

No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,
Petitioner,

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Elizabeth A. Brown
Clerk of Supreme Court

v.

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK,
STATE OF NEVADA, AND THE HONORABLE ELIZABETH GONZALEZ,

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

From the Eighth Judicial District Court, County of Clark, Dept. XI
Dist. Court Case No. A-16-735910-B

PETITION FOR WRIT OF MANDAMUS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies the following:

Petitioner PricewaterhouseCoopers LLP has no parent corporations and no publicly held company owns 10% or more of the company's stock. The following law firms have represented Petitioner in this litigation: Bartlit Beck LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Snell & Wilmer L.L.P.

DATED: January 22, 2021

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NRAP 17 & 21(A)(3)(A) ROUTING STATEMENT

The Nevada Supreme Court should decide this petition for at least two reasons. First, the Supreme Court has reserved jurisdiction over “[c]ases originating in business court,” where this case originated. NRAP 17(a)(9). Second, the Supreme Court has also reserved jurisdiction over cases that raise “as a principle issue a question of statewide public importance.” NRAP 17(a)(12). This is such a case. As explained below, this petition concerns the enforceability of contractual jury trial waivers, an issue the Supreme Court has already identified as being “a matter of great importance.” *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 96-97, 40 P.3d 405, 408 (2002).

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STATEMENT OF THE CASE

This petition raises an important question of law regarding contractual jury trial waivers. Plaintiff Michael A. Tricarichi (“Tricarichi”) sued Defendant PricewaterhouseCoopers LLP (“PwC”) regarding tax advice PwC gave concerning a 2003 transaction in which Tricarichi sold all the stock of his wholly-owned company. Tricarichi’s Engagement Agreement with PwC clearly states on its face that the “Agreement” consists of the “engagement letter and the **attached Terms of Engagement to Provide Tax Services.**” (bold text in original) In the attached Terms, PwC and Tricarichi unequivocally agreed “not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.”

PwC sought to enforce the jury waiver by moving to strike Tricarichi’s jury demand. Despite acknowledging earlier in the case that he had received the Terms, Mr. Tricarichi claimed for the first time during his deposition that he had not received them. The district court denied PwC’s motion to strike the jury demand because “there is no rider that is signed or initialed by Plaintiff waiving the jury trial.”

This Court has held that “[c]ontractual jury trial waivers are valid and enforceable in Nevada.” *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 97, 40 P.3d 405, 408 (2002). But the district court’s order, if allowed to stand, would eviscerate jury trial waivers in this state. If a party can escape a jury trial waiver simply by claiming that he did not receive a referenced part of the contract that contains the waiver, it would create a giant loophole for parties to avoid their negotiated waivers. For this reason, courts across the country have held that when a contracting party signs an agreement that explicitly incorporates terms and conditions, those terms and conditions are part of the contract as a matter of law, even if the party later claims in court that he did not actually receive them.

Contrary to the district court’s reasoning, there is no requirement that Tricarichi must have separately signed or initialed the Terms of Engagement for them to be a binding part of the contract. Tricarichi signed the Engagement Agreement itself, acknowledging his acceptance of the full “Agreement,” which was defined to include the Terms of Engagement. Nothing more was required.

Having denied PwC's motion to strike the jury demand, the district court has set this case for a jury trial in a five-week stack starting March 15, 2021. Writ review by this Court before the scheduled trial is necessary because PwC may lose its ability to challenge the court's refusal to enforce the jury trial waiver if the case proceeds to a jury trial. Moreover, the jury should not be tasked with deciding whether Tricarichi agreed to the jury trial waiver—an exercise that would defeat the very purpose of the waiver itself. PwC respectfully requests that this Court grant the petition and issue a writ of mandamus directing the district court to enforce the jury trial waiver by striking Tricarichi's jury demand.

ISSUE PRESENTED

Did the district court err by refusing to strike Tricarichi's jury demand because the Terms of Engagement to Tricarichi's Engagement Agreement with PwC were not separately initialed or signed, even though the engagement letter that Tricarichi *did* sign explicitly defines the Terms to be part of the Agreement?

RELIEF SOUGHT

Petitioner PwC requests that the Court issue a writ of mandamus instructing the district court to strike Plaintiff Michael Tricarichi's jury demand.

FACTUAL AND PROCEDURAL BACKGROUND

I. TRICARICHI ENGAGED PwC TO PERFORM TAX RESEARCH AND EVALUATION SERVICES FOR THE 2003 WESTSIDE TRANSACTION

In 2003, Tricarichi hired PwC to give tax advice regarding a proposed transaction whereby Tricarichi would sell 100% of the stock of his wholly-owned company, Westside Cellular. Westside had recently received approximately \$65 million in settlement proceeds from an antitrust case, and the proposed transaction attempted to mitigate Tricarichi's tax exposure. APP346-73 (*Tricarichi v. Comm'r of Internal Revenue*, T.C. Memo 2015-201 at 3 (2015)).

Tricarichi signed an Engagement Agreement with PwC dated April 10, 2003. APP387-94. The Agreement stated that PwC would provide "tax research and evaluation services." APP387. The second sentence of the Agreement explicitly provided that both the engagement letter and the attached Terms of Engagement to Provide Tax Services comprised the full Agreement between Tricarichi and PwC:

This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this “Agreement”) set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP . . . and you necessary to ensure that PricewaterhouseCoopers’ professional services are performed to achieve mutually agreed upon objectives.

APP387 (emphasis in original).

The Terms of Engagement comprise three pages attached to the engagement letter. As relevant here, the Terms provide a clear and unambiguous jury trial waiver in Section 9, “Resolution of Differences”:

In the unlikely event that differences concerning this Agreement should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of both parties, PricewaterhouseCoopers and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.

APP393.¹

The final paragraph of the Engagement Agreement advised Tricarichi that, “[i]f this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us.” APP390. The term “Agreement,” a defined

¹ The Terms also limit any damages to the amount of professional fees Tricarichi paid to PwC. APP393.

term, included both the Engagement Agreement and the attached Terms of Engagement. APP387. Tricarichi signed the Engagement Agreement, and his signature appears directly below an indication that the letter included “Enclosure(s): Terms of Engagement to Provide Tax Services.” APP391.

The Westside transaction closed in September 2003. Tricarichi received \$34.9 million as part of the deal. APP363. The company that acquired Westside, an affiliate of Fortrend International LLC, provided a warranty that it would cause Westside to satisfy all of its federal tax obligations arising from receipt of the settlement proceeds. APP352. But Westside never paid any federal taxes and instead tried to offset the gain with a bad-debt deduction from a portfolio of defaulted loans. APP355.

II. TRICARICHI SUED PWC AFTER THE IRS HELD HIM LIABLE FOR WESTSIDE’S UNPAID TAXES

The Internal Revenue Service (IRS) ultimately audited Westside’s 2003 tax return, disallowed the claimed deduction, and assessed a tax deficiency of \$15.2 million and \$6 million in penalties. APP361. Because Westside was insolvent at the time of the IRS’s audit, the IRS sought to collect the tax deficiency, penalties, and interest from Tricarichi as a transferee of Westside’s assets. APP357. Following lengthy litigation and

a trial, the United States Tax Court issued an opinion in October 2015 finding Tricarichi liable as a transferee for Westside’s unpaid taxes, penalties, and interest. APP372. The United States Court of Appeals for the Ninth Circuit affirmed the Tax Court’s decision. *Tricarichi v. Comm’r of Internal Revenue*, 752 F. App’x 455, 456 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 38 (2019).

Following the Tax Court’s decision, Tricarichi filed suit against PwC alleging that PwC’s 2003 advice about the Westside transaction was negligent.² The district court granted summary judgment in PwC’s favor on Tricarichi’s original claim, holding that the claim was time-barred. APP811-14. The Court noted that “Plaintiff and PwC entered into an engagement agreement . . . which contained a New York choice-of-law provision.” APP812 at ¶2. That choice-of-law provision is contained in Section 10 of the Terms of Engagement, immediately following the jury trial waiver in Section 9. APP393 (“This Agreement will be governed by

² Tricarichi sued four other defendants in connection with the 2003 transaction—Cooperative Rabobank U.A., Utrecht-America Finance Co., Seyfarth Shaw LLP, and Graham R. Taylor. The district court dismissed Tricarichi’s claims against the first three based on lack of personal jurisdiction, which this Court affirmed. *Tricarichi v. Cooperative Rabobank, U.A.*, 135 Nev. 87, 98, 440 P.3d 645, 654-55 (2019).

the laws of the State of New York.”). The district court did not decide whether New York’s or Nevada’s statute of limitations applied to Tricarichi’s claim because the court held that the claim was time-barred under either statute. APP813 at ¶ 18. The district court therefore entered judgment in favor of PwC “regarding any and all claims arising from the services PwC provided Plaintiff in 2003.” APP814.

Following the district court’s grant of summary judgment, Tricarichi received leave to file an amended complaint alleging a new theory. APP188-234. Tricarichi now contends that PwC was negligent because it did not advise him about a new IRS notice—Notice 2008-111—that updated and clarified prior IRS notices regarding “Midco” tax-shelter transactions that the IRS issued in December 2008, over five years *after* PwC’s engagement with Tricarichi had ended. APP226-27. Tricarichi now contends that, if PwC had told him about Notice 2008-111 when the IRS published it, he would have immediately stopped litigating and settled with the IRS on the outstanding taxes, penalties, and interest. APP227. Tricarichi seeks as damages from PwC the interest that accrued on his tax deficiency since the issuance of Notice 2008-111, as well as the attorney’s fees and expenses Tricarichi paid to litigate

against the IRS. According to Tricarichi's expert, these alleged damages total more than \$18 million, consisting of approximately \$15 million in interest and \$3 million in legal fees and expenses. APP838-39, 850-53.

III. THE DISTRICT COURT DENIED PwC'S MOTION TO STRIKE TRICARICHI'S JURY DEMAND

Throughout the litigation, until his deposition in October 2020, Tricarichi never disputed that the Terms of Engagement were part of his Engagement Agreement with PwC. In his April 2016 complaint, Tricarichi admitted that he "signed" an "Engagement Letter" with PwC, and the complaint specifically referenced a provision of the Engagement Agreement that was contained in the Terms of Engagement. *Compare* APP037 at ¶ 37 ("The PwC Engagement Letter further noted that it would work with Plaintiff to avoid the imposing of any tax penalty."); *with* APP392 ("We will discuss with Client possible courses of action related to the Client's tax return to avoid the imposition of any penalty (e.g., disclosure)."); *see also* APP099 (same allegation).

Tricarichi also submitted an affidavit in connection with a motion for summary judgment PwC filed in 2017 in which he acknowledged that his Engagement Agreement with PwC consisted of both the letter and

the Terms. APP1249-51. Tricarichi stated that “PwC sent me an engagement letter and asked me to sign it. A copy of the letter is included in Exhibit 2 to PwC’s Motion for Summary Judgment filed March 6, 2017.” APP1250 at ¶ 3. Exhibit 2 to PwC’s motion contained the full letter and the attached Terms of Engagement. APP1250 at ¶ 3. Tricarichi further clarified in his affidavit that “[t]here were no *other* drafts of the engagement letter, *or of the rider to the letter*, exchanged with me.” APP1250 at ¶ 3. Saying that there were no “other” drafts of the letter or the rider (*i.e.*, the Terms) conclusively establishes that Tricarichi *did* receive at least one draft of the letter and the Terms of Engagement. Further, Tricarichi’s brief in opposition to PwC’s motion for summary judgment on the initial claim (later barred by the statute of limitations) confirmed that the Terms were “attached to the engagement letter that PwC sent” him. APP1278-79 (“The choice-of-law provision is simply one of various boilerplate clauses in a standard rider attached to the engagement letter that PwC sent Plaintiff.”).

In his October 2020 deposition, in the face of PwC’s statements to the district court that it would seek to enforce the jury waiver, Tricarichi changed his tune. Tricarichi claimed—for the first time in the litigation—

that he did not actually receive a copy of the Terms of Engagement with the Engagement Agreement. APP443-44. Tricarichi testified that he did not ask for a copy of the Terms of Engagement when he saw them referenced in the Engagement Agreement, nor did he inquire about the enclosures referenced on the signature page. APP448-49. He just “assumed that this [letter] was the agreement.” APP449.

PwC moved for summary judgment and, in the alternative, moved to strike Tricarichi’s jury demand and to limit Tricarichi’s damages to the fees he paid PwC in accordance with the Engagement Agreement. APP270-306. The district court denied PwC’s motion for summary judgment because “the briefing establish[ed] genuine issues of material fact.” APP1306-07. And the district court denied PwC’s motion to strike the jury demand and to limit Tricarichi’s damages to the fees he paid PwC because “there is no rider that is signed or initialed by Plaintiff waiving the jury trial or agreeing to the limitation of damages.” APP1306.

This petition for mandamus followed. The case is currently scheduled for a jury trial in a five-week trial stack beginning March 15, 2021. APP1304-05.

THE WRIT SHOULD ISSUE

I. WRIT REVIEW IS WARRANTED IN THIS CASE

Writ review is appropriate in this case for at least two reasons: (1) pretrial review is effectively the only avenue available for PwC to challenge the district court's refusal to enforce the jury trial waiver; and (2) this case presents important legal questions regarding the enforceability of jury trial waivers.

First, this Court has previously held that writ review is available and appropriate when a district court refuses to enforce a contractual jury trial waiver. *Lowe*, 118 Nev. at 92, 96-97, 40 P.3d at 405, 407-08. In *Lowe*, the Court held that “extraordinary review is available when a district court denies a party’s motion to strike a jury demand” because “there is not a plain, speedy and adequate remedy in the ordinary course of law.” 118 Nev. at 96, 40 P.3d at 408 (quoting NRS 34.160). That is because, the Court explained, “wait[ing] to challenge the district court’s denial of [a] motion to strike the jury demand on appeal” would pose “too difficult a burden to meet on appellate review” given that Nevada law requires an appellant to show that “the error complained of substantially affected their rights” and that “the outcome of the case would have been

different” absent the error. 118 Nev. at 97. The reasoning of *Lowe* applies with equal force here. Writ review is PwC’s best—and potentially only—available option for enforcing the jury trial waiver to which Tricarichi contractually agreed.

Second, writ review is also appropriate because this case presents important and recurring legal questions regarding the enforceability of contractual jury trial waivers. Writ review is available “to control a manifest abuse or arbitrary or capricious exercise of discretion,” which includes a “clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule.” *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 931-32, 267 P.3d 777, 779-80 (2011). Where a “petition raises an important issue of law that needs clarification, [this Court] exercise[s] its discretion to consider its merits.” 127 Nev. at 931, 267 P.3d at 780; *see also Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010) (mandamus appropriate where petition raises an “issue [that] is not fact-bound and involves an unsettled and potentially significant, recurring question of law.”).

This petition raises such a question. As this Court noted in *Lowe*, “the validity of contractual jury trial waivers in Nevada is a matter of

great importance.” 118 Nev. at 97, 40 P.3d at 408. The question in this petition goes to the heart of the enforceability of contractual jury trial waivers. The district court’s order, if allowed to stand, would allow parties to escape contractual jury trial waivers simply by claiming they did not receive, sign, or initial the part of the contract that contains the waiver. Such a rule would create a significant loophole and make it difficult to enforce jury trial waivers. As explained below, the better view—and the one that is “in accordance with Nevada’s public policy favoring the enforceability of contracts,” *Lowe*, 118 Nev. at 100, 40 P.3d at 410—is that a jury trial waiver contained in terms that are explicitly referenced and made binding in a signed contract is valid and enforceable, even if one of the contracting parties later claims not to have received the terms.

II. THE DISTRICT COURT ERRED BY REFUSING TO ENFORCE THE JURY TRIAL WAIVER IN THIS CASE

The district court denied PwC’s motion to strike Tricarichi’s jury demand because “there is no rider that is signed or initialed by Plaintiff waiving the jury trial.” APP1306. The district court’s reasoning is clearly erroneous. The Terms of Engagement containing the jury trial waiver are part of Tricarichi’s Engagement Agreement with PwC as a matter of law

because the Terms are explicitly referenced and made binding in the signed Agreement. There is no requirement that the Terms must be separately signed or initialed, nor does it matter that Tricarichi claimed in a deposition (contrary to his representations earlier in the case) that he did not receive a copy of the Terms.

Because the Terms are part of Tricarichi's Engagement Agreement with PwC, the district court should have enforced the parties' jury trial waiver. The waiver is clearly stated in plain English under a bold heading "**Resolution of Differences**" in the middle of succinct Terms. APP393. Additionally, Tricarichi was a sophisticated businessman with bargaining power who had the opportunity to have an attorney review the Engagement Agreement. In these circumstances, Tricarichi cannot carry his burden of "demonstrat[ing] that the waiver was not entered into knowingly, voluntarily or intentionally." *Lowe*, 118 Nev. at 100, 40 P.3d at 410.

A. The Jury Trial Waiver Is Part of Tricarichi's Engagement Agreement with PwC as a Matter of Law

Under basic principles of contract law, the jury trial waiver is part of the contract between Tricarichi and PwC. Where a collateral document is "by express terms made part of the contract, the terms of [that

document] will control with the same force as though incorporated in the very contract itself.” *Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982).

Here, there can be no doubt that Tricarichi and PwC expressly made the Terms of Engagement, including the jury trial waiver, part of the contract. The second sentence of the Engagement Agreement defines the “Agreement” to include the “engagement letter and the **attached Terms of Engagement to Provide Tax Services.**” APP388 (bold text in original). The conclusion of the letter advised Tricarichi: “If this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us.” APP390. Tricarichi did just that, signing the letter directly below a notation on the last page that the letter included “Enclosure(s): Terms of Engagement to Provide Tax Services.” APP391. By so signing the letter, Tricarichi acknowledged his acceptance of the “Agreement,” which had been defined on the first page to include both the engagement letter and the attached Terms of Engagement. Accordingly, the Terms of Engagement, including the jury trial waiver, should “control with the same force as though incorporated in the very contract itself.” *Lincoln Welding Works*, 98 Nev.

at 345, 647 P.2d at 383; *see also MMAWC, LLC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (enforcing terms of document that contract stated was “attached hereto and incorporated herein”).

The district court refused to enforce the jury trial waiver because Tricarichi did not separately sign or initial the Terms of Engagement. APP1306. But there is no requirement that every page or every attachment to a contract must be signed or initialed to be binding. To the contrary, “Nevada contract law d[oes] not require evidence that [a party] sign[ed] each page.” *Energetic Lath & Plaster, Inc. v. Cimini*, No. 66657, 2016 WL 7439346, at *2 (Nev. Dec. 22, 2016). In *Lincoln Welding Works*, this Court held that “plans and specifications” incorporated into a subcontract were binding on the parties, but there was no indication that the plans and specifications had been separately signed or initialed, or that such a ministerial triviality had any bearing on whether the incorporated document was enforceable. 98 Nev. at 345, 647 P.2d at 383-84. Here, Tricarichi’s signature on the engagement letter indicated his acceptance of the “Agreement,” which expressly included both the

letter and the attached Terms of Engagement. APP388, 392. That signature is all that is required to make the full Agreement binding.

It makes no difference that Tricarichi claimed during his October 2020 deposition that he did not actually receive a copy of the Terms of Engagement. Not only was this claim directly contrary to assertions Tricarichi had made earlier in the litigation, including in his complaint, in a sworn affidavit, and in a brief submitted to the district court, *see supra* at 10,³ but it should be irrelevant as a matter of law. Tricarichi does not dispute that he received and signed the engagement letter from

³ It would be appropriate for the Court to simply disregard Tricarichi's claim that he did not receive the Terms of Engagement because it directly contradicts assertions he made earlier in the case. It is well recognized that courts at summary judgment can "ignore" an affidavit that "constitute[s] a 'sham' produced for the sole purpose of falsely circumventing summary judgment." *Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, No. 77124-COA, 2019 WL 7410795, at *6 (Nev. Ct. App. Dec. 31, 2019). "In such situations, the court can find an affidavit to be a sham if it contains assertions that directly contradict other assertions previously made by that same witness during discovery and the contradiction cannot otherwise be legitimately reconciled as anything but manufactured." *Id.* By the same logic, the Court should also disregard Tricarichi's belated and self-serving claim in his deposition that he did not receive the Terms of Engagement because it "directly contradict[s] other assertions previously made by [Tricarichi] during discovery" for the "sole purpose of falsely circumventing" the jury trial waiver. *Id.*

PwC. APP391, 444-45. The letter defines the “Agreement” to include the Terms of Engagement, and Tricarichi made edits or notations on each of the pages of the letter that referenced the Terms. Tricarichi tried to cross out an unrelated sentence on the same page that identified the Terms as part of the Agreement, and he signed and dated the signature page directly below the reference to the Terms being an enclosure. APP388, 391.

Numerous courts have held that in these circumstances, where a contract that a party signs clearly and unambiguously incorporates terms and conditions, those terms and conditions are part of the contract as a matter of law *even if* one party later claims that he did not actually receive a physical copy of them. One illustrative example is *Madison Who’s Who of Executives & Professionals Throughout the World, Inc. v. SecureNet Payment Systems, LLC*, No. 10-CV-364 (ILG), 2010 WL 2091691 (E.D.N.Y. May 25, 2010). There, the court enforced contract terms related to payments contained in terms and conditions attached to a contract even though one of the parties “allege[d] that it never received a copy of the Terms & Conditions.” *Id.* at *3. The court found it “apparent that the Terms & Conditions were incorporated by reference into the

Merchant Agreement” because there were “two references to the Terms & Conditions in the signed pages” of the contract. *Id.* The court held that a party “cannot avoid the natural consequences of its signature on the Merchant Agreement affirming that it had received the Terms & Conditions and agreeing to adhere to it.” *Id.* at *4. The court continued, “[i]f Madison agreed to abide by this document without first securing a copy of it for review or even contacting SecureNet for any information then such an omission of due diligence was negligence and will not relieve Madison of its obligations under the agreement.” *Id.*; *see also, e.g., Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 998-99 (N.D. Cal. 2012) (holding that arbitration clause in terms and conditions referenced in rental car agreement was enforceable even though customer claimed he did not receive a copy because “the terms of an incorporated document must only have been easily available to him; they need not have actually been provided”); *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc.*, No. C-11-0052 EMC, 2011 WL 1086035, at *4 (N.D. Cal. Mar. 24, 2011) (enforcing arbitration clause contained in General Terms and Conditions that were explicitly referenced in purchase agreement and were not attached but were available upon request).

The reasoning of *Madison* applies with equal force here. There were “two references to the Terms [of Engagement] in the signed pages” of Tricarichi’s Engagement Agreement with PwC, including one in bold. *Madison*, 2010 WL 2091691, at *3; APP387, 391. Tricarichi expressly agreed that the Terms were part of the “Agreement” between him and PwC. APP397, 391. Tricarichi testified that he did not ask for a copy of the Terms when he saw them referenced in the Engagement Agreement, nor did he ask about the enclosures specifically referenced on the signature page. APP448-49. He just “assumed that this [letter] was the agreement.” APP449. *Madison* and its progeny directly address the ramifications of Tricarichi’s negligence: “If [Tricarichi] agreed to abide by this document without first securing a copy of it for review or even contacting [PwC] for any information then such an omission of due diligence was negligence and will not relieve [Tricarichi] of [his] obligations under the agreement.” *Madison*, 2010 WL 1091691, at *4; *see also Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366 (S.D.N.Y. 1975) (“It is a settled proposition of contract law in this state and nation that the signer of a deed or other instrument . . . is conclusively bound thereby. That his mind never gave assent to the terms expressed is not

material. If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent; in either case the writing binds him.”).

Although PwC has not located a case under Nevada law addressing the exact circumstances presented here, the reasoning of *Madison* and the other cases cited above is fully consistent with Nevada contract law. This Court has held that “[i]gnorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its conten[t]s and to assent to them” *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (citation omitted); *CVSM, LLC v. Doe Dancer V*, No. 72627, 2019 WL 978679, at *2 (Nev. Feb. 25, 2019) (“[A] party who does not read a contract before signing it can still be bound by its terms.” (citing 1 Williston on Contracts § 4:19 (4th ed.)). As a leading contracts treatise explains, “[i]t is the duty of every contracting party to learn and know the contents of a contract before he signs and delivers it.” 1 Williston on Contracts § 4:19

(4th ed.). “[T]he integrity of contracts demands that [this rule] be rigidly enforced by the courts.” *Id.*

By signing the engagement letter, Tricarichi indicated his acceptance of the “Agreement,” which explicitly included the Terms of Engagement. APP387. Tricarichi is “conclusively presumed to know” the “contents” of the full Agreement, including the Terms of Engagement, “and to assent to them.” *Campanelli*, 86 Nev. at 841, 477 P.2d at 872. If in fact Tricarichi signed the engagement letter without first securing and reading a copy of the Terms of Engagement, then that is simply “negligence” that will not “relieve [Tricarichi] from his contract obligations.” *Id.* Just as failure to read and understand contract provisions is not a defense to their enforcement, *see* 1 Williston on Contracts § 4:19 (4th ed.), so too signing an Agreement that explicitly incorporates attached Terms of Engagement without first obtaining a copy of the Terms and reviewing them should not be a defense to the Terms’ enforceability.

It makes especially little sense in the context of jury trial waivers to allow a party to escape the consequences of the waiver simply by claiming that he did not receive the part of the contract containing it. The

whole point of a jury trial waiver is to agree to having a judge instead of a jury as the factfinder for a dispute between the parties. The jury trial waiver in Tricarichi's Engagement Agreement with PwC notes that its purpose is "to facilitate judicial resolution and save time and expense of both parties." APP393. But if a party can create a fact question, and thereby obtain a jury trial, simply by claiming in court that he did not receive or was not aware of the jury trial waiver—even though he signed a contract agreeing to be bound by the terms containing the jury trial waiver—it will render such waivers a dead letter.⁴

B. The Jury Trial Waiver Is Valid and Enforceable

"Contractual jury trial waivers are valid and enforceable in Nevada." *Lowe*, 118 Nev. at 97, 40 P.3d at 408. This Court has held, "in accordance with Nevada's public policy favoring the enforceability of contracts," that "contractual jury trial waivers are presumptively valid

⁴ Other provisions in the Terms of Engagement should be enforced as well. For example, Tricarichi agreed that his damages for any claim against PwC related to the tax services PwC provided are limited to the amount of professional fees Tricarichi paid PwC, except where PwC was grossly negligent or acted willfully or fraudulently. APP393. Tricarichi similarly agreed that his Engagement Agreement would be governed by New York law. APP373.

unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally.” *Id.* at 100.

Tricarichi cannot carry his burden of proving that the jury trial waiver in his Engagement Agreement with PwC was not entered into knowingly, voluntarily, or intentionally. As explained above, the jury trial waiver is set forth in the Terms of Engagement which Tricarichi agreed were part of his Agreement with PwC. Tricarichi “is conclusively presumed to know [the] conten[t]s” of the full Agreement he signed “and to assent to them.” *Campanelli*, 86 Nev. at 841, 477 P.2d at 872.

In *Lowe*, this Court identified four factors courts may consider in determining whether a jury trial waiver was made knowingly, voluntarily, or intentionally: “(1) the parties’ negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party’s counsel had an opportunity to review the agreement.” 118 Nev. at 100-01, 40 P.3d at 410-11 (quoting *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)). The *Lowe* factors “are merely a non-exhaustive list of suggestions and no one factor is determinative of a

case.” *Casey v. Third Judicial Dist. Court*, No. 51593, 2009 WL 3188939, at *2 n.1 (Nev. Sept. 25, 2009).

The *Lowe* factors indicate that Tricarichi’s waiver was knowing, intentional, and voluntary. Although the parties did not directly negotiate the jury trial waiver provision, it was conspicuous and written in plain English. The jury trial waiver appears on the second page of the Terms under the bold heading “**9. Resolution of Differences.**” APP393. It states in crystal clear language that “PwC and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.” APP393. PwC and Tricarichi had equal bargaining power. Tricarichi was a sophisticated businessman who had just won an antitrust settlement worth more than \$65 million. Tricarichi was not limited to PwC; he could have chosen any of a number of tax firms to evaluate his proposed transaction. Finally, Tricarichi was represented by counsel when he signed the Engagement Agreement, and he undoubtedly had the opportunity to review the agreement with his counsel. APP451 (Tricarichi “may have” run the Engagement Agreement by his attorney Randy Hart); APP 387 & 390 (Engagement Agreement dated April 10, 2003, but not signed by Tricarichi until April 25, 2003);

see Lowe, 118 Nev. at 101-102, 40 P.3d at 411 & n.36 (jury trial waiver valid where contracting parties were “sophisticated and experienced business people” who were “represented by counsel”); *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, No. 57784, 2012 WL 642746, at *2 (Nev. Feb. 27, 2012) (jury trial waiver valid where contracting party was “a sophisticated businessman” and “was represented by counsel”).

It is immaterial to the enforceability of the jury trial waiver that Tricarichi now claims he did not receive the Terms of Engagement with the Engagement Agreement. As explained above, the Terms are part of the contract between PwC and Tricarichi as a matter of law. Courts have enforced contractual jury trial waivers in situations like this one where a party later claims that he did not receive the terms and conditions containing the waiver. *See, e.g., Supermedia LLC v. Mustell & Borrow*, No. 08-21510-CIV-GOLD/McALILEY, 2011 WL 13175082, at *4 (S.D. Fla. Feb. 3, 2011) (enforcing jury trial waiver contained in Terms and Conditions and striking jury demand because, “irrespective of whether the Terms and Conditions were provided to Defendants at the time the agreements were signed, they were available on the Internet and

Defendants do not dispute that the Agreements acknowledging receipt of the Terms and Conditions were signed”).

For these reasons, the district court’s decision was in error and the district court should have enforced the jury trial waiver.

III. IN THE ALTERNATIVE THIS COURT COULD REMAND FOR AN EVIDENTIARY HEARING REGARDING WHETHER TRICARICHI WAS ON NOTICE OF THE TERMS OF ENGAGEMENT

As explained above, the correct outcome here is that the Terms of Engagement are a binding part of Tricarichi’s contract with PwC *regardless* of whether Tricarichi now claims that he did not receive them. However, if the Court believes that whether Tricarichi received the Terms is essential to their enforceability, then the Court can remand the case for an evidentiary hearing. In this evidentiary hearing, the *district court*, not a jury, should hear the evidence and decide whether the Terms of Engagement, including the jury trial waiver, are part of the contract between Tricarichi and PwC.

This Court has ordered such an evidentiary hearing in circumstances analogous to this case. In *Bank of America, N.A. v. Lee*, Nos. 69101, 69306, 2017 WL 4803907 (Nev. Oct. 23, 2007), the question was whether the Court should enforce provisions in a contract requiring

arbitration and waiving a jury trial. *Id.* at *1. There was a dispute about whether the plaintiff's signature on the contract was genuine. *Id.* at *2. This Court held that "the district court should have held an evidentiary hearing to determine whether a valid contract exists." *Id.* The Court therefore reversed and remanded for an evidentiary hearing to determine "whether there exists a valid contract requiring arbitration and waiving the right to a jury trial." *Id.*

Here, there is no dispute about the genuineness of Tricarichi's signature on the Engagement Agreement. But if the Court concludes that Tricarichi's new assertion that he did not receive the Terms of Engagement is relevant to their enforceability, remanding for a targeted evidentiary hearing on this question before the district court is the only path forward. The alternative—submitting the question of whether Tricarichi received the Terms to a jury—is not viable. A jury should not be asked to determine whether a party agreed to waive that very jury. Submitting the question to the jury would effectively be a *de facto* negation of the jury trial waiver. If factual questions must be resolved in order to determine whether a jury trial waiver is enforceable, those factual questions should be resolved by the court, not a jury. It is after all

the court that decides the factual question of whether a waiver was knowing, intentional, and voluntary. *See Lowe*, 118 Nev. at 101, 40 P.3d at 411. The court should likewise decide whether Tricarichi received the Terms of Engagement to the extent physical receipt is relevant to their enforceability.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should issue a writ of mandamus directing the district court to grant PwC's motion to strike Tricarichi's jury demand.

DATED: January 22, 2021

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VERIFICATION

On January 22, 2021, the affiant, Kelly H. Dove, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

“I am counsel for Petitioner, I have read the foregoing petition for writ of mandamus and all factual statements in the petition are within the affiant’s personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

The exhibits in the appendix and attached to the concurrently filed Request for Judicial Notice are true and correct copies of the original documents.”

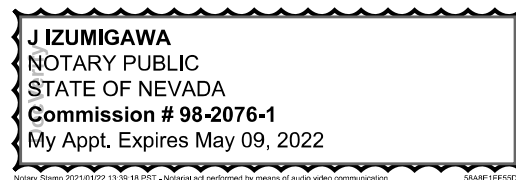
Kelly Harrison Dove

Signed on 2021/01/22 12:39:18 -8:00

Kelly H. Dove

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 22nd day of January, 2021.

Signed on 2021/01/22 12:39:18 -8:00



Notary Public in and for the State of Nevada



CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, 14 point, and is 6084 words.

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

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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 January 22, 2021, I caused to be served a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS** by the method indicated:

- ☒ **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.

Honorable Elizabeth Gonzalez
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☒ **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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