

Case No. A-16-735910-B

Dept. No. XV

AFFIDAVIT OF GEERT CHRISTIAAN KORTLANDT IN SUPPORT OF COÖPERATIEVE RABOBANK U.A. AND UTRECHT-AMERICA FINANCE CO.'S MOTION TO DISMISS

I, Geert Christiaan (Chris) Kortlandt, having first been duly sworn upon oath, hereby depose and state as follows:

1. I am over 18 years of age and fully competent to execute this affidavit. I submit this affidavit on behalf of Defendants Coöperatieve Rabobank U.A. ("Rabobank") and Utrecht-America Finance Co. ("Utrecht"). My knowledge of the facts stated herein is based on my personal knowledge and my review of Rabobank and Utrecht's business records.

2. I am Managing Director of Global Client Solutions at Rabobank's New York, New York branch office. I have been employed by Rabobank in various positions since 1993.

3. Rabobank is a cooperative organized under Dutch law with its principal place of business in the Netherlands. Rabobank maintains a branch in New York, New York. Utrecht is an indirect subsidiary of Rabobank that is incorporated in Delaware and has its principal place of business in New York, New York.

4. Neither Rabobank nor Utrecht has any branch, any office, any employees or any agents in Nevada. Rabobank and Utrecht are not licensed to conduct business in Nevada and are not required to and do not pay taxes in Nevada.

5. In connection with Mr. Tricarichi's transaction, Rabobank and Utrecht did not assume any ongoing obligations in Nevada or engage in continuing contacts with Mr. Tricarichi in Nevada. Utrecht played a limited role in making a loan to Nob Hill Holdings, Inc., a Delaware company with its principal place of business in San Francisco, California, which Nob Hill used to finance its purchase of Westside Cellular, Inc., an Ohio company with its principal place of business in Ohio. Plaintiff Michael Tricarichi, Westside and Nob Hill set up accounts at Rabobank's New York branch in order to facilitate the transfer of funds in connection with the loan and underlying transaction. Utrecht made its loan and the transaction closed on September 9, 2003. All money transfers between the Rabobank accounts occurred on September 9, 2003 in

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New York. Later that same day, Nob Hill repaid Utrecht the $29.9 million loan, along with a $150,000 transaction fee, in New York. Rabobank and Utrecht did not make any transfers to or from a Nevada account. All of the current Rabobank and Utrecht employees involved with the loan and deposit services at issue in this case worked in New York, and all associated documents are in New York.

6. True and correct copies of the following documents related to the loan and transaction are attached hereto as exhibits:

- Account Opening Documents for Mr. Tricarichi's Rabobank New York Account (Tax Court Ex. 29-J)(Exhibit 1);
- Account Opening Documents for Westside's Rabobank New York Account (Tax Court Ex. 31-J)(Exhibit 2);
- Promissory Note by Nob Hill in favor of Utrecht dated as of September 9, 2003 (Tax Court Ex. 36-J)(Exhibit 3);
- Security and Assignment Agreement by Nob Hill in favor of Utrecht dated as of September 9, 2003 (Tax Court Ex. 37-J)(Exhibit 4);
- Pledge Agreement by Nob Hill in favor of Utrecht dated as of September 9, 2003 (Tax Court Ex. 38-J)(Exhibit 5);
- Control Agreement between Nob Hill, Rabobank and Utrecht dated as of September 9, 2003 (Tax Court Ex. 39-J)(Exhibit 6);
- Security and Assignment Agreement dated as of September 9, 2003 by Westside in favor of Utrecht dated as of September 9, 2003 (Tax Court Ex. 40-J)(Exhibit 7);
- Control Agreement between Westside, Rabobank and Utrecht dated as of September 9, 2003 (Tax Court Ex. 41-J)(Exhibit 8);
- Guaranty by Westside in favor of Utrecht dated as of September 9, 2003 (Tax Court Ex. 42-J)(Exhibit 9);
- Letter Agreement by Fortrend International LLC and Nob Hill in favor of Rabobank and Utrecht dated as of September 9, 2003 (Tax Court Ex. 137-J)(Exhibit 10);
- Non-Confidentiality Certificate between Rabobank, Utrecht, Mr. Tricarichi, Nob Hill, Westside, Fortrend, Nob Hill's and Westside's counsel, Klink & Associates, Inc., and Mr. Tricarichi's counsel, Hahn Loeser & Parks (Exhibit 11).

Lewis Roca
ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Further affiant sayeth not.

Geert Christiaan Kortlandt

Subscribed and sworn to before me
this 17 day of October, 2016

Notary Public

MATT C. REILLY
Notary Public, State of New York
No. 01RE6251488
Qualified in New York County
Commission Expires 11/4/2017

Lewis Roca
ROTHGERBER CHRISTIE
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

EXHIBIT 1

DDA Signature Card

Rabobank Nederland
New York Branch
245 Park Avenue
New York, NY 10167-0062 U.S.A.

Account No.	Date Account Opened
Name of Company: MICHAEL TRICARICHI, ESCROW ACCOUNT	[redacted]
Address: 341 ARBOUR GARDENS AVE, LAS VEGAS, NV 89148	S.I.C. No.
Statement Address: SAME	Telephone No.: 702-597-0021
Industry	Transferred From
Identification (if a new company), Introduced By, or Other Account Holders	○ Other Bank ○ Other Financial Institution ○ Employee's Direct Deposit ○ Depositor's Request
Approved By	Welcome Letter ○ Yes ○ No

○ Resolution as to Signing Authority
○ Operation of Account Agreement
○ Partnership Agreement for Opening Account

Rabobank

Title of Account (please print or type): MICHAEL TRICARICHI, ESCROW ACCOUNT

Account No.

In Account With Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. ("Rabobank Nederland"), New York Branch

[illegible]

Authorized Signatures: [signature]

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Docket No. ~~23630-12~~
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RABO-F- 0005480

APP1177

General Resolution

I, the undersigned Secretary of MICHAEL TRICARICHI ESCROW ACCOUNT,
(Exact Name of Corporation)

a corporation duly organized and existing under the laws of NEVADA
(Name of State where incorporated)

and having its principal place of business in 341 ARBOUR GARDEN AVE, hereby CERTIFY
(Name of City or Town and State)

that the following is a true copy of a certain resolution duly adopted by the Board of Directors of the said corporation in accordance with its By-Laws at, and recorded in the minutes of, a meeting of the said Board duly held on

9/8/03 and not subsequently rescinded or modified.
(Date of Meeting)

Resolved

1. That COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., "RABOBANK NEDERLAND", NEW YORK BRANCH (hereinafter called the "Bank") be and hereby is designated a Depository of Funds of this Corporation, and

MICHAEL TRICARICHI

(If officer(s), designate office(s) only, for example, President, Treasurer, etc.; if person(s) other than officer(s), insert name(s).)

(If two or more are designated, indicate whether they are to sign singly, any two, jointly or otherwise.)

is (are) hereby authorized to sign, for and on behalf of this Corporation, any and all checks, drafts and other orders with respect to any funds at any time(s) to the credit of this Corporation with the Bank and/or against any account(s) of this Corporation maintained at any time(s) with the Bank, inclusive of any such checks, drafts and other orders in favor of any of the above-designated officer(s) and/or other person(s), and to enter into one or more agreements with the Bank concerning the operation of the account as the person executing such agreement shall deem appropriate, and that the Bank be and hereby is authorized (a) to pay the same to the debit of any account(s) of this Corporation then maintained with it (b) to receive for deposit to the credit of this Corporation and/or for collection for the account of this Corporation, any and all checks, drafts, notes and other instruments for the payment of money, whether or not endorsed by this Corporation, which may be submitted to it for such deposit and/or collection, it being understood that each such item shall be deemed to have been unqualifiedly endorsed by this Corporation, and (c) to redeem, as the act of this Corporation, any and all stop-payment instructions (inclusive of any relative agreement) with respect to any such checks, drafts and other orders as aforesaid and remittance(s) of amount when signed by any one or more of the officer(s) and/or other person(s) as hereinbefore designated.

2. That MICHAEL TRICARICHI
(If officer(s), designate office(s) only, for example, President, Treasurer, etc.; if person(s) other than officer(s), insert name(s).)

(If two or more are designated, indicate whether they are to sign singly, any two, jointly or otherwise.)

is (are) hereby authorized, for and on behalf of this Corporation, to transact any and all other business with or through the Bank which at any time(s) may be deemed by the said officer(s) and/or other person(s) transacting the same to be advisable, including, without limiting the generality of the foregoing, authority to (a) discount and/or negotiate notes, drafts and other commercial paper (b) apply for letters or forms of credit (c) borrow money, with or without security (d) assign, transfer, pledge or otherwise hypothecate any property of the Corporation (e) purchase, exchange, sell or otherwise deal in or with any stocks, bonds and other securities (f) execute and deliver automated customer service agreements and agreements relative to performance of various computer services (g) enter into contracts orally or in writing for the purchase and/or sale of foreign exchange (spot or forward) and enter into contracts orally or in writing for any interest rate, commodity swap, equity swap, interest rate option, cap, collar, floor, currency swap or similar transaction (including any option with respect to any of these transactions) and give oral instructions regarding payments in settlement of any of the foregoing; and (h) in reference to any of the business or transactions [illegible] in this subdivision "2" referred to, make, enter into, execute and deliver to the Bank such negotiable or non-negotiable instruments, indemnity and other agreements, confirmations, obligations, assignments, endorsements, hypothecations, security agreements, financing statements, pledges, receipts and/or other documents as may be deemed by the officer(s) and/or other person(s) so acting to be necessary or desirable.

(continued on reverse side)

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RABO-F- 0005481

APP1178

3. That any and all withdrawals of money and/or other transactions heretofore had in behalf of this Corporation with the Bank are hereby ratified, confirmed and approved, and that the Bank (and any interested third party) may rely upon the authority conferred by this entire resolution unless, and except to the extent that, this resolution shall be revoked or modified by a subsequent resolution of this board, and until a certified copy of such subsequent resolution has been received by the Bank.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Corporation this

EIGHTH day of SEPTEMBER yr 2003

Secretary

(Corporate Seal)

Note: If the Secretary signing the above certificate is one of the officers authorized to sign, the President of the Corporation should complete the following additional certificate.

I, the undersigned President of the Corporation named above, do hereby certify that the person who executed the foregoing certificate is the duly elected Secretary of the Corporation and that such certificate is accurate in all respects.

Dated 9/8/2003 2003

President

Operation of Account Agreement

The UNDERSIGNED ("Customer") for good and valuable consideration agrees with Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. "Rabobank Nederland" ("Bank") that the operation of each account ("Account") the Customer now or hereafter has with the Bank or any of its branches or agencies and the carrying on of other banking business by the Customer with the Bank or any of its branches or agencies shall be subject to the following terms and conditions:

1. *Waiver of Protest*

Subject to instructions given to the Bank in writing by the Customer, the Customer waives in favor of the Bank presentment, notice of dishonor and protest of all bills of exchange, promissory notes, checks, orders for payment of money, warrants, coupons, notes (all or any of which are hereinafter collectively or separately referred to as "instruments" or "instrument" as the case may be) drawn, made, accepted or endorsed by the Customer and now or hereafter delivered to the Bank at any of its branches or agencies for any purpose. The Customer shall remain liable to the Bank as if presentment, notice of dishonor and protest had been duly made or given. The Bank may note or protest any instrument because of any endorsement other than that of the Customer or for any other reason if the Bank, in its discretion, considers it to be for the best interest of the Customer or the Bank. The Bank will not, in any circumstances, be responsible or liable for failure or omission to note or protest any instrument.

2. *Use of Agents*

The Bank may use the services of any bank or agent as it may deem advisable in connection with any banking business of the Customer. Each bank or agent is deemed to be the agent of the Customer, and the Bank will not, in any circumstances, be responsible or liable to the Customer by reason of any act or omission of such bank or agent, however caused, in the performance of such services or by reason of the loss, theft, destruction or delayed delivery of any instrument while in transit to or from, or in the possession of, such bank or agent.

3. *Authority to Charge Accounts*

(a) *For Indemnities Drawn on Account*

The Bank may charge the Account with the amount of any instrument payable by the Customer at any branch or agency of the Bank.

(b) *Unpaid Instruments*

The Bank may charge against the Account the amount of any instrument cashed or negotiated by the Bank for the Customer or credited to the Customer which payment is not received by the Bank and to charge the Account with the amount of any other indebtedness or liability of the Customer to the Bank.

Any expenses incurred by the Bank in connection with paying a dishonored or unpaid instrument may be charged to the Account. The Customer is liable to the Bank for the amount charged and will pay on demand any overdraft, together with interest thereon at the lowest rate charged by the Bank from time to time for overdrafts. Notwithstanding such charging, all rights and remedies of the Bank against all parties are preserved. No charging of unpaid instruments shall be deemed to be payment of such instruments.

(c) *Lost or Stolen Instruments*

Should any instrument received by the Bank for the account of the Customer by way of deposit, discount, collection or otherwise be lost or stolen or otherwise disappear from any cause whatsoever other than negligence on the part of the Bank, the Bank may charge the Account with the amount of such instrument, and the Customer agrees to pay the same.

(d) *For Operation of Accounts*

The Bank may make a reasonable service charge against the Account for the operation of the Account and may debit the Account from time to time with the amount of such charge.

(e) *Multiple Accounts*

If the Customer shall have more than one Account, and if there should be insufficient funds in an Account to pay an instrument drawn against such Account or to pay any other amount which the Bank may charge against such Account, the Bank is authorized to pay such instrument or charge out of any other Account of the Customer at any branch or agency of the Bank.

4. *Use of Checks*

The Customer will draw crossed checks only on the Account for which the checks are prepared. The Bank will not be liable in any circumstances for any loss or damage arising from the wrongful acceptance of a check or wrongful refusal by the Bank to honor a check drawn by the Customer on an Account other than the Account for which the check is prepared.

5. Verification of Account

Upon the receipt from the Bank of a statement of the Account together with checks and other vouchers for amounts charged to the Account appearing therein, the Customer will examine the said checks and check the credit and debit entries in the said statement, and, within thirty days of the delivery thereof to the Customer or, if the Customer has instructed the Bank to mail the said statement and checks, within thirty days of the mailing thereof to the Customer, will notify the Bank in writing of any errors, irregularities or omissions therein or therefrom, and at the expiration of the said thirty days (except as to any errors, irregularities or omissions of which the Bank has been so notified and except as to payments made on forged or unauthorized endorsements) it shall be conclusively settled as between the Bank and the Customer that such statement and the amount of the balance shown therein is correct and the said checks and vouchers are genuine and properly chargeable to and charged against the Account and that the Customer was not entitled to be credited with any sum not credited in the said statement.

6. Mailing

This paragraph will not apply if contrary instructions received by the Bank.

The Customer instructs the Bank to mail to the Customer at the Customer's address recorded on the books of the Bank a statement of the Account together with checks for amounts charged to the Account. These instructions will continue in force until contrary instructions in writing are received by the Bank from the Customer. The Customer will advise the Bank promptly if the statement has not been received within ten days of the date upon which it is normally received.

7. Endorsement of Printed Endorsements

To be deleted and initialled by the Customer if not applicable.

The Customer, having adopted a rubber stamped and/or printed endorsement, authorizes the Bank to accept an impression of the said stamp or other similar stamp or the printed endorsement as a sufficient endorsement by the Customer on all instruments deposited to the credit of the account of the Customer at the Bank or which may from time to time be pledged as collateral security by the Customer or discounted by the Bank for the account of the Customer. The Customer shall be bound by all such stamped or printed endorsements as amply and effectually as if such endorsements were written by or with the authority of the Customer, and the Customer shall fully indemnify and hold harmless the Bank and its employees and agents at all times from all claims and demands in respect of all instruments bearing such stamped or printed endorsements, whether by reason of such stamped or printed endorsement having been made without authority or otherwise.

8. No FDIC Insurance

Deposits held by the Bank for the Customer are not insured by the Federal Deposit Insurance Corporation (FDIC).

9. This Agreement shall be Governed by the Laws of the State of New York without giving effect to any conflict of law principles.

Dated	Name of Customer
SEPTEMBER 8TH, 2003	MICHAEL TRICARICHI, ESCROW ACCT
	Authorized Signature: [signature]
	Title: PRES - ESCROW AGENT

EXHIBIT 29-J
Docket No. 23630-12
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RABO-F- 0005484

APP1181

09/08/03 MON 16:48 FAX 4154337168 BITTNER/ADEN 003

09/05/03 FRI 15:48 FAX 212 808 2584 RABO CORP FIN NY 005

Names of Directors and Officers

The
Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.,
"Rabobank Nederland",
New York Branch
245 Park Avenue
New York, NY 10167-0062 U.S.A.

I hereby certify the following to be the Directors and Officers of

MICHAEL TRICARICHI ESCROW ACCOUNT (the "Corporation")
(Name of Corporation)

namely

Directors

MICHAEL TRICARICHI

Officers

Title	Name
MICHAEL TRICARICHI PRES SEC. ESCROW AGENT	

THE CORPORATION HEREBY undertakes to notify you of any changes in its directors or officers, and of any changes in its by-laws or its Articles of Incorporation or any other documents regarding the authority of directors, officers or agents to sign on its behalf. You may assume that the above named are the directors and officers of the Corporation and in charge of its affairs and that its by-laws and resolutions of which you hold copies are in full force and effect, until you are notified in writing to the contrary.

Dated at SAN FRANCISCO this 8TH day of SEPTEMBER, 2003

Secretary [signature]

(Affix Corporate Seal)

Rabobank

09/08/03 MON 16:48 [TX/RX NO 8408]

EXHIBIT 29-J
Docket No. 23630-12
Page 6 of 7

RABO-F- 0005485

APP1182

Form **W-9**

Request for Taxpayer Identification Number and Certification

Give form to the requester. Do not send to the IRS.

Name: MICHAEL TRICARICHI ESCROW ACCT

Check appropriate box: ☐ Individual/Sole proprietor ☐ Corporation ☐ Partnership ☑ Other ▸ ESCROW ACCT

Address: 341 ARBOUR GARDEN AVE

City, state, and ZIP code: LAS VEGAS NV 89148

Part I Taxpayer Identification Number (TIN)

Social security number

or

[redacted]

Part II Certification

Under penalties of perjury, I certify that:

Sign Here | Signature of U.S. person ▸ [signature] Date ▸ 9/8/2003

Purpose of Form

Penalties

RABO-F- 0005486

EXHIBIT 29-J
Docket No. 23630-12
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EXHIBIT 2

ODA Signature Card

Account No.

Date Account Opened

Name of Company
WEST SIDE CELLULAR, INC.
Address 341 ARGUE GARDENS
LAS VEGAS, NV 89148

Permanent Address

Business

Identification if a new customer introduced by an Other Account Number

Approved By

Welcome Letter
○ Yes ○ No

○ Resolution as to Signing Authority
○ Operation of Account Agreement
○ Partnership Agreement for Opening Account

Rabobank
New York Branch
245 Park Avenue
New York, NY 10167-0002 U.S.A.

Tax Identification No.
[redacted]

S.S.C. No.

Telephone No.
415-986-2940

Transferred From
○ Other Bank
○ Other Financial Institution
○ Employer's Direct Deposit
○ Depositor's Request

Rabobank
International

EXHIBIT 31-J
Docket No. 23630-12
Page 1 of 8

WSC0207

APP1185

Title of Account (please print or type)

WEST SIDE CELLULAR, INC.

Account No.

In Account With Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A.
(Rabobank Nederland), New York Branch

You are authorized to mail or to deliver by messenger to mailing address each month, statement of our/my checking account and cancelled vouchers. Your customary maintenance charges as effective from time to time may be deducted from this account.

Authorized Signature(s)

PRESIDENT + DIRECTOR

General Resolution

I the undersigned Secretary of WEST SIDE CELLULAR, INC.
(Exact Name of Corporation)

a corporation duly organized and existing under the laws of OHIO
(Name of State where Incorporated)

and having its principal place of business at LAS VEGAS, NV, hereby certify
(Name of City or Town and State)

that the following is a true copy of a certain resolution duly adopted by the Board of Directors of the said Corporation at a meeting duly held as by laws at, and recorded in the minutes of a meeting of the said Board duly held on

AUGUST 19TH, 2009 and not subsequently rescinded or modified
(Date of Meeting)

Resolved

1. That COOPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A. "RABOBANK NEDERLAND", NEW YORK BRANCH (hereinafter called the "Bank") be and hereby is designated a Depository of funds of this Corporation and

MICHAEL TRICARICHI, PRESIDENT AND DIRECTOR
(If different designate officer(s) only, for example, President, Treasurer, etc., if person(s) other than officers, so designate)

(If two or more are designated, indicate whether they are to sign singly, any two, jointly or otherwise.)

is (are) hereby authorized for and on behalf of this Corporation, any and all checks, drafts and other orders with respect to any funds of any kind to the credit of this Corporation with the Bank and/or against any account of this Corporation maintained at any time with the Bank, inclusive of any such checks, drafts and other orders in favor of any of the above designated officer(s) and/or other person(s), and to enter into one or more agreements with the Bank concerning the operation of the account as the person executing such agreement shall deem appropriate and that the Bank be and hereby is authorized to pay the same to the order of any account of this Corporation then maintained with it (a) to receive for deposit to the credit of this Corporation and/or for collection for the account of this Corporation, any and all checks, drafts, notes and other instruments for the payment of money, whether or not endorsed by this Corporation, which may be submitted to it for such deposit and/or collection, it being understood that each such item shall be deemed to have been endorsed by this Corporation, and (b) to receive, on the act of this Corporation, any and all stop-payment instructions (inclusive of any voidable agreement) with respect to any such checks, drafts and other orders as aforesaid and notices of non-payment when signed by any one or more of the officer(s) and/or other person(s) as hereinbefore designated.

2. That MICHAEL TRICARICHI, PRESIDENT AND DIRECTOR
(If different designate officer(s) only, for example, President, Treasurer, etc., if person(s) other than officers, so designate)

(If two or more are designated, indicate whether they are to sign singly, any two, jointly or otherwise.)

is (are) hereby authorized for and on behalf of this Corporation, to transact any and all other business with or through the Bank which at any time(s) may be deemed by the said officer(s) and/or other person(s) hereinafter to be advisable, including, without limiting the generality of the foregoing, authority to: (a) discount and/or negotiate notes, drafts and other commercial paper; (b) apply for letters or forms of credit; (c) borrow money, with or without security; (d) assign, transfer, pledge or otherwise hypothecate any property of the Corporation; (e) purchase, exchange, sell or otherwise deal in or with any stocks, bonds and other securities; (f) execute and deliver automated customer services agreements and agreements relative to performance of various computer services; (g) enter into contracts orally or in writing for the purchase and/or sale of foreign exchange (spot or forward) and enter into contracts orally or in writing for any rate swap, commodity swap, equity swap, interest rate option, cap, collar, floor, currency swap or similar transaction (including any option with respect to any of these transactions) and give oral instructions regarding payments or settlement of any of the foregoing and (h) with reference to any of the business or transactions hereinbefore in this subdivision 2 referred to, make, enter into, execute and deliver to the Bank such negotiable or non-negotiable instruments, indemnity and other agreements, confirmations, assignments, endorsements, hypothecations, security agreements, financing statements, pledges, receipts and/or other documents as may be deemed by the officer(s) and/or other person(s) so acting to be necessary or desirable.

3. That any and all withdrawals of money and/or other transactions heretofore had in behalf of this Corporation with the Bank are hereby ratified, confirmed and approved, and that the Bank (and any interested third party) may rely upon the authority conferred by this entire resolution unless, and except to the extent that, this resolution shall be revoked or modified by a subsequent resolution of this board, and until a certified copy of such subsequent resolution has been received by the Bank.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Corporation this

9TH day of AUGUST, 2003

Secretary

(Corporate Seal)

Note: If the Secretary signing the above certificate is one of the officers authorized to sign, the President of the Corporation should complete the following additional certificate:

I, the undersigned President of the Corporation named above, do hereby certify that the person who executed the foregoing certificate is the duly elected Secretary of the Corporation and that such certificate is accurate in all respects.

Dated

AUGUST 19TH, 2003

President

Names of Directors and Officers

For
Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.,
"Rabobank Nederland",
New York Branch
245 Park Avenue
New York, NY 10167-0062 U.S.A.

I hereby certify the following to be the Directors and Officers of

WEST SIDE CELLULAR, INC. (the Corporation)
(Name of Corporation)

namely:

Directors:

MICHAEL TEICAREICHI

Officers:

Title	Name
PRES., DIRECTOR	MICHAEL TEICAREICHI

THE CORPORATION HEREBY undertakes to notify you of any changes in its directors or officers, and of any changes in its by-laws or its Articles of Incorporation or any other document respecting the authority of directors, officers or agents to sign on its behalf. You may assume that the above named are the directors and officers of the Corporation and in charge of its affairs and that its by-laws and resolutions of which you hold copies are in full force and effect, until you are notified in writing to the contrary.

Dated at SAN FRANCISCO this 19TH day of AUGUST yr 2003

Secretary

(Affix Corporate Seal)

Access Key #:

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Docket No. 23630-12
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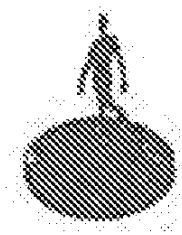
Rabobank

WSC0211

Operation of Account Agreement



The UNDERSIGNED (Customer) for good and valuable consideration agrees with Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., "Rabobank Nederland" (Bank) that the operation of each account (Account) the Customer now or hereafter has with the Bank or any of its branches or agencies and the carrying on of other banking business by the Customer with the Bank or any of its branches or agencies shall be subject to the following terms and conditions:

1. *Waiver of Protest*

Subject to instructions given to the Bank in writing by the Customer, the Customer waives in favor of the Bank presentment, notice of dishonor and protest of all bills of exchange, promissory notes, checks, orders for payment of money, security coupons, notes (or any of which are hereinafter collectively or separately referred to as "instruments" or "instrument" as the case may be) drawn, made, accepted or endorsed by the Customer and now or hereafter delivered to the Bank or any of its branches or agencies for any purpose. The Customer shall remain liable to the Bank as if presentment, notice of dishonor and protest had been duly made or given. The Bank may note or protest any instrument because of any endorsement other than that of the Customer or for any other reason if the Bank, in its discretion, considers it to the best interest of the Customer or the Bank. The Bank will not in any circumstances be responsible or liable for failure or omission to note or protest any instrument.

2. *Use of Agents*

The Bank may use the services of any bank or agent as it may deem advisable in connection with any banking business of the Customer. Such bank or agent is deemed to be the agent of the Customer, and the Bank will not, in any circumstances, be responsible or liable to the Customer by reason of any act or omission of such bank or agent, however caused, in the performance of such services or by reason of the loss, theft, destruction or delayed delivery of any instrument while in transit or in the possession of such bank or agent.

3. *Authority to Charge Accounts*

(a) *For Instruments Drawn on Accounts*

The Bank may charge the Account with the amount of any instrument payable by the Customer at any branch or agency of the Bank.

(b) *Unpaid Instruments*

The Bank may charge against the Account the amount of any instrument cashed or negotiated by the Bank for the Customer or credited to the account for which payment is not received by the Bank and to charge the Account with the amount of any other indebtedness or liability of the Customer to the Bank.

Any expenses incurred by the Bank in connection with paying a dishonored or unpaid instrument may be charged to the Account. The Customer is liable to the Bank for the amount charged and will pay on demand any overdraft, together with interest thereon at the interest rate charged by the Bank from time to time for overdrafts. Notwithstanding such charging, all rights and remedies of the Bank against all parties are preserved. No charging of unpaid instruments shall be deemed to be payment of such instruments.

(c) *Lost or Stolen Instruments*

Should any instrument received by the Bank for the account of the Customer by way of deposit, discount, collection or otherwise be lost or stolen or otherwise disappear from any cause whatsoever other than negligence on the part of the Bank, the Bank may charge the Account with the amount of such instrument, and the Customer agrees to pay the same.

(d) *For Operation of Account*

The Bank may make a reasonable service charge against the Account for the operation of the Account and may debit the Account from time to time with the amount of such charge.

(e) *Multiple Accounts*

If the Customer shall have more than one Account, and if there should be insufficient funds in an Account to pay an instrument drawn against such Account or to pay any other amount which the Bank may charge against such Account, the Bank is authorized to pay such instrument or charge out of any other Account of the Customer at any branch or agency of the Bank.

4. *Use of Checks*

The Customer will draw encoded checks only on the Account for which the checks are encoded. The Bank will not be liable in any circumstances for any loss or damage arising from the wrongful acceptance of a check or wrongful refusal by the Bank to honor a check drawn by the Customer on an Account other than the Account for which the check is encoded.

5. Verification of Account

Upon the receipt from the Bank of a statement of the Account together with checks and other vouchers for amounts charged to the Account appearing therein, the Customer will examine the said checks and check the credit and debit entries in the said statement, and within thirty days of the delivery thereof to the Customer or, if the Customer has instructed the Bank to mail the said statement and checks, within thirty days of the mailing thereof to the Customer, will notify the Bank in writing of any errors, irregularities or omissions therein or therefrom, and at the expiration of the said thirty days (except as to any errors, irregularities or omissions of which the Bank has been so notified and except as to payments made on forged or unauthorized endorsements) it shall be conclusively settled as between the Bank and the Customer that such statement and the accuracy of the balance shown thereon is correct and the said checks and vouchers are genuine and properly chargeable to and charged against the Account and that the Customer has not claimed to be credited with any item not credited in the said statement.

6. Mailing

The Customer instructs the Bank to mail to the Customer at the Customer's address recorded on the books of the Bank a statement of the Account together with checks for amounts charged to the Account. These instructions will continue in force until contrary instructions in writing are received by the Bank from the Customer. The Customer will advise the Bank promptly if the statement has not been received within ten days of the date upon which it is normally received.

In the absence of such notice by the Customer, the Bank's records will be conclusive.

7. Statement of Printed Endorsements

The Customer, having adopted a rubber stamped and/or printed endorsement, authorizes the Bank to accept an impression of the said stamp or other similar stamp of the printed endorsement as a sufficient endorsement by the Customer on all instruments deposited to the credit of the account of the Customer at the Bank or which may from time to time be pledged as collateral security by the Customer or discounted by the Bank for the account of the Customer. The Customer shall be bound by all such stamped or printed endorsements as amply and effectually as if such endorsements were written by or with the authority of the Customer, and the Customer shall fully indemnify and hold harmless the Bank and its employees and agents at all times from all claims and demands in respect of all instruments bearing such stamped or printed endorsements, whether by reason of such stamped or printed endorsement having been made without authority or otherwise.

In the absence of such notice by the Customer, the Bank's records will be conclusive.

8. No FDIC Insurance

Deposits held by the Bank for the Customer are not insured by the Federal Deposit Insurance Corporation (FDIC).

9. This Agreement shall be Governed by the Laws of the State of New York without giving effect to any conflict of law principles.

Dated

AUGUST 19TH 2003

Name of Customer

WEST SIDE CELLULAR, INC.

By Signature

*

By Title

PRESIDENT + DIRECTOR

W-9

Request for Taxpayer
Identification Number and Certification

Give form to the requester. Do not send to the IRS

NEW SIDE CELLULAR, INC.

241 ARBOR GARDENS

LAS VEGAS, NV 89148

Taxpayer Identification Number (TIN)

Social security number

Part II Certification

Sign Here

Date ▶ 8/19/03

Purpose of Form

What is backup withholding?

Penalties

EXHIBIT 3

PROMISSORY NOTE

$29,000,000 Dated: As of September 9, 2003

FOR VALUE RECEIVED, the undersigned, NOBLE HILL HOLDINGS, INC., a Delaware corporation (the "Borrower"), HEREBY PROMISES TO PAY to the order of UTRECHT-AMERICA FINANCE CO. ("UAFC") the principal amount of the Advance (as defined below) on October 8, 2003 (the "Maturity Date"), together with interest (computed on the basis of a year of 365 days for the actual number of days elapsed) on the principal amount of the advance made by UAFC to the Borrower on the date hereof (the "Advance"). Interest on the Advance shall be payable on the day when the principal amount of such Advance is due and, with respect to interest on any overdue principal amount, payable on demand, at a fluctuating interest rate per annum equal at all times to (but with respect to any interest on any overdue principal amount hereunder 2.00% per annum above) the rate of interest, announced by Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A., "Rabobank Nederland", New York Branch ("Rabobank") in New York, New York, from time to time, as its base rate, each change in such fluctuating interest rate to take effect simultaneously with the corresponding change in such base rate, but in no event in excess of the maximum interest rate permitted by applicable law. The Borrower may prepay the principal amount of the Advance in whole or in part at any time without penalty.

UAFC will not make the Advance until the following conditions have been satisfied:

(a) The Borrower has executed and delivered to UAFC the Security and Assignment Agreement, dated as of the date hereof, made by the Borrower in favor of UAFC (the "Security Agreement");

(b) The Borrower has executed and delivered to UAFC the Control Agreement in form and substance satisfactory to UAFC, among the Borrower, UAFC and Rabobank (the "Control Agreement");

(c) The Borrower has executed and delivered to UAFC the Pledge Agreement, dated as of the date hereof, made by the Borrower in favor of UAFC (the "Pledge Agreement");

(d) The Borrower and West Side Cellular, Inc., an Ohio corporation ("West Side"), together with the Borrower, the "Credit Parties" and each a "Credit Party") shall have on deposit in one or more accounts with Rabobank (or another financial institution which has acknowledged the pledge of such account pursuant to agreements substantially in the form of the relevant Collateral Agreements (as defined below), provided that both the financial institution and the form and substance of the acknowledgment are acceptable to UAFC in its sole discretion) (the "Collateral Accounts") from

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Docket No. 23630-12
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deposits in a total amount not to be less than the sum of (i) the principal amount of the Advance *plus* (ii) $1,000,000 (the "Required Amount");

(e) The Credit Parties have a combined tangible net worth of not less than the Required Amount;

(f) UAFC shall have received an upfront fee of $150,000;

(g) UAFC shall have received a non-confidentiality certificate in form and substance and executed by parties satisfactory to UAFC;

(h) No judgments or decrees shall have been entered against either Credit Party involving in the aggregate a liability (not paid or fully covered by insurance) of $10,000 or more;

(i) UAFC shall have received the legal opinions of (i) counsel to the Borrower and (ii) counsel to West Side, each in form and substance satisfactory to UAFC;

(j) Each Credit Party and each of their subsidiaries is Solvent and will be Solvent after giving effect to the transactions contemplated hereby, in the other Transaction Documents (as hereinafter defined) and in the other documents executed in connection herewith and therewith. For the purposes hereof, "Solvent" shall mean, with respect to any individual, partnership, corporation, limited liability company or other entity (each, a "Person") on a particular date, that on such date (a) the fair value of the property of such Person is greater than the total amount of liabilities, including, without limitation, contingent liabilities, of such Person, (b) the present fair salable value of the assets of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured, (c) such Person does not intend to, and does not reasonably believe that it will, incur debts or liabilities beyond such Person's ability to pay such debts and liabilities as they mature and (d) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person's property would constitute an unreasonably small capital. The amount of contingent liabilities at any time shall be computed as the amount that, in the light of all the facts and circumstances existing at such time, represents the amount that can reasonably be expected to become an actual or matured liability;

(k) No Events of Default shall exist prior to or after giving effect to the making of the Advance; and

(l) All corporate and other proceedings, and all documents, instruments and other legal matters in connection with the transactions contemplated by the Transaction Documents shall be satisfactory in form and substance to UAFC.

If due to either (i) the introduction of or any change (including, without limitation, any change by way of imposition or increase of reserve requirements) in or in the interpretation of any law or regulations or (ii) the compliance by UAFC with any guideline or request from any central bank or other governmental authority (whether or not having the force of law) issued or made after the date hereof, there shall be any increase in the cost to UAFC of funding or maintaining this Promissory Note, then the

Borrower shall from time to time, upon demand by UAFC, pay to UAFC additional amounts sufficient to indemnify UAFC against such increased cost. A certificate as to the amount of such increased cost, submitted to the Borrower by UAFC, shall be conclusive absent manifest error.

The Borrower represents and warrants as follows:

(a) The Borrower is a corporation duly formed, validly existing and in good standing under the laws of Delaware.

(b) West Side is a corporation, duly organized, validly existing and in good standing under the laws of Ohio.

(c) The execution, delivery and performance by each Credit Party of the Transaction Documents to which it is a party are within such Credit Party's powers, have been duly authorized by all necessary action, and do not contravene (i) such Credit Party's constituent documents, (ii) any law or (iii) any contractual restriction binding on or affecting such Credit Party.

(d) No authorization or approval (including exchange control approval) or other action by, and no notice to or filing with, any governmental authority or regulatory body is required for the due execution, delivery and performance each Credit Party of the Transaction Documents to which it is a party.

(e) Each Transaction Document is the legal, valid and binding obligation of each Credit Party which is a party thereto enforceable against such Credit Party in accordance with its terms, subject to the effect of any applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights generally and subject, as to enforceability, to the effect of general principles of equity (regardless of whether such enforcement is considered in a proceeding in equity or at law), and the obligations under such agreements rank at least pari passu in all respects with all other obligations of such Credit Party.

(f) Neither Credit Party has any outstanding indebtedness or other obligations as of the date hereof, other than those obligations hereunder.

(g) Each Credit Party and each of their subsidiaries is Solvent and will be Solvent after giving effect to the transactions contemplated hereby, in the other Transaction Documents and in the other documents executed in connection herewith and therewith.

(h) The proceeds of the Advance will be used to acquire the Pledged Interests (as defined in the Pledge Agreement) (the "Acquisition"). No part of the proceeds of the Advance will be used to purchase or carry any margin stock.

(i) The Transaction (and any component thereof) (i) is not a "tax shelter" as defined in Internal Revenue Code sections 6111(c) or (d), (ii) is not subject to the registration provisions of Internal

Revenue Code section 6011(a)(1), (iii) is not a "listed transaction" as defined in Treasury Regulation section 301.6111-2T(b)(2), (iv) is not a "reportable transaction" (within the meaning of Treasury Regulation Section 1.6011-4) and (v) is not subject to the list maintenance requirements of Internal Revenue Code section 6112. For the purposes of this clause (i), "Transaction" shall mean (i) the making and repayment of the Advance and the other activities contemplated hereby, (ii) the Acquisition and (iii) the transactions entered into in connection herewith and therewith and contemplated hereby and thereby.

(j) The Borrower has received a "should" level opinion from nationally recognized counsel as the matters represented in clause (i) above.

In the event that the Borrower or UAFC determines at a later date that the Transaction is a "reportable transaction", each of the Borrower and West Side (i) will properly treat the Transaction as a "reportable transaction", (ii) acknowledges that UAFC may maintain the lists and other records required by Treasury Regulation Section 301.6112-1 and (iii) will provide to UAFC, in a timely manner, all information necessary for UAFC to maintain such lists and records.

So long as any amount under this Promissory Note shall remain unpaid, the Borrower will and will cause West Side and each of their subsidiaries to, unless UAFC shall otherwise consent in writing:

(a) Comply in all material respects with all applicable laws, rules, regulations and orders, such compliance to include, without limitation, paying when due all taxes, assessments and governmental charges imposed upon it or upon its property except to the extent contested in good faith.

(b) Comply with all of the terms and provisions of and fully enforce its rights under all agreements, instruments and other documents to which it is a party.

(c) Not make any advance, loan, extension of credit or capital contribution to, or purchase any stock, bonds, notes, debentures or other securities of or any assets constituting a business unit of, or make any other investment in, any person or entity, except for the purchase the Pledged Interests.

(d) Not (i) make any distribution, direct or indirect, on account of any interest in the Borrower or such subsidiary or (ii) make any redemption, conversion, exchange, retirement or similar purchase, payment, or other acquisition for value, direct or indirect, of any interest in the Borrower or such subsidiary; provided, however, that any wholly owned direct or indirect subsidiary of the Borrower may declare and pay dividends to the Borrower or any wholly owned direct or indirect subsidiary of the Borrower.

(e) Not create, incur, assume or suffer to exist any indebtedness other than indebtedness hereunder.

(f) Not enter into any merger, consolidation or amalgamation, or liquidate, wind up or dissolve itself (or suffer any liquidation or dissolution) or convey, sell, lease, assign, transfer or otherwise dispose

of, all or substantially all of its property, business or assets, or make any material change in its present method of conducting business.

(g) Immediately after the acquisition of West Side, (i) cause West Side to execute and deliver to UAFC (A) a Security and Assignment Agreement, in form and substance satisfactory to UAFC, made by West Side in favor of UAFC (the "West Side Security Agreement") (B) a Control Agreement in form and substance satisfactory to UAFC, among West Side, UAFC and Rabobank (the "West Side Control Agreement") and (C) a Guaranty, in form and substance satisfactory to UAFC, made by West Side in favor of UAFC (the "Guaranty"; together with the Security Agreement, the West Side Security Agreement, the Control Agreement, the West Side Control Agreement and the Pledge Agreement, the "Collateral Agreements"; the Collateral Agreements, collectively with this Promissory Note, the "Transaction Documents") and (ii) pay to West Side the Guaranty Fee (as defined in the Guaranty).

The Borrower agrees, on behalf of itself and each other Credit Party, that UAFC, each Credit Party and each of their affiliates and their respective directors, officers, employees, agents, counsel, auditors, consultants and advisors (collectively, "Representatives") are permitted to disclose to any and all persons, without limitation of any kind, the "structure" and "tax aspects" (as such terms are used in Internal Revenue Code Sections 6011, 6111 and 6112 and the regulations promulgated thereunder) of the transactions contemplated by the Transaction Documents (the "Transaction"), and all materials of any kind (including opinions or other tax analyses) that are provided by any Credit Party or UAFC to such Representative related to such structure and tax aspects. In this regard the Borrower acknowledges and agrees, on behalf of itself and each other Credit Party, that any disclosure of the structure or tax aspects of the Transaction is not limited in any way by an express or implied understanding or agreement, oral or written (whether or not such understanding or agreement is legally binding). Furthermore, the Borrower acknowledges and agrees, on behalf of itself and each other Credit Party, that the Borrower and the Credit Parties do not know or have reason to know that the use or disclosure of information relating to the structure or tax aspects of the Transaction is limited in any other manner (such as where the Transaction is claimed to be proprietary or exclusive) for the benefit of any other person. The Borrower also acknowledges, on behalf of itself and each other Credit Party, that none of the Credit Parties and their affiliates have provided UAFC or any of its affiliates with any federal income tax statement (as defined in Reg. § 301.6112-1(c)(2)(iii)) in connection with the Investment, and, similarly, none of UAFC and its affiliates has provided any Credit Party or any of their affiliates with any such federal income tax statement.

If any of the following events (each an "Event of Default") shall occur and be continuing:

(a) the Borrower shall fail to pay any principal of, or any interest on, any Advance when due; or

(b) any representation or warranty made by either Credit Party in connection with the Advance or otherwise in connection with any Transaction Document shall prove to have been incorrect in any material respect when made; or

IN WITNESS WHEREOF, THE UNDERSIGNED HAS EXECUTED THIS

(c) either Credit Party shall fail to perform or observe any other term, covenant or agreement contained in any Transaction Document to which it is a Party (or in any other agreement that may be delivered by such Credit Party relating thereto) on its part to be performed or observed; or

(d) the aggregate amount on deposit in the Collateral Accounts shall be, at any time, less than the Required Amount; or

(e) the Credit Parties shall have a combined tangible net worth less than the Required Amount; or

(f) either Credit Party or any of their subsidiaries shall incur or suffer to exist any indebtedness for borrowed money (excluding indebtedness evidenced by this Promissory Note); or

(g) either Credit Party shall generally not pay its debts as such debts become due, or shall admit in writing its inability to pay its debts generally, or shall make a general assignment for the benefit of creditors; or any proceeding shall be instituted by or against either Credit Party seeking to adjudicate it a bankrupt or insolvent, or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, or composition of it or its debts under any law relating to bankruptcy, insolvency or reorganization or relief of debtors, or seeking the entry of an order for relief or the appointment of a receiver, trustee, or other similar official for it or any substantial part of its property and, in the case of any such proceeding instituted against it (but not instituted by it) either such proceeding shall remain undismissed or unstayed for a period of 15 days or any of the actions sought in such proceeding (including, without limitation, the entry of an order for relief against it or the appointment of a receiver, trustee, custodian or other similar official for it or for any substantial part of its property) shall occur; or either Credit Party shall take any action to authorize any of the actions set forth above in this subsection (f); or

(h) the occurrence of any of the events set forth in subparagraph (g) with respect to any subsidiary of either Credit Party; or

(i) (A) any Transaction Documents shall cease, for any reason, to be in full force and effect, or either Credit Party shall so assert or (B) any Lien created by any Collateral Agreement shall cease to be enforceable to the same effect and priority purported to be created thereby or either Credit Party shall so assert; or

(j) Any party to any Transaction Agreement shall default in the observance or performance of any agreement or covenant contained therein, without giving effect to any amendment thereto or any waiver or consent to such default by the parties thereto;

then, and in any such event, UAFC may declare this Promissory Note, all interest thereon and all other amounts payable hereunder to be forthwith due and payable, whereupon this Promissory Note, all such interest and all such amounts shall become and be forthwith due and payable, without presentment, demand, protest or further notice of any kind, all of which the Borrower hereby expressly waives.

provided, however, that in the event of an actual or deemed entry of an order for relief with respect to a Credit Party or any subsidiary thereof or any guarantor of the Borrower's obligations to UAFC hereunder under the Federal Bankruptcy Code, such obligations and all such interest and other amounts shall automatically become due and payable, without presentment, demand, protest or any notice of any kind, all of which are hereby expressly waived by the Borrower.

Upon the occurrence and during the continuance of any default or Event of Default hereunder, UAFC and each of its affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by law, to set off and apply any and all deposits (general or special, time or demand, provisional or final) at any time held and other indebtedness at any time owing by, to or for the credit of a Credit Party or any of their subsidiaries or any of their account against any and all of the Borrower's obligations now or hereafter existing under this Promissory Note, irrespective of whether or not UAFC shall have made any demand under this Promissory Note and although such deposits, indebtedness or obligations may be unmatured or contingent. UAFC agrees promptly to notify the Borrower after any such set-off and application, provided that the failure to give such notice shall not affect the validity of such set-off and application. UAFC's rights under this paragraph are in addition to other rights and remedies (including, without limitation, other rights of set-off) which UAFC may have.

All payments made by the Borrower hereunder shall be made free and clear of, and without deduction or withholding for or on account of, any present or future income, stamp or other taxes, levies, imposts, duties, charges, fees, deductions or withholdings, now or hereafter imposed, levied, collected, withheld or assessed by any governmental authority, excluding net income taxes imposed on UAFC as a result of a present or former connection between UAFC and the jurisdiction of the governmental authority imposing such tax. If any such non-excluded taxes, levies, imposts, duties, charges, fees deductions or withholdings ("Non-Excluded Taxes") are required to be withheld from any amounts payable to UAFC hereunder, the amounts so payable to UAFC shall be increased to the extent necessary to yield to UAFC (after payment of all Non-Excluded Taxes) interest at the rates or in the amounts specified herein. Whenever any Non-Excluded Taxes are payable by the Borrower, as promptly as possible thereafter the Borrower shall send to UAFC a certified copy of an original official receipt received by the Borrower showing payment thereof. If the Borrower fails to pay any Non-Excluded Taxes when due to the appropriate taxing authority or fails to remit to UAFC the required receipts or other required documentary evidence, the Borrower shall indemnify UAFC for any incremental taxes, interest or penalties that may become payable by UAFC as a result of any such failure. The agreements in this paragraph shall survive the termination of this Promissory Note and the payment of the Advances and all other amounts payable hereunder.

The Borrower shall make each payment of principal and interest hereunder prior to 11:00 A.M. (New York City time) on the day when due in lawful money of the United States of America to UAFC at 245 Park Avenue, New York, New York 10167, in same day funds. Whenever any payment to be made hereunder shall be otherwise due on a Saturday, a Sunday or a public or bank holiday in New York City (any other day being a "Business Day"), such payment shall be made on the next succeeding Business Day, and such extension of time shall in such case be included in the computation of payment of interest.

All notices and other communications provided for hereunder shall be in writing (including telegraphic or facsimile communication) and mailed, telexed, communicated by facsimile or delivered, if to the Borrower, at its address at 555 Howard Street, Suite 100, San Francisco, California 94105, and if to UAFC, at its address at 245 Park Avenue, New York, New York 10167, Attention: Corporate Services Department or, for either party, at such other address as it may by written notice communicate to the other party. All such notices and communications shall be effective upon receipt.

No amendment or waiver of any provision of this Promissory Note, nor consent to any departure by the Borrower herefrom, shall in any event be effective unless the same shall be in writing and signed by UAFC and then such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

No failure on the part of UAFC to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

The Borrower also agrees to pay on demand all costs and expenses (including fees and expenses of counsel) incurred by UAFC in enforcing this Promissory Note.

This Promissory Note shall be binding upon and inure to the benefit of the Borrower and UAFC and their respective successors and assigns.

THIS PROMISSORY NOTE SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK. THE BORROWER HEREBY IRREVOCABLY SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY NEW YORK STATE OR FEDERAL COURT SITTING IN NEW YORK COUNTY OVER ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS PROMISSORY NOTE. PROCESS, PLEADINGS AND OTHER LEGAL PAPERS SHALL BE SERVED UPON THE BORROWER AT THE ADDRESS FOR NOTICE SET FORTH ABOVE. THE BORROWER HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO, THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING.

THE BORROWER HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS PROMISSORY NOTE OR ANY OTHER INSTRUMENT OR DOCUMENT DELIVERED IN RELATION HERETO.

THE BORROWER IRREVOCABLY CONSENTS TO THE SERVICE OF COPIES OF THE SUMMONS AND COMPLAINT AND ANY OTHER PROCESS WHICH MAY BE SERVED IN ANY SUCH ACTION OR PROCEEDING AND SUCH SERVICE SHALL BE

CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. NOTHING IN THIS PARAGRAPH SHALL AFFECT LANC'S RIGHT TO SERVE LEGAL PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR AFFECT LANC'S RIGHT TO BRING ANY ACTION OR PROCEEDING AGAINST THE BORROWER'S PROPERTY IN THE COURTS OF OTHER JURISDICTIONS.

This Promissory Note is the Note referred to in, and is secured by and entitled to the benefits of the Collateral Agreements, as the same may from time to time amended, supplemented, extended, renewed, restated or otherwise modified.

NOB HILL HOLDINGS, INC.

By: _____
Name: _____
Title: _____

EXHIBIT 4

SECURITY AND ASSIGNMENT AGREEMENT

SECURITY AND ASSIGNMENT AGREEMENT dated as of September 9, 2011, made by NOB HILL HOLDINGS, INC., a Delaware corporation (the "Borrower"), in favor of UNITED AMERICA FINANCIAL LLC ("UAFC"), with its office at 245 Park Avenue, New York, New York 10167.

PRELIMINARY STATEMENTS.

1. Borrower has issued that certain Promissory Note, dated as of the date hereof (said Promissory Note, as it may be modified, supplemented, extended, renewed, restated or otherwise modified from time to time, being the "Note", the terms defined therein and not otherwise defined herein being used herein as therein defined) in favor of UAFC.

2. In order to secure the obligations of the Borrower under the Note, Borrower has agreed to grant to UAFC the security interest contemplated by this Agreement.

NOW, THEREFORE, in consideration of the premises and in order to induce UAFC to make the Advance under the Note and for other good and valuable consideration, the Borrower hereby agrees as follows:

SECTION 1. Grant of Security. The Borrower hereby pledges and assigns to UAFC, and hereby grants to UAFC a first priority security interest in, all of the Borrower' right, title and interest, direct or indirect, in and to the following, whether now owned or hereafter acquired (the "Collateral"):

(a) The Collateral Accounts;

(b) All other accounts, contract rights, chattel paper, general intangibles and other obligations of any kind, now or hereafter existing and all rights now or hereafter existing in and to all security agreements, leases, and other contracts securing or otherwise relating to any such accounts, contract rights, chattel paper, general intangibles or obligations;

(c) All other personal property, now or hereafter existing; and

(d) All proceeds (as defined in the Uniform Commercial Code in effect in the State of New York on the date hereof (the "Code")) of any and all of the foregoing Collateral.

SECTION 2. Security for Obligations. This Agreement secures the payment of all obligations of the Borrower now or hereafter existing under the Note, whether for principal, interest, fees, expenses or otherwise, and all obligations of the Borrower now or hereafter existing under this Agreement (all such obligations being the "Obligations").

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SECTION 3. Borrower Remains Liable. Anything herein to the contrary notwithstanding, (a) the Borrower shall remain liable under the contracts and agreements included in the Collateral to the extent set forth therein to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed, (b) the exercise by UAFC of any of the rights hereunder shall not release the Borrower from any of its duties or obligations under the contracts and agreements included in the Collateral, and (c) UAFC shall not have any obligation or liability under the contracts and agreements included in the Collateral by reason of this Agreement, nor shall UAFC be obligated to perform any of the obligations or duties of the Borrower thereunder or to take any action to collect or enforce any claim for payment assigned hereunder.

SECTION 4. Representations and Warranties. The Borrower represents and warrants as follows:

(a) The Borrower owns its interest in the Collateral free and clear of any lien, security interest, charge or encumbrance except for the security interest created by this Agreement. No effective financing statement or other instrument similar in effect covering all or any part of the Collateral is on file in any recording office, except such as may have been filed in favor of UAFC relating to this Agreement.

(b) This Agreement creates a valid and perfected first priority security interest in the Collateral, securing the payment of the Obligations, and all filings and other actions necessary or desirable to perfect and protect such security interest have been duly taken.

(c) No authorization, approval or other action by, and no notice to or filing with, any governmental authority or regulatory body is required either (i) for the grant by the Borrower of the security interest granted hereby or for the execution, delivery or performance of this Agreement by the Borrower or (ii) for the perfection of or the exercise by UAFC of its rights and remedies hereunder, except for such financing statements as may be filed in favor of UAFC relating to this Agreement.

(d) (i) The full and correct legal name, type of organization, jurisdiction of organization, organizational ID number (if applicable) and mailing address of the Borrower as of the date hereof are correctly set forth in Annex 1 hereto.

(ii) Annex 1 correctly specifies the place of business the Borrower or, if the Borrower has more than one place of business, the location of the chief executive office of the Borrower.

(e) The Borrower has not (i) within the period of four months prior to the date hereof, changed its location (as determined in accordance with Section 9-307 of the Code), (ii) heretofore changed its name, or (iii) heretofore become a "new debtor" (as defined in Section 9-102(a)(56) of the UCC) with respect to a currently effective security agreement previously entered into by any other Person.

SECTION 5. Further Assurances. (a) The Borrower agrees that from time to time, at the expense of the Borrower, the Borrower will promptly execute and deliver, or cause to be executed and delivered, all further instruments and documents, and take all further action, that may be necessary or desirable, or that UAFC may reasonably request, in order to perfect and protect any security interest granted or purported to be granted hereby or to enable UAFC to exercise and enforce its rights and remedies hereunder with respect to any Collateral. Without limiting the generality of the foregoing, the Borrower will execute and file such financing or continuation statements, or amendments thereto, and such other instruments or notices, as may be necessary or desirable, or as UAFC may reasonably request, in order to perfect and preserve the security interest granted or purported to be granted hereby.

(b) The Borrower hereby authorizes UAFC to file one or more financing or continuation statements, and amendments thereto, relative to all or any part of the Collateral without the signature of the Borrower where permitted by law. A carbon, photographic or other reproduction of this Agreement or any financing statement covering the Collateral or any part thereof shall be sufficient as a financing statement where permitted by law.

(c) The Borrower will furnish to UAFC from time to time statements and schedules further identifying and describing the Collateral and such other reports in connection with the Collateral as UAFC may reasonably request, all in reasonable detail.

SECTION 6. Transfers and Other Liens. The Borrower shall not:

(a) Sell, assign (by operation of law or otherwise) or otherwise dispose of any of the Collateral.

(b) Create or suffer to exist any lien, security interest or other charge or encumbrance upon or with respect to any of the Collateral to secure the indebtedness of any person or entity, except for the security interests created by this Agreement.

(c) Without at least 30 days' prior written notice to UAFC, the Borrower shall not take any action which would cause the information on Annex I to be inaccurate.

SECTION 7. UAFC Appointed Attorney-in-Fact. The Borrower hereby irrevocably appoints UAFC, upon the occurrence of an Event of Default, the Borrower's attorney-in-fact, with full authority in the place and stead of the Borrower and in the name of the Borrower, UAFC or otherwise, from time to time in UAFC's discretion, to take any action and to execute any instrument which UAFC may deem necessary or advisable to accomplish the purposes of this Agreement, including, without limitation:

(a) to ask, demand, collect, sue for, recover, compromise, receive and give acquittance and receipts for moneys due and to become due under or in respect of any of the Collateral;

(b) to receive, indorse, and collect any drafts or other instruments, documents and chattel paper, in connection with clause (i) above, and

(c) to file any claims or take any action or institute any proceedings which UAFC may deem necessary or desirable for the collection of any of the Collateral or otherwise to enforce the rights of UAFC with respect to any of the Collateral.

SECTION 8. UAFC May Perform. If the Borrower fails to perform any agreement contained herein, UAFC may itself perform, or cause performance of, such agreement, and the expenses of UAFC incurred in connection therewith shall be payable by the Borrower under Section 11(b).

SECTION 9. UAFC's Duties. The powers conferred on UAFC hereunder are solely to protect its interest in the Collateral and shall not impose any duty upon it to exercise any such powers. Except for the safe custody of any Collateral in its possession and the accounting for moneys actually received by it hereunder, UAFC shall have no duty as to any Collateral or as to the taking of any necessary steps to preserve rights against prior parties or any other rights pertaining to any Collateral.

SECTION 10. Remedies. If any Event of Default shall have occurred and be continuing:

(a) UAFC may exercise in respect of the Collateral, in addition to other rights and remedies provided for herein or otherwise available to it, all the rights and remedies of a secured party on default under the Code (whether or not the Code applies to the affected Collateral) and also may (i) require the Borrower to, and the Borrower hereby agrees that it will at its expense and upon request of UAFC forthwith, assemble all or part of the Collateral as directed by UAFC and make it available to UAFC at a place to be designated by UAFC which is reasonably convenient to both parties and (ii) without notice except as specified below, sell the Collateral or any part thereof in one or more parcels at public or private sale, at any of UAFC's offices or elsewhere, for cash, on credit or for future delivery, and upon such other terms as UAFC may deem commercially reasonable. The Borrower agrees that, to the extent notice of sale shall be required by law, at least ten days' notice to the Borrower of the time and place of any public sale or the time after which any private sale is to be made shall constitute reasonable notification. UAFC shall not be obligated to make any sale of Collateral regardless of notice of sale having been given. UAFC may adjourn any public or private sale from time to time by announcement at the time and place fixed therefor, and such sale may, without further notice, be made at the time and place to which it was so adjourned.

(b) All cash proceeds received by UAFC in respect of any sale of, collection from, or other realization upon all or any part of the Collateral (including but not limited to all amounts on deposit in the Collateral Accounts) may, in the sole discretion of UAFC, be held by UAFC as collateral for, and/or then or at any time thereafter applied (after payment of any amounts payable to UAFC pursuant to Section 11) in whole or in part by UAFC against, all or any part of the Obligations in such order as UAFC shall elect. Any surplus of such cash or cash proceeds held by UAFC and remaining

after payment in full of all the Obligations shall be paid over to the Borrower or to whomsoever may be lawfully entitled to receive such surplus.

SECTION 11. Indemnity and Expenses. (a) The Borrower agrees to indemnify UAFC from and against any and all claims, losses and liabilities growing out of or resulting from this Agreement (including, without limitation, enforcement of this Agreement), except claims, losses or liabilities resulting from UAFC's gross negligence or willful misconduct.

(b) The Borrower will upon demand pay to UAFC the amount of any and all reasonable expenses, including the reasonable fees and disbursements of its counsel and of any experts and agents, which UAFC may incur in connection with (i) the administration of this Agreement, (ii) the custody, preservation, use or operation of, or the sale of, collection from, or other realization upon, any of the Collateral, (iii) the exercise or enforcement of any of the rights of UAFC hereunder or (iv) the failure by the Borrower to perform or observe any of the provisions hereof.

SECTION 12. Continuing Security Interest; Transfer of Note. This Agreement shall create a continuing security interest in the Collateral and shall (i) remain in full force and effect until the payment in full of the Obligations, whether before or after the Maturity Date, (ii) be binding upon the Borrower, its successors and assigns and (iii) inure to the benefit of and be binding on UAFC and its successors, transferees and assigns. Without limiting the generality of the foregoing clause (iii), UAFC may assign or otherwise transfer the Note held by it to any other person or entity, and such other person or entity shall thereupon become vested with all the benefits in respect thereof granted to UAFC herein or otherwise. Upon the termination hereof, the security interest granted hereby shall terminate and all rights to the Collateral shall automatically revert to the Borrower without any further action on the part of any party hereto. Upon any such termination, UAFC will, at the Borrower's expense, execute and deliver to the Borrower such documents as the Borrower shall reasonably request to evidence such termination.

SECTION 13. Notices. All notices, requests and demands to or upon UAFC or Borrower to be effective shall be in writing, addressed to the relevant address set forth in the Note.

SECTION 14. Governing Law; Terms. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, except to the extent that the validity or perfection of the security interest hereunder, or remedies hereunder, in respect of any particular Collateral are governed by the laws of a jurisdiction other than the State of New York. Unless otherwise defined herein or in the Note, terms used in Article 9 of the Code are used herein as therein defined.

SECTION 15. Entire Agreement. This Agreement and the other Transaction Documents represent the agreement of the Borrower and UAFC with respect to the subject matter hereof, and there are no promises, undertakings, representations or warranties by the Borrower or UAFC relative to the subject matter hereof.

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IN WITNESS WHEREOF, the Borrower has caused this Agreement to be duly executed and delivered by its officer thereunto duly authorized as of the date first above written.

NOB HILL HOLDINGS, INC.

By: _____
Name: _____
Title: _____

ANNEX I

Legal name:	Nob Hill Holdings, Inc.
Type of organization:	corporation
Jurisdiction of Organization:	Delaware
Organizational ID number (if applicable):	[redacted]
Mailing Address:	As set forth in the Note
Place of business the Borrower or, if more than one place of business, the location of the chief executive office:	Mailing Address

[illegible]

EXHIBIT 5

PLEDGE AGREEMENT

PLEDGE AGREEMENT, dated as of September 9, 2003, made by NOB HILL HOLDINGS, INC., a Delaware corporation (the "Borrower"), in favor of UTRECHT-AMERICA FINANCE CO. ("UAFC").

W I T N E S S E T H:

WHEREAS, pursuant to the Promissory Note, dated as of the date hereof, made by the Borrower to the order of UAFC (the "Note"), UAFC has made an Advance to the Borrower upon the terms and subject to the conditions set forth therein;

WHEREAS, the Borrower is, or upon the application of the Advance as provided in the Note, will be, the legal and beneficial owner of the Pledged Stock (as hereinafter defined) issued by West Side Cellular, Inc., a corporation organized under the laws of Ohio (the "Issuer"); and

NOW, THEREFORE, in consideration of the premises and to induce UAFC make the Advance and for other good and valuable consideration, the Borrower hereby agrees with UAFC as follows:

1. Defined Terms. (a) Unless otherwise defined herein, terms defined in the Note and used herein shall have the meanings given to them in the Note.

(b) The following terms shall have the following meanings:

"Agreement": this Pledge Agreement, as the same may be amended, modified or otherwise supplemented from time to time.

"Code": the Uniform Commercial Code from time to time in effect in the State of New York.

"Collateral": the Pledged Stock and all Proceeds.

"Collateral Account": any account established to hold money Proceeds, maintained under the sole dominion and control of UAFC, subject to withdrawal by UAFC only as provided in paragraph 8(a).

"Lien": any mortgage, pledge, hypothecation, assignment, deposit arrangement, encumbrance, lien (statutory or other), charge or other security interest or any preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever (including, without limitation,

any conditional sale or other title retention agreement having substantially the same economic effect as any of the foregoing).

"Obligations": the collective reference to the unpaid principal of and interest on the Note and all other obligations and liabilities of the Borrower to UAFC (including, without limitation, interest accruing at the then applicable rate provided in the Note after the maturity of the Advances and interest accruing at the then applicable rate provided in the Note after the filing of any petition in bankruptcy, or the commencement of any insolvency, reorganization or like proceeding, relating to the Borrower, whether or not a claim for post-filing or post-petition interest is allowed in such proceeding), whether direct or indirect, absolute or contingent, due or to become due, or now existing or hereafter incurred, which may arise under, out of, or in connection with, the Note, this Agreement or any other document made, delivered or given in connection therewith, in each case whether on account of principal, interest, reimbursement obligations, fees, indemnities, costs, expenses or otherwise (including, without limitation, all fees and disbursements of counsel to UAFC that are required to be paid by the Borrower pursuant to the terms of the Note or this Agreement).

"Person": an individual, partnership, corporation, limited liability company, business trust, joint stock company, trust, unincorporated association, joint venture, governmental authority or other entity of whatever nature.

"Pledged Stock": all of the issued and outstanding shares of common stock of the Issuer, together with all certificates, options or rights of any nature whatsoever that may be issued or granted by the Issuer to the Borrower.

"Proceeds": all "proceeds" as such term is defined in Section 9-102(64) of the Code and, in any event, shall include, without limitation, all dividends or other income from the Pledged Stock, collections thereon or distributions with respect thereto.

"Securities Act": the Securities Act of 1933, as amended.

(c) The words "hereof," "herein" and "hereunder" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not to any particular provision of this Agreement, and section and paragraph references are to this Agreement unless otherwise specified.

(d) The meanings given to terms defined herein shall be equally applicable to both the singular and plural forms of such terms.

2. Pledge; Grant of Security Interest. The Borrower hereby delivers to UAFC, all the Pledged Stock and hereby grants to UAFC, a first priority security interest in the Collateral, as collateral security for the prompt and complete payment and performance when due (whether at the stated maturity, by acceleration or otherwise) of the Obligations.

3. Powers. Concurrently with the delivery to UAFC of each certificate representing one or more units of the Pledged Stock, the Borrower shall deliver an undated power covering such certificate, duly executed in blank by the Borrower with, if UAFC so requests, signature guaranteed.

4. Representations and Warranties. The Borrower represents and warrants that:

(a) The Pledged Stock constitutes all the issued and outstanding capital stock of the Issuer.

(b) All the Pledged Stock have been duly and validly created and are fully paid and non-assessable.

(c) The Borrower is, or upon the application of the Advance as provided in the Note, will be, the record and beneficial owner of, and has good and marketable title to, the Pledged Stock, free of any and all Liens or options in favor of, or claims of, any other Person, except the security interest created by this Agreement.

(d) Upon delivery to UAFC of the certificate(s), if any, evidencing the Pledged Stock, the security interest created by this Agreement will constitute a valid, perfected first priority security interest in the Collateral, enforceable in accordance with its terms against all creditors of the Borrower and any Persons purporting to purchase any Collateral from the Borrower, except as affected by bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and other similar laws relating to or affecting creditors' rights generally and general equitable principles (whether considered in a proceeding in equity or at law).

5. Covenants. The Borrower covenants and agrees with UAFC that, from and after the date of this Agreement until this Agreement is terminated and the security interests created hereby are released:

(a) If the Borrower shall, as a result of its ownership of the Pledged Stock, become entitled to receive or shall receive any certificate (including, without limitation, any certificate received in connection with any reclassification, increase or reduction of capital or any certificate issued in connection with any reorganization), option or rights, whether in addition to, in substitution of, as a conversion of, or in exchange for any of the Pledged Stock, or otherwise in respect thereof, the Borrower shall accept the same as the agent of UAFC, hold the same in trust for UAFC and deliver the same forthwith to UAFC in the exact form received, duly indorsed by the Borrower to UAFC, if required, together with an undated power covering such certificate duly executed in blank by the Borrower and with, if UAFC so requests, signature guaranteed, to be held by UAFC, subject to the terms hereof, as additional collateral security for the Obligations. Any sums paid upon or in respect of the Pledged Stock upon the liquidation or dissolution of the Issuer shall be paid over to UAFC to be held by it hereunder as additional collateral security for the Obligations, and in case any distribution of capital shall be made on or in respect of the Pledged Stock or any property shall be distributed upon or with respect to the Pledged Stock pursuant to the recapitalization or reclassification of the capital of the

Issuer or pursuant to the reorganization thereof, the property so distributed shall be delivered to UAFC to be held by it hereunder as additional collateral security for the Obligations. If any sums of money or property so paid or distributed in respect of the Pledged Stock shall be received by the Borrower, the Borrower shall, until such money or property is paid or delivered to UAFC, hold such money or property in trust for UAFC, segregated from other funds of the Borrower, as additional collateral security for the Obligations.

(b) Without the prior written consent of UAFC, the Borrower will not (1) vote to enable, or take any other action to permit, the Issuer to issue any shares of stock or other equity securities of any nature or to issue any other securities convertible into or granting the right to purchase or exchange for any shares of stock or other equity securities of any nature of the Issuer, (2) sell, assign, transfer, exchange, or otherwise dispose of, or grant any option with respect to, the Collateral, (3) create, incur or permit to exist any Lien or option in favor of, or any claim of any Person with respect to, any of the Collateral, or any interest therein, except for the security interests created by this Agreement or (4) enter into any agreement or undertaking restricting the right or ability of the Borrower or UAFC to sell, assign or transfer any of the Collateral.

(c) The Borrower shall maintain the security interest created by this Agreement as a first, perfected security interest and shall defend such security interest against claims and demands of all Persons whomsoever. At any time and from time to time, upon the written request of UAFC, and at the sole expense of the Borrower, the Borrower will promptly and duly execute and deliver such further instruments and documents and take such further actions as UAFC may reasonably request for the purposes of obtaining or preserving the full benefits of this Agreement and of the rights and powers herein granted. If any amount payable under or in connection with any of the Collateral shall be or become evidenced by any promissory note, other instrument or chattel paper, such note, instrument or chattel paper shall be immediately delivered to UAFC, duly endorsed in a manner satisfactory to UAFC, to be held as Collateral pursuant to this Agreement.

(d) The Borrower shall pay, and save UAFC harmless from, any and all liabilities with respect to, or resulting from any delay in paying, any and all stamp, excise, sales or other taxes which may be payable or determined to be payable with respect to any of the Collateral or in connection with any of the transactions contemplated by this Agreement.

6. Voting Rights. Unless an Event of Default shall have occurred and be continuing and UAFC shall have given notice to the Borrower of UAFC's intent to exercise its corresponding rights pursuant to Section 7 below, the Borrower shall be permitted to exercise all voting and corporate rights with respect to the Pledged Stock; provided, however, that no vote shall be cast or corporate right exercised or other action taken which, in UAFC's reasonable judgment, would impair the Collateral or which would be inconsistent with or result in any violation of any provision of the Note or this Agreement.

7. Rights of UAFC. (a) All money Proceeds received by UAFC hereunder shall be held by UAFC. All Proceeds while held by UAFC in a Collateral Account (or by the Borrower in trust for

UAFC) shall continue to be held as collateral security for all the Obligations and shall not constitute payment thereof until applied as provided in paragraph 8(a).

(b) If an Event of Default shall occur and be continuing under the Note and UAFC shall give notice of its intent to exercise such rights to the Borrower, (1) UAFC shall have the right to receive any and all cash dividends paid in respect of the Pledged Stock and make application thereof to the Obligations in such order as UAFC may determine, and (2) all of the Pledged Stock shall be registered in the name of UAFC or its nominee, and UAFC or its nominee may thereafter exercise (A) all voting, corporate and other rights pertaining to such of the Pledged Stock at any meeting of shareholder of the Issuer or otherwise and (B) any and all rights of conversion, exchange, subscription and any other rights, privileges or options pertaining to such of the Pledged Stock as if it were the absolute owner thereof (including, without limitation, the right to exchange at its discretion any and all of the Pledged Stock upon the merger, consolidation, reorganization, recapitalization or other fundamental change in the structure of the Issuer, or upon the exercise by the Borrower or UAFC of any right, privilege or option pertaining to such Pledged Stock, and in connection therewith, the right to deposit and deliver any and all of the Pledged Stock with any committee, depositary, transfer agent, registrar or other designated agency upon such terms and conditions as UAFC may determine), all without liability except to account for property actually received by it, but UAFC shall have no duty to the Borrower to exercise any such right, privilege or option and shall not be responsible for any failure to do so or delay in so doing.

8. Remedies. (a) If an Event of Default shall have occurred and be continuing, at any time at UAFC's election, UAFC may apply all or any part of Proceeds held in any Collateral Account in payment of the Obligations in such order as UAFC may elect.

(b) If an Event of Default shall have occurred and be continuing, UAFC may exercise, in addition to all other rights and remedies granted in this Agreement and in any other instrument or agreement securing, evidencing or relating to the Obligations, all rights and remedies of a secured party under the Code. Without limiting the generality of the foregoing, UAFC, without demand of performance or other demand, presentment, protest, advertisement or notice of any kind (except any notice required by law referred to below) to or upon the Borrower or any other Person (all and each of which demands, defenses, advertisements and notices are hereby waived), may in such circumstances forthwith collect, receive, appropriate and realize upon the Collateral, or any part thereof, and/or may forthwith sell, assign, give option or options to purchase or otherwise dispose of and deliver the Collateral or any part thereof (or contract to do any of the foregoing), in one or more parcels at public or private sale or sales, in the over-the-counter market, at any exchange, broker's board or office of UAFC or elsewhere upon such terms and conditions as it may deem advisable and at such prices as it may deem appropriate, for cash or on credit or for future delivery without assumption of any credit risk. UAFC shall have the right upon any such public sale or sales, and, to the extent permitted by law, upon any such private sale or sales, to purchase the whole or any part of the Collateral so sold, free of any right or equity of redemption in the Borrower, which right or equity is hereby waived or released. UAFC shall apply any Proceeds from time to time held by it and the net proceeds of any such collection, recovery, receipt, appropriation, realization or sale, after deducting all reasonable costs and