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.

Electronically Filed
Nov 20 2017 10:39 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 APPENDIX

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 20th day of November, 2017, I caused the document entitled APPELLANT'S REPLY APPENDIX 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 **PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS**

Defendant PricewaterhouseCoopers LLP ("PwC") moves this Court to dismiss Plaintiff Michael A. Tricarichi ("Plaintiff")'s Complaint with prejudice under Nevada Rule of Civil Procedure 12(b)(5).

This Motion to Dismiss is based on the complaint on file, any documents it references, the memorandum of points and authorities below, including its attachments or matters of judicial notice, and any oral argument that this Court may entertain.

Dated: July 11, 2016.

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

PLEASE TAKE NOTICE that the undersigned will bring PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS on for hearing on the ______ day of ________, 2016, at the hour of _____a.m./p.m., in Department 15, or as soon thereafter as counsel may be heard.

Dated: July 11, 2016.

SNELL & WILMER LLP

By: ______________________
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

In 1993, Plaintiff Michael A. Tricarichi ("Plaintiff"), sole owner of Westside Cellular, Inc. ("Westside"), brought suit on behalf of Westside against certain of its cellular service provider competitors for alleged anticompetitive practices – a litigation Plaintiff alleges was for "Westside's survival." (Compl. ¶ 27.) After over a decade of litigation, in which Plaintiff was heavily involved, Plaintiff received a $65 million settlement in early 2003 from Westside's competitors. Realizing that he would incur significant taxation on the settlement proceeds, Plaintiff was apparently no longer concerned with Westside's "survival." Instead, he immediately sought business deals that would allow him to walk away from his own company, avoid taxation, dump Westside's tax burdens on someone else, and receive a hefty sum for his ownership interest in Westside. Plaintiff found that deal in September 2003, when he completed a business transaction with Fortrend International, LLC ("Fortrend") in which he personally received $34 million (the "Fortrend Transaction" or "Transaction").

Twelve years later, however, in 2015, the United States Tax Court ("Tax Court"), following a trial on the merits, found that the Fortrend Transaction was an improper tax shelter and that Plaintiff committed a constructively fraudulent transfer by completing the Fortrend Transaction. The Tax Court held Plaintiff liable for over $21 million in unpaid taxes and tax penalties. Rather than accept the Tax Court's ruling and the consequences of his own actions, Plaintiff seeks to blame others for his decision to pursue the Fortrend Transaction. Thus, Plaintiff sues, among others, PricewaterhouseCoopers LLP ("PwC") – the accounting firm Plaintiff retained for four months in 2003 – for gross negligence and negligent misrepresentation in connection with the Fortrend Transaction.

Plaintiff's current legal posture, however, stands in stark contrast to the position Plaintiff advocated before the Tax Court that PwC's advice was perfectly proper. Plaintiff argued:

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- "PwC[] adhere[d] to proper seller due diligence standards in an all-cash transaction." (Ex. 1, Petitioner Michael A. Tricarichi's 11/10/2014 Reply Brief in Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, at 55.)[1]
- "PwC did everything it needed to do to vet the risks to [Plaintiff] associated with the proposed stock sale" of Westside. (Id. at 55-56.)
- PwC "reached the correct conclusion that the stock sale was neither listed nor otherwise reportable under the reportable transaction rules that were then in effect." (Id. at 56-57.)

Indeed, the Tax Court itself credited PwC's advice in its post-trial opinion, but found that Plaintiff proceeded with the Fortrend Transaction even though he knew it was risky:

- PwC advised that Fortrend's proposed plan to eliminate tax liabilities "appeared to be a very aggressive tax-motivated strategy that was 'subject to IRS challenge,'" but Plaintiff "***turned his back on this red flag***." (Ex. 2, Tax Court's 10/14/2015 Opinion in Michael A. Tricarichi v. Commissioner of Internal Revenue, 110 T.C.M. (CCH) 370 (T.C. 2015), at 81 (emphasis added).)
- While "clearly suspicious about Fortrend's scheme . . . [Plaintiff] engaged in ***willful blindness and actively avoided learning the truth***." (Id. (emphasis added).)
- Plaintiff "knew that [the Fortrend Transaction] was likely a 'reportable' or 'listed transaction'" prior to entering into the Transaction. (Id.)[2]
- "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." (Id.)
- "We find as a fact that [Plaintiff] had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West[s]ide's accrued tax liabilities and leave it without assets to satisfy those liabilities." (Id. at 82.)

Thus, Plaintiff's current action has nothing to do with compensating an unsuspecting client for allegedly receiving negligent tax advice. Rather, this case is about a sophisticated businessman who knowingly entered into a risky transaction to avoid taxes and now seeks to use PwC, and the other defendants, as a form of investment insurance for his prior decision that turned out badly. The laws of Nevada are not intended to be a form of investment insurance, and, therefore, the Court should dismiss this action for the following three independent reasons:

Plaintiff's Claims Are Time-Barred. Plaintiff's claims against PwC are time-barred and

[1] All references to "Ex." refer to the exhibits attached to the Request for Judicial Notice filed concurrently herewith. All page numbers refer to the consecutively numbered exhibit page numbers located in the bottom right hand corner of the page.

[2] For federal income tax purposes, a "reportable" or "listed" transaction is a tax transaction that the IRS considers to be a reportable tax shelter. (See Compl. ¶ 24.)

have been time-barred for at least ***nine years***. Pursuant to the parties' April 2003 Engagement Agreement governing their professional relationship, New York law applies to Plaintiff's claims. Because Plaintiff's "gross negligence" and "negligent misrepresentation" claims are, in truth, claims for accountant malpractice, see Rosenbach v. Diversified Grp., Inc., 819 N.Y.S.2d 851, 2006 WL 1310656 (N.Y. Sup. Ct. 2006), New York's statute of limitations for professional malpractice, which bars claims brought three years after the client receives the allegedly negligent advice, applies. See Ackerman v. Price Waterhouse, 644 N.E.2d 1009, 1011 (N.Y. 1994). Here, Plaintiff alleges that PwC provided him advice from April 2003 to August 2003, and ***thus his claims were time-barred by August 2006***. The Court should dismiss Plaintiff's claims against PwC with prejudice for this reason alone.

The Tax Court's Findings Preclude Plaintiff's Claims as a Matter of Law. In ruling against Plaintiff, the Tax Court found that Plaintiff committed, at least, constructive fraud when completing the Fortrend Transaction. Specifically, the Tax Court found that, among other things, Plaintiff: (1) affirmatively "turned his back on . . . red flag[s]" raised by PwC (Ex. 2 at 81); (2) "engaged in ***willful blindness and actively avoided learning the truth***" (id. (emphasis added)); and (3) ultimately agreed to the Fortrend Transaction with "at least constructive knowledge" of its improper purpose (id. at 82). Plaintiff is collaterally estopped from re-litigating the Tax Court's conclusions. See Bower v. Harrah's Laughlin, Inc., 215 P.3d 709, 717 (Nev. 2009). As a result, Plaintiff's claims against PwC are precluded as a matter of law for several reasons:

First, Plaintiff's claims are barred by the in pari delicto doctrine. The in pari delicto doctrine bars recovery for any injury suffered from Plaintiff's own wrongdoing. Kirschner v. KPMG LLP, 938 N.E.2d 941, 950 (N.Y. 2010) ("The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers."). Here, Plaintiff's own wrongdoing in completing the Fortrend Transaction, as found by the Tax Court, bars recovery on any supposed injury he incurred as a matter of law.

Second, Plaintiff fails to state a cause of action against PwC for either gross negligence or negligent misrepresentation, because Plaintiff cannot allege that he reasonably relied on PwC's advice. See, e.g., Water St. Leasehold LLC v. Deloitte & Touche LLP, 796 N.Y.S.2d 598, 600

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(N.Y. App. Div. 2005) (holding negligent misrepresentation claim against accounting firm failed as a matter of law because plaintiffs could not prove reliance); Finova Capital Corp. v. Berger, 794 N.Y.S.2d 379, 381 (N.Y. App. Div. 2005) (dismissing negligence claim where plaintiff failed to adequately allege he "relied on defendant's alleged negligently rendered opinion . . . and that such reliance was the proximate cause of its damages" as required to state negligence claim).

As a matter of law, a plaintiff cannot rely on alleged misrepresentations when the plaintiff knows the alleged truth. Baraliu v. Vinya Capital, L.P., 2009 WL 959578, at *7 (S.D.N.Y. Mar. 31, 2009). Moreover, a plaintiff also cannot reasonably rely on alleged misrepresentations when the plaintiff has reason to suspect that the representation is incorrect but fails to undertake further investigation. See HSH Nordbank AG v. UBS AG, 941 N.Y.S.2d 59, 66 (N.Y. App. Div. 2012). Here, the Tax Court found that Plaintiff: (1) constructively knew that the Fortrend Transaction was improper, and (2) ignored red flags that should have led him to investigate the Transaction further. Thus, Plaintiff cannot plead reasonable reliance in the face of such findings.

For these reasons, and the reasons below, the Court should dismiss Plaintiff's Complaint against PwC with prejudice.

II. STATEMENT OF FACTS

A. Plaintiff Enters Into a Transaction with Fortrend for $34.6 Million and Engages PwC for Certain Services.

Plaintiff was the president and sole shareholder of Westside, an Ohio telecommunications company, from 1991 to 2003. (Compl. ¶¶ 9, 27.) In 1993, Plaintiff, on behalf of Westside, filed a complaint with the Public Utilities Commission of Ohio ("PUCO") against certain competing cellular service providers, alleging anticompetitive trade practices. (Id. ¶ 28.) Plaintiff alleges "Westside's survival hung in the balance," (id. ¶ 27), and Plaintiff took an active role in the lengthy litigation. (Ex. 2 at 68-69.) After litigating the matter in front of PUCO and the Ohio Supreme Court for a decade, Plaintiff reached a settlement for roughly $65 million. (Compl. ¶ 28.) The settlement also required Westside to cease its business activities. (Id.) In anticipation of the settlement, Plaintiff became concerned that he would suffer double taxation on

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the $65 million settlement. (Id. ¶ 29.) Apparently no longer concerned with Westside's "survival," Plaintiff and his Cleveland-based outside legal counsel, Hahn Loeser & Parks, LLP ("Hahn Loeser"), began considering business transactions that would enable Plaintiff to get out of Westside, avoid double taxation, and receive a hefty sum for his ownership interest in Westside. (Id.)

In March or April 2003, Plaintiff and his advisers met with representatives from Fortrend, a company purportedly in the distressed debt receivables business, to discuss selling Plaintiff's shares in Westside to Fortrend. (Id. ¶ 31.) Plaintiff and Fortrend agreed that after the closing Westside would merge into Fortrend and Fortrend would use Westside in its distressed-debt collection business. (Id. ¶ 32.) Fortrend would offset Westside's tax liabilities from the settlement with tax deductions resulting from Fortrend's distressed-debt business. (Id.)

Prior to completing the Fortrend Transaction, Plaintiff and Westside engaged PwC in April 2003 to provide certain advice regarding the Fortrend Transaction's tax implications. Plaintiff and PwC entered into an engagement agreement for PwC to "provide tax research and evaluation services" (the "Engagement Agreement" or "Agreement"). (Id. ¶ 37; Ex. 3, 4/10/2003 Engagement Agreement, at 90.)

The Engagement Agreement provides that it and the terms therein are "necessary" to "achieve mutually agreed upon objectives," between PwC, Plaintiff and Westside. The Engagement Agreement further states that signing the Agreement constitutes a representation that "the Agreement is in accordance with [Plaintiff's] understanding of our engagement." (Ex. 3 at 92.) The Agreement included a New York choice-of-law provision: "This Agreement will be governed by the laws of the State of New York." (Ex. 3 at 95.)

As part of its engagement, PwC reviewed the proposed Fortrend Transaction in connection with IRS Notice 2001-16, which was issued in January 2001 ("Notice 2001-16"). (Compl. ¶ 40.) Notice 2001-16 listed certain business transactions involving the use of an intermediary company to purchase the stock of a target company, or "Midco transactions," as "reportable transactions" for federal income tax purposes, meaning the IRS considers them, and substantially similar transactions, to be reportable tax shelters. (Id. ¶ 24.) Notice 2001-16 further

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states that participants who fail to report these tax shelters may be subject to penalties. (Id. ¶ 56.)

According to the Tax Court, PwC's review concluded that a "position can be taken" that the Transaction was not a reportable transaction under Notice 2001-16. (Ex. 2 at 71.) This conclusion was not an endorsement. In tax-advice terms pursuant to regulations in effect in 2003, a "position can be taken" conclusion expresses a less than one-third level of confidence that the position would ultimately survive IRS scrutiny. (Id. at 81 n.14, 88.) Independent of PwC, Hahn Loeser also spent several days researching whether the proposed Fortrend Transaction was a "reportable transaction" under Notice 2001-16. (Id. at 81.)

In addition to the Tax Court's finding that PwC expressed a low level of confidence that the Fortrend Transaction would survive IRS scrutiny, PwC also provided Plaintiff with other explicit warnings. PwC noted significant risk in the "high basis/low value" debt receivable strategy that Fortrend proposed to eliminate Westside's tax liabilities once the Transaction closed. (Id. at 71.) 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 to be reported by Westside after the completed Transaction. (Id.) PwC completed its services under the Engagement Agreement by August 2003 and received $48,000 in fees. (Compl. ¶ 39.)

After Plaintiff's relationship with PwC concluded, Plaintiff entered into a stock purchase agreement with Fortrend, and the Transaction closed on September 9, 2003. (Id. ¶ 54.) Plaintiff sold his shares in Westside for $34.6 million. (Id. ¶ 45.) Defendant Coöperatieve Rabobank U.A. ("Rabobank"), a Dutch bank, and Defendant Utrecht-America Finance Co. ("Utrecht"), a wholly-owned subsidiary of Rabobank, loaned Fortrend $29.9 million to complete the Transaction. (Id. ¶¶ 11-12, 44.) The Complaint does not allege that PwC negotiated the terms of the stock purchase agreement, or was otherwise involved in the Transaction's closing.

After the Transaction was executed, Plaintiff moved to Nevada to avoid paying Ohio state income taxes on his $34 million gain from selling his Westside shares. (Ex. 2 at 68, 70.)

B. Following Closing, Fortrend Eliminates Westside's Tax Liabilities, Without PwC's Involvement.

The Complaint alleges that, following closing, Fortrend made efforts to eliminate

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Westside's 2003 tax liabilities as the Transaction contemplated. Plaintiff does not allege that PwC had any involvement with these efforts.

Years earlier in 2001, a Fortrend affiliate, Millennium, obtained a portfolio of distressed Japanese debt valued at roughly $137,000. (Compl. ¶ 60.) In August 2003, Defendants Seyfarth Shaw LLP ("Seyfarth"), a law firm, and Graham R. Taylor, a former Seyfarth partner, provided Fortrend with an allegedly false opinion letter that stated, among other things, that it was appropriate for Millennium to claim that its tax basis in the Japanese portfolio was over $314 million, even though Millennium purchased the Japanese portfolio for roughly $137,000. (Id. ¶ 61.) This is known as an allegedly improper distressed asset/debt, or "DAD," tax shelter. (Id. ¶¶ 62-63.) In November 2003, Millennium contributed a subset of the Japanese portfolio, known as the Aoyama Loans, to Westside. (Id. ¶ 69.) The Aoyama Loans had a purported tax basis of over $43 million. Westside accordingly wrote off the Aoyama Loans on its 2003 income tax return, claiming a roughly $42.5 million bad debt deduction. (Id.) Westside's 2003 income tax return reported a total income of over $66 million – including roughly $65 million from the settlement Westside received from the cellular service providers – and total deductions of over $67 million – including the $42.5 million write-off of the Aoyama Loans. (Id.) Westside, therefore, did not pay any amount of taxes in 2003. (Id.)

Plaintiff does not allege PwC had any involvement in preparing Westside's 2003 income tax return.

C. <u>The IRS and Tax Court Find Plaintiff Liable for Tax Deficiencies and Penalties</u>.

In the late 2000s, the IRS audited Westside's 2003 tax return and disallowed the roughly $42.5 million deduction from the write-off of the Aoyama Loans. (Compl. ¶ 75.) In 2009, the IRS assessed over $15 million in unpaid tax deficiencies and imposed $6 million in tax penalties. (Id. ¶¶ 75-76.) Westside was unable to pay these liabilities. (Id. ¶ 76.) Accordingly, the IRS initiated a transferee liability examination concerning Westside's 2003 tax liabilities and penalties to determine whether it could recover Westside's tax liability from anyone who had received Westside's assets. (Id. ¶ 77.) The IRS determined that Plaintiff had transferee liability for Westside's tax deficiency and penalties, and sent Plaintiff a notice of liability on June 25, 2012, totaling roughly $21.2 million. (Id. ¶ 78.)

In September 2012, Plaintiff petitioned the Tax Court for review of the IRS notice of transferee liability. The IRS argued Plaintiff was liable for Westside's tax liabilities under multiple provisions of the Ohio Uniform Fraudulent Transfer Act ("OUFTA"), including the ***constructive fraud provision***, whereby one who receives assets from a debtor is liable to a subsequent creditor if he or she constructively knew that the debtor's debts would not be paid. (Ex. 2 at 80.)

Plaintiff argued that he did not know, and had no reason to know, that the Fortrend Transaction itself was a reportable tax shelter or that Fortrend was going to employ an abusive tax shelter to avoid Westside's tax liabilities after the Transaction was completed. (Ex. 1 at 42-58.) Plaintiff conceded he was "generally aware of a hypothetical transaction Fortrend suggested could be used to satisfy West[s]ide's tax." (Id. at 44.) But, because Fortrend's DAD transaction did not occur until after the closing, Plaintiff argued that he, his attorneys Hahn Loeser, and PwC "could not research or opine on a transaction" that "had not been and perhaps never would be implemented." (Id. at 54-55.)

Plaintiff argued, "PwC properly focused its work on the actual risks faced by their client and worked with [Plaintiff's attorneys] to ensure that those risks were mitigated through provisions in the Stock Purchase Agreement. This conduct is fully consistent with seller-side due diligence requirements of an all-cash sale of stock." (Id. at 54.) Plaintiff argued that PwC's risk analysis "illustrate[s] PwC's adherence to proper seller due diligence standards in an all-cash transaction," (id. at 55), and "[a]t most PwC simply (and accurately) noted that if Fortrend did implement the transaction, there was an audit risk" (id.). Thus, "PwC did everything it needed to do to vet the risks to [Plaintiff] associated with the proposed stock sale." (Id. at 55-56.) Plaintiff testified at the Tax Court trial that he did not first "learn that there might be a problem with Westside's unpaid federal income tax for 2003" until "November of '07." (Ex. 4, 6/9/2014 Tax Court Trial Transcript in Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, at 178.)

The Tax Court issued its post-trial Opinion in October 2015, finding Plaintiff liable for

Westside's tax deficiencies and penalties. The Tax Court held that Plaintiff committed a constructively fraudulent transfer under OUFTA, and was therefore subject to transferee liability for Westside's subsequent tax liabilities. (Ex. 2 at 82-83.) Specifically, the Tax Court held that Plaintiff committed, at least, constructive fraud in completing the Fortrend Transaction, because he "had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West[s]ide's tax liabilities." (Id. at 82.) The Tax Court made several factual findings to support this conclusion that now bind Plaintiff here:

- When negotiating the April 2003 engagement letter with PwC, Plaintiff attempted to strike language that stated: "'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.'" (Id. at 70.) Plaintiff "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.'" (Id.) Plaintiff's actions "evidenc[ed] his active avoidance of learning the truth." (Id. at 81.) Plaintiff's "effort to strike this language from the engagement letter was ultimately unsuccessful. [PwC] insisted on retaining this language and, after further negotiations, [Plaintiff] acquiesced." (Id. at 70 n.3, 87.)
- Plaintiff was "clearly suspicious about Fortrend's scheme . . . but instead of digging deeper, [he] engaged in willful blindness and actively avoided learning the truth." (Id. at 81.)
- Plaintiff "knew that the transaction Fortrend was proposing was likely a 'reportable' or 'listed transaction,'" and specifically his attorneys at Hahn Loeser "spent several days researching Notice 2001-16, 'reportable transactions,' 'sham transactions,' and transactions involving 'an intermediary corporation.'" (Id.)
- "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," – a less than one-third chance of being upheld. (Id. at 81 n.14, 88.)
- PwC advised that Fortrend's proposed strategy of eliminating Westside's tax liabilities "appeared to be a 'very aggressive tax-motivated strategy' that was 'subject to IRS

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challenge'" and PwC "specifically declined to give 'more likely than not' assurance" as to Fortrend's proposed strategy of eliminating Westside's tax liabilities. "Petitioner turned his back on this red flag." (Id. at 73.)

- Plaintiff was a "sophisticated entrepreneur who had built a company and knew how to value a business," and therefore other aspects of Fortrend's proposal "should have provoked tremendous skepticism" and "demanded further inquiry from any reasonably diligent person." (Id. at 81-82.) Plaintiff "displayed familiarity with tax concepts." (Id. at 68.)

D. Plaintiff Brings This Action to Deflect His Liability.

In the wake of the Tax Court's decision finding constructive fraud and $21 million in tax liabilities, Plaintiff brings this action against PwC and others, hoping to hold them responsible for his own wrongful conduct. Plaintiff alleges that Fortrend, not named as a defendant, defrauded him with the help of Defendants Rabobank, Utrecht, Seyfarth and Graham Taylor (collectively, the "Co-Defendants"). Contrary to the Tax Court's conclusions, Plaintiff alleges that "unbeknownst to [him]," "Fortrend always intended to engage in an IRS reportable transaction; avoid paying Westside's taxes; strip Westside of its assets; and leave Plaintiff 'holding the bag' for transferee liability imposed by the IRS." (Compl. ¶¶ 59-60.)

As to PwC, Plaintiff alleges that, while Fortrend and the Co-Defendants ***knew*** of Fortrend's intended fraudulent scheme, PwC merely "***should have*** known that the Fortrend [T]ransaction was illegitimate for tax purposes and would result in substantial tax and penalty exposure to Mr. Tricarichi personally." (Id. ¶ 6 (emphasis added).) Thus, Plaintiff does not allege that PwC committed fraud. Plaintiff alleges, among other things, that he relied on PwC's professional advice that the Fortrend Transaction was not a Midco tax shelter under IRS Notice 2001-16, that Plaintiff would not be subject to transferee liability for Westside's taxes as a result of the Fortrend Transaction, and that "there was no reason not to go forward with Fortrend's offer to purchase Plaintiff's Westside stock." (Id. ¶ 53.) Contrary to Plaintiff's position in the Tax Court proceedings that PwC "did everything it needed to do to vet the risks to [Plaintiff] associated with the proposed stock sale" (Ex. 1 at 55-56), Plaintiff now claims that PwC's advice constituted gross negligence and negligent misrepresentation. (Compl. ¶¶ 81-93.)

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III. ARGUMENT

A. Plaintiff's Claims Are Barred by the Statute of Limitations.

The Court must dismiss a claim as time barred when "the defense of the statute of limitations appears from the complaint itself." Kellar v. Snowden, 489 P.2d 90, 92 (Nev. 1971). "When the complaint shows on its face that the cause of action is barred, the burden falls upon the plaintiff to satisfy the court that the bar does not exist." Bank of Nev. v. Friedman, 420 P.2d 1, 4 (Nev. 1966). Here, Plaintiff's claims are time-barred by the applicable New York statute of limitations. Indeed, his claims against PwC have been time-barred for over ***nine years***. The Court should dismiss this action against PwC with prejudice for this reason alone.

1. Plaintiff's Claims Are Subject to New York's Statute of Limitations.

New York law applies to Plaintiff's claims, pursuant to the choice-of-law provision in the parties' April 2003 Engagement Agreement stating the Engagement Agreement "will be governed by the laws of the State of New York." (Ex. 3 at 95.)[3]

The Nevada Supreme Court permits contracting parties "broad" latitude "to choose the law that will determine the validity and effect of their contract." Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Inv'rs, 603 P.2d 270, 273 (Nev. 1979). Thus, Nevada courts will enforce a contractual choice-of-law provision as long as: (1) "the parties acted in good faith and not to evade the law of the real situs of the contract"; (2) the "situs fixed by the agreement" has "a substantial relation with the transaction"; and (3) the agreement is not "contrary to the public policy of" Nevada or the "other interested state." Progressive Gulf Ins. Co. v. Faehnrich, 327 P.3d 1061, 1064 (Nev. 2014) (citation omitted). Here, the New York choice-of-law provision in the Engagement Agreement is valid and enforceable under Nevada law.

[3] Plaintiff understandably fails to attach the Engagement Agreement hoping to close his eyes to the Agreement's New York choice-of-law provision. However, on a motion to dismiss, Nevada courts may consider "matters incorporated by reference or integral to the claim" without converting the motion to dismiss into a motion for summary judgment. Baxter v. Dignity Health, 357 P.3d 927, 930 (Nev. 2015) (citation omitted). The Engagement Agreement is specifically referenced throughout the Complaint (see Compl. ¶¶ 37, 39), and is integral to Plaintiff's tort claims because it created the "duty to Plaintiff to use such skill, prudence and diligence as commonly possessed and exercised by tax and business professionals in the fields of income taxes, tax savings transactions and business tax consulting" (id. ¶ 81), which Plaintiff alleges PwC breached. The Court therefore should consider the terms of the Engagement Agreement.

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First, Plaintiff and PwC negotiated the choice-of-law provision in good faith – and the Complaint does not allege otherwise. The Engagement Agreement provides that its terms are "necessary" to "achieve mutually agreed upon objectives" between the parties, and that signing the agreement constitutes a representation that "the Agreement is in accordance with your understanding of our engagement." (Ex. 3 at 90, 92.) Thus, Plaintiff, as a sophisticated business person who signed the Engagement Agreement, affirmed his understanding and agreement that the choice-of-law clause governed the relationship between the parties. See Izquierdo v. Easy Loans Corp., 2014 WL 2803285, at *4 (D. Nev. June 19, 2014) (under Nevada law, applying Delaware contractual choice-of-law provision on motion to dismiss where there was no indication "parties acted in anything other than good faith in selecting Delaware as the governing law"); Nevada Power Co. v. Calpine Corp., 2006 WL 1582101, at *6 (D. Nev. June 1, 2006) (holding same on motion to dismiss and enforcing California choice-of-law provision).[4]

Second, the situs selected by the choice-of-law clause has a significant relationship to the contract. PwC's headquarters and principal place of business is in New York. See, e.g., Commisso v. PricewaterhouseCoopers LLP, 2012 WL 3070217, at *1 (S.D.N.Y. July 27, 2012) (noting PwC is "headquartered in New York"); BHC Interim Funding, L.P. v. Finantra Capital, Inc., 283 F. Supp. 2d 968, 984 (S.D.N.Y. 2003) (same). Courts have held that the substantial relationship requirement is satisfied where one of the parties has its principal place of business in the state chosen by the contract. See, e.g., Engel v. Ernst, 724 P.2d 215, 217 (Nev. 1986) (enforcing Colorado choice-of-law clause, holding Colorado had a substantial relationship to the contract because defendant accounting firm "recognized Colorado as [its] corporate headquarters"); Restatement (Second) of Conflicts of Laws § 187 cmt. f (substantial relationship requirement met "where one of the parties is domiciled or has his principal place of business" in

[4] Consideration of federal authorities is appropriate in the context of a motion to dismiss as Nevada Rule of Civil Procedure 12(b)(5) is based substantially on its counterpart in Federal Rule of Civil Procedure 12(b)(6). It is a well-settled principle that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when [a Nevada Court] examines its rules." Nelson v. Heer, 122 P.3d 1252, 1253 (Nev. 2005). Indeed, "the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 38 P.3d 872, 876 n.24 (Nev. 2002) (citation omitted).

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the state); see also Ruiz v. Affinity Logistics Corp., 667 F.3d 1318, 1323 (9th Cir. 2012) (enforcing Georgia choice-of-law clause when company had its principal place of business in Georgia); Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co., 88 F. Supp. 3d 1156, 1167 (S.D. Cal. 2015) (enforcing New York choice-of-law clause, noting that "the fact that Defendant has its principal place of business in New York satisfies the substantial relationship inquiry").

Third, applying New York law would not contravene any public policy of Nevada or New York. To the contrary, Nevada courts uphold valid choice-of-law clauses even if applying the out-of-jurisdiction law would preclude all relief for the plaintiff. See, e.g., Progressive Gulf Ins., 327 P.3d at 1065 (applying Mississippi law even though it "preclude[d] all recovery" for Nevada residents) (citation omitted); Izquierdo, 2014 WL 2803285, at *4 (under Nevada choice-of law principles, applying Delaware statute of limitations pursuant to Delaware choice-of-law provision and dismissing Nevada citizen's claims where doing so would "support[] Nevada's long-recognized public interest in protecting the freedom to contract"). The choice-of-law clause here is valid and enforceable.

Therefore, the Engagement Agreement's New York choice-of-law provision governs Plaintiff's claims against PwC, which arise out of the accountant-client relationship formed by the Engagement Agreement. See Risinger v. SOC LLC, 936 F. Supp. 2d 1235, 1249 (D. Nev. 2013) (applying choice-of-law provision to statutory claims arising out of relationship formed by agreement because, under Nevada law, a choice-of-law clause without "qualifying language, or apparent exceptions" is construed broadly so that all "disputes arising from the agreement are to be adjudicated under the guise" of the chosen law not just contract claims); Stellia Ltd. v. B+S Card Serv. GmbH, 2013 WL 1195709, at *5-6 (D. Nev. Mar. 22, 2013) (dismissing contract, statutory and tort claims pursuant to contractual provision that agreement is "governed by German law" and German forum selection clause); see also Melt Franchising, LLC v. PMI Enters., Inc., 2009 WL 32587, at *3 (C.D. Cal. Jan. 2, 2009) (finding that choice-of-law provision with broad "governed by" language applied to all "disputes, whether sounding in tort or contract law, which arose out of the Agreement"); In re TFT-LCD (Flat Panel) Antitrust Litig., 781 F. Supp. 2d 955, 965 (N.D. Cal. 2011) (finding that choice-of-law clauses stating that agreements were "governed by" New York and Texas law applied to "all causes of action arising from" the agreements, including non-contractual antitrust and unfair competition claims).

2. New York's Statute of Limitations for Accountant Malpractice Actions Applies to Plaintiff's Claims.

In determining which statute of limitations applies to a plaintiff's claim, New York courts "look to the essence of the stated claim and not the label by which a plaintiff chooses to identify it." Rosenbach, 2006 WL 1310656, at *4 (citation omitted). Here, while Plaintiff labels his claims against PwC as "gross negligence" and "negligent misrepresentation," the "essence" of his claims is accountant malpractice. New York's statute of limitations for accountant malpractice actions governs.

First, as to his gross negligence claim, Plaintiff alleges that PwC's advice breached a duty owed to Plaintiff arising out of the accountant-client relationship between the parties. (See Compl. ¶ 82.) Specifically, Plaintiff alleges PwC breached its duty "to use such ***skill, prudence, and diligence as commonly possessed and exercised by tax and business professionals*** in the fields of income taxes, tax savings transactions and business tax consulting." (Id. (emphasis added).) Plaintiff's allegations ***parrot*** the duty element for a professional negligence claim. See, e.g., Charleson v. Hardesty, 839 P.2d 1303, 1307 (Nev. 1992) ("The elements of a professional negligence action" include "the duty of the professional ***to use such skill, prudence, and diligence as other members of [the] profession commonly possess and exercise***" and "breach of that duty" (alteration in original) (emphasis added)); A. Morrison Trucking, Inc. v. Bonfiglio, 824 N.Y.S.2d 752, 2006 WL 2726796, at *5 (N.Y. Sup. Ct. Sept. 18, 2006) (accountant malpractice claim under New York law requires breach of duty to "exercise the standards of skill and care recognized by the accounting profession" causing "plaintiff to sustain tax interest and liabilities"). Thus, the nature of Plaintiff's lawsuit is one for professional malpractice, and therefore, the Court should apply New York's accountant malpractice statute of limitations. See, e.g., A. Morrison Trucking, 2006 WL 2726796, at *5 (applying accountant malpractice statute of limitations to negligence and breach of contract claims where "[t]he gravamen of such claims as pled is that [defendant CPA] failed to exercise the standards of skill and care recognized by the accounting profession and his deviation therefrom caused Morrison to sustain tax interest and liabilities"); see also Sears, Roebuck & Co. v. Enco Assocs., Inc., 385 N.Y.S.2d 613, 614 (N.Y. App. Div. 1976), modified, 372 N.E.2d 555 (N.Y. 1977) (applying professional malpractice statute of limitations to claims against architect for negligence, breach of contract and breach of implied warranty, when claims "sound[ed] in malpractice").

Similarly, as to his negligent misrepresentation claim, Plaintiff alleges that "*[i]n* ***consulting*** and ***otherwise representing*** Plaintiff with respect" to the Fortrend Transaction, "PwC owed a duty to Plaintiff to communicate accurate information to Plaintiff." (Compl. ¶ 88 (emphasis added).) As with the gross negligence claim, the duty at issue arises from the accountant-client relationship. Plaintiff alleges that PwC breached that duty by allegedly misrepresenting that the Fortrend "[T]ransaction . . . was proper and according to the tax laws." (Id. ¶ 89.) Thus, Plaintiff's negligent misrepresentation "claim, in essence, asserts that [PwC] provided poor [tax] advice," and therefore the accountant malpractice statute of limitations applies. See Rosenbach, 2006 WL 1310656, at *4 (accountant malpractice statute of limitations time-barred claim labeled "negligent misrepresentation," where "claim, in essence, asserts that defendants provided poor [tax] advice"); see also Tenamee v. Schmukler, 438 F. Supp. 2d 438, 446 (S.D.N.Y. 2006) (malpractice statute of limitations barred negligent misrepresentation claim that was "at its core . . . a legal malpractice claim"); LSF6 Mercury Reo Invs. LLC v. Platinum Appraisals, 2013 WL 3456643, at *3 (N.Y. Sup. Ct. July 3, 2013) (malpractice statute of limitations barred negligent misrepresentation claim against an appraiser that was "effectively a claim for professional malpractice").

3. Plaintiff's Claims Are Time-Barred under New York Law.

Under New York law, a "cause of action charging that a professional failed to perform services with due care and in accordance with the recognized and accepted practices of the profession is governed by the three-year Statute of Limitations applicable to negligence actions" – New York Civil Practice Law and Rules ("C.P.L.R.") 214. Ackerman, 644 N.E.2d at 1011. The three-year time bar begins to run once the client ***receives*** the allegedly negligent work product or advice. Id. at 1012 (claim accrues "upon the client's receipt of the accountant's work product

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since this is the point that a client reasonably relies on the accountant's skill and advice and, as a consequence of such reliance, can become liable for tax deficiencies"); Williamson ex rel. Lipper Convertibles, L.P. v. PricewaterhouseCoopers LLP, 872 N.E.2d 842, 845 (N.Y. 2007) ("A claim accrues when the malpractice is committed, not when the client discovers it."); Arnold v. KPMG LLP, 543 F. Supp. 2d 230, 235 (S.D.N.Y. 2008), aff'd, 334 F. App'x 349 (2d Cir. 2009) (same); Maya NY, LLC v. Hagler, 965 N.Y.S.2d 475, 478 (N.Y. App. Div. 2013) (holding that the limitations period for "causes of action alleging accountant malpractice" began running "at the time the negligent . . . advice was given," and dismissing the claims as time-barred).

Here, the Complaint alleges PwC advised Plaintiff from April to August 2003. (Compl. ¶ 39.) Accordingly, Plaintiff's claims were at the latest time-barred in August 2006. Ackerman, 644 N.E.2d at 1013 (holding that claims against accountant expired three years after allegedly deficient tax advice). Plaintiff's suit is plainly time-barred on the face of the Complaint, and therefore, the Court should dismiss this action with prejudice. See Kellar, 489 P.2d at 92.[5]

B. The Tax Court's Decision Precludes Plaintiff's Claims Against PwC as a Matter of Law.

1. The Tax Court Found Plaintiff Committed Constructive Fraud and Plaintiff Is Collaterally Estopped from Challenging That Finding.

Plaintiff is collaterally estopped from re-litigating the Tax Court's conclusion that he committed constructive fraud in connection with the Fortrend Transaction. This finding dooms his claims against PwC here as a matter of law because: (1) as a participant in the allegedly improper Fortrend Transaction, Plaintiff's recovery is barred by the doctrine of in pari delicto; and (2) Plaintiff cannot show reliance on PwC's tax advice as required for both his gross negligence and negligent misrepresentation claims.

[5] Plaintiff may advocate for the application of Nevada's statutes of limitations, but applying Nevada law does not alter the result. Plaintiff's claims are still time-barred by Nevada's specific statute of limitations governing accountant malpractice actions, section 11.2075 of the Nevada Revised Statutes. Nev. Rev. Stat. § 11.2075(1). Section 11.2075 provides that an "action against an accountant or an accounting firm to recover damages for malpractice" is time-barred "[f]our years after the completion of performance of the service for which the action is brought." Id. PwC completed "performance of the service for which the action is brought" no later than August 2003, and thus Plaintiff's claims were time-barred by August 2007 under Nevada law.

The doctrine of collateral estoppel bars a party from re-litigating facts or issues that were conclusively determined by a prior court. See Kahn v. Morse & Mowbray, 117 P.3d 227, 235 (Nev. 2005). Nevada courts apply federal collateral estoppel law in determining the preclusive effect of a federal decision presented to a Nevada court.[6] Bower, 215 P.3d at 717; Garcia v. Prudential Ins. Co. of Am., 293 P.3d 869, 872-73 (Nev. 2013) (same). Collateral estoppel applies to tax cases, including Tax Court decisions. Stern v. United States, 563 F. Supp. 484, 486 (D. Nev. 1983); United States v. Abatti, 463 F. Supp. 596, 598 (S.D. Cal. 1978); Katchis v. United States, 1999 WL 500147, at *4 (S.D.N.Y. July 15, 1999) (finding preclusive effect of prior Tax Court decision and dismissing complaint); Coleman v. C.I.R., 16 F.3d 821, 830-31 (7th Cir. 1994) (same). Moreover, Tax Court decisions maintain their preclusive effect while the order is on appeal. Stern, 563 F. Supp. at 487; Abatti, 463 F. Supp. at 599. Necessary inferences from the Tax Court's decision must be given preclusive effect in subsequent proceedings, even if the Tax Court did not make specific findings as to those inferences. See id.

"To establish the preclusive effect of a previous federal decision, a party must demonstrate that the issue he seeks to preclude is (1) 'identical to the one alleged in the prior litigation,' (2) has 'been actually litigated in the prior litigation,' and (3) that the resolution of the issue was 'a critical and necessary part' of the earlier judgment." Bower, 215 P.3d at 717 (quoting Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992)); Casillas v. Clark Cty. Sch. Dist., 2013 WL 2179279, at *7 (D. Nev. May 17, 2013). As to the first element, an issue is "identical" if "the issue sought to be litigated is sufficiently similar to the issue present in [the] earlier proceeding and sufficiently material in both actions to justify invoking [collateral estoppel]." United States v. Weems, 49 F.3d 528, 532 (9th Cir. 1995). Second, "an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund, 754 F.3d 754, 761 (9th Cir. 2014) (citation omitted). Finally, an issue is critical and necessary to the earlier

[6] New York courts also apply federal law in determining the preclusive effect of a federal decision. Carroll ex rel. Pfizer, Inc. v. McKinnell, 859 N.Y.S.2d 901, 2008 WL 731834, at *2 (N.Y. Sup. Ct. Mar. 17, 2008) ("Where the judgment to be given preclusive effect is made in a federal forum the scope of that judgment, including the applicability of principles of res judicata and collateral estoppel, are governed by federal law." (citation omitted)).

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judgment if the trier of fact "must have determined" the issue in order to reach its judgment. Westinghouse Elec. Corp. v. Gen. Circuit Breaker & Elec. Supply Inc., 106 F.3d 894, 901 (9th Cir. 1997).

Here, the Tax Court found that Plaintiff's decision to complete the Fortrend Transaction constituted, at least, ***constructive fraud***. (Ex. 2 at 82.) Specifically, the Tax Court found:

- Plaintiff attempted to strike a sentence from the Engagement Agreement requiring him to notify PwC if he determined the Transaction was a reportable transaction "because he wanted to keep the paper trail free . . . of any references to 'reportable transactions.'" (Id. at 70.)
- Plaintiff was "clearly suspicious about Fortrend's scheme. But instead of digging deeper, [he] engaged in willful blindness and ***actively avoided learning the truth***." (Id. at 81 (emphasis added).)
- Plaintiff "knew that the transaction Fortrend was proposing was likely a 'reportable' or 'listed transaction.'" (Id.)
- PwC advised Plaintiff that Fortrend's plan to eliminate Westside's tax liabilities was a "very aggressive tax-motivated strategy" "subject to IRS challenge," but Plaintiff "***turned his back on this red flag***." (Id. (emphasis added).)
- Plaintiff was a "sophisticated entrepreneur who had built a company and knew how to value a business," and thus other aspects of Fortrend's proposal "should have provoked tremendous skepticism" and "demanded further inquiry from any reasonably diligent person." (Id. at 81-82.)
- "We find as a fact that petitioner had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West[s]ide's accrued tax liabilities and leave it without assets to satisfy those liabilities." (Id. at 82.)

Based on those facts, the Tax Court held that Plaintiff committed a fraudulent transfer under OUFTA and was therefore subject to transferee liability for the subsequent tax liabilities. (Id. at 82-83.)

The Tax Court's conclusion that Plaintiff committed constructive fraud in completing the

Fortrend Transaction, and the specific factual findings the Tax Court made to support that conclusion, all relate to a single issue – whether Plaintiff knew that the Fortrend Transaction was illegitimate when he decided to pursue it. The Tax Court's findings as to this issue satisfy each of the elements required to give the findings preclusive effect in this action.

First, the issue of Plaintiff's culpable knowledge in connection with the Fortrend Transaction was present in, and material to, Plaintiff's Tax Court proceeding as well as the action before this Court. The Tax Court held that Plaintiff was liable for tax deficiencies and penalties because Plaintiff committed, at least, constructive fraud in completing the Fortrend Transaction. The issue of Plaintiff's culpability in connection with the Fortrend Transaction was indisputably material to the Tax Court's decision. Likewise, the issue of Plaintiff's fraudulent behavior is equally present in this action. See, e.g., infra, Section III.B.2.

Second, the issue of Plaintiff's culpability in the Fortrend Transaction was actually litigated in the Tax Court. During those proceedings, the IRS argued that Plaintiff was liable for Westside's tax liabilities under the constructive fraud provision of OUFTA. (Ex. 2 at 80.) In opposition, Plaintiff argued that he did not commit constructive fraud because he did not know, and had no reason to know, that the Fortrend Transaction was a reportable tax shelter, and that Fortrend intended to illegitimately evade Westside's tax liabilities. After multiple rounds of briefing by the parties and a four-day trial (see Compl. ¶ 79), the Tax Court rejected Plaintiff's position. The issue of Plaintiff's culpability in the Fortrend Transaction was plainly litigated in the Tax Court. See ReadyLink Healthcare, 754 F.3d at 761.

Finally, the determination of Plaintiff's culpability in the Fortrend Transaction was critical and necessary to the Tax Court's decision against Plaintiff. Westinghouse Elec. Corp., 106 F.3d at 901. Again, the Tax Court affirmed the IRS's imposition of Westside's tax liabilities and penalties onto Plaintiff under the constructive fraud provision of OUFTA. To reach that decision, the Tax Court had to establish that Plaintiff committed, at least, constructive fraud in completing the Fortrend Transaction. In support of that conclusion, the Tax Court made several specific findings evidencing Plaintiff's knowledge of, and culpability for, the Fortrend Transaction's alleged impropriety. Thus, the Tax Court's conclusion that Plaintiff was subject to transferee

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liability was ***dependent*** on its conclusion that Plaintiff committed constructive fraud, and therefore the Tax Court "must have determined" the issue of Plaintiff's culpability in order to hold Plaintiff liable for Westside's tax deficiencies and penalties. Id.

Plaintiff is therefore collaterally estopped from denying his own fraudulent wrongdoing and culpability in the Fortrend Transaction. As a result, as discussed below, Plaintiff's claims against PwC fail as a matter of law.

2. Plaintiff's Claims Are Barred by the *In Pari Delicto* Doctrine.

Plaintiff's wrongdoing in the Fortrend Transaction, as the Tax Court found, precludes him from recovering damages here. The in pari delicto doctrine bars recovery for any injury suffered from Plaintiff's own wrongdoing. Kirschner, 938 N.E.2d at 950 ("The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers." (emphasis added)). The rationale underlying the doctrine is that there is no societal interest in providing an accounting between wrongdoers. Id. ("[N]o courts should be required to serve as paymaster of the wages of crime, or referee between thieves. Therefore, the law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them." (citation omitted)). "[T]he principle that a wrongdoer should not profit from his own misconduct is so strong" that in pari delicto should "appl[y] even in difficult cases and should not be 'weakened by exceptions.'" Id. (citation omitted).

Courts invoke the in pari delicto doctrine at the pleading stage to dismiss complaints where the plaintiff's involvement in wrongdoing is apparent in documents properly before the court, or in rulings with preclusive effect. See, e.g., Metro. Plaza WP, LLC v. Goetz Fitzpatrick, LLP, 3 N.Y.S.3d 595, 597 (N.Y. App. Div. 2015) ("The motion court correctly gave collateral estoppel effect to the rulings of the bankruptcy court in a prior proceeding finding deceit and other misconduct by plaintiffs, as well as defendants, and dismissed the complaint pursuant to the doctrine of in pari delicto."); UCAR Int'l Inc. v. Union Carbide Corp., 119 F. App'x 300, 302 (2d Cir. 2004) (dismissing complaint on in pari delicto grounds based on "[t]he pleadings, taken together with the facts of which the district court took judicial notice").

"The justice of the in pari delicto rule is most obvious where a willful wrongdoer is suing someone who is ***alleged to be merely negligent***," as is the case here. Kirschner, 938 N.E.2d at 950 (emphasis added). Specifically, courts have applied the in pari delicto doctrine to dismiss professional negligence actions where the plaintiff knew of or participated in the activity that allegedly gives rise to the negligence action. See, e.g., Chaikovska v. Ernst & Young, LLP, 913 N.Y.S.2d 449, 451 (N.Y. App. Div. 2010) ("Here, in this action against a corporate auditor, the 'New York [in pari delicto doctrine] immunizes [the] auditor if its client had top-level managers who knew of or participated in the financial wrongdoing that gave rise to the errors in the financial statements that the auditor certified as GAAP-compliant.'" (citation omitted)); Zazzali v. Eide Bailly LLP, 2013 WL 6045978, at *19-20 (D. Idaho Nov. 14, 2013) (dismissing professional negligence action against auditor for failing to detect Ponzi scheme, when plaintiff participated in the scheme); see also Kerman v. Chenery Assocs., Inc., 2015 WL 1292581, at *6 (W.D. Ky. Mar. 23, 2015) (dismissing under the in pari delicto doctrine plaintiff taxpayer's rescission claim arising out of IRS penalties plaintiff incurred for participating in tax shelter where the Tax Court held plaintiff participated in tax shelter, should have known it was a sham and was collaterally estopped from denying Tax Court's findings).

Here, the Tax Court indisputably found that, not only did Plaintiff participate in the Fortrend Transaction, his participation and decision to complete the Fortrend Transaction constituted, at least, ***constructive fraud***. Specifically, the Tax Court found, among other things: (1) Plaintiff was "***willful[ly] blind[]***" and deliberately avoided learning any details that might suggest that the Fortrend Transaction was improper (Ex. 2 at 81 (emphasis added)); (2) Plaintiff "***turned his back on . . . red flag[s]***" raised by PwC (id. (emphasis added)); and (3) Plaintiff "had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West[s]ide's tax liability" (id. at 82); see also supra, Section II.C (listing the Tax Court's findings regarding Plaintiff's fraudulent wrongdoing). Plaintiff's fraudulent wrongdoing in connection with the Fortrend Transaction bars recovery on both of his claims against PwC, which are

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premised on his decision to complete that very Transaction. See Kirschner, 938 N.E.2d at 950; Kerman, 2015 WL 1292581, at *6.[7]

3. Plaintiff Fails to State a Claim as a Matter of Law Because He Cannot Allege That He Reasonably Relied on PwC's Advice.

Similarly, in light of the Tax Court's findings, Plaintiff has not, and cannot, state a claim for gross negligence or negligent misrepresentation against PwC. Under New York law, in order to state either a claim for gross negligence or negligent misrepresentation, Plaintiff must establish that he reasonably relied on PwC's allegedly negligent advice. See, e.g., Hydro Inv'rs, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000) (under New York law, elements of negligent misrepresentation claim include "the plaintiff reasonably relied on it to his or her detriment"); Water St. Leasehold LLC, 796 N.Y.S.2d at 600 (holding that negligent misrepresentation claim against accounting firm failed as a matter of law because plaintiffs could not prove reliance); Resolution Tr. Corp. v. Coopers & Lybrand, 915 F. Supp. 584, 588 (S.D.N.Y. 1996) ("If no one relies on [professional service], then presumably it could not be a substantial factor in causing an injury," as required to state negligence claim); Finova Capital Corp., 794 N.Y.S.2d at 381 (dismissing professional negligence and negligent misrepresentation claims where plaintiff failed to adequately allege he "relied on defendant's alleged negligently rendered opinion . . . and that such reliance was the proximate cause of its damages" as required to state negligence claim).

Numerous courts have held that where a plaintiff knows "at the time a representation was made that it was false, [h]e cannot claim to have relied on the truth of that representation." See, e.g., Baraliu, 2009 WL 959578, at *7 (dismissing fraud claim where plaintiff "should have been aware of the regulation" that revealed the falsity of alleged misrepresentations); Musalli Factory for Gold & Jewelry v. JPMorgan Chase Bank, N.A., 261 F.R.D. 13, 21 (S.D.N.Y. 2009) (dismissing claim based on alleged misrepresentation where plaintiff "knew it was false"), aff'd, 382 F. App'x 107 (2d Cir. 2010); Stolow v. Greg Manning Auctions Inc., 258 F. Supp. 2d 236,

[7] Plaintiff's claims would be equally barred by the in pari delicto doctrine under Nevada law. See USACM Liquidating Tr. v. Deloitte & Touche LLP, 764 F. Supp. 2d 1210, 1230 (D. Nev. 2011), aff'd, 754 F.3d 645 (9th Cir. 2014) (under Nevada law, in pari delicto "prohibits plaintiffs from recovering damages resulting from their own wrongdoing." (citation omitted)).

249 (S.D.N.Y. 2003) ("[Plaintiff] has not pled reasonable reliance because he acknowledges that he was aware of the bid-rigging.").

New York courts also hold that when sophisticated parties have "hints" that statements made to them are inaccurate, "'a heightened degree of diligence [is] required of [them],' and they '[cannot] reasonably rely on [the] representations without making additional inquiry to determine their accuracy.'" Afra v. Zamir, 905 N.Y.S.2d 77, 80 (N.Y. App. Div. 2010), aff'd, 929 N.Y.S.2d 11 (N.Y. 2011) (dismissing fraudulent misrepresentation claim where sophisticated party should have followed up on red flags (citation omitted)); see also, e.g., Rodas v. Manitaras, 552 N.Y.S.2d 618, 620 (N.Y. App. Div. 1990) (dismissing misrepresentation claim where sophisticated plaintiffs "could have easily protected themselves by insisting on an examination of the books as a condition of closing"); HSH Nordbank, 941 N.Y.S.2d at 66 (affirming dismissal of misrepresentation claim, holding that as "a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (citations omitted)).[8]

Here, Plaintiff alleges he relied on PwC's advice that the Fortrend Transaction was "proper and according to the tax laws." (Compl. ¶¶ 89, 94.) The Tax Court's findings foreclose Plaintiff from pleading that he reasonably relied on PwC's alleged advice, for two reasons:

First, as shown above, in finding Plaintiff liable, the Tax Court rejected Plaintiff's contention that he was unaware of the impropriety of the Fortrend Transaction in part because of the advice given by PwC and his attorney. Rather, the Tax Court held Plaintiff at least constructively knew: (1) that the Fortrend Transaction itself was likely a reportable tax shelter; and (2) that "Fortrend intended to implement an illegitimate scheme to evade West[s]ide's accrued tax liabilities and leave it without assets to satisfy those liabilities." (Ex. 2. at 80-82.) In

[8] Indeed, the Tax Court found Plaintiff to be a "sophisticated entrepreneur who had built a company and knew how to value a business." (Ex. 2 at 81.) The Tax Court also found that Plaintiff did carefully read the terms of the Engagement Agreement, demonstrated by the fact that he purposefully tried to strike out language from the Agreement requiring him to disclose to PwC if he determined the Fortrend Transaction was a reportable transaction. (Id.) The Tax Court found he did this in order to avoid leaving a paper trial that could be later used against him. (Id.) The Tax Court also found that he "displayed familiarity with tax concepts." (Id. at 68.)

light of those facts – again, which Plaintiff is collaterally estopped from denying – Plaintiff did not and could not have reasonably relied on PwC's supposed representation that the "transaction proposed was proper and according to the tax laws" (Compl. ¶¶ 84, 89, 94), when the Tax Court found he independently knew the opposite was true. See, e.g., Baraliu, 2009 WL 959578, at *7; Eaves v. Designs for Fin., Inc., 785 F. Supp. 2d 229, 250 (S.D.N.Y. 2011) (dismissing negligent misrepresentation claim under New York law where allegations did not demonstrate plaintiff relied on defendant's statements and advice but rather that plaintiff "did not trust" statements and acted against advice).

Second, even if Plaintiff had relied on PwC's tax advice, Plaintiff was aware of numerous red flags that should have made a sophisticated business person wary of entering into the Fortrend Transaction. (Ex. 2 at 81-82.) Specifically, as stated supra, Section II.C, the Tax Court found that Plaintiff was "clearly suspicious about Fortrend's scheme" but "engaged in ***willful blindness*** and actively avoided learning the truth." (Id. at 81 (emphasis added).) In fact, while PwC attempted to warn Plaintiff that Fortrend's proposed plan to eliminate Westside's tax liabilities "appeared to be a 'very aggressive tax-motivated strategy' that was 'subject to IRS challenge,'" Plaintiff ***"turned his back on this red flag."*** (Id. (emphasis added).)

Plaintiff's failure to investigate red flags, and his decision to "actively avoid[] learning the truth" (id.), rendered any reliance on PwC unreasonable as a matter of law. HSH Nordbank, 941 N.Y.S.2d at 66 (as "a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (citation omitted)). Thus, because the Tax Court's findings foreclose Plaintiff's ability to plead reasonable reliance, the Court should dismiss his claims with prejudice.[9]

[9] Indeed, courts have held that "it is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any [misrepresentation] claim based on these predictions fails as a matter of law." Brakke v. Econ. Concepts, Inc., 213 Cal. App. 4th 761, 769 (2013) (dismissing fraud claim, holding plaintiff could not legally plead justifiable reliance on defendant's alleged statement that pension plan qualified for favorable treatment under Internal Revenue Code ("IRC") § 412 (citation omitted)); Patel v. Pac. Life Ins. Co., 2009 WL 1456526, at *13 (N.D. Tex. May 22, 2009) (same); Chau v. Aviva Life & Annuity Co., 2011 WL 1990446, at *4 (N.D. Tex. May 20, 2011) (same as to plans under IRC § 419).

IV. CONCLUSION

For the foregoing reasons, PwC respectfully requests that the Court grant this Motion and dismiss the claims against PwC with prejudice.

Dated: July 11, 2016.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing: **PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS**, by the method indicated:

☐	i) **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
☐	ii) **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
☐	iii) **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
☐	iv) **BY PERSONAL DELIVERY:** by causing personal delivery by __________, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
☑	v) **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
☐	vi) **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, 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 **PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS, LLP'S MOTION TO DISMISS** JURY TRIAL DEMANDED

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POINTS AND AUTHORITIES

I. INTRODUCTION

Confronted with the allegations of the Complaint showing its gross negligence and misrepresentations in advising Plaintiff Michael Tricarichi, Defendant Pricewaterhouse Coopers ("PwC") points the finger at Plaintiff, saying that he waited too long to bring his claims and that another case in which PwC was not a party absolves PwC. Neither accusation is true. Plaintiff brought his claims about six months after he incurred injury and thus well within the statute of limitations. And the prior case to which PwC refers – while noting PwC's failings in advising Mr. Tricarichi – did not decide the question of PwC's liability, because it did not have to. That question is for this Court or a jury empaneled by this Court to decide.

PwC tries to get around the Complaint's allegations by asking this Court to take judicial notice of certain documents. One of these is the engagement letter between Plaintiff and PwC, which PwC cites to argue that a New York statute of limitations applies. Though the letter is not properly considered on a motion to dismiss, it does not help PwC's statute of limitations argument in all events. This is because the law of the forum – Nevada – applies to procedural matters such as the statute of limitations, Plaintiff's claims are timely under Nevada law, and Plaintiff's claims are also timely under New York law, assuming for the sake of argument that such law applies.

PwC also asks this Court to take judicial notice of the Tax Court opinion finding Plaintiff liable for taxes, penalties and interest in connection with the transaction whereby Plaintiff sold all his stock in a company called Westside Cellular to another company, Fortrend. PwC advised Plaintiff regarding the tax aspects of this transaction, telling him that the stock sale was proper under the tax laws and advising Plaintiff that he could not be held liable for Westside's taxes. PwC's advice proved to be wrong. According to PwC, though, the Tax Court opinion says Plaintiff is nonetheless to blame. Not so. The Tax Court did not make the "findings" PwC says it did, and in any case, it is not appropriate for this Court to take judicial notice, on a motion to dismiss, of the factual or legal findings of another court, and thereby deprive Plaintiff the right to proceed with his case before it has even started.

In short, Plaintiff's claims are timely, and Plaintiff is not precluded from bringing them by the doctrine of collateral estoppel or otherwise. PwC's motion should be denied.

II. FACTUAL BACKGROUND

A. Plaintiff Tricarichi and Defendant PwC

Plaintiff, Michael Tricarichi, built a cellular telephone business from the ground up and preserved that business through years of litigation necessitated by the illegal trade practices of several larger, competing cellular providers. (Cmplt. ¶ 1) After those competitors were found liable for their anticompetitive actions, Mr. Tricarichi and his company, Westside Cellular, resolved the damages owed for those actions via a substantial settlement. (Id. ¶¶ 27-28) As part of the settlement, Mr. Tricarichi's company exited the cellular phone business. (Id.)

Faced with the question of what to do next, Mr. Tricarichi considered a number of options, including investing in other ventures via Westside, of which he was the sole shareholder. (Cmplt. ¶ 2) During this process, Mr. Tricarichi met with representatives of another company, Fortrend International, LLC ("Fortrend"), which offered to buy all his shares in Westside and employ Westside in Fortrend's debt-collection business. (Id.) Fortrend represented that Westside's remaining assets would facilitate this business, that it would legitimately offset Westside's contingent tax liabilities, and that in all events it would ensure that those tax liabilities were satisfied fully. (Id.) As a result, Fortrend said, Mr. Tricarichi would realize a greater net return on his investment in Westside than would otherwise be the case if Westside were liquidated. (Id.) Fortrend assured Mr. Tricarichi that the proposed transaction, including its tax aspect, was legitimate and in accordance with the tax laws. (Id.) Unbeknownst to Plaintiff, Fortrend's representations and assurances were knowingly false. (Id.)

Mr. Tricarichi retained a nationally recognized accounting firm with expertise in tax matters – Defendant PwC – to review the proposed transaction. (Compl. ¶ 3) PwC did so, ultimately advising Mr. Tricarichi that the proposed stock sale transaction was legitimate for tax purposes, and that Mr. Tricarichi had no ongoing exposure related to Westside once the transaction with Fortrend was completed. (Id.) Unbeknownst to Mr. Tricarichi at the time, PwC's advice in this regard was, at minimum, grossly negligent. (Id.)

B. Midco Transactions Generally

The transaction proposed by Fortrend and reviewed by PwC was what became known as a "Midco" or "intermediary" transaction. Such transactions were widely promoted during the late 1990s and early 2000s by Fortrend and others, but actually constituted abusive tax shelters. (Cmplt. ¶ 24) The IRS has listed Midco transactions as "reportable transactions" for federal income tax purposes, meaning that the IRS considers them, and substantially similar transactions, to be improper tax-avoidance mechanisms. (Id.)

Midco-type transactions were generally promoted to shareholders – like Mr. Tricarichi – of closely held C corporations with potentially large taxable gains. (Cmplt. ¶ 25) Promoters of Midco transactions targeted such shareholders and offered a purported solution to "double taxation," that is, the taxation of gains at both the corporate and individual shareholder levels. (Id.) Generally speaking, Midco transactions proceeded as follows: First, an "intermediary company," or "midco," affiliated with the promoter – typically a shell company, often organized offshore – would purchase the shares of the target company, and thus its tax liability. (Id.) After acquiring the shares and this tax liability, the intermediary company would engage in a second step that was supposed to offset the target's realized gains and eliminate the corporate-level tax. (Id.)

To draw Mr. Tricarichi and others like him into such transactions, Midco promoters like Fortrend (which is now defunct) represented to the target company's shareholders that they would legitimately net more for their shares than would otherwise be the case absent the intermediary transaction. (Cmplt. ¶¶ 15, 25) As happened with Plaintiff's transaction, however, such representations often proved, years later, to be false, resulting in substantial tax liabilities and penalties for Plaintiff and others. (Id. ¶ 26)

C. Plaintiff Becomes Ensnared in the Midco Transaction.

As noted above, prior to 2003, Plaintiff was the president and sole shareholder of Westside, which purchased network access from major cellular service providers and resold that access to its cell-phone customers. (Cmplt. ¶ 27) Over time, Plaintiff learned that certain of these providers were engaging in anticompetitive trade practices. (Id.) Westside therefore sued those providers; prevailed on liability; and reached a settlement regarding damages, pursuant to which Westside ultimately netted (after attorney fees and employee payments) proceeds of about $40 million. (Id. ¶¶ 27-28) In exchange, Westside was required to terminate its business as a retail provider of cell phone service in June 2003 – effectively relinquishing its assets in return for the settlement proceeds. (Id. ¶ 28)

Plaintiff asked the Hahn Loeser law firm to look into tax matters related to the settlement. (Cmplt. ¶ 29) Because Westside was a C Corporation, there was a concern the settlement proceeds could be subject to double taxation. (Id.) Plaintiff was introduced to both Fortrend and another Midco promoter; each said it was in the distressed debt receivables business and wanted to purchase Westside for this business. (Id. ¶¶ 29-31)

Fortrend and the other promoter, Midcoast Credit Corp. ("Midcoast"), each made an offer proposing essentially the same transaction: An intermediary company would borrow money to purchase the stock of Westside. (Cmplt. ¶ 32) After the sale closed, the intermediary company would merge into Westside, and the purchaser would employ Westside in its distressed-debt collection business. (Id.) The purchaser would fund its operations with Westside's remaining cash (Fortrend represented that financing for its distressed-debt recovery business was otherwise difficult to obtain), and legitimately offset Westside's contingent tax liabilities, which in all events, would be satisfied fully. (Id.)

Fortrend and Midcoast represented to Plaintiff that the stock purchase they were each proposing would result in legitimate tax benefits and thus a greater net return to Plaintiff than he would otherwise realize. (Cmplt. ¶ 33) They assured Plaintiff that they had successfully undertaken numerous other transactions like the one being proposed to Plaintiff and that such transactions were proper under the tax laws. (Id.) Unbeknownst to Plaintiff, Fortrend paid Midcoast to step away, and Plaintiff thus chose to proceed further with Fortrend. (Id. ¶¶ 34-35)

D. Plaintiff Retains PwC to Vet the Proposed Transaction.

In April 2003, Plaintiff retained PwC to review the proposed transaction. (Cmplt. ¶ 37) Plaintiff is unsophisticated in tax matters and was relying on PwC's expertise in deciding whether to proceed with the transaction. (Id.)

Unbeknownst to Plaintiff, however, PwC had on at least one prior occasion brought Fortrend to the table to facilitate a Midco transaction that PwC itself had advocated. (Cmplt. ¶ 38) In particular, in late 1999, PwC advocated that a Midco transaction be used in the purchase of the Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; PwC approached Fortrend to serve as an intermediary; and a Fortrend affiliate in fact served as an intermediary, purchasing the Bishop stock in a Midco transaction that PwC helped negotiate. (Id.) PwC disclosed none of this to Plaintiff. (Id.) The Bishop Midco transaction was audited by the IRS starting in late 2003 (but before Plaintiff had reported the Westside stock sale on any tax returns), found deficient by the IRS in 2004, and confirmed by the courts in 2008 and 2009 to be an illegal tax shelter. (Id.)

During the period April-August 2003, a team of PwC tax professionals set out to examine and advise Plaintiff regarding the stock sale transaction proposed by Fortrend.

(Cmplt. ¶ 39) While Plaintiff and Fortrend proceeded to discuss and negotiate a proposed stock purchase agreement, PwC reviewed the terms, and considered the tax implications, thereof as part of its engagement. (Id.) PwC personnel put between 150 and 200 hours into this effort, for which PwC charged approximately $48,000 in fees. (Id.) PwC participated in various calls with the parties and/or their representatives, reviewed transaction documentation, and undertook research. (Id.) PwC understood, among other things, that Fortrend intended to offset Westside's contingent tax liability with deductions associated with high basis / low value assets, and that Plaintiff was relying on Fortrend to satisfy Westside's tax obligations. (Id.)

PwC further understood but failed to properly advise Plaintiff regarding IRS Notice 2001-16 and its significance for the Fortrend transaction. (Cmplt. ¶¶ 40, 56) Notice 2001-16, which had been issued in January 2001, describes transactions where a corporation disposes of substantially all of its assets and then the corporation's shareholders sell their stock to another party who seeks favorable tax treatment. (Id. ¶ 56) The notice states that any transactions that are the same as, or substantially similar to, those described in the Notice are "listed transactions." (Id.) Listed transactions are deemed by the IRS to be abusive tax shelters. (Id.) Persons failing to report these tax shelters may be subject to penalties. (Id.) PwC failed to properly advise Plaintiff that Notice 2001-16 applied to Midco transactions described therein and to "substantially similar" transactions; that the term "substantially similar" was broadly construed in this context; and that the proposed transaction and its tax implications posed risk for Plaintiff. (Id. ¶¶ 56-58)

Notwithstanding the problematic nature of the transaction proposed by Fortrend, which should have been apparent to PwC given its expertise in tax matters, PwC came to the conclusion that the transaction did not fit the IRS definition of a Midco (or substantially similar) transaction and that it was not a reportable transaction as defined by the IRS. (Cmplt.

¶ 53) PwC also came to the conclusion that Plaintiff would not be subject to transferee liability for Westside's taxes as a result of the Fortrend transaction. (Id.) PwC's examination of the proposed transaction concluded with a determination that there was no reason not to go forward with Fortrend's offer to purchase Plaintiff's Westside stock. (Id.) PwC advised Plaintiff of its conclusions in or about August 2003. (Id.)

Relying upon PwC's advice, Plaintiff proceeded with the Fortrend transaction. (Cmplt. ¶ 53) Had PwC advised Plaintiff otherwise, Plaintiff would not have proceeded with the transaction. (Id.) Plaintiff and Fortrend executed the stock purchase agreement, and the transaction closed, on September 9, 2003. (Id. ¶ 54) Thereafter, Westside's remaining funds, rather than being used to facilitate Fortrend's debt-collection business, were drained by Fortrend. (Id. ¶ 55) Westside did not engage in the debt-collection business as Fortrend had represented to Plaintiff it would. (Id.) In an attempt to offset Westside's tax liability on the $40 million in settlement proceeds from the network-access litigation, Fortrend had Westside claim a correspondingly large bad-debt deduction. Westside did not pay any taxes. (Id. ¶¶ 59-69)

E. Plaintiff is Left Holding the Bag.

The IRS audited Westside's 2003 tax return. (Cmplt. ¶ 75) At the conclusion of the audit, the IRS disallowed the $40 million-plus bad-debt deduction that Fortrend / Westside had claimed. (Id.) The IRS sent a notice of deficiency to Westside determining a tax deficiency of $15,186,570 and penalties totaling $6,012,777 under the tax code, but Westside – which had no assets or resources by that point as a result of Fortrend's actions – did not pay any of these amounts and did not petition the U.S Tax Court for relief. (Id. ¶¶ 75-76)

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

Plaintiff petitioned the U.S. Tax Court for review of the IRS notice of transferee liability. (Cmplt. ¶ 79) The matter was litigated and proceeded to trial. (Id.) The Tax Court found in October 2015 that – contrary to what PwC had told Plaintiff – the Fortrend transaction was an improper Midco transaction, and Plaintiff was liable under transferee liability principles for Westside's tax deficiency and penalties totaling about $21.2 million, plus interest. (Id.)

III. ARGUMENT

A. Plaintiff's Claims Are Timely Under Both Applicable Nevada Law and the New York Law that PwC Incorrectly Applies.

PwC labors to avoid Nevada law—the majority of its statute-of-limitations argument is spent arguing that Nevada law does not apply, and its entire analysis of the applicable Nevada statute is relegated to a footnote. But the Nevada Supreme Court has long held that statutes of limitations are procedural rules and therefore the law of the forum—Nevada—applies. Moreover, the New York choice-of-law clause in the engagement letter between Plaintiff and PwC does not cover procedural rules like the statute of limitations, nor did it require New York choice of forum.

Plaintiff's claims are timely under Nevada law because Plaintiff suffered no injury until October 2015. The statute of limitations cannot have expired because: (a) the statute applies only to actions "to recover damages," (b) there were no damages (and thus no possible suit "to recover damages") until the adverse Tax Court decision in October 2015, and (c) as PwC also fails to note in its motion, the parties have had tolling agreements in effect from when Plaintiff first received notice from the IRS until the filing or this lawsuit. As a matter of basic logic, the statute of limitations under Nev. Rev. Stat. § 11.2075 could not have expired before a suit for damages was possible or Plaintiff even received notice of the IRS' contrary position.

Plaintiff's claims are also timely because the Nevada statute tolls the limitations period "for any period during which the accountant or accounting firm conceals the act, error or omission upon which the action is founded" (Nev. Rev. Stat § 11.2075(2)). Plaintiff expressly alleges such concealment (e.g., Cmplt. ¶¶ 73-74). PwC cites the statute in its motion to dismiss, but omits the tolling provision and makes no attempt to argue that Plaintiff's concealment allegations are insufficient under the statute. (Mot. at 16 n.5.)

Moreover, regardless of concealment, issues of fact preclude dismissal under the only subsection of the Nevada statute PwC cites in support of its motion—which provides that an action is barred four years "after the completion of performance of the service for which the action is brought." (Id.) Indeed, even if New York law applies, Plaintiff's claims are also timely under New York law pursuant to the "continuous representation" doctrine, because the parties expressly contemplated PwC would provide continuing services in the event of an IRS audit.

1. Nevada Law Applies to the Statute of Limitations for Plaintiff's Claims.

PwC argues that New York statutes of limitation apply based solely on a substantive choice-of-law provision in the parties' engagement letter. At the outset, the Court should not consider the engagement letter on PwC's motion to dismiss, as the Complaint does not incorporate it by reference and it is not integral to Plaintiff's claims. PwC contends that the engagement letter is "integral to Plaintiff's tort claims because it created the 'duty of Plaintiff to use such skill, prudence and diligence as commonly possessed and exercised by tax and business professionals in the fields of income taxes, tax savings transactions and business tax consulting.'" (Mot. at 11 n.3.) But these duties are not specified in the engagement letter and are not dependent on its specific terms. They arise because PwC undertook to provide professional services to Plaintiff, and the engagement agreement is thus not "integral" to Plaintiffs' tort claims. Indeed, if the agreement is "central" to Plaintiff's claims, then the applicable statute of limitations should be six years. See Nev. Rev. Stat § 11.190(1)(b).

Regardless, Nevada law applies notwithstanding the choice-of-law provision. Under well-established Nevada law, statutes of limitations are governed by the law of the forum, even where the substance of the dispute is governed by another state's laws:

> The rule is, that a personal contract by its terms to be performed in some place other than that where the contract is made, is to be governed by the law of the place of performance; … but this rule applies only to the rights and obligations resting upon, or arising from, the contract; **the law of the forum always governs the remedy** in England and this country; **and the Statute of Limitations applies only to a remedy, and not to a right or obligation.**

Wilcox v. Williams, 5 Nev. 206, 211 (1869) (emphasis added); see also Asian Am. Entm't Corp. v. Las Vegas Sands, Inc., 324 F. App'x 567, 568 (9th Cir. 2009) ("The relevant choice-of-law rule, as established by the Nevada Supreme Court, is the rule of lex fori: i.e., that 'the Statute of Limitations of the forum [will] govern the remedy....'") (quoting Wilcox); Spilsbury v. U.S. Specialty Ins. Co., 2015 WL 476228, at *3 (D. Nev. Feb. 4, 2015) (same); Seely v. Illinois-California Exp., Inc., 541 F. Supp. 1307, 1309 (D. Nev. 1982) ("The defense that a claim is barred by the statute of limitations is a procedural matter governed by the law of the forum, in this case Nevada law."). Contractual choice-of-law provisions govern only substantive issues, not procedural issues like statutes of limitations. Tipton v. Heeren, 109 Nev. 920, 922, 859 P.2d 465, 466 (1993) (Nevada law governed procedural issue despite contractual choice-of-law provision specifying Wyoming law, which applies to substantive issues;) G & H Associates v. Ernest W. Hahn, Inc., 113 Nev. 265, 272, 934 P.2d 229, 233 (1997 ("Statutes of limitation are procedural bars …").[1]

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[1] Other (substantive) issues to which the choice-of-law provision may apply are not yet before the Court, and Plaintiff reserves the right to later contend that the choice-of-law provision does or does not govern other issues in this matter.

Moreover, the engagement letter's generic choice-of-law provision states only, in its entirety, that "[t]his Agreement will be governed by the laws of the State of New York." Under New York law, choice-of-law provisions cannot be read to include statutes of limitation unless they expressly so provide. Portfolio Recovery Associates, LLC v. King, 14 N.Y.3d 410, 416, 927 N.E.2d 1059, 1061 (2010) ("Choice of law provisions typically apply to only substantive issues, and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right. There being no express intention in the agreement that Delaware's statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period.") (citations omitted). As even New York law provides that choice-of-law provisions do not include statutes of limitation unless they expressly so state, the choice-of-law provision here was not intended to include statutes of limitations, and did not so state.[2]

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[2] PwC vaguely asserts that the choice-of-law provision governs "Plaintiff's claims" against it, but makes no attempt to explain why it would govern the applicable statute of limitation. Virtually all of the cases PwC cites to imply that a generic choice-of-law provision covers statute-of-limitation issues have nothing to do with statutes of limitation. See cases cited in Motion at 11-14. The lone exception is a federal district court case in which the party advocating Nevada's statute of limitations (notwithstanding a Delaware choice-of-law provision) "offered no argument or explanation why Nevada law should apply," and tried to "improperly raise new arguments [in this regard] in its reconsideration motion." Izquierdo v. Easy Loans Corp., 2014 WL 2803285, at *2 (D. Nev. June 19, 2014) (emphasis in original). Moreover, Izquierdo considered neither Wilcox nor other authority cited above supporting the application of Nevada statutes of limitations, and is thus not persuasive. And contrary to PwC's suggestion otherwise (Mot. at 12 n.4), federal precedent is not persuasive authority in Nevada on every issue of law (such as statutes of limitation) merely because the issue becomes relevant to a motion to dismiss and both Nevada and Federal procedural rules allow motions to dismiss for failure to state a claim—the cases PwC cites to support this absurd proposition merely consider specialized Nevada procedural rules in light of federal precedent regarding their federal analogues. See Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), as modified (Jan. 25, 2006) (considering the test for "alternate security" in lieu of a supersedeas bond to support a stay pending appeal, and relying on federal precedent because because NRCP 62(d) is "substantially based on its federal counterpart, FRCP 62(d)"); Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53–54, 38 P.3d 872, 876–77 (2002) (considering whether Nevada courts should exercise discretion in determining whether to allow jury trial despite earlier waiver of jury trial right, and looking to federal authority interpreting FRCP 39(b), which has a Nevada analogue in NRCP 39(b)).

Unsurprisingly, Judge Denton recently concluded that Nevada statutes of limitation applied regardless of a contractual choice-of-law clause. (See Ex. A, Dec. 3, 2013 Order in Cantor G&W (Nevada) Holdings, L.P. v. Asher, Case No. A-11-646021, Dist. Ct., Clark Cty. Nev. (writ denied)) Judge Denton held that "[t]he defense that a claim is barred by the statute of limitations is a procedural matter governed by the law of the forum." (Id. ¶¶ 9-10.) Judge Denton similarly noted that "even under Delaware law [the law specified in the choice-of-law clause], a choice of law provision will only include the statute of limitations of the chosen jurisdiction if their inclusion is specifically noted." (Id. ¶ 11.)

2. Plaintiff's Claims are Timely under Nevada Law.

As a threshold matter, Plaintiff had no damages prior to the October 2015 Tax Court opinion imposing liability for Westside's tax deficiency. (See Cmplt. ¶ 79.) Because Nev. Rev. Stat. § 11.2075, by its plain terms, only applies to actions "to recover damages," the limitations period thus cannot have expired before October 2015. See Siragusa v. Brown, 971 P.2d 801, 806 (Nev. 1998) ("[P]laintiffs should not be foreclosed from judicial remedies before they know that they have been injured…."). Moreover, PwC agreed in a series of tolling agreements to waive any defense based on the expiration of the statute of limitations between January 19, 2011 and May 1, 2016, and Plaintiff filed his Complaint on April 29, 2016.[3] PwC ignores all of this. Plaintiff's suit is timely, and PwC's motion to dismiss should be denied.

PwC's sole argument that Plaintiff's claims are untimely under Nevada law is that: (a) Subsection 1 of Nevada's statute of limitations for malpractice actions against accountants provides that such actions must be commenced within "[f]our years after the completion of performance of the service for which the action is brought," and (b) "PwC completed

[3] Commencing in October 2012, after the IRS sent Plaintiff a notice of transferee liability in June 2012, Plaintiff and PwC entered into a series of retroactive tolling agreements. Copies of the tolling agreements are provided as Exhibit B to this Opposition. Before that time, Plaintiff had no reason to proceed otherwise.

'performance of the service for which the action is brought' no later than August 2003." (Mot. at 16 n.5, citing Nev. Rev. Stat § 11.2075(1).) Neither assertion is correct. First, PwC neglects to note that subsection 2 of the statute provides: "The time limitation set forth in subsection 1 is tolled for any period during which the accountant or accounting firm conceals the act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to the accountant or the firm." Nev. Rev. Stat § 11.2075(2). Despite this express provision and a section of the Complaint titled "Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts" (Cmplt. ¶¶ 73-74), PwC makes no attempt to argue that subsection 2 of the statute is inapplicable or that the Complaint does not adequately allege concealment.[4] Nor could PwC so argue, because the Complaint alleges that PwC concealed the acts, errors and omissions upon which the action is founded, including PwC's previous advocacy of at least one other Midco transaction involving Fortrend and Rabobank (who conspired to defraud Plaintiff). (Cmplt. ¶¶ 38, 73-74, 104 et seq.) As alleged in the Complaint, the concealed facts only came to light during or after the Tax Court trial. (Id. ¶¶ 73, 79).

At minimum, PwC's concealment of its acts, errors and omissions raises issues of fact inappropriate for resolution on a motion to dismiss. It is well-established under Nevada law that motions to dismiss on statute of limitations grounds should be denied where they raise questions of fact to be determined by the jury or trial court after full hearing. See Millspaugh v. Millspaugh, 611 P.3d 201, 202 (Nev. 1980) (reversing trial court's dismissal of legal

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[4] Although the Complaint alleges fraudulent concealment, Plaintiffs need not even meet the standard for fraudulent concealment in order to qualify for tolling under Section 11.2075(2). The Nevada Supreme Court has yet to interpret what constitutes "concealment" for purposes of this tolling provision, but it has held that "concealment" for purposes of a virtually identical tolling provision (in the statute of limitations for actions against health care providers) requires only an intentional act to keep another from learning a fact. Winn v. Sunrise Hosp. & Med. Ctr., 128 Nev. Adv. Op. 23, 277 P.3d 458, 464 (2012).

malpractice case as untimely because of fact question about when plaintiff should have discovered attorneys' malpractice); Siragusa, 971 P.2d at 806 (holding that "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact," such that "the time of discovery may be decided as a matter of law only where uncontroverted evidence proves [when] the plaintiff discovered or should have discovered the fraudulent conduct" (internal quotation marks omitted)); Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 1079 (Nev. 1983) (placing the burden of demonstrating the absence of a genuine issue of material fact as to when a party discovered or should have discovered the facts underlying a claim on the party seeking summary judgment on statute of limitations grounds), disapproved on other grounds by Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000). Plaintiff should thus at least be allowed discovery regarding the full extent of PwC's concealment of the acts, errors and omissions that caused Plaintiff's injuries.

Fact issues regarding when PwC's services were complete likewise preclude dismissal. PwC notes that paragraph 39 of the Complaint alleges that "during the period of April-August 2003, a team of PwC tax professionals … set out to examine and advise Plaintiff regarding the transactions proposed by Fortrend and Midcoast." Construing the Complaint liberally in Plaintiff's favor, this does not establish that PwC ceased providing services in August of 2003. Vacation Vill., Inc. v. Hitachi Am., Ltd., 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). All the more so as the Complaint alleges that PwC agreed to later work with Plaintiff to avoid the imposition of any tax penalty (Cmplt. ¶ 37), and the engagement letter provides that PwC would "be available to assist [Plaintiff] in the event of an audit of any issue for which [it had] provided services under this Agreement." (Eng. Ltr. at p. 94 of PwC appendix)

3. Plaintiff's Claims are Also Timely under New York Law.

Although, as shown above, New York law does not apply, the parties' agreement for PwC to later assist Plaintiff in connection with an IRS audit similarly makes Plaintiff's claims timely by virtue of New York's "continuous representation" doctrine, under which: "where a professional representation of a client continues on an ongoing basis as part of the same matter, the statute of limitations begins to run only when the entire course of the representation has ended." MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP, 43 F. Supp. 3d 309, 315 (S.D.N.Y. 2014) (fact issues regarding continuous representation precluded dismissal; allegations gave rise "to a reasonable inference that the parties anticipated continuous representation"); see also Stokoe v. Marcum & Kliegman LLP, 24 N.Y.S.3d 267, 268 (N.Y. App. Div. 2016) (affirming order denying motion to dismiss complaint: "Plaintiffs carried their burden of demonstrating evidentiary facts showing that the continuous representation toll applied, based on the 'mutual understanding' set forth in the engagement letters that defendants could be called upon in a government investigation to justify their audit findings.")

B. The Tax Court Decision Does Not Preclude Plaintiff's Claims Against PwC.

1. Since PwC's Request for Judicial Notice Should Be Denied, Its Corresponding Preclusion Arguments Should Also Be Rejected.

None of PwC's preclusion arguments can succeed if the Court denies PwC's Request for Judicial Notice regarding the Tax Court opinion on Plaintiff's transferee liability. This is because all of PwC's preclusion arguments assume that this Court will take judicial notice of certain findings in the Tax Court opinion. As discussed in Plaintiff's Opposition to PwC's request for judicial notice, which Plaintiff incorporates herein by reference, PwC's request is overreaching and should be denied. The Tax Court opinion does not preclude Plaintiff from proceeding against PwC in this Court.

2. The Tax Court's Opinion Does Not Collaterally Estop Plaintiff's Claims Against PwC.

PwC starts its discussion of collateral estoppel correctly enough by noting that "[t]he doctrine of collateral estoppel bars a party from re-litigating facts or issues that were conclusively determined by a prior court." (Mot. at 17, citing Kahn v. Morse & Mowbray, 117 P.3d 227, 235 (Nev. 2005)) The discussion goes downhill from there, however, as PwC proceeds to mischaracterize the facts and issue that the Tax Court determined. PwC's goal here is to give the false impression that the Tax Court found Mr. Tricarichi solely responsible for entering into the Fortrend transaction, and PwC without fault. It's a classic example of "blame the victim," and it doesn't work.

According to PwC, the issue decided by the Tax Court was "whether Plaintiff knew that the Fortrend Transaction was illegitimate when he decided to pursue it." (Mot. at 19) The actual issue decided by the Tax Court was whether Plaintiff "had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid," an issue that necessarily encompasses what PwC knew in advising Plaintiff. Tax Ct. Op. at p.80 of PwC appendix (emphasis added). After misstating the issue, PwC contends that the Tax Court made various factual findings about what Plaintiff, and Plaintiff alone, supposedly knew or did. (See Mot. at 18.) PwC can make this contention, however, only by both misstating the issue and blatantly mischaracterizing the Tax Court opinion, which actually reflects PwC's "front and center" involvement in matters that it now tries to walk away from. As the Complaint indicates, PwC was a key adviser to Plaintiff when he was considering the Fortrend transaction. Accordingly, PwC took part in the review of and decision to complete this transaction. PwC contends that the Tax Court found Plaintiff solely blameworthy in this decision process, but that is not so. The Tax Court expressly stated that Plaintiff's advisers, such as PwC, did not act appropriately during this process. As the Tax Court stated, for example:

> 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.
>
> Petitioner **and his advisers** knew that the transaction Fortrend was proposing was likely a "reportable" or "listed transaction."…
>
> ***
>
> … [T]o 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….

Tax Ct. Op. at pp. 81, 82 of PwC appendix (emphasis added, citation omitted). Rather than accurately quote such passages, PwC either avoids them altogether or studiously deletes the Tax Court's references to Plaintiff's advisers – i.e., to PwC. So, for example, PwC says the Tax Court found that "Plaintiff was 'clearly suspicious about Fortrend's scheme …'"; that "[he] engaged in willful blindness"; and that "Plaintiff 'knew that the transaction Fortrend was proposing was likely … reportable…'" – when, as set forth above, the Tax Court actually wrote that both Plaintiff and PwC thought, did and knew these things. (Compare Mot. at 9:17-19 with Tax Ct. Op. at p. 81 of PwC appendix.)

The Tax Court, of course, did not decide, as between Plaintiff and PwC, who was ultimately to blame for Plaintiff'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 to the U.S. Treasury in the wake of the transaction. It is, however, the job of this Court, and/or a jury empaneled by this Court, to look at matters as between Plaintiff and PwC and decide whether PwC was grossly negligent in advising Plaintiff to go ahead with the Fortrend transaction, and whether PwC is liable to Plaintiff for the losses he incurred as a result.

The law has long recognized the difference between such points. Indeed, in Kahn v. Morse & Mowbray, 117 P.3d 227 (Nev. 2005), the lead case that PwC cites regarding collateral estoppel, the Nevada Supreme Court distinguished between the effect of entering into an agreement or transaction, and the propriety of the advice that led a party to enter into that agreement in the first place. In Kahn, the court addressed whether a prior court ruling that plaintiffs were bound by an oral settlement agreement collaterally estopped plaintiffs from proceeding with a claim that their attorneys had given them bad advice in connection with entry into that agreement. The high court reversed the lower court's imposition of collateral estoppel on this point:

> [T]he district court did not address the factual issues underlying [plaintiffs'] assertion that [defendant] offered them bad advice…. The fact that [plaintiffs] agreed to the terms [of the agreement] has nothing to do with the factual issues concerning whether [defendant] properly advised them as to those terms.

Kahn, 117 P.3d at 236. Like plaintiffs in Kahn, Plaintiff here received advice from professionals regarding whether he should enter into an agreement. (See, e.g., Cmplt. ¶¶ 37-53, 53.) After one court ruled on the consequences of entering into that agreement, plaintiff brought claims in a second case alleging the professionals' advice leading up to the agreement was bad. Collateral estoppel does not apply to such claims in the second case. See Kahn.

A similar result obtains in tax-related cases. In U.S. v. Boyle, 469 U.S. 241 (1985), the U.S. Supreme Court distinguished between a taxpayer's duties to the government under the tax laws, and the duties owed to the taxpayer by his advisers. The Court there held that a taxpayer's failure to timely file a tax return was not excused by the taxpayer's reliance on his attorney. Citing Boyle, other courts have held that taxpayers may proceed against their attorneys and accountants when the tax authorities find tax liabilities. For example, in Pair v. Queen, 2 A.3d 1063 (D.C. 2010), the court reversed dismissal of the taxpayer plaintiffs' attorney malpractice claim. As the court held:

> Boyle concerned the duties an estate and its representative owed to the IRS. By contrast, the Pairs' claims of malpractice concern the duties a professional owes to a client…. [Plaintiffs] are seeking "compensatory and consequential damages" through a malpractice claim…. [N]othing in Boyle suggests that a

> taxpayer's non-delegable duty to the IRS relieves a professional from liability for negligent failure to perform the duties for which an estate has employed him.

Pair, 2 A.3d at 1066. See also Bick v. Peat Marwick and Main, 799 P.2d 94, 102 (Kan. App. Ct. 1990) (affirming judgment against accounting firm on taxpayer's negligence claim).

Given this distinction between tax liability (which the Tax Court was considering) and professional liability (which it was not), there is no reason for this Court to resolve this case based solely on a few snippets from the Tax Court opinion (which PwC chooses to recite repeatedly) regarding the dealings between Plaintiff and PwC. For example, a statement from PwC to Plaintiff that a proposed transaction is "aggressive" (see Mot. at 2, 6, 9, 18) does not necessarily absolve PwC from advising Plaintiff to proceed notwithstanding its "aggressive" nature. Some "aggressive" tax structures are perfectly legitimate. See, e.g., In re ClassicStar Mare Lease Litig., 727 F.3d 473, 489 (6th Cir. 2013) ("Plaintiffs were undoubtedly engaged in an attempt to take advantage of the arcane and often labyrinthine nature of the U.S. Tax Code, but their project was a lawful one."). Others are not. Plaintiff retained PwC to advise him on the subject, and – as Plaintiff has now learned – PwC failed in that task. Similarly, the fact that Plaintiff had been successful in the cell-phone business and had some "familiarity with tax concepts" (see Mot. at 10, 18) does not make him an expert in tax matters and allow PwC to walk away from its gross negligence. See, e.g., ClassicStar, 727 F.3d at 479 (investment marketed to wealthy individuals recognized investors' need for professional advice regarding its tax aspects). Again, Plaintiff retained PwC to provide expert advice and, as alleged in the Complaint, PwC failed. The Tax Court did not hold otherwise or even decide the issue. As such, imposing collateral estoppel here would be wrong. See, e.g., Eureka Fed. Sav. and Loan *Ass'n v. Am. Cas. Co.*, 873 F.2d 229, 233 (9th Cir. 1989) ("Collateral estoppel is inappropriate if there is <u>any doubt</u> as to whether an issue was actually litigated in a prior proceeding.") (emphasis added); Lanier v. Clovis Unified School Dist., 2012 WL 1355674 at *9 (E.D. Cal.

2012) (listing factors for determining whether issues are identical; finding no collateral estoppel) (citing Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1116 (9th Cir. 1999)).

While the foregoing is more than sufficient basis to deny PwC's motion, it should also be noted that the tax litigation is not yet over. Plaintiff intends to appeal the Tax Court's decision.[5] If this Court were to grant PwC's motion and enter judgment, and the Ninth Circuit were to reverse the Tax Court, this Court's judgment would also have to be reversed as a result. See Butler v. Eaton, 141 U.S. 240, 243-44 (1891) (reversing judgment based on other judgment that had also been 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 grant defendant's request); Erebia v. Chrysler Plastic Products Corp., 891 F.2d 1212, 1251 (6th Cir. 1989) ("Where the prior judgment, or any part thereof, relied upon by the subsequent court has been reversed, the defense of collateral estoppel evaporates.") (citations omitted). This further supports denial of PwC's motion.

3. PwC's In Pari Delicto Argument Misconstrues Both That Legal Doctrine and the Claims Against PwC.

"The equitable defense of in pari delicto, which literally means 'in equal fault,' is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." Pinter v. Dahl, 486 U.S. 622, 632 (1988). PwC argues that this defense applies here because Plaintiff's fault is greater than PwC's. PwC maintains that Plaintiff's claims against it are based on negligent, unintentional conduct, while Plaintiff himself is guilty of fraud. But PwC leaves important descriptive qualifiers off the "fault" at issue on both sides of the equation. As a result, its analysis is exactly backwards: In truth, PwC is alleged to have committed **gross** negligence (which is <u>intentional</u> misconduct), while Plaintiff is accused of **constructive** fraud

[5] Certain proceedings continued in the Tax Court after its October 2015 opinion issued, with the Tax Court only recently ruling on the amount of interest due on the taxes it previously found Plaintiff liable for. See Tricarichi v. Commissioner, T.C. Memo 2016-132 (July 18, 2016).

(which is <u>not</u> intentional misconduct). This matters because, as stated recently, "in pari delicto should not be applied where the plaintiff is guilty of simple negligence and the defendant is guilty of either gross negligence or willful and wanton or intentional conduct." Long, Kaufman, and Wunderlich, 12A Blue Sky Law § 9:138 (June 2016).

New York law, upon which PwC relies, recognizes the material difference between negligence and "gross negligence." As New York's highest court explained, "'gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for rights of others or 'smacks' of intentional wrongdoing." Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 823-24 (1993). Likewise, New York recognizes that "there are two varieties of fraud claims, actual and constructive." Grand Union Mount Kisco Employees Federal Credit Union v. Kanaryk, 848 F. Supp. 446, 455 (S.D.N.Y. 1994). "Constructive fraud requires the same showing as actual fraud, except for one crucial aspect – the element of the defendant's scienter, or knowledge of the falsity of his or her representation, need not be proven." Id. See also Southern Industries, Inc. v. Jeremias, 66 A.D.2d 178, 186 (N.Y. App. Div. 1978) ("[T]he transfer in question was made without an actual intent to defraud and is invalid only under the constructive fraud provisions….").

Accordingly, because the parties are not equally at fault, the in pari delicto defense cannot help PwC here. Having committed intentional misconduct, PwC's culpability outweighs Plaintiff's supposed unintentional (or "constructive") misconduct. Moreover, as PwC ignores throughout its motion, the Tax Court's "constructive fraud" finding against Tricarichi was based on the actions and inactions of "petitioner **and his advisers**," including PwC. Tax Ct. Op. at p. 81 of PwC appendix. Thus, even in comparing PwC's negligent misrepresentation with "Tricarichi's" constructive fraud (neither of which requires intentional misconduct), the balance <u>still weighs against PwC</u> because it bears responsibility for the constructive fraud as well.

Finally, even if PwC were correct about the general issue of fault, application of the in pari delicto defense is not automatic. "[T]he courts should not be so enamored with the Latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction." In re Amerco Deriv. Litig., 127 Nev. 196, 217 (2011) (citation omitted). "[W]hether the defense of in pari delicto should apply here is an **issue of fact** for the district court to decide following necessary discovery and briefing that properly evaluates the factors to be considered for the defense." Id. (emphasis added) Among the factors to be considered that would militate against applying the equitable defense: "[w]here, by applying the rule, [1] the public cannot be protected because the transaction has been completed, [2] where no serious moral turpitude is involved, [3] where the defendant is the one guilty of the greatest moral fault, and [4] where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied." Id. (citation omitted). Here, even if the Court were inclined to engage in the fault balancing test, no discovery has been taken, and it is too early in the case to engage in the fact-specific endeavor of determining whether to apply the defense – much less to dismiss the case as a matter of law on this basis.

4. PwC's Reliance Argument Is Premature and Misguided.

PwC's reliance argument is a rehash of its collateral estoppel argument, and it fails for largely the same reasons. Contrary to PwC's argument and its misrepresentation of the Tax Court opinion, the Tax Court did not give PwC a free pass or decide who, as between Plaintiff and PwC, was to blame for Plaintiff's entry into the Fortrend transaction, because it did not have to decide this. The Tax Court was deciding tax liability, not professional liability, and it specifically referred to the actions of Plaintiff "and his advisers" – i.e., PwC – not just to the actions of Plaintiff. Since the pertinent facts and legal standards for the tax claims and the professional liability claims are not identical, a finding in one case does not necessarily transfer over to the other. For example, as noted above in the in pari delicto discussion, there is a material difference between the mental states required to show constructive fraud (which was at issue in the Tax Court) and gross negligence (which is at issue here). Accordingly, the Tax Court opinion does not prevent Plaintiff from pleading and proving justifiable reliance in this case. *See, e.g., Corva v. United Svcs. Auto. Ass'n*, 485 N.Y.S.2d 264, 266 (N.Y. App. Div. 1985) (reversing dismissal of claims because lower court made "erroneous assumption" that standard for determining justifiable reliance in misrepresentation claim was same as standard of reasonable care in negligence action); Johnson v. Proskauer Rose LLP, 9 N.Y.S.3d 201, 210-12 (N.Y. App. Div. 2015) (affirming denial of motion to dismiss misrepresentation claim against tax-shelter advisers and finding that justifiable reliance is a fact-intensive question not appropriate for determination on motion to dismiss); Cohan v. KPMG, LLP, No. 12 EV 014325 at 8 (Fulton Cty. Ga. Ct. Dec. 13, 2013) (holding, in tax-shelter case against accounting firm, that "[i]t is for the jury to determine whether Plaintiff justifiably relied"). (Ex. C hereto)

As the foregoing cases indicate, it would be markedly premature to dismiss Plaintiff's claims at this stage without at least allowing him to develop a record regarding his reliance. As the court in Corva noted, reliance is considered justifiable unless it is "utterly unreasonable." 485 N.Y.S.2d at 266. In other words, if a person is of "normal intelligence, experience and education, he may not put faith in representations which any such normal person would recognize at once as preposterous … or which are shown by facts within his observation to be … patently and obviously false…." Id. Given the complex nature of the Fortrend transaction, it cannot be said, on a motion to dismiss and in light of the Complaint's allegations, that it was "utterly unreasonable" for Plaintiff to rely on PwC's representations, or that "any normal person" would have recognized PwC's representations "at once as preposterous" or "patently and obviously false." These are issues of fact better addressed later in the case, and this is true regardless of whether Plaintiff was aware that the proposed transaction was "aggressive" from a tax standpoint. See Cohan, supra at 7 (in a transaction with complicated tax aspect, knowledge of alleged fraud "should not be casually imputed" to the taxpayer, even if he "[c]learly … understood this transaction conceptually as a strategy to minimize his taxes"); Johnson, supra.

In the face of this common-sense approach, PwC cites a hodgepodge of cases that can be readily distinguished, or that actually demonstrate Plaintiff's point. Consider the following examples, which PwC cites to support its argument that Plaintiff "knew" or "should have known" that PwC's representations were false:

- Baraliu v. Vinya Capital, L.P., 2009 WL 959578 (S.D.N.Y. 2009): The court held that plaintiff "should have known" about a certain regulation harmful to his case because he admitted in the complaint that he was, just like defendant, a "sophisticated trader." Id. at *7. By contrast, Mr. Tricarichi is not, of course, a premier accounting firm with sophisticated tax expertise.

- Stolow v. Greg Manning Auctions Inc., 258 F.Supp. 2d 236, 249 (S.D.N.Y. 2003): Plaintiff admitted in his complaint he was aware of the bid-rigging scheme that he was complaining about. Mr. Tricarichi makes no such admission in his pleading.

- Arfa v. Zamir, 905 N.Y.S.2d 77, 78, 80 (N.Y. App. Div. 2010): Here, by the time the parties entered into the agreement at issue, "they had already developed an adversarial, even hostile, relationship" via which plaintiff had "clear notice of [defendant's] dishonesty" giving rise to a need for heightened due diligence and inquiry. PwC does not suggest that the same was the case between itself and Mr. Tricarichi, and the Complaint does not so allege.

- Rodas v. Manitaras, 552 N.Y.S.2d 618 (N.Y. App. Div. 1990): Before buying a restaurant business, plaintiffs asked to review its books and records, but the request was refused. There is no suggestion that Mr. Tricarichi was denied such due diligence with respect to the Fortrend transaction.

- Brakke v. Economic Concepts, Inc., 213 Cal. App. 4th 761 (Cal. Ct. App. 2013): PwC cites this case and two others[6] for the proposition that "it is entirely unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government," such as PwC. (Mot. at 24 n.9) In these cases, the defendant advisers opined to the taxpayer plaintiffs that a certain tax structure would pass muster under the tax laws. See, e.g., Brakke, 213 Cal. App. 4th at 768. Then, years after the advice had been given, the IRS issued revenue rulings or regulations indicating that the structure was actually invalid. Id. (advice given in 2002/2003;

[6] Patel v. Pacific Life Ins. Co., 2009 WL 1456526 (N.D.Tex. 2009); Chau v. Aviva Life and Annuity Co., 2011 WL 1990446 (N.D.Tex. 2011).

> IRS revenue ruling in 2004); *Patel*, 2009 WL 1456526 at *4 (advice in 2003; regulations issued in 2005). In Mr. Tricarichi's case, by contrast, the IRS had already issued Notice 2001-16 – which indicated that the Fortrend transaction was improper for tax purposes – more than two years before PwC told Tricarichi to go ahead with the transaction. In other words, PwC was not "predicting the future." It was advising Mr. Tricarichi about an IRS pronouncement that had been around for more than two years. Mr. Tricarichi was thus entitled to rely on PwC's advice.

IV. CONCLUSION

Now that PwC's advice has proven to be wrong, Mr. Tricarichi is entitled to seek redress from PwC in this Court, rather than have his case cut short, before it even starts, on an overreaching motion to dismiss.

WHEREFORE, for all the foregoing reasons, Plaintiff Michael A. Tricarichi respectfully requests that the Court DENY Defendant Pricewaterhouse Coopers' motion to dismiss.

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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 26th day of August, 2016, I caused the document entitled **PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS, LLP'S MOTION TO DISMISS** to be served on the following by Electronic Service to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR, Defendants.	Case No.: A-16-735910-B Dep't. No.: XV **PRICEWATERHOUSECOOPERS LLP'S REPLY IN SUPPORT OF THE MOTION TO DISMISS**

SNELL & WILMER
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Plaintiff Michael A. Tricarichi's ("Plaintiff") Opposition to Defendant PricewaterhouseCoopers LLP's ("PwC") Motion to Dismiss does not and cannot explain away the reality that through this ill-conceived lawsuit, Plaintiff seeks improperly to shift a $21 million tax liability from himself to PwC and others, while refusing to accept responsibility for the constructive fraud the Tax Court found Plaintiff committed when he knowingly participated in a tax avoidance scheme. It should therefore come as no surprise to the Court that Plaintiff's claims fail as a matter of law, as shown in PwC's Motion to Dismiss (the "Motion"). Plaintiff's claims against PwC have been time-barred for a decade. Moreover, in holding Plaintiff liable, the Tax Court made certain factual findings against Plaintiff that he is collaterally estopped from challenging here. Those findings preclude Plaintiff's present claims (1) under the in pari delicto doctrine; and (2) because the findings prevent Plaintiff from proving justifiable reliance on PwC's alleged advice. The Opposition does nothing to change these conclusions.

Plaintiff's Claims Are Time-Barred. Plaintiff argues that the applicable statute of limitations does not bar his claims because (1) Nevada law applies to the statute of limitations, despite a New York choice-of-law provision in the parties' 2003 Engagement Agreement, and Nevada's statute of limitations for accounting malpractice was tolled because PwC fraudulently concealed its negligence from Plaintiff; and (2) even if New York law applies, the statute of limitations was tolled under New York's "continuous representation" doctrine. Plaintiff's arguments do not withstand scrutiny.

First, Nevada law does not apply; New York law does. When parties agree to a choice-of-law provision, as here, Nevada courts routinely apply the statute of limitations of that chosen jurisdiction. See, e.g., Mardian v. Greenberg Family Tr., 359 P.3d 109 (Nev. 2015). Plaintiff's assertion that Nevada courts should apply Nevada's statute of limitations without regard to the parties' contractual agreement is not supported by the legal authority Plaintiff cites.

Applying New York law, Plaintiff's claims are clearly time-barred under the three-year statute of limitations for accounting malpractice, which runs from the date PwC provided its purported advice to Plaintiff, and therefore would have run a decade ago. Plaintiff's sole argument in response – that New York's continuous representation doctrine tolls the statute – is meritless. The continuous representation doctrine is a "limited exception," Abramo v. Teal, Becker & Chiaramonte, CPA's, P.C., 713 F. Supp. 2d 96, 104 (N.D.N.Y. 2010), and applies only where "there ***has been*** continuous representation," Weiss v. Deloitte & Touche, LLP, 882 N.Y.S.2d 229, 232 (App. Div. 2009) (emphasis added); see also Williamson v. PricewaterhouseCoopers LLP, 872 N.E.2d 842, 848 (N.Y. 2007). Here, the Complaint does not allege any continuous representation by PwC of Plaintiff following the Transaction at issue in 2003. Nor could it; Plaintiff affirmatively alleges that PwC's representation and work ***ended*** in August 2003. (Compl. ¶ 39.) The continuous representation doctrine therefore cannot save Plaintiff's time-barred claims.

Second, even if Nevada's statute of limitations applies – and it does not – Plaintiff's claims are still untimely. Plaintiff argues that the doctrine of fraudulent concealment tolls the statute of limitations. However, to plead concealment adequately, Plaintiff must allege the facts PwC actively concealed. He fails to do so. In addition, Nevada law requires more than the defendant's mere silence for a plaintiff to invoke the concealment tolling provision. But Plaintiff does not allege a single affirmative act by PwC to conceal information from Plaintiff. See, e.g., USACM Liquidating Tr. v. Deloitte & Touche, LLP, 764 F. Supp. 2d 1210 (D. Nev. 2011).

The Tax Court's Findings Preclude Plaintiff's Claims as a Matter of Law. Plaintiff agrees that collateral estoppel bars a party from re-litigating issues of fact that were conclusively determined by a prior court. Plaintiff also acknowledges that the Tax Court found Plaintiff had constructive knowledge that the 2003 Fortrend Transaction ("Transaction") was a tax avoidance scheme and he committed constructive fraud by entering into the Transaction. Plaintiff further does not dispute that these factual findings satisfy the collateral estoppel elements and thus enjoy preclusive effect. Such concessions are dispositive because the Tax Court's post-trial factual findings prevent Plaintiff from stating a cause of action against PwC here.

Nevertheless, Plaintiff argues that his claims should not be dismissed because: (1) collateral estoppel should not apply since the Tax Court did not adjudicate Plaintiff's malpractice claims against PwC; (2) the doctrine of in pari delicto (a) does not bar Plaintiff's claims because PwC's alleged conduct is more culpable than Plaintiff's already established constructive fraud, and (b) may not be applied at the pleading stage; and (3) the Tax Court did not rule on whether Plaintiff justifiably relied on PwC's advice and thus this is a question of fact not to be decided at the pleading stage. Plaintiff's arguments all fail as a matter of law.

First, Plaintiff mischaracterizes the collateral estoppel issue. PwC does not, and need not, contend that Plaintiff's claims are barred because the Tax Court adjudicated the precise negligence ***claims*** Plaintiff brings here. Rather, the Tax Court made specific ***factual findings as to Plaintiff*** – including that he ignored red flags raised by PwC, actively avoided learning the truth about the Transaction, and committed at least constructive fraud because he knew or should have known that the Transaction was an illegitimate tax avoidance scheme. Those factual findings are entitled to preclusive effect and the Opposition does not contend otherwise. The preclusive effect of the Tax Court's post-trial factual findings is what bars Plaintiff's claims against PwC under the in pari delicto doctrine and prevents Plaintiff from proving justifiable reliance on PwC.

Second, Plaintiff provides no legal authority for his contention that PwC's alleged gross negligence is ***more*** wrongful than Plaintiff's own established constructive fraud. Plaintiff provides no legal citation because he cannot; the law is otherwise. Constructive fraud must be based on conduct that ***at a minimum*** is grossly negligent. See, e.g., Spielbeuhler v. Henry Spielbeuhler Constr. Corp., 284 N.Y.S.2d 13, 15 (App. Div. 1967). Thus, Plaintiff's conduct is as culpable, if not more culpable, than PwC's alleged conduct. The in pari delicto doctrine applies to bar claims when the parties are at equal fault. Kirschner v. KPMG LLP, 938 N.E.2d 941, 950 (N.Y. 2010). Plaintiff does not contend otherwise.

Likewise, Plaintiff's argument that the Court should not apply the in pari delicto doctrine at the pleading stage (Opp'n at 22) finds no support in the case law. PwC's Motion cited myriad cases in which courts applied the in pari delicto doctrine at the pleading stage to dismiss complaints. (See Mot. at 20-21 (citing cases); Metro. Plaza WP, LLC v. Goetz Fitzpatrick, LLP, 3 N.Y.S.3d 595, 597 (App. Div. 2015) ("The motion court correctly gave collateral estoppel

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effect to the rulings of the bankruptcy court in a prior proceeding finding deceit and other misconduct by plaintiffs, as well as defendants, and dismissed the complaint pursuant to the doctrine of in pari delicto.”).) Tellingly, Plaintiff fails to address these cases. Dismissal is particularly warranted here where Plaintiff is collaterally estopped from contesting the very facts that support the application of in pari delicto.

Third, the Opposition's argument concerning Plaintiff's inability to prove lack of justifiable reliance misapplies the doctrine of collateral estoppel. PwC does not argue that the Tax Court specifically addressed Plaintiff's negligence claims against PwC; PwC need not make such an argument. Rather, PwC argues that the Tax Court made factual findings that are entitled to preclusive effect. Such post-trial factual findings include that Plaintiff knew of the Transaction's improprieties but ignored and refused to investigate those red flags. Those unchallengeable factual findings (not any ruling by the Tax Court on PwC's alleged negligence) preclude Plaintiff from proving justifiable reliance, a necessary element of Plaintiff's claims against PwC. New York law provides that a plaintiff cannot justifiably rely on advice when, as the Tax Court found, he (1) either knew or should have known the advice was inaccurate; or (2) had reasons to suspect the advice was inaccurate but failed to investigate. (See Mot. at 22-23.) Plaintiff does not dispute this is the law. Therefore, the Tax Court's preclusive factual findings require dismissal.

For these reasons, and the reasons below, the Court should dismiss Plaintiff's Complaint against PwC with prejudice.

II. ARGUMENT

A. Plaintiff's Claims Are Barred by the Statute of Limitations.

As shown in the Motion (at 8), the Court must dismiss a claim as time-barred when “the defense of the statute of limitations appears from the complaint itself.” Kellar v. Snowden, 489 P.2d 90, 92 (Nev. 1971). “When the complaint shows on its face that the cause of action is barred, the burden falls upon the plaintiff to satisfy the court that the bar does not exist.” Bank of Nev. v. Friedman, 420 P.2d 1, 4 (Nev. 1966). The Opposition fails to carry its burden.

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1. Plaintiff's Claims Are Barred Under New York Law.

(a) Plaintiff's Claims Are Subject to New York's Statute of Limitations.

As shown in the Motion (at 11-14), the parties' April 2003 Engagement Agreement contains a New York choice-of-law provision that: (1) is enforceable under Supreme Court of Nevada precedent determining the enforceability of a contractual choice-of-law provision; and (2) encompasses Plaintiff's claims that arise out of the relationship created by the Engagement Agreement, including the statutes of limitations for those claims. In his Opposition, Plaintiff does not contest that the New York choice-of-law provision is valid and enforceable under Nevada law, or challenge that the provision encompasses his causes of action.[1]

Instead, Plaintiff asserts that Nevada courts must apply Nevada's statute of limitations, even when there is a valid choice-of-law provision selecting a different State. Plaintiff, however, cites no controlling or persuasive authority applying Nevada's statute of limitations in the face of a valid contractual choice-of-law provision, let alone any authority that articulates the broad rule he seems to have created. Instead, Plaintiff cites a Nevada decision *from 1869*, Wilcox v. Williams, 5 Nev. 206 (1869), and a few federal courts quoting that case, for the general proposition that the law of the forum ordinarily governs "procedural" issues such as statutes of limitations. (Opp'n at 10.) Critically, however, Plaintiff does not cite any binding opinion that involves a choice-of-law provision. See Wilcox, 5 Nev. 206; Asian Am. Entm't Corp. v. Las Vegas Sands, Inc., 324 F. App'x 567 (9th Cir. 2009); Spilsbury v. U.S. Specialty Ins. Co., 2015 WL 476228 (D. Nev. Feb. 4, 2015); Seely v. Ill.-Cal. Express, Inc., 541 F. Supp. 1307 (D. Nev.

[1] Seeking to avoid the New York choice-of-law provision at the pleading stage, Plaintiff asks the Court to ignore the Engagement Agreement altogether. However, as explained in PwC's Request for Judicial Notice and Reply in support, Nevada courts may consider on a motion to dismiss "matters incorporated by reference or integral to the claim." Baxter v. Dignity Health, 357 P.3d 927, 930 (Nev. 2015) (citation omitted). Plaintiff responds that the Engagement Agreement is not integral to his negligence claims because it does not explicitly refer to a duty of care. (Opp'n at 9-10.) He cites no support for this specious position. The Engagement Agreement created the professional relationship between PwC and Plaintiff that forms the basis of his claims. Indeed, the Complaint alleges that the Engagement Agreement obligated PwC to perform the very services Plaintiff now alleges PwC rendered negligently. (Compl. ¶ 3); Herons Cove Enters., LLC v. Primary Capital Advisors, LC, 2009 WL 10627485, at *3 (M.D. Fla. June 11, 2009) (taking judicial notice of engagement letter on motion to dismiss negligence and negligent misrepresentation claims arising out of reports made by defendant, because letter "establishes that [defendant was] engaged . . . to prepare the reports").

1982); G & H Assocs. v. Ernest W. Hahn, Inc., 934 P.2d 229 (Nev. 1997).[2]

Contrary to Plaintiff's position, when parties agree to a choice-of-law provision, courts applying Nevada choice-of-law rules consistently apply the statute of limitations of the jurisdiction identified in that provision, including a recent Supreme Court of Nevada case. See Mardian, 359 P.3d at 111. In that case, the Supreme Court held that "because of the [Nevada] choice-of-law provision" in the agreement between the parties, Nevada's statute of limitations applied to plaintiff's claims – not because of some general rule that Nevada courts always apply Nevada's statute of limitations. Indeed, the Court held it "would not have been appropriate for the district court to apply [another state's] limitation period" "because the [agreement] specif[ies] that [it is] governed by Nevada law." Id. Thus, binding Supreme Court of Nevada authority dictates that Plaintiff's claims here be governed by New York's statute of limitations.[3]

Federal courts applying Nevada choice-of-law rules agree. Izquierdo v. Easy Loans Corp., 2014 WL 2803285, at *4 (D. Nev. June 19, 2014), is instructive. There, the court applied Delaware's statute of limitations to defendant's cross-complaint under the Delaware choice-of-law provision in the parties' agreement. The court began by recognizing that Nevada courts apply the Restatement (Second) of Conflicts of Laws § 187 in determining choice-of-law questions involving contractual choice-of-law provisions. Id. at *3 (citing Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Inv'rs, 603 P.2d 270, 273 (Nev. 1979)); (see also Mot. at 12). Restatement § 187 provides that the "law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could

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[2] Plaintiff also cites Tipton v. Hereen, 859 P.2d 465 (Nev. 1993), which did not even involve a statute of limitations issue. (Opp'n at 10.) Instead, the court, with no analysis, simply applied Wyoming law to the plaintiff's claims pursuant to a Wyoming choice-of-law provision, but applied Nevada Rules of Civil Procedure and a since-repealed Nevada statute on judgments to defendant's subsequent attorneys' fee request after prevailing on the underlying claims.

[3] Plaintiff cites a Nevada State District Court opinion, Cantor G&W (Nevada) Holdings, L.P. v. Asher, No. 11A64602 (Nev. Dist. Ct.), applying Nevada's statute of limitations despite a Delaware choice-of-law provision in the parties' agreement, holding, with little analysis, "the defense that a claim is barred by the statute of limitations is a procedural matter governed by the law of the forum." The order is not controlling, nor even persuasive where it does not discuss Nevada law on applying choice-of-law provisions, as discussed further below. (See also Mot. at 11-12.) Moreover, Cantor was decided two years ***before*** the Supreme Court of Nevada's contrary holding in Mardian. See also Mohave State Bank v. CRM Colo. River Marina, LLC, 2012 WL 2115675 (Nev. Dist. Ct. Mar. 3, 2012) (declining to apply Nevada's specific statute of limitations for deficiency judgments where agreement contained an Arizona choice-of-law provision).

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have resolved by an explicit provision in their agreement directed to that issue" as long as (1) the parties acted in good faith in agreeing to the choice-of-law provision; (2) the chosen state has a substantial relation to the transaction; and (3) the choice-of-law provision is not contrary to Nevada public policy. The court found that the Delaware choice-of-law provision satisfied all three requirements, specifically holding that "applying Delaware's statute of limitations supports Nevada's long-recognized public interest in protecting the freedom to contract" and is consistent with established Nevada law enabling parties to contractually agree to shorter limitation periods. Id. at *4 (citing Hansen v. Edwards, 426 P.2d 792, 793 (Nev. 1967)).

Notably, the court explicitly rejected the defendant's argument that Nevada law should apply to "procedural matters, such as the statute of limitations" – the very argument advanced by Plaintiff here. Id. The court held that that "procedural" distinction was "inapplicable because there is a facially valid contractual provision choosing Delaware law as the governing law," and thus the approach articulated in Restatement § 187 must apply. Id. at *4. The court stated it was irrelevant that the choice-of-law provision did not explicitly provide that it would apply to statutes of limitations, because under Nevada choice-of-law principles, Nevada courts apply a valid choice-of-law provision to any issue that "***could have [been]*** resolved by an explicit provision in their agreement directed to that issue," regardless of whether the issue was in fact explicitly addressed in the provision. Id. at *3 (emphasis added). See also Zurich Am. Ins. Co. v. Intermodal Maint. Servs., Inc., 2015 WL 1280748, at *6 (D. Nev. Mar. 20, 2015) (under Nevada choice-of-law rules, applying Nebraska's statute of limitations pursuant to Nebraska choice-of-law provision, noting "applying Nebraska's statute of limitations comports with Nevada's recognized public interest in recognizing freedom to contract"); DeLeon v. CIT Small Bus. Lending Corp., 2013 WL 1907786, at *6 (D. Nev. May 7, 2013) (applying Colorado's statute of limitations pursuant to Colorado choice-of-law provision "[u]nder Nevada choice-of-law rules"); Shinn v. Baxa Corp., 2011 WL 3419239, at *2 (D. Nev. Aug. 2, 2011) (applying Colorado's statute of limitations pursuant to Colorado choice-of-law provision).[4]

[4] Plaintiff notes that under New York choice-of-law rules, New York courts generally require a choice-of-law provision to state that it encompasses statute of limitations. (Opp'n at 11.) However, Plaintiff does not argue that New York choice-of-law rules apply. That is because, in a

Here, as shown in the Motion (at 11), the New York choice-of-law provision in the Engagement Agreement satisfies the three requirements for a valid choice-of-law provision under Nevada law and Restatement § 187. The Opposition does not challenge this showing. New York's statute of limitations governs Plaintiff's claims.[5]

(b) Plaintiff's Claims Have Been Barred Since 2006.

Plaintiff does not dispute that, despite asserting claims for "gross negligence" and "negligent misrepresentation," they are governed by the applicable statute of limitations for an accounting malpractice action. (Opp'n at 12-13, 15.) As stated in the Motion (at 14) and uncontested by Plaintiff, the statute of limitations for accounting malpractice actions under New York law is three years after the services are rendered, "not when the client discovers it." Williamson, 872 N.E.2d at 845; see also N.Y. C.P.L.R. 214. The Complaint alleges that PwC provided advice in connection with the Transaction from April 2003 to August 2003. Thus, Plaintiff's claims have been barred under New York law since at least August 2006.

Plaintiff does not dispute that New York's statute of limitations on his claims ordinarily would have run by August 2006. Instead, Plaintiff asserts that the statute of limitations was tolled indefinitely under New York's continuous representation doctrine. (Opp'n at 15.) The continuous representation doctrine does not apply here.

The continuous representation doctrine "carves out a ***limited*** exception to the three-year bar." Abramo, 713 F. Supp. 2d at 104 (emphasis added). That doctrine "operates to toll the running of the statute of limitations until the ongoing representation is completed." Weiss, 882

Nevada forum, Nevada choice-of-law rules determine how to apply a choice-of-law provision. Nevada relies on Restatement § 187 which applies the parties' chosen law to any issue the parties "could have resolved by an explicit provision in their agreement." Ferdie, 603 P.2d at 273.

[5] Finally, Plaintiff's argument that Nevada's statute of limitations applies is further undermined by the series of tolling agreements he and PwC entered into that Plaintiff asks the Court to consider. (Opp'n at 12.) As Plaintiff himself points out, the purpose of the agreements was to toll the statute of limitations for any claims against PwC "arising from the services performed by PwC" relating to the Fortrend Transaction which were not already time-barred by January 2011. (Pl.'s Ex. B at 1.) The parties agreed in each of these tolling agreements that they "shall be construed in accordance with the laws of ***New York***." (Id. at 2 (emphasis added).) Plaintiff consented to every one of these New York choice-of-law clauses, as recently as October 2015. (Id.) Plaintiff does not explain how, in light of these tolling agreements governed by New York law, there can be any reasonable dispute that the parties have long understood and agreed that issues of statute of limitations would be decided under New York law.

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N.Y.S.2d at 232. "The doctrine has a narrow scope," Abramo, 713 F. Supp. 2d at 104, and "[i]n determining whether the doctrine applies, the concern is whether there ***has been*** continuous representation." Weiss, 882 N.Y.2d at 232 (emphasis added). "[U]nless services relating to the particular transaction sued upon were rendered within the limitation period, even the defendant's general and unfettered control of [the plaintiff's] financial, tax and investment affairs . . . is insufficient to sustain the timeliness of the action." Booth v. Kriegel, 825 N.Y.S.2d 193, 195 (App. Div. 2006). "The mere possibility" that continuous representation "***could have occurred*** does not give rise to the application of the continuous treatment doctrine where it in fact has not." ATC Healthcare Inc. v. Goldstein, Golub & Kessler LLP, 958 N.Y.S.2d 59, 2010 WL 3633864 (Sup. Ct. 2010) (table) (emphasis added); Williamson, 872 N.E.2d at 848 (continuous representation doctrine does not apply where parties lacked "awareness of a condition or problem warranting further representation" and "no course of representation was alleged").

Here, Plaintiff does not allege that PwC actually assisted or represented him regarding the Transaction after August 2003. Indeed, Plaintiff does not allege that he and PwC even discussed the Transaction after August 2003. Plaintiff actually alleges the opposite: that PwC's representation and work ***ended*** in August 2003. (Compl. ¶ 39.) Thus, the only two cases he cites for his argument (Opp'n at 15) – cases in which the defendants were alleged to have continued to represent the plaintiffs – are irrelevant and do not support his argument. See MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP, 43 F. Supp. 3d 309, 316 (S.D.N.Y. 2014) (discussing plaintiff's "decision to seek further advice from [defendant] regarding the 2010 10-K and [defendant's] decision to render such advice"); Stokoe v. Marcum & Kleigman LLP, 24 N.Y.S.3d 267, 268 (App. Div. 2016) (affirming trial court order, which explained – at 2015 WL 1306995, at *4 – how defendant, after delivering audit opinion, continued "responding to document and interview requests by the SEC," "culminating in the . . . 2010 submission of a declaration to the SEC reaffirming [defendant's] unqualified audit opinions").

Instead, Plaintiff contends there was continuous representation based only on the parties' 2003 Engagement Agreement, which states that PwC would "be available to assist the Client in the event of an audit." (Ex. 3 at 94.)[6] However, Plaintiff does not allege that PwC actually represented Plaintiff during an IRS audit, or provided any assistance during that time, or that Plaintiff even sought such assistance. Again, "[t]he mere possibility" that continuous representation "***could have occurred*** does not give rise to the application of the continuous treatment doctrine where it in fact has not." ATC Healthcare Inc., 958 N.Y.S.2d 59, *4 (table).

Indeed, New York courts have explicitly rejected the very argument Plaintiff advances. In Johnson v. Proskauer Rose LLP, the plaintiffs and defendant law firm entered an agreement under which the defendant firm "would render tax advice to plaintiffs regarding the discussed sale of [company] stock." 9 N.Y.S.3d 201, 204-05 (App. Div. 2015). In 2001, the defendant provided an opinion letter, concluding it was "more likely than not" that the scheme would not accrue any penalties if disallowed by the IRS. Id. at 205. In 2006, the IRS requested information from plaintiffs regarding the tax strategy. Id. Ultimately, the IRS disallowed the scheme, and assessed back taxes and penalties against the plaintiffs. Id. The plaintiffs sued for malpractice.

The appellate court affirmed the trial court's dismissal of the claims as time-barred and rejection of the plaintiff's continuous representation tolling argument because "there were no allegations that plaintiffs required any form of representation from [the defendant] on the shelter transaction between June 2001, when they received the opinion letter, and 2006, and because ***any alleged general understanding of a 'standby,' 'ongoing representation,' in the event IRS inquiries arose, did not amount to continuous representation***." Id. (emphasis added). The mere "possibility that the need for future legal work would be required with respect to the tax strategy" cannot trigger the continuous representation doctrine where "there was no concrete task defendants were likely to perform after they delivered the opinion letter." Id.

The result is no different here. At most, Plaintiff alleges a "possibility" he ***may*** have sought PwC's representation in the future. He does not allege such representation occurred. Thus, the continuous representation doctrine does not apply, and Plaintiff's claims are time-barred.

2. Reliance on Nevada Law Fails to Save Plaintiff's Time-Barred Claims.

Even if Nevada's statute of limitations applied, and it does not, Plaintiff's claims are still

[6] All exhibit citations are to those submitted in connection with PwC's Request for Judicial Notice.

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time-barred under Nevada Revised Statute § 11.2075 ("§ 11.2075"), which governs accounting malpractice actions. Plaintiff's assertions to the contrary are without merit.

(a) Plaintiff's Claims Were Barred No Later Than August 2007.

Plaintiff first argues that because § 11.2075 governs actions "against an accountant or accounting firm to recover damages for malpractice," the clock on his claims did not begin to run until he allegedly incurred damages in 2015. (Opp'n at 12.) Plaintiff is wrong as a matter of law.

Plaintiff provides no legal authority to support his position that he must incur damages before his claims accrue – because there is none. The plain language of § 11.2075(1) makes clear that an accounting malpractice claim is barred after any of the following dates, ***whichever occurs earlier***: (a) two years after plaintiff discovers or should have discovered the alleged malpractice act; (b) four years after the accountant completes the service; or (c) four years after the accountant issues an initial report regarding the plaintiff's financial statements. There is no requirement that the plaintiff must sustain injury before the clock starts, and indeed the clock starts to run under subdivisions (b) and (c) when either the accountant completes its service or issues an initial audit report, regardless of whether the plaintiff has discovered the malpractice. While case law applying § 11.2075 is limited, the lone case that does so, USACM Liquidating Trust, 764 F. Supp. 2d at 1231-32, dismissed a malpractice claim based on an audit report, holding "[defendant] completed the fiscal year 2000 audit on June 28, 2001" and thus "the four-year limitations period under § 11.2075(1)(c) expired on June 28, 2005."

In contrast, other specific professional malpractice statutes of limitations in the Nevada Revised Statutes ***do explicitly require an injury or discovery*** of the malpractice before the clock begins to run. For example, the statute of limitations on legal and veterinarian malpractice claims is "4 years after the plaintiff ***sustains damage or*** within 2 years after the plaintiff ***discovers*** or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier." Nev. Rev. Stat. § 11.207 (emphasis added); see also Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc., 333 P.3d 229, 232 (Nev. 2014) (for legal malpractice claims, Nevada legislature "codified the discovery rule" in enacting Nev. Rev. Stat. § 11.207). Likewise, the statute of limitations on medical malpractice claims is "4

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years after the ***date of injury or*** 2 years after the plaintiff ***discovers*** or through the use of reasonable diligence should have discovered the material facts which constitute the action, whichever occurs earlier." Nev. Rev. Stat. § 41A.097 (emphasis added).

The plain meaning of § 11.2075 is confirmed by comparing it to the previous version of the statute prior to a 1997 amendment. Former § 11.207(1) applied to accountant, attorney and veterinarian malpractice actions and stated: "no action against any accountant, attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, may be commenced more than 4 years after the plaintiff sustains damage and discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action." Nev. Rev. Stat. § 11.207(1) (amended 1997).

In 1997, the statute was amended and broken into two separate statutes: § 11.2075 for accountant malpractice and § 11.207 for attorneys and veterinarians. While, as shown above, the statute for attorneys and veterinarians retained language that actions would only be barred "4 years after the plaintiff sustains damage or within 2 years after [discovery]," Nev. Rev. Stat. § 11.207, the statute for accountants ***removed*** the requirement that a plaintiff must sustain damage before the clock on an accountant malpractice action starts. Instead, § 11.2075 provides that an accountant malpractice claim is barred two years after a plaintiff discovers or should discover the malpractice, or four years after the accountant completes the service or issues a report, whichever occurs earlier – with no requirement that the plaintiff sustain injury. This change in the language is critical because "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed," and it is "presumed the legislature, by deleting an express portion of a law, intended a substantial change in the law." <u>McKay v. Bd. of Supervisors of Carson City,</u> 730 P.2d 438, 442 (Nev. 1986). Thus, there can be no doubt that § 11.2075 does not require that a plaintiff sustain injury before his accountant malpractice claim begins to run. Plaintiff's claims are therefore time-barred under § 11.2075(1)(b) even if the Court applies Nevada law.

(b) <u>Plaintiff's Concealment Tolling Allegations Fail as a Matter of Law</u>.

Plaintiff next argues that his claims are timely because the statute was tolled under the concealment tolling provision of § 11.2075, which tolls an accounting malpractice claim "for any period during which the accountant or accounting firm conceals the act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to the accountant or the firm." Nev. Rev. Stat. § 11.2075(2).

Plaintiff broadly alleges that the impropriety of the Transaction was concealed from him until the Tax Court's October 2015 opinion. (Compl. ¶¶ 73-74.) That allegation is undermined by Plaintiff's own testimony at the Tax Court trial that he "learn[ed] that there might be a problem with Westside's unpaid federal income tax for 2003" in "November of '07." (Ex. 4 at 181:15-19.) The allegation is further undermined by the Tax Court's preclusive factual finding that Plaintiff himself at least constructively ***knew*** that the Transaction was a tax avoidance scheme at the time. Beyond these irreconcilable factual contradictions, Plaintiff's supposed concealment allegations also fail as a matter of law for at least two other independent reasons.

First, Plaintiff's fraudulent concealment allegations do not even satisfy the "simple, concise, and direct" requirements of notice pleading under Nevada Rule of Civil Procedure 8(e), let alone plead with particularity "the time, place, and the identity of the parties involved and the nature of the fraud" as required for fraudulent concealment allegations under Rule 9(b). Morris v. Bank of Am. Nev., 886 P.2d 454, 455 n.1 (Nev. 1994). Plaintiff alleges in one block paragraph that Defendants collectively "fraudulently concealed their acts" in various ways. (Compl. ¶ 73.) He makes no effort, as he must, to articulate which defendant concealed which allegedly concealed fact. Thus, it is unclear which concealment allegation, if any, pertains to PwC.

Second, the concealment allegations that could arguably apply to PwC do not satisfy the requirement to plead an "affirmative act." Merely alleging "silence or passive conduct" does not trigger the concealment tolling provisions of Nevada's statutes of limitations on professional malpractice actions.[7] USACM Liquidating Tr., 764 F. Supp. 2d at 1231-32. Rather, a plaintiff

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[7] As Plaintiff notes (see Opp'n at 13 n.4), the concealment tolling provisions in Nevada's statutes of limitations for accounting, legal, and medical malpractice are identical. Compare Nev. Rev. Stat. 11.2075(2), with Nev. Rev. Stat. § 11.207(2) and Nev. Rev. Stat. § 41A.097(3). Given the limited authority applying the accounting malpractice tolling provision, it is proper under Nevada precedent to apply verbatim concealment tolling provisions in other professional malpractice claims. See, e.g., Arndell v. Robison, Belaustegui, Sharp & Low, 2012 WL 3886181, at *5 (D. Nev. Sept. 6, 2012) (noting lack of authority applying legal malpractice concealment tolling provision but applying standard for verbatim medical malpractice concealment tolling provision).

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must allege "affirmative conduct" that fraudulently conceals information. Id. (accounting malpractice claim barred under § 11.2075, and concealment tolling provision did not apply where plaintiff did not allege "affirmative conduct" – other than the underlying alleged malpractice itself – "which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief"); Arndell, 2012 WL 3886181, at *5 (concealment requires an affirmative act and only "occurs when (1) the defendant intentionally withheld information, and (2) this withholding would have hindered a reasonably diligent plaintiff from timely filing suit.") (quoting Winn v. Sunrise Hosp. & Med. Ctr., 277 P.3d 458, 464 (Nev. 2012)).

Here, Plaintiff seems to allege that PwC, among others, concealed its "knowledge of the illegitimacy of these transactions and the transaction involving Plaintiff." (Compl. ¶ 74.) However, Plaintiff does not allege that PwC undertook an affirmative intentional act that hindered Plaintiff from discovering his alleged malpractice claim. Instead, Plaintiff simply alleges that PwC did not inform him that the Transaction was improper. But, again, the law is clear: to invoke concealment to toll the statute of limitations, "something more than the underlying act is required." USACM Liquidating Tr., 764 F. Supp. 2d at 1231-32; see also Rodrigues v. Washinsky, 373 P.3d 956 (Nev. 2011) (dismissing malpractice claim and holding tolling provision did not apply where plaintiffs did not allege defendants "did anything that could have potentially hindered [plaintiffs] from discovering their injury until well after the three-year limitations period had already elapsed"); Libby v. Eighth Jud. Dist. Ct., 325 P.3d 1276, 1281 (Nev. 2014) (dismissing malpractice claim based on doctor's alleged failure to remove suture after surgery, rejecting argument that doctor "'should have known' that he left the sutures in her knee" where plaintiff "does not allege that [doctor] performed any ***intentional act*** that hindered her from learning about the sutures" (emphasis added)).

Moreover, Plaintiff brings only negligence-based claims against PwC, as opposed to fraud-based claims against all other Defendants. Plaintiff does not explain how PwC could conceal "its ***knowledge*** of the illegitimacy" of the Transaction (Compl. ¶ 74) (emphasis added), when Plaintiff alleges only that PwC negligently, ***not knowingly***, provided improper advice. See Romero v. Toyota Motor Corp., 916 F. Supp. 2d 1301, 1313 (S.D. Fla. 2013) (no concealment

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tolling because "it is axiomatic that 'one cannot conceal what one does not know'"); Lowe v. Letsinger, 772 F.2d 308, 314 (7th Cir. 1985) (dismissing conspiracy to conceal claim where "one cannot conspire to conceal the existence of something that one does not know exists").

Plaintiff's other concealment allegation possibly attributed to PwC fares no better. Plaintiff alleges PwC concealed its involvement in a different purported "Midco transaction" for a different client in 1999, completely unconnected to Plaintiff. (Compl. ¶¶ 38, 74.) But again, he does not allege PwC took any affirmative act to conceal this other alleged transaction from Plaintiff. See USACM Liquidating Tr., 764 F. Supp. 2d at 1231-32; Rodrigues, 373 P.3d 956. Nor does Plaintiff explain how PwC's alleged failure to disclose previous work on another transaction constitutes an attempt to conceal any alleged error in PwC's advice ***to Plaintiff***. The Complaint also does not allege that there were any known issues with this other transaction when PwC provided advice to Plaintiff. Thus, the Complaint does not explain why PwC would have or should have told Plaintiff about this alleged other transaction at that time. Plaintiff's concealment allegations, therefore, do not rescue Plaintiff's claims. See id. (dismissing malpractice claim and holding concealment tolling provision did not apply because while plaintiffs allege that defendant law firm intentionally refused to "provide a full accounting along with their client files" and hid a "clear conflict of interest," this was "immaterial" to plaintiff's malpractice claim).[8]

(c) Discovery Is Not Needed To Find Plaintiff's Claims Untimely.

Finally, Plaintiff asks the Court to punt on the statute of limitations issue so he can conduct discovery on it. However, to support his position, Plaintiff cites only cases in which the applicable statutes of limitations were subject to the discovery rule and factual issues remained as to whether or when the plaintiff had discovered the injury. (See Opp'n at 13-14 (citing Siragusa v. Brown, 971 P.2d 801, 806 (Nev. 1998) (discovery rule for civil conspiracy claims); Millspaugh v. Millspaugh, 611 P.2d 201 (Nev. 1980) (same for fraud claims); Oak Grove Inv'rs v. Bell & Gossett Co., 668 P.2d 1075, 1079 (Nev. 1983) (same for property damage claim).) As shown, the statute of limitations on accounting malpractice claims under § 11.2075(1)(b) is not subject to the

[8] Mullins v. Cavallera, 2011 WL 11680096 (Nev. Dist. Ct. Jan. 3, 2011) (dismissing malpractice claim as untimely as "assertion that [defendant] 'concealed' information is nothing more than an unsupported argument"); Romano v. Coleman, 2009 WL 8520405 (Nev. Dist. Ct. June 23, 2009).

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discovery rule, and runs when the defendant performs the services.

Thus, there is no factual dispute here for which Plaintiff needs discovery. To the contrary, the Complaint plainly states that PwC provided services concerning the Transaction from April to August 2003. (Compl. ¶ 39.) The statute of limitations, consequently, began to run in 2003 and Plaintiff's claims are barred, even if the Court applied Nevada, instead of New York law.

In a last-ditch effort to save his claims, Plaintiff seems to suggest that he needs discovery to determine whether ***he*** received advice from PwC beyond August 2003. (Opp'n at 14.) That argument is absurd on its face. Plaintiff necessarily would already have such information if it existed, and would have pleaded it. Instead, he pleaded that PwC provided services from April to August 2003, nothing later. Plaintiff does not need discovery to confirm the facts he already knows and has pled.

Therefore, Plaintiff's claims are time-barred, even if the Court applied Nevada law.[9]

B. The Tax Court's Order Precludes Plaintiff's Claims as a Matter of Law.

1. The Tax Court Found Plaintiff Committed Constructive Fraud and Plaintiff Is Collaterally Estopped from Challenging That Finding.[10]

Plaintiff agrees that the doctrine of collateral estoppel bars a party from re-litigating facts or issues that were conclusively determined by a prior court. (Opp'n at 16.) He also acknowledges that "[t]he actual issue decided by the Tax Court" was that "Plaintiff 'had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid'" (id.

[9] As a final matter, while Plaintiff mentions in passing the series of tolling agreements between him and PwC, he stops short of arguing that such agreements preserve his claims, and for good reason. (Opp'n at 12 n.3.) The agreements only toll the statute of limitations on claims against PwC "that would expire during the period of time from January 19, 2011 through May 1, 2016." (Pl.'s Ex. B.) The agreements do not resuscitate claims that already expired ***before*** January 2011. As shown, Plaintiff's claims against PwC were time-barred well before January 2011.

[10] Plaintiff argues the Court should not take judicial notice of the Tax Court opinion because he disputes the Tax Court's findings. But that is the very purpose of collateral estoppel – to ensure that "any issue that was actually and necessarily litigated in one action will be estopped from being relitigated in a subsequent suit." Five Star Capital Corp. v. Ruby, 194 P.3d 709, 711 (Nev. 2008). As explained in PwC's Reply in support of the Request for Judicial Notice, it is appropriate to take judicial notice that the Tax Court made certain findings, precluding Plaintiff from challenging those conclusions. Plaintiff's position would effectively eradicate the doctrine of collateral estoppel in Nevada courts. This is, of course, not the law, and Nevada courts routinely dismiss actions as precluded by an order from a different proceeding. See, e.g., Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc., 21 P.3d 912, 914 (Nev. 2014); Garcia v. Prudential Ins. Co. of Am., 293 P.3d 869, 874 (Nev. 2013).

at 16 (quoting Ex. 2 at 80)), and that the Tax Court found he committed constructive fraud in connection with the Transaction. (Opp'n at 20-21.) Further, Plaintiff does not dispute that the Tax Court's findings as to him are entitled to preclusive effect under the relevant collateral estoppel elements. (See Mot. at 17.) Thus, Plaintiff apparently agrees with PwC that he is precluded from re-litigating the Tax Court's factual findings as to him, including that he committed constructive fraud.

These concessions are dispositive on the issue of collateral estoppel. As explained more fully in the Motion (at 16-20) and below, based on these Tax Court findings, Plaintiff's claims against PwC (1) are barred by the in pari delicto doctrine; and (2) fail because Plaintiff cannot, as a matter of law, show justifiable reliance. Plaintiff's arguments to the contrary are unavailing.

Plaintiff first argues that he is not precluded from bringing his negligence claims against PwC because the Tax Court "did not decide, as between Plaintiff and PwC, who was ultimately to blame for Plaintiff's entry into the Fortrend transaction." (Opp'n at 17; see also id. at 19 ("Given this distinction between tax liability (which the Tax Court was considering) and professional liability (which it was not), there is no reason for this Court to resolve this case based solely on a few snippets from the Tax Court opinion").) In support, Plaintiff cites Kahn v. Morse & Mowbray, 117 P.3d 227 (Nev. 2005), which Plaintiff claims stands for the proposition that "a prior court ruling that plaintiffs were bound by an oral settlement agreement" did not "collaterally estop[] plaintiffs from proceeding with a claim that their attorneys had given them bad advice in connection with entry into that agreement." (Opp'n at 18.)

With this argument, Plaintiff creates a straw man. PwC does not contend that Plaintiff is absolutely precluded from bringing a claim against PwC simply because Plaintiff was found by the Tax Court to owe back taxes and a penalty to the IRS. Rather, PwC maintains that the Tax Court's ***specific factual findings as to Plaintiff*** are entitled to preclusive effect and cannot be re-litigated. The reason Plaintiff's claims should be dismissed here is that, ***given those specific***

factual findings which Plaintiff cannot re-litigate, (1) Plaintiff's claims are barred under in pari delicto; and (2) Plaintiff cannot prove justifiable reliance. (See infra Parts II.B.2; II.B.3.)[11]

This exact distinction is highlighted in Kahn, the case cited in the Opposition. There, the plaintiffs sued their former attorney for malpractice after a court had previously determined that the plaintiffs were bound by an oral agreement that their attorney allegedly told them was not a final agreement. Kahn, 117 P.3d at 230-34. In analyzing whether the plaintiffs' claims against their attorney were barred under collateral estoppel, the Supreme Court of Nevada stated:

> any issues or facts decided in the prior suit are collaterally barred from relitigation, even if a claim of legal malpractice had not accrued. Such a conclusion is consonant with the doctrine of collateral estoppel, which focuses upon the underlying factual bases surrounding issues and ***not upon claims***.

Id. at 235 (emphasis added). The Court then ruled that certain causes of action were barred under collateral estoppel principles, while others were not. In concluding that some claims were barred, the Court explained, "we have determined that in the prior litigation the district court necessarily and actually litigated the underlying factual bases supporting the claims." Id. at 236. Thus, Kahn actually stands for the principle that a plaintiff's claim should be dismissed where the underlying factual issues were preclusively determined in a prior litigation, and those established facts preclude liability in the subsequent action.[12] That is precisely the circumstance here.

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[11] Plaintiff appears to argue that his claims are not barred by *res judicata*, i.e., claim preclusion. That is not PwC's position. PwC contends that Plaintiff is barred from re-litigating certain factual issues under collateral estoppel, i.e., ***issue*** preclusion. As the Supreme Court of Nevada has explained, "while claim preclusion can apply to all claims that were or could have been raised in the initial case . . . issue preclusion . . . applies to prevent relitigation of only a specific issue that was decided in a previous suit . . . even if the second suit is based on different causes of action and different circumstances." Five Star Capital Corp., 194 P.3d at 713-14.

[12] None of the other cases cited by Plaintiff suggests a different result. In United States v. Boyle, 469 U.S. 241 (1985), which is not a collateral estoppel case, the U.S. Supreme Court simply held that a taxpayer's reliance on an attorney to prepare and file a tax return does not constitute "reasonable cause" under § 6651(a)(1) of the Internal Revenue Code, so as to allow the taxpayer to avoid a penalty for late filing. 469 U.S. at 252. Pair v. Queen, 2 A.3d 1063 (D.C. Cir. 2010), is also not a collateral estoppel case. That court held that the plaintiffs' claims were not barred by the doctrine of contributory negligence because the court "cannot say, as a matter of law, that the [plaintiffs] were guilty of negligence *per se*" where the "trial court did not determine whether the failure to file timely returns was due to a lack of diligence or dereliction of duty on the part of the [plaintiffs] with regard to ascertaining and meeting filing deadlines, or rather due to their reasonable reliance on professionals' erroneous advice and assistance regarding substantive issues." 2 A.3d at 1067-68. Here, the Tax Court has already made preclusive factual findings regarding Plaintiff's conduct. Nor can Plaintiff find support in Bick v. Peat Marwick & Main, 799 P.2d 94 (Kan. Ct. App. 1990). There, the court held that, notwithstanding the plaintiff

Plaintiff also tries to avoid the impact of the Tax Court's binding factual findings by trying to shift responsibility to PwC, claiming the Tax Court opinion "reflects PwC's 'front and center' involvement" in Plaintiff's Transaction. (Opp'n at 16.) Plaintiff's argument again misses the mark as a matter of law. Putting aside that Plaintiff's position is a distortion of the Tax Court opinion, PwC was not a party to the Tax Court proceeding, and, therefore, there are no factual findings with respect to PwC. See Bower v. Harrah's Laughlin, Inc., 215 P.3d 709, 717 (Nev. 2009) ("Preclusion is generally prohibited in cases where a party is seeking to assert a judgment against a person who was not a party in the prior case."). There are, however, specific factual findings by the Tax Court as to Plaintiff, and those findings are entitled to preclusive effect. Plaintiff's post-hoc attempts to shift the blame for his actions cannot change the fact that the Tax Court's findings are binding as to Plaintiff. Specifically, the Tax Court found:

- "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." (Ex. 2 at 81 (emphasis added).)
- "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." (Id.)
- "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." (Id.)
- "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'

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accepted the IRS penalty, he was not estopped from bringing a claim against his tax preparer and arguing he had no knowledge of the improperly filed taxes, since the jury found that the plaintiff "did not know or should not have known of the omission in his . . . tax returns." Bick, 799 P.2d at 98. Here, in contrast, the Tax Court specifically found that "petitioner [i.e., Plaintiff] had constructive knowledge of Fortrend's tax-avoidance scheme." (Ex. 2 at 82.)

assurance on this point. ***Petitioner turned his back on this red flag***." (<u>Id.</u> (emphasis added).)

- "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 willing to pay a 47% premium to acquire cash, which by definition cannot be worth more than its face value." (<u>Id.</u>)
- "Numerous spreadsheets prepared by petitioner's brother explicitly 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. . . . [T]he 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.'***" (<u>Id.</u> at 82 (emphasis added).)
- "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." (<u>Id.</u>)
- "***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." (<u>Id.</u> (emphasis added).)
- "In sum, ***we find that petitioner had constructive knowledge of Fortrend's tax-avoidance scheme***." (<u>Id.</u> (emphasis added).)

As these findings (and the Tax Court opinion in its entirety) make clear, the Tax Court found that Plaintiff actively avoided learning the truth about the Transaction, ignored red flags from PwC regarding the Transaction, and had constructive knowledge that Fortrend intended to implement an illegal tax-avoidance scheme. These are specific factual findings as to Plaintiff, not PwC, and Plaintiff does not even attempt to argue that these issues were not "'actually litigated in the prior litigation'" or that resolving those issues was not "'a critical and necessary part' of the earlier judgment." Bower, 215 P.3d at 717 (quoting Clark v. Bear Stearns & Co., 966 F.2d 1318, 1320 (9th Cir. 1992)). Thus, these factual findings are entitled to preclusive effect under the collateral estoppel doctrine.

Plaintiff also argues that the Court should not give preclusive effect to the Tax Court findings because "Plaintiff intends to appeal the Tax Court's decision," and if the Ninth Circuit reverses the Tax Court's decision, "this Court's judgment would also have to be reversed as a result." (Opp'n at 20.) This argument is wrong for two reasons. First, as PwC explained in the Motion (at 17), a federal order enjoys preclusive effect even if it is being appealed: "the Tax Court decision is entitled to collateral estoppel effect until reversed, vacated or modified; it is conclusive in favor of the winning party as to all material issues that were there litigated and adjudicated." Stern v. United States, 563 F. Supp. 484, 487 (D. Nev. 1983); see also United States v. Abatti, 463 F. Supp. 596, 599 (S.D. Cal. 1978). Plaintiff cites no authority to the contrary. Second, if the Ninth Circuit reverses the Tax Court's decision, then Plaintiff will not owe any taxes or penalties. That would render the current proceedings entirely moot. Therefore, that the Ninth Circuit could reverse the Tax Court's decision provides no basis not to apply the principles of collateral estoppel to the factual findings by the Tax Court.

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2. Plaintiff's Claims Are Barred by the *In Pari Delicto* Doctrine.

Plaintiff concedes that under the in pari delicto doctrine, a plaintiff may not recover for an injury suffered by his own wrongdoing if the plaintiff is "in equal fault" or at greater fault than the defendant. (Opp'n at 20 (quoting Pinter v. Dahl, 486 U.S. 622, 632 (1988)); see also Kirschner, 938 N.E.2d at 950. Plaintiff also does not dispute that, if it applies, the in pari delicto doctrine would bar his claims. Instead, he proffers three reasons why the Court should not properly enforce the doctrine and dismiss his claims – none of which withstands scrutiny.

First, Plaintiff argues that in pari delicto cannot bar his claims because PwC's alleged torts – consisting of negligent misrepresentation and gross negligence – are somehow more wrongful than Plaintiff's already-determined wrongdoing – constructive fraud. (Opp'n at 20-21.) Plaintiff provides no authority to support this position. Instead, he cherry-picks and juxtaposes two unrelated case quotations without context to attempt to inflate artificially the level of culpability associated with gross negligence while minimizing the seriousness of constructive fraud, likening it to simple negligence. This attempted sleight of hand fails. It is axiomatic that Plaintiff, whose wrongdoing sounds in ***fraud***, cannot possibly be less culpable than PwC, whose alleged wrongdoing sounds only in ***negligence***.

Unsurprisingly, the law does not support Plaintiff's theory. To the contrary, constructive fraud "has been defined as that ***resulting from gross negligence*** or from admissions, declarations, or conduct intended or calculated, or such as might reasonably be expected, to influence the conduct of the other party and which have so misled him to his prejudice that it would work a fraud to allow the true state of facts to be proved." Spielbeuhler, 284 N.Y.S.2d at 15 (emphasis added); see also Forbo-Giubiasco, S.A. v. Congoleum Corp., 1984 WL 998, at *4 (S.D.N.Y. Oct. 17, 1984) (same). Thus, constructive fraud can be based only on conduct that constitutes, ***at a minimum***, gross negligence. See, e.g., Paul v. Detroit Edison Co., 94 F. Supp. 3d 880, 888 (E.D. Mich. 2015) (finding "the company representative's assurances . . . were ***so grossly negligent*** as to amount to constructive fraud") (emphasis added); see also id. at 888-89 (contrasting ruling in prior constructive fraud action where court dismissed claims because "plaintiff failed to show gross negligence" necessary to establish constructive fraud, with case at hand, where alleged conduct "was not an honest mistake but was ***precisely the sort of malfeasance that may give rise to constructive fraud***" (emphasis added)). Plaintiff cites no authority – statute, case law, treatise, anything – in which a court held that constructive fraud could be based on conduct that amounted to something ***less*** than gross negligence.

Thus, when comparing the Tax Court's preclusive findings against Plaintiff for constructive fraud with Plaintiff's allegations against PwC for negligence and gross negligence, the parties at a minimum stand "in equal fault." It is undisputed as a matter of law that when both parties are equally culpable, the in pari delicto doctrine bars the Plaintiff's claims. See Kirschner, 938 N.E.2d at 950 ("[W]here both parties are equally culpable, courts will not interpose in favour of either.") (internal quotation omitted); Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275, 310 (S.D.N.Y. 1998) (dismissing claims at the pleading stage where "the factual allegations demonstrate substantially equal fault between" the parties).

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Second, Plaintiff argues that even if constructive fraud evinces more culpable conduct than negligent misrepresentation or gross negligence, in pari delicto should still not apply to bar his claims because "the Tax Court's 'constructive fraud' finding against Tricarichi was based on the actions and inactions of 'petitioner and his advisers,' including PwC." (Opp'n at 21 (quoting Ex. 2 at 81).) In other words, Plaintiff contends the Tax Court found that both Plaintiff and PwC committed constructive fraud.

Plaintiff's argument is not only wrong on the facts; it would not help him even if the facts were as he claims. To start, the Tax Court did not make binding findings as to PwC at all. Moreover, the Tax Court did not find that Plaintiff and PwC were equally culpable or even that Plaintiff's culpability was based on PwC's actions or inactions. Such an argument ignores the Tax Court's finding that "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." (Ex. 2 at 81.) It also ignores the finding that, "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***." (Id. (emphasis added).) Thus, the Tax Court did not find that Plaintiff committed constructive fraud based on the actions and inactions of PwC. To the contrary, it found that Plaintiff committed constructive fraud, in part, because he ignored specific red flags from PwC. Plaintiff's post-hoc attempt to shift the blame to PwC is belied by the Tax Court's unambiguous findings.

Yet even if Plaintiff were somehow correct that PwC "bears responsibility for the constructive fraud as well" (Opp'n at 21), such a determination would only ***support*** the application of in pari delicto here to bar Plaintiff's claims against PwC. Again, the in pari delicto doctrine will bar recovery where "the factual allegations demonstrate substantially equal fault between" the parties. Granite Partners, 17 F. Supp. 2d at 310.

Third, with little else to salvage his claims, Plaintiff simply argues that whether in pari delicto applies is a question of fact that should not be decided at the pleading stage. (Opp'n at 22.) But the facts triggering in pari delicto here have already been conclusively established by the

Tax Court's findings, which Plaintiff is estopped from challenging. By definition, there is no dispute of fact any longer. That is the entire point of collateral estoppel. See Bower, 215 P.3d at 718 (doctrine "'is based upon the sound public policy of limiting litigation by preventing a party who had one full and fair opportunity to litigate an issue from again drawing it into controversy'"); Hafter v. Clark, 992 F. Supp. 2d 1063, 1071 (D. Nev. 2014) (same).

Moreover, as shown in the Motion (at 20), New York law is clear that "in pari delicto may be resolved on the pleadings," and "the principle that a wrongdoer should not profit from his own misconduct is so strong in New York that we have said the defense applies even in difficult cases and should not be weakened by exceptions." Kirschner, 938 N.E.2d at 947 n.3 & 950. Plaintiff provides no New York authority to support his position, and does not even address the numerous cases cited in the Motion where courts applied New York law to dismiss claims at the pleading stage under the in pari delicto doctrine. (See Mot. at 20-21; see also Kerman v. Chenery Assocs., Inc., 2015 WL 1292581, at *6 (W.D. Ky. Mar. 23, 2015) (dismissing under the in pari delicto doctrine plaintiff taxpayer's rescission claim arising out of IRS penalties plaintiff incurred for participating in tax shelter where the Tax Court held plaintiff participated in tax shelter, should have known it was a sham and was collaterally estopped from denying Tax Court's findings).)[13] The Court should dismiss Plaintiff's claims as barred under the doctrine of in pari delicto.

3. Plaintiff Fails to State a Claim as a Matter of Law Because He Cannot Show That He Reasonably Relied on PwC's Advice.

Finally, as to both of his claims, Plaintiff alleges he reasonably relied on PwC's alleged advice that the Transaction was "proper and according to the tax laws." (Compl. ¶¶ 89, 94.)

[13] As shown in the Motion (at 10-11), because Plaintiff's claims are governed by the New York choice-of-law provision in the parties' 2003 Engagement Agreement, New York law applies to determine the applicability of PwC's in pari delicto defense. See Granite Partners, 17 F. Supp. 2d at 306 n.16. The Opposition does not argue otherwise. Nevertheless, Plaintiff cites a single Nevada case for the supposed proposition that in pari delicto defenses should not be adjudicated at the pleading stage. That case does not contain such a holding. Plaintiff quotes In re Amerco Derivative Litigation, 252 P.3d 681 (Nev. 2011), as stating, "whether the defense of in pari delicto should apply here is an **issue of fact**," with Plaintiff adding the bolding and underlines for the phrase "issue of fact." (Opp'n at 22 (quoting In re Amerco, 252 P.3d at 696).) However, the phrase "issue of fact" ***does not appear*** in the sentence Plaintiff quotes, or in any other section of the opinion. Nor does the court ever state in In re Amerco that whether the defense of in pari delicto should apply is an issue that cannot be adjudicated at the pleading stage.

However, as shown in the Motion (at 22), Plaintiff's claims fail as a matter of law because the Tax Court's findings foreclose Plaintiff from pleading or proving he reasonably relied on PwC's advice for two reasons. First, the Tax Court found that Plaintiff ***at least*** constructively knew the Transaction was improper, and courts have held that a plaintiff cannot reasonably rely on an allegedly false representation when he knew or should have known the truth when the representation was made. See, e.g., Baraliu v. Vinya Capital, L.P., 2009 WL 959578, at *7 (S.D.N.Y. Mar. 31, 2009). Second, the Tax Court found that Plaintiff ignored warnings from PwC and failed to investigate his own suspicions about the Transaction, and courts have held that when sophisticated parties have "hints" that statements made to them are inaccurate, "they '[cannot] reasonably rely on [the] representations without making additional inquiry to determine their accuracy.'" Arfa v. Zamir, 905 N.Y.S.2d 77, 80 (App. Div. 2010).

The Opposition does not contend that PwC misstates the law governing pleading and proving reasonable reliance. Nor does Plaintiff even attempt to argue that the Tax Court did not actually make the factual findings that preclude Plaintiff from proving reasonable reliance. Instead, as he does throughout the Opposition, Plaintiff contends: (1) the Tax Court did not adjudicate Plaintiff's claims against PwC; and (2) it is simply "premature" for the Court to rule on reliance at the pleading stage because reliance is generally a fact question. (Opp'n at 22-23.)

Plaintiff's protests again miss the mark. As explained above, PwC does not argue that the Tax Court made findings on PwC's alleged professional liability to Plaintiff. The Tax Court made factual findings as to ***Plaintiff's*** involvement in the Transaction – including his awareness of its improprieties and his dismissal of and refusal to investigate red flags. Plaintiff is estopped from challenging these factual findings, and these findings prevent him from proving reasonable reliance as a matter of law. The pleading stage does not give Plaintiff the refuge he seeks when critical aspects of the factual record have already been established by the Tax Court order and Plaintiff is precluded as a matter of law from challenging that record.[14] Plaintiff cannot, as matter

[14] The cases Plaintiff cites for the proposition that it would be "markedly premature to dismiss Plaintiff's claims" on reliance grounds now (Opp'n at 23-24), say no such thing. In Corva v. United Servs. Auto. Ass'n, 485 N.Y.S.2d 264, 266 (App. Div. 1985), the court held that just because a defendant lawyer may have justifiably relied on representations made by opposing counsel does not necessarily mean as a matter of law that the defendant lawyer did not violate his duty of care owed to his client by failing to independently verify opposing counsel's

of law, plead and prove reasonable reliance on PwC's alleged advice.

III. CONCLUSION

For the foregoing reasons, PwC respectfully requests that the Court grant this Motion and dismiss the claims against PwC with prejudice.

DATED this 28th day of September, 2016.

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representations. PwC does not argue that ***PwC*** justifiably relied on a third party when giving Plaintiff advice and that PwC's reliance precludes any negligence claim against PwC. Rather PwC argues that the Tax Court's findings preclude Plaintiff from establishing that ***he*** justifiably relied on PwC, a necessary element of his negligence claims against PwC. Plaintiff next cites Johnson v. Proskauer Rose LLP, which declined to dismiss an accounting malpractice claim where defendant argued that plaintiffs could not establish justifiable reliance because plaintiffs were "aware of the uncertain nature of the tax strategy when they agreed to participate it." 9 N.Y.S.3d at 201. Johnson is inapposite because that case did not involve any preclusive factual findings made in a prior litigation. The court simply found it premature to dismiss the claims based on lack of reliance because the court was limited to the plaintiffs' complaint, which did not concede plaintiffs were aware of the uncertainties of the tax strategy. Id. Finally, Plaintiff cites Cohan v. KPMG, LLP, No. 12 EV 014325 (Fulton Cty. Ga. Ct. Dec. 13, 2013), a Georgia state court trial order, for the proposition that, generally, reliance is a question of fact. This is inapposite for the same reasons: it did not involve preclusive prior factual findings.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On September 28, 2016, I caused to be served a true and correct copy of the foregoing PRICEWATERHOUSECOOPERS LLP'S REPLY IN SUPPORT OF THE MOTION TO DISMISS upon the following by the method indicated:

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).

☒ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☐ **BY OVERNIGHT MAIL:** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

v.

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.: XV

SEYFARTH SHAW'S JOINDER IN PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS

MORRIS LAW GROUP
900 BANK OF AMERICA PLAZA · 300 SOUTH FOURTH STREET · LAS VEGAS, NEVADA 89101
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Defendant Seyfarth Shaw LLP ("Seyfarth") hereby joins in the motion to dismiss filed by defendant Pricewaterhousecoopers LLP's on all points of law, except with regard to the statute of limitations of New York applying to the claims made by plaintiff Michael Tricarichi against Seyfarth.

MORRIS LAW GROUP

By: /s/ STEVE MORRIS
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b) and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of MORRIS LAW GROUP, and that the following documents were served via electronic service: **SEYFARTH SHAW'S JOINDER IN PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS**

TO:

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DATED this 26th day of October, 2016.

By: /s/ PATRICIA FERRUGIA

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. 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 **ORDER REGARDING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION TO DISMISS BASED ON STATUTE LIMITATIONS AND COLLATERAL ESTOPPEL**

DEC 0 7 2016

Defendant PricewaterhouseCoopers LLP's Motion to Dismiss based on statute of limitations and collateral estoppel came on for hearing before this Court on November 15, 2016. Mark A. Hutchison, Scott F. Hessell, and Thomas D. Brooks, appeared on behalf of Plaintiff Michael A. Tricarichi. Richard C. Gordon, Peter B. Morrison and Winston P. Hsiao appeared on behalf of Defendant PricewaterhouseCoopers LLP. Steve Morris and Ryan M. Lower appeared on behalf of Defendant Seyfarth Shaw LLP. Dan R. Waite appeared on behalf of Defendants Cooperative Rabobank, U.A., and Utrecht-America Finance Co. The Court, having reviewed the papers on file herein and having heard argument from the parties and good cause appearing,

IT IS HEREBY ORDERED that Defendant PricewaterhouseCoopers LLP's Motion to Dismiss is DENIED without prejudice. Pursuant to the parties' agreement, Defendant PricewaterhouseCoopers LLP shall have until January 17, 2017 to file an answer to the complaint.

DATED: December 9, 2016

DISTRICT COURT JUDGE

Submitted by:

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, 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 **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANT PRICEWATERHOUSE COOPERS, LLP'S MOTION TO DISMISS BASED ON STATUTE LIMITATIONS AND COLLATERAL ESTOPPEL**

TO: ALL INTERESTED PARTIES

NOTICE IS HEREBY GIVEN that an Order Regarding Defendant Pricewaterhouse Coopers, LLP's Motion to Dismiss Based on Statute Limitations and Collateral Estoppel was entered in the above-entitled action on December 12, 2016, a copy of which is attached hereto.

DATED this 13th day of December, 2016.

SPERLING & SLATER, P.C.

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Attorneys for Plaintiff Michael A. Tricarichi

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC and that on this 13th day of December, 2016, I caused the document entitled **NOTICE OF ENTRY OF ORDER REGARDING DEFENDANT PRICEWATERHOUSE COOPERS, LLP'S MOTION TO DISMISS BASED ON STATUTE LIMITATIONS AND COLLATERAL ESTOPPEL** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Madelyn B. Carnate-Peralta
An employee of Hutchison & Steffen, LLC