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.

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Supreme Court Case No. 73175

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

APPEAL

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

APPELLANT'S REPLY BRIEF

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Docket 73175 Document 2017-39921

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

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NRAP 26.1 DISCLOSURE

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

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

Since the inception of this case, Appellant has been represented only by the

firms listed below, who are expected to appear in this court.

Dated this 20th day of November, 2017.

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I. ARGUMENT

A. Introduction

Through a combination of factual misstatements, legal contortions and arguments not raised below, Respondents hope to evade answering for their role in defrauding Appellant. Resort to such devices bespeaks the weakness of Respondents' arguments. Factually, Respondents' "blame the victim" approach does not absolve them of their role in the fraud committed upon Mr. Tricarichi, and it does not preclude Respondents from personal jurisdiction in Nevada as a result of that role. Likewise, Respondents' overstatement of the holding in *Walden v. Fiore*, failure to acknowledge binding authority of the Nevada Supreme Court, and resort to new arguments not raised in the District Court merely confirm that Respondents are properly before a court of this State. As has long been recognized by this Court, a strong and sound policy interest supports allowing Nevada citizens to sue all those who have harmed them in one action in the Nevada courts, rather than forcing Nevadans to pursue defendants in multiple foreign jurisdictions. This policy applies with full force here, where it would be entirely reasonable for Respondents – large and sophisticated financial institutions and an international law firm that is no stranger to Nevada – to defend themselves in the District Court in Las Vegas, where Appellant's claims against another defendant are already proceeding. The District Court erred when it dismissed Respondents on personal

jurisdiction grounds, and this Court should correct that error by reversing and remanding to the District Court.

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

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

a. Respondents' Primary Factual Misstatements

Rabobank and Utrecht begin their attack upon Mr. Tricarichi by mischaracterizing two points regarding the Midco transaction and Respondents' involvement in it. Neither point succeeds.

First, Respondents wrongly claim that "they had no contact with Nevada in connection with Mr. Tricarichi's midco transaction." (Answ. Brf. at 1) The record belies this assertion. Mr. Tricarichi moved to Nevada in May 2003, two months before even receiving a letter of intent from Fortrend, and was here while the transaction was being negotiated. (App. Vol. 7 at APP 1494-95, 1503-24) By mid-August 2003, when Fortrend asked Rabobank for financing, Respondents knew Appellant resided here. (App. Vol. 1 at APP 0016; App. Vol. 7 at APP 1525-27, 1428 ¶ 4) Rabobank approved the financing, to be provided by Utrecht, and during this process, Respondents reached out to Nevada and Appellant:

- Within a week of receiving the loan request, Rabobank asked Tricarichi to complete documents to open a Rabobank escrow account for Westside; the documents list Tricarichi's Nevada address. (App. Vol. 7 at APP 1495, 1529)

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

- In particular, while Appellant asked the purchaser to transfer the price for his stock to his account at Pershing bank (App. Vol. 7 at APP 1495), Rabobank refused to proceed with the transaction this way. (*Id.*)

- Instead, Rabobank, wishing to maintain control of the funds, insisted that Appellant open another account at Rabobank to be used to receive the purchase price. (*Id.*) Rabobank sent Appellant documents to open this account; those documents – along with internal Rabobank documents – again reflect Appellant's residence in Nevada. (App. Vol. 7 at APP 1496, 1551-58, 1593-97)

Respondents do not dispute the foregoing chronology. They maintain, however, that "their only contacts with Mr. Tricarichi were three faxes Mr. Tricarichi sent from California to New York." (Answ. Brf. at 1) Of course, the faxes were Rabobank forms that Tricarichi was returning to the bank after the bank sent them to him to be completed, along with other documents that the bank specifically demanded. (Tricarichi Aff. ¶¶ 11-16 at APP 1495-96; App. Vol. 7 at APP 1529-36, 1550-65). The fact that Appellant was in California for the closing of the Midco transaction when he returned the documents to open the second account is immaterial. (*See* App. Vol. 9 at APP 1891-92.) Respondents also complain that Appellant's affidavit does "not [specifically] claim that he received [the request to open the second Rabobank account] in Nevada." (Answ. Brf. at 5) It remains undisputed, however, that Appellant moved to Nevada in May 2003 – before Rabobank's request was made – and has resided there since, and

Respondents' own internal records show that they were aware of that fact.[1] (App. Vol. 7 at APP 1494, 1593-97) As discussed below and in the Opening Brief, these facts are sufficient as a matter of law to establish personal jurisdiction.

Trying to shift blame, Respondents also claim the Tax Court held that Mr. Tricarichi "committed tax fraud." (Answ. Brf. at 2) This is a mischaracterization. The Tax Court held Tricarichi liable as a transferee under Section 6901 of the federal tax code (26 U.S.C. § 6901). As the Tax Court stated: "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." (Tax Ct. Op. at *12 – App. Vol 6 at APP 1281 (emphasis added – citing *Commissioner v. Stern*, 357 U.S. 39, 42 (1958)) In Appellant's case, the transferor was the company Westside, under Fortrend's ownership; Fortrend (via subsidiary Nob Hill) purchased Appellant's Westside stock, representing and

[1] The parties in the Tax Court litigation also stipulated that Appellant lived in Nevada at the time of the Westside stock sale. (App. Vol. 7 at APP 1590-92) While Respondents try to make something of the Tax Court applying Ohio law to transferee liability issues (Answ. Brf. at 2, 7 (citing Tax Ct. Op. at *12, App. Vol. 6 at APP 1281)), the authority cited by the Tax Court on this point reflects that Appellant's residence was not even pertinent to the choice of law. *See* Tax Ct. Op. at *12 – App. Vol. 6 at APP 1281 (citing *Estate of Miller v. Commissioner*, 42 T.C. 593, 598-99 (1964) (looking to where company was located and transaction occurred to determine choice of law)). *See also Cullifer v. Commissioner*, 2014 WL 5023456 *18 and n.26 (T.C.) (Texas law applied in Midco case despite fact that taxpayer resided in Florida, since taxpayer's company was located in Texas and transaction thus occurred there), *aff'd mem.* 651 Fed. Appx. 847 (11th Cir. 2016).

warranting that it would pay any taxes Westside owed, but then instead stripped Westside of its assets and failed to pay the taxes as promised. (*See* Opening Brf. at 22-24 (citing to record).) The Tax Court found that, in light of the tax advice from Respondents' co-defendant PwC, Appellant could be held liable as a transferee under the constructive fraud provisions of the Uniform Fraudulent Transfer Act and thus as a transferee under Section 6901 of the tax code. (App. Vol. 6 at APP 1282 *et seq*.) This reality is a far cry from Respondents' conclusory and accusatory spin, which seeks to pin all the blame on Mr. Tricarichi.

As alleged in the Complaint, were it not for defendant PwC's grossly negligent advice, Appellant would not have gone forward with the transaction and thus could not have been liable as a transferee at all. (App. Vol. 1 at APP 0012, 0015, 0031) Respondents take issue with these allegations of the Complaint in their Answering Brief, but they are misguided in doing so. Respondents argue the Tax Court's ruling collaterally estops Appellant from making such allegations, but they ignore, among other things, (1) that Rabobank and Utrecht never raised this argument below as a basis for dismissal on personal jurisdiction grounds – thereby waiving the argument for purposes of this appeal – and (2) that, even if these Respondents had raised such argument below, the District Court denied a collateral estoppel argument by PwC on a motion to dismiss. (App. Vol. 6 at APP 1146-68,

Vol. 9 at APP 1862-73; Reply App. at APP 2038, 2062, 2143-44)[2] *See Schuck v. Signature Flight Support*, 126 Nev. 434, 437 (2010) (party may not raise new theory for first time on appeal); *City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. Adv. Op. 2 n.2 (2013) (party improperly raised issue preclusion for first time on appeal). Thus, Respondents' reliance upon the Tax Court opinion is unavailing.

b. Respondents' Primary Misstatements of the Law

Respondents' first legal argument is "*Walden* Eliminated Effects-Based Jurisdiction." (Answ. Brf. at 15) Wrong. As discussed in the Opening Brief (at 36), the U.S. Supreme Court's "effects test" originated with *Calder v. Jones*, 465 U.S. 783 (1984). In *Calder* the Court "concluded a nonresident defendant who engaged in intentional actions expressly aimed at the forum, causing harm, the brunt of which is suffered (and which the defendant knows is likely to be suffered in the forum state) should reasonably anticipate being haled into court there." *PDL Biopharma, Inc. v. Genentech, Inc.*, 2011 WL 4433687 (Nev. Dist. Ct. July 7, 2011) (discussing *Calder*). In *Walden v. Fiore*, 134 S.Ct. 1115 (2014), the U.S. Supreme Court expressly noted that *Calder* is still the law and, indeed, applied the

[2] Respondent Seyfarth joined in PwC's motion to dismiss. (Reply App. at APP 2140) Rabobank and Utrecht did argue collateral estoppel was a basis to dismiss Appellant's aiding and abetting fraud and conspiracy counts for failure to state a claim, but the District Court denied that motion as moot after granting dismissal on jurisdictional grounds. (App. Vol. 6 at APP 1164, Vol. 9 at APP 1917)

principles set out in *Calder* to the facts before it in *Walden*. 134 S.Ct. at 1123-24.[3] While the Court found no personal jurisdiction in *Walden*, the facts of that case – which involved a Georgia defendant who happened to interact with the Nevada plaintiffs while they were passing through the Atlanta airport and showing California identification[4] – are readily distinguishable from Mr. Tricarichi's case, where Respondents, knowing that Tricarichi resided in Nevada, purposefully reached out to him to open accounts and take steps that Respondents wanted to be taken as part of a transaction which Respondents knew to be improper under the tax laws, and which Respondents thus knew were likely to cause harm to Tricarichi in Nevada. *Cf. Walden*, 134 S.Ct. at 1119. Contrary to Respondent's argument, effects-based jurisdiction is alive and well.

Indeed, as discussed in the Opening Brief (at 34-35), the Nevada Supreme Court has previously found jurisdiction over out-of-state defendants consistent with the effects test – but Respondents completely ignore this authority. In *Peccole v. Eighth Jud. Dist. Ct.*, 111 Nev. 968 (1995), which Respondents ignore,

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[3] Even cases cited by Respondents themselves reflect that the *Calder* effects test is still good law. *See, e.g., Bellagio, LLC v. Bellagio Car Wash*, 116 F.Supp. 3d 1166, 1170 (D.Nev. 2015) ("Because the instant suit sounds in tort, the court considers purposeful direction, also known as the 'effects test.'"); *Ponder v. Wild*, 2017 WL 1536165 *4 (D.Nev. April 26, 2017) (discussing whether case "passes [the] effects test").

[4] Not, as Respondents represented at oral argument below, Nevada identification. (App. Vol. 8 at APP 1879)

the Court found specific personal jurisdiction over out-of-state defendants who, by telephone from Colorado, initially solicited Nevada plaintiffs to purchase property in Colorado and misrepresented the nature of that property:

> Petitioners ... contend that [defendants] availed themselves of the privilege of acting in Nevada and causing important consequences in Nevada, thereby subjecting themselves to Nevada's personal jurisdiction.... We agree with these contentions....

111 Nev. at 970-71 (citations omitted). Like the defendants in *Peccole*, Respondents reached out to Appellant in Nevada to enter into a business relationship as part of a fraud upon Appellant that caused important consequences in Nevada for Appellant. Under *Peccole*, jurisdiction over Respondents in Nevada is proper. But Respondents say not one word about *Peccole* or similar cases[5] cited by Appellant.

The District Court erred when it too ignored *Peccole* and misapplied *Walden* to the factual scenario present in this case. As discussed in the Opening Brief (at 37-39), numerous courts have recognized the particular factual scenario in *Walden* to be distinguishable from the cases before them, and thus proceeded to find specific personal jurisdiction pursuant to *Calder* and the effects test. *See, e.g.*,

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[5] *PDL Biopharma.*, 2011 WL 4433687 (citing *Peccole* and finding specific personal jurisdiction over out-of-state corporate defendant which, via subsidiary, sent letter to plaintiff in Nevada); *Chipping v. Fleming Law Firm*, 2012 WL 1188467 at *3 (D.Utah 2012) (out-of-state firm subjected itself to personal jurisdiction in Utah by arranging for Utah plaintiff's money to be transferred to firm's escrow account to facilitate plaintiff's investment with third party).

Exobox Tech. Corp. v. Tsambis, 2015 WL 82886 at *4 (D. Nev. Jan. 6, 2015) (finding jurisdiction in Nevada over Pennsylvania resident who "posted online messages and filed a Texas lawsuit against [plaintiff], which he knew to be a Nevada corporation, and in doing so expressly aimed his conduct into Nevada"). As the court in *Exobox* held:

> *Walden* is factually distinguishable from this case.... In *Walden,* Defendant directed his activities at an entity that incidentally happened to be going to Nevada. **In this case, Tsambis chose to direct his activities to an entity known to be in Nevada**.... [T]he Supreme Court's opinion in *Walden* stops well short of overturning [prior precedent]. Rather, the Supreme Court decided *Walden* narrowly on the facts before it.

Id. at *5-6 (emphasis added). Similarly, the Minnesota Supreme Court has held:

> *Walden*'s holding is not as broad as [defendant] contends, and its facts are easily distinguishable. *Walden* merely held that a defendant's "random, fortuitous, or attenuated" contact with a forum resident in an airport—while the resident was outside of the forum—was insufficient to support personal jurisdiction.... *Walden* does not disturb **numerous, long-established precedents allowing courts to exercise personal jurisdiction over defendants based in part on commercial contacts with businesses or residents that are located inside the forum**.... Indeed, even *Walden* explained that in some cases "a defendant's contacts with the forum State may be *intertwined* with his transactions or interactions with the plaintiff."

Rilley v. MoneyMutual, LLC, 884 N.W.2d 321, 329 (Minn. 2016) (finding personal jurisdiction over defendant finance company that emailed plaintiffs known to be Minnesota residents) (emphasis added). *See also Leibman v. Prupes*, 2015 WL

898454 (C.D.Cal. 2015); *Cook v. McQuate*, 2016 WL 5793999 *6 (W.D.Va. 2016).

Respondents ignore all of the foregoing cases except *Exobox*, which Respondents mistakenly claim has been discredited by the Ninth Circuit. According to Respondents, the Ninth Circuit has "made clear" – via two non-precedential memorandum decisions which do not even cite *Exobox* – that *Exobox* was wrongly decided and that all of the circuit's prior express-aiming jurisprudence is no longer good law. (Answ. Brf. at 20 (citing *Elghasen v. RBS Computer, Inc.*, 692 Fed. Appx. 940 (Mem.) (9th Cir. 2017), and *Bixby v. KBR, Inc.*, 603 Fed. Appx. 605 (Mem.) (9th Cir. 2015)) Such non-precedential decisions carry little weight here.[6] Regardless, Respondents studiously avoid explaining why the Nevada Supreme Court's holding in *Peccole*, *supra*, does not bind them, or why the rationale of *Rilley* and the other cases cited by Appellant is inapplicable here.

Respondents themselves acknowledge that, given the lack of Ninth Circuit precedent on the issue, "[d]istrict courts in the Ninth Circuit have split on whether,

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[6] Indeed, these decisions are also factually distinguishable. While Respondents here knew that Tricarichi was a Nevada resident, in *Elghasen* plaintiff "has not shown that [defendant] knew he was a Nevada resident." *Elghasen*, *supra*. And *Bixby*, far from arising out of events connected to the forum state (Oregon), dealt with "the operation of a water treatment plant in … Iraq" that allegedly harmed National Guardsmen stationed there. *Bixby*, *supra*.

and to what extent, *Walden* overruled prior Ninth Circuit law." *Microsoft Corp. v. Mountain West Computers, Inc.*, 2015 WL 4479490 at *6 (W.D.Wash. July 22, 2015) (denying motion to dismiss on jurisdiction grounds, and compiling citations). Appellant submits that *Exobox*, *Leibman* and like cases properly acknowledge the narrow facts of *Walden* and the policy interests to be considered, and are factually more on point. Respondents' cases, by contrast, broadly expand the application of *Walden* and are factually distinguishable.

Following *Exobox* and the other cases cite by Appellant – including the Nevada Supreme Court's prior holding in *Peccole* – better serves the policy interests of this State. This Court has held that, "[w]here possible, a Nevada resident should be able to obtain judicial redress in the most convenient, cost-effective manner...." *Trump v. Eighth Jud. Dist. Ct.,* 109 Nev. 687, 703 (1993) (finding Nevada to be the appropriate jurisdiction). *See also Exobox*, 2015 WL 82886 at *7 ("'A State generally has a "manifest interest" in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.'") (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985)). Allowing Appellant's claims against all Defendants to proceed together serves that interest, whereas requiring Appellant to chase Respondents to the Netherlands and other parties elsewhere – while the claims against PwC proceed in Nevada – does not. Moreover, the fact that Appellant's claims all arise under Nevada law further

weighs in favor of allowing those claims to proceed in Nevada. *See Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869, 890 (Kan. 2012).

c. The Remaining Cases Cited by Respondents Do Not Help Them.

Respondents devote a significant portion of their brief to discussing whether the District Court's decision is consistent with certain federal district court and appellate decisions. (Answ. Brf. at 18-19, 21-23) Respondents do so without addressing the Nevada Supreme Court's holding in *Peccole* – which runs counter to the District Court's decision; without addressing most of the contrary authority cited by Appellant; without speaking to the narrowness of *Walden*'s facts; and without advancing any policy reasons why the District Court's decision is correct. In addition to being inapplicable and unpersuasive for these reasons, the authority that Appellant cites is also factually distinguishable. For example:

- *Bellagio, LLC v. Bellagio Car Wash*, 116 F.Supp. 3d 1166, 1170 (D.Nev. 2015): The court held there was no jurisdiction over the California defendant in a trademark infringement case where "the only advertising for [defendant's] car wash are print ads circulated within a three-mile radius of the car wash's location in California." Here, by contrast, Respondents affirmatively reached out to Appellant in Nevada by, among other things, insisting that he open multiple bank accounts in connection with the Midco transaction, at least one of which was for the sole benefit of Respondent.
- *Zabeti v. Arkin*, 2014 WL 3395991 *1-3 (D.Nev. July 8, 2014): No jurisdiction over a Colorado judge and attorney in a Nevada § 1983 action complaining about a Colorado child custody dispute that the Nevada plaintiff lost. Again, unlike here, the defendants did not reach out to the plaintiff in Nevada.

- *Poor Boy Prod'ns v. Fogerty*, 2015 WL 5057221 *5 (D.Nev. Aug. 26, 2015): "No evidence is adduced of any materials containing the [trademark] having been used to advertise any event in Nevada.... [T]here is no evidence of Nevada-specific design or targeting as to the merchandise generally available on the Internet."

- *Erickson v. Nebraska Machinery Co.*, 2015 WL 4089849 *4 (N.D.Cal. Jul. 6, 2015): "The mere act of copying [plaintiff's] photographs and posting them on [defendant's] website did not involve entering California, contacting anyone in California, or otherwise reaching out to California."

- *Under a Foot Plant, Co. v. Exterior Design, Inc.*, 2015 WL 1401697 *4-5 (D.Or. Mar.24, 2015): "It is undisputed that defendant's conduct did not occur within the State of Oregon. Indeed, plaintiff alleges the reproduction of the Copyrighted Works took place in Maryland, Massachusetts, and on defendant's [passive] websites."

- *Waldman v. Palestinian Liberation Org.*, 835 F.3d 317, 337 (2d Cir. 2016): No express aiming or personal jurisdiction over defendants who "affected United States citizens only because they were victims of indiscriminate violence that occurred abroad."

- *Monkton Ins. Svcs., Ltd. v. Ritter*, 768 F.3d 429, 433 (5th Cir. 2014): The defendant bank "entered into an account contract with ... a Cayman company, in Cayman, not with [plaintiff]," whereas here Rabobank entered into account contracts with Appellant, a Nevada resident.

These cases provide no support for Respondents' position.

2. Respondents Concede that Nevada Jurisdiction is Reasonable.

Rabobank and Utrecht do not argue that it would be unreasonable for them to appear and defend Tricarichi's claims in the District Court in Las Vegas. As discussed in the Opening Brief (at 39-41), the exercise of jurisdiction over these parties in Nevada is entirely reasonable. Again, Nevada has a manifest interest in providing Mr. Tricarichi, a Nevada resident, a convenient forum to seek relief for

his injuries, and Respondents will experience no undue burden from defending their actions here. Rabobank, a multinational banking and financial services company, has numerous offices throughout the U.S. (App. Vol. 7 at APP 1566 *et seq.*), and Utrecht's subsidiaries include Rabo AgriFinance, LLC – which is registered to do business in Nevada, and of which Utrecht is the Manager – and Rabobank, N.A., a national banking association based in neighboring California. (App. Vol. 7 at APP 1578, 1584 *et seq.*) It is hardly unreasonable for entities with such a presence to appear and defend themselves in Las Vegas, where Appellant's related claims against defendant PwC are already proceeding. *See, e.g., Oklahoma v. Cifelli*, 2017 WL 149990 (W.D.Okla. 2017).

3. Rabobank and Utrecht's Participation in the Conspiracy to Defraud Mr. Tricarichi Further Supports Jurisdiction in Nevada.

In *Davis v. Eighth Jud. Dist.*, 97 Nev. 332 (1981), this Court held that Nevada courts have personal jurisdiction over out-of-state defendants who participate in a conspiracy to injure a Nevada resident. In *Davis*, the administrators of the Howard Hughes estate sued a group of defendants who "conspired to seize control of the Hughes empire for their own financial gain." *Id.* at 334. Certain non-resident defendants moved to dismiss, arguing there was no personal jurisdiction over them in Nevada. *Id.* This Court rejected that argument:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an omission or act done elsewhere with respect to causes of action arising from these effects.... We

> conclude that it is reasonable and constitutionally permissible to require the respondent-defendants to appear and defend their activities in Nevada where the alleged injuries occurred.

Id. at 338-39 (citation and internal quotations omitted).

Notwithstanding this holding, Respondents argue that "*Davis* Does Not Support Conspiracy Jurisdiction." (Answ. Brf. at 23) This, Respondents say, is because "*Davis* did not analyze the conspiracy theory of jurisdiction, did not state that it was basing its ruling on a conspiracy theory of jurisdiction, and did not use the term 'conspiracy jurisdiction.'" (*Id.*) Respondents' argument is all semantics, no substance. This Court held in *Davis* that out-of-state participants in a ***conspiracy*** targeting a Nevada resident are subject to Nevada ***jurisdiction***. The fact that the Court did not use the words "conspiracy" and "jurisdiction" immediately adjacent to each other is meaningless. Similarly, the Court was not obligated to "analyze the conspiracy theory of jurisdiction" before arriving at a conclusion that is perfectly sound for policy and other reasons already discussed. *Davis* is consistent with the effects test of *Calder*, which dates from the same period, and which, as already discussed, remains the law after *Walden*. Respondents cite no Nevada case overruling or even questioning *Davis*. The only Nevada case that Respondents do cite –*Sharpstown Gen. Hosp. v. Laborers Health*

and Welfare Trust Fund, 874 P.2d 728 (Nev. 1994) – has nothing to do with a conspiracy, and does not cite, much less reverse, *Davis*.[7]

Respondents next argue that the Ninth Circuit has "declined to adopt" conspiracy jurisdiction. (Answ. Brf. at 24) The authority cited for this proposition is dicta from a footnote in *Goldsmith v. Sill*, 2013 WL 1249707 *5 n.1 (D.Nev. Mar. 6, 2013). In *Goldsmith*, the district court expressly states conspiracy jurisdiction "had not been raised by the parties." *Id.* The court also acknowledges that the Ninth Circuit has "not reach[ed] [the] question of whether [the] conspiracy theory of jurisdiction is valid." *Id.* (citation omitted). Nonetheless, the court hypothesized (in 2013) that the Ninth Circuit might be skeptical of conspiracy jurisdiction because of a venue decision the Circuit had issued 34 years previously, in 1979. *Id.* (citation omitted). This does not mean the Ninth Circuit affirmatively "declin[ed] to adopt" conspiracy jurisdiction. The Ninth Circuit has just not taken a position on the issue.[8] But the Nevada Supreme Court has – in *Davis* – and that decision remains sound.

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[7] When it affirmed quashing a Texas default judgment against the defendant, the Court in *Sharpstown* simply confirmed there was no personal jurisdiction *in* Texas over a Nevada defendant that "received telephone calls *from* Texas." 874 P.2d at 729 (emphasis in original).

[8] Respondent Seyfarth acknowledges this, at page 28 of its brief.

Respondents' next argument is that "*Walden* Overruled *Davis*." (Answ. Brf. at 25) This, too, is incorrect. *Walden* does not even mention *Davis* and is readily distinguishable. *Walden* had nothing to do with a calculated conspiracy among various parties to defraud plaintiff, but dealt rather with a chance meeting between plaintiff and defendant at an airport. Accordingly, numerous courts hold conspiracy personal jurisdiction to be alive and well notwithstanding the decision in *Walden*. *See, e.g.,* Opening Brf. at 46-47 and cases cited therein. Moreover, as already discussed, sound policy reasons support the holding in *Davis*, and the application of that holding to this case.

Respondents ignore such matters and instead try to avoid this State's jurisdiction by raising new arguments not made in the District Court. Respondents first argue that Tricarichi is collaterally estopped to plead a conspiracy claim (and thus to assert conspiracy jurisdiction) because of certain Tax Court findings that, Respondents say, show Appellant knew the Fortrend transaction was "tax fraud." (Answ. Brf. at 27-28) As noted above, however, PwC made a collateral estoppel argument below on a motion to dismiss – which the District Court denied – and Respondents themselves never raised collateral estoppel as a basis for dismissal on personal jurisdiction grounds, thereby waiving the argument for this appeal. *See Schuck*, 126 Nev. at 437; *Cliff Shadows*, 129 Nev. Adv. Op. 2 n.2. And, as

discussed above, Appellant was not found to have committed "tax fraud," in any event, much less been a knowing participant in the conspiracy.

Even assuming *arguendo* that this Court reaches Respondents' new argument, it is without merit. Respondents try to give the false impression that the Tax Court found Mr. Tricarichi solely responsible for entering into the Fortrend transaction. It's a classic example of "blame the victim," and it doesn't work. The issue before the Tax Court was whether Appellant "had *constructive* knowledge that West Side's Federal and Ohio tax liabilities would not be paid," an issue that necessarily encompasses what defendant PwC knew in advising Appellant. (App. Vol. 6 at APP 1285 (emphasis added)) Respondents suggest the Tax Court made various factual findings about what Appellant, and Appellant alone, supposedly knew or did. Respondents can do so, however, only by mischaracterizing the Tax Court opinion, which actually imputes the knowledge and actions of their co-defendant PwC to Appellant, whom PwC advised when he was considering the Fortrend transaction. The Tax Court expressly stated that Appellant's advisers, including PwC, did not act appropriately in advising Tricarichi:

> 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 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.

(App. Vol. 6 at APP 1285 (emphasis added, citation omitted)).

The Tax Court did not decide, as between Appellant and PwC, who was ultimately to blame for Appellant's entry into the Fortrend transaction, because that was not the Tax Court's job. The Tax Court's job was to decide whether taxes were owed the U.S. Treasury in the wake of the transaction. It is, however, the job of the District Court, and/or a jury empaneled by that Court, to look at matters as between Appellant and PwC and decide whether PwC was grossly negligent in advising Appellant to go ahead with the Fortrend transaction. Accordingly, collateral estoppel is not appropriate here. *See Kahn v. Morse & Mowbray*, 117 P.3d 227, 236 (Nev. 2005) (reversing imposition of collateral estoppel when prior court ruling "did not address the factual issues underlying [plaintiffs'] assertion that [defendant] offered them bad advice"); *U.S. v. Boyle*, 469 U.S. 241 (1985) (distinguishing between taxpayer's duties to the government under the tax laws, and duties owed to taxpayer by his advisers); *Pair v. Queen*, 2 A.3d 1063, 1066 (D.C. 2010) (reversing dismissal of taxpayer plaintiffs' attorney malpractice claim; "nothing in *Boyle* suggests that a taxpayer's non-delegable

duty to the IRS relieves a professional from liability for negligent failure to perform … duties" owed to taxpayer).[9]

Respondents also argue that Appellant did not plead his conspiracy claim with particularity. Again, Respondents did not raise this argument in the District Court (*see* App. Vol. 6 at APP 1164 (making a different argument), so it is waived. *See Schuck* and *Cliff Shadows*, *supra*. In any event, the argument is also without merit. Conspiracy need not be pleaded with particularity. *Vandalay Enterprises, Inc. v. Herrin*, 390 P.3d 959 *2, No. 68548 (Nev. Feb. 17, 2017) (unpublished disposition) (plaintiff "sufficiently met the pleading standard for civil conspiracy" under NRCP 8(a), which requires a "short and plain statement of the claim"). *See also Kim v. Kearney*, 838 F.Supp. 2d 1077, 1093 (D.Nev. 2012) (conspiracy claims may be based on circumstantial evidence).

Regardless, Tricarichi has more than adequately pled Rabobank and Utrecht's participation in a conspiracy to defraud him via a transaction Respondents knew to be illegal for tax purposes. *See* Opening Brf. at 11-14, 19-

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[9] Furthermore, the tax litigation is not over. The Tax Court's ruling is on appeal. *Tricarichi v. Commissioner*, Docket No. 16-73418 (9th Cir.). If this Court were to apply collateral estoppel as Respondents ask, and the Ninth Circuit were to reverse the Tax Court, this Court's judgment would have to be vacated. *See, e.g., Butler v. Eaton*, 141 U.S. 240, 243-44 (1891) (reversing judgment based on another judgment that was reversed); *In re Hedged-Investments Assocs., Inc.*, 48 F.3d 470, 473 (10th Cir. 1995) (reversal of judgment on which defendant sought to base collateral estoppel made it impossible to impose collateral estoppel).

22, 44-45 (citing to record). Rabobank and Utrecht, like the out-of-state defendants in *Davis*, were active participants in a conspiracy aimed at defrauding and injuring Appellant, a Nevada resident. Rabobank and Utrecht financed and facilitated numerous Midco transactions promoted by Fortrend and others, earning millions of dollars in fees for executing round-trip loans in a matter of days. But well before Fortrend, Rabobank and Utrecht first contacted Appellant about a Midco transaction, Respondents and Fortrend all knew that such transactions were illegal for tax purposes. Nonetheless, they joined together to induce Appellant into, and to effectuate, a Midco transaction, knowing that it would cause Appellant serious damage. Starting in July 2003, months after Appellant had become a Nevada resident, Fortrend's Mr. Conn Vu sent Appellant – in Nevada – a letter of intent regarding the proposed purchase of Appellant's Westside stock via a Midco transaction, and the parties proceeded to discuss and negotiate a proposed stock purchase agreement, with Fortrend falsely assuring Appellant that the transaction was valid for tax purposes. Shortly thereafter, in mid-August 2003, Fortrend asked Rabobank for a $29.9 million loan to finance the purchase of Appellant's Westside stock. (Fortrend's loan request identifies Mr. Tricarichi as a Las Vegas resident. (App. Vol. 7 at APP 1527)) At about the same time, at Rabobank's request, Appellant completed and signed account opening documents reflecting a Nevada address for an escrow account to facilitate

the transaction's closing. (*Id.* at APP 1529-36) Later that month, Rabobank approved Fortrend's loan, which would be made by Utrecht. Then, as the transaction's closing date neared, Rabobank insisted that Appellant open another escrow account in connection with the transaction, again reaching out to Appellant in Nevada. With this last piece in place, the transaction closed, sealing Appellant's fate. Nowhere along the way – despite their knowledge of the fact – did Rabobank or Utrecht warn Appellant that the Midco structure being employed was illegal.

Finally, Respondents mistakenly argue Tricarichi has not adequately pointed to conspirators' contacts with Nevada. Yet, Respondents acknowledge that Fortrend sent Tricarichi an original and amended letter of intent in Nevada. Respondents say these documents do not relate to Tricarichi's claims (Answ. Brf. at 29-30), but this makes no sense, since Tricarichi is claiming that he was defrauded into entering the transaction proposed in these very documents; that Respondents aided and abetted this fraud; and that Respondents were part of the conspiracy to defraud Tricarichi via this transaction. And, of course, there are Respondents' own contacts with Tricarichi and Nevada, and the fact that the transaction was proposed, negotiated and consummated all while Tricarichi was a Nevada resident.

C. There Is Personal Jurisdiction Over Seyfarth in Nevada.

Seyfarth makes largely the same arguments as Rabobank and Utrecht, and Tricarichi therefore adopts his foregoing arguments in response to Seyfarth's. To the extent Seyfarth has anything new to add, it further mischaracterizes the facts and the law.

First, Seyfarth misleadingly tries to distance itself from the conspiracy set forth in the Complaint by repeatedly referring to the opinion letter it issued as part of that conspiracy as one "rendered to a third party in Ireland," or words to that effect. (Seyfarth Brf. at 2 *et seq.*) This argument simply echoes the District Court's error in finding Seyfarth's opinion letter "unrelated both to this case and to ... Tricarichi." (App. Vol. 8 at APP 1842) As set forth in the Opening Brief (at 49-50), Seyfarth issued its opinion letter on August 21, 2003, while the Westside stock purchase was still being negotiated and just weeks before the transaction closed. The opinion was addressed to Mr. McNabola at Millennium, an affiliate of the Midco promoter, Fortrend. (Vol. 1 at APP 0014-15, 0089) McNabola also signed the purchase agreement on behalf of Nob Hill (another Fortrend affiliate). (Vol. 4 at APP 0676) Millennium, the recipient of Seyfarth's opinion, was the sole shareholder of Nob Hill, the purchaser of Tricarichi's Westside stock. (Vol. 1 at APP 0014-15) Millennium also owned the debt that was the subject of the Seyfarth opinion. (Vol. 1 at APP 0023-24) After transferring a portion of that debt

to Westside post-closing, and in order to claim a loss when writing off the debt, based on the Seyfarth opinion it claimed a high basis despite having purchased the debt for a fraction of that claimed basis. (*Id.* at APP 0024-27) The reasonable inference – contrary to Seyfarth's argument and the District Court's holding – is that the Seyfarth opinion was an integral part of the Midco transaction conspiracy, which was directed at Appellant in Nevada.

Second, Seyfarth makes sure to use the word "Ohio" repeatedly, in an effort to suggest that Nevada jurisdiction is inappropriate. But, as discussed above, the parties in the Tax Court litigation stipulated, and the record here reflects, that Appellant lived in Nevada when the Westside stock sale was proposed, negotiated and consummated. The fact that Westside was located in Ohio, while pertinent to choice of law in the Tax Court, is not pertinent to jurisdiction here.

Third, Seyfarth suggests Appellant was improperly trying to "avoid" taxes via the Midco transaction and residency in Nevada. (Seyfarth Brf. at 3) But, as Judge Learned Hand put it, "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not … a patriotic duty to increase one's taxes." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935). PwC advised Appellant that the transaction was proper for tax purposes, Nevada has no

income tax, and Appellant was free to listen to PwC's advice and move to Nevada. Seyfarth's attempt to insinuate otherwise is off base.

Next, in addition to incorrectly contending that *Walden* effectively overruled *Davis*, Seyfarth tries to distinguish *Davis* on the facts. Seyfarth seizes on a snippet from *Davis* saying that the defendants there "had attended" the target of the fraud and conspiracy, Howard Hughes, toward the end of his life. (Seyfarth Brf. at 24-25) From this, Seyfarth tries to imply that *all* the defendants in *Davis* attended to Hughes *in person* in Nevada. But the opinion does not say this, and it is undisputed that *Davis* involved a motion to dismiss by only the "out-of-state" defendants in that case, who participated in the conspiracy targeting Hughes in Nevada (*Davis*, 97 Nev. at 334) – just as Seyfarth participated in the conspiracy targeting Tricarichi here.

Seyfarth also contends that two recent decisions of this Court support the notion that *Davis* has effectively been overruled. (Brf. at 26-27) But neither of those cases involved a conspiracy, and they are irrelevant. *See Dogra v. Liles*, 129 Nev. Adv. Op. 100 (2013); *Catholic Diocese of Green Bay v. Doe*, 131 Nev. Ad. Op. 29 (2015).[10] As previously discussed, *Davis* is entirely consistent with the *Calder* effects test, which remains the law after *Walden*.

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[10] *See also* Seyfarth Brf. at 32-33 (citing other non-conspiracy cases –*Bristol-Myers Squibb Co. v. Super Ct. of Calif.*, 137 S.Ct. 1773 (2017); *In re Beatrice B.*

Like the other Respondents, Seyfarth argues that Appellant has not adequately pled conspiracy. (Brf. at 31) But, again, conspiracy need not be pled with particularity (*Vandalay* and *Kim, supra*), and Tricarichi has more than adequately done so here.

Finally, Seyfarth resorts to mischaracterizing Appellant's argument. Noting the extensive list of Seyfarth contacts with Nevada outlined in the Opening Brief (at 53), Seyfarth asserts (Brf. at 33) that Appellant's claims do not arise from these contacts. But Appellant never argued they did. Appellant provided the list to demonstrate that it would be entirely reasonable for Seyfarth to defend itself in Nevada, since Seyfarth regularly does business here. Seyfarth does not dispute its regular contacts with Nevada. Seyfarth's only argument for why it would be unreasonable for the firm to appear in a Las Vegas court is to point to the "Ireland opinion letter" and "Ohio" red herrings – which are debunked above. Thus, there is no reason why Seyfarth, a large law firm that regularly does business in Nevada, should be immune from defending, in a Nevada court, its role in a conspiracy that targeted, defrauded and injured a Nevada resident.

Davis Family Heritage Tr. v. Dist Ct., 133 Nev, Adv. Op. 26 (2017); and *Fulbright & Jaworski LLP v. Dist. Ct.*, 342 P.3d 997 (2015)).

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

Respondents all concede that, if Appellant has made a *prima facie* case for personal jurisdiction, he is, at minimum, entitled to jurisdictional discovery to further flesh out this case. While Respondents dispute that a *prima facie* case has been made, Appellant submits that it has, for the reasons set forth in the Opening Brief and herein.

Rabobank and Utrecht also offer up the red herring that Appellant "had the added benefit of extensive discovery from [them] in the Tax Court proceeding." (Brf. at 31) But, again, in connection with the Tax Court proceedings, Appellant only received copies of documents subpoenaed from Rabobank by the IRS – which was not focused on the question of whether Respondents should be subject to personal jurisdiction in a Nevada civil suit. (App. Vol. 9 at APP 1898) As discussed in the Opening Brief, Respondents (and others) likely possess additional information, currently unavailable to Appellant, regarding the specific Midco transaction that targeted Appellant in Nevada, and Respondents' role, including further potential evidence regarding Respondents' purposeful direction of their activities toward the Nevada forum. Similarly, Respondents (and others) may possess further information (again unavailable to Appellant at this early juncture) regarding the scope of their Midco promotions with Fortrend and others – and the scope of such activity directed toward Nevada. With respect to the reasonableness

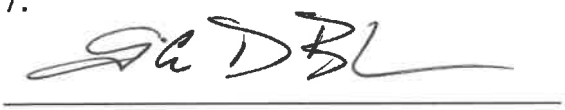
factor, Respondents may also possess more information – unavailable to Appellant – regarding the scope of their business dealings in Nevada. In light of the showing Appellant has already made, discovery – written, oral and documentary – would likely shed even more light on these subjects.

Seyfarth additionally contends that Appellant now seeks different discovery than he sought in the District Court. (Brf. at 35) This is false. With respect to conspiracy/specific jurisdiction, Appellant asked the District Court for leave to take the very same discovery Appellant seeks in his Opening Brief here. (*Compare* Opening Brf. at 56-57 and App. Vol. 1 at APP 0182-83.) Seyfarth's argument is but another instance of Respondents' efforts to misdirect this Court.

II. CONCLUSION

This Court should reverse the decisions of the District Court dismissing Respondents, and remand to the District Court for further proceedings; or, alternatively, reverse the denial of jurisdictional discovery and remand for such discovery.

Dated this 20th day of November, 2017.



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CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more and contains 6,885 words.

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

Dated this 20th day of November, 2017

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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 20th day of November, 2017, I caused the document entitled APPELLANT'S REPLY BRIEF to be served on the following by Electronic Service to:

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