No. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

VOLUME I

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Third Amended Order Setting Civil Jury Trial, Calendar Call and Pre-Trial Conference	12/8/2020	VII	APP1302-APP1305

DATED: January 22, 2021

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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 **APPENDIX TO PETITION FOR WRIT OF MANDAMUS VOLUME I** 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
Regional Justice Center
200 Lewis Ave.
Las Vegas, Nevada 89101

☒ **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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BUSINESS COURT CIVIL COVER SHEET A-16-735910-B

Clark County, Nevada

Case No. _____ XV

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
MICHAEL A. TRICARICHI	PRICEWATERHOUSE COOPERS, LLP, et al.
Attorney (name/address/phone):	Attorney (name/address/phone):
Mark A. Hutchison, Esq., Todd L. Moody, Todd W. Prall	
Hutchison & Steffen, LLC, 10080 W. Alta Drive, Suite 200,	
Las Vegas, NV 89145, Tel: 702-385-2500	

II. Nature of Controversy *(Please check the applicable boxes for both the civil case type and business court case type)*

☐ Arbitration Requested

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☒ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Civil Writs
- ☐ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Judicial Review/Appeal/Other Civil Filing

Judicial Review
- ☐ Foreclosure Mediation Case

Appeal Other
- ☐ Appeal from Lower Court

Other Civil Filing
- ☐ Foreign Judgment
- ☐ Other Civil Matters

Business Court Filing Types

CLARK COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-89
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☐ Mergers (NRS 92A)
- ☐ Uniform Commercial Code (NRS 104)
- ☐ Purchase/Sale of Stock, Assets, or Real Estate
- ☐ Trademark or Trade Name (NRS 600)
- ☐ Enhanced Case Management
- ☒ Other Business Court Matters

WASHOE COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art.8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademark/Trade Name (NRS 600)
- ☐ Trade Secrets (NRS 600A)
- ☐ Enhanced Case Management
- ☐ Other Business Court Matters

29th Apr 2016
Date

Signature of initiating party or representative

Nevada AOC - Research Statistics Unit
Pursuant to NRS 3.275

Form PA 201
Rev 3.1

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

A-16-735910-B

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. DEPT NO. XV **COMPLAINT** BUSINESS COURT MATTER JURY TRIAL DEMANDED EXEMPT FROM ARBITRATION

NATURE OF THE CASE

1. 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. 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. As part of the settlement, Mr. Tricarichi's company exited the cellular phone business.

2. 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. 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. Fortrend represented, among other things, that Westside's remaining assets would facilitate this business, and that it would employ Westside's tax liabilities to legitimately offset tax deductions associated with the debt-collection business. 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. Fortrend assured Mr. Tricarichi that the proposed transaction, including its tax aspect, was legitimate and in accordance with the tax laws. Unbeknownst to Plaintiff, Fortrend's representations and assurances were knowingly false.

3. Mr. Tricarichi retained a nationally recognized accounting firm with expertise in tax matters – Defendant PricewaterhouseCoopers LLP ("PwC") – to review the proposed transaction. PwC, via its senior partner Richard Stovsky and tax experts in its National Tax Office, did so, ultimately advising Mr. Tricarichi that the proposed transaction was legitimate for tax purposes, and that Mr. Tricarichi had no ongoing exposure related to Westside once the

transaction with Fortrend was completed. Unbeknownst to Mr. Tricarichi at the time, PwC's advice in this regard was, at minimum, grossly negligent.

4. Defendant Coöperatieve Rabobank U.A. ("Rabobank") and its affiliate Utrecht-America Finance Co. ("Utrecht") facilitated the transaction by loaning Fortrend the lion's share of the purchase price and by serving as the key conduit for the funds that changed hands at closing, in return for a substantial fee – all along knowing that the transaction was improper for tax purposes.

5. Defendants Seyfarth Shaw LLP ("Seyfarth") and Graham R. Taylor – a law firm and a now-disbarred lawyer who was a Seyfarth partner at the time – unbeknownst to Plaintiff until years later, further facilitated the transaction by providing Fortrend with a legal opinion blessing steps that Fortrend would take but that Seyfarth and Taylor actually knew to be illegitimate for tax purposes – also in return for a substantial fee.

6. Despite their representations and advice to the contrary to Mr. Tricarichi, Fortrend knew and PwC should have known that the Fortrend transaction was illegitimate for tax purposes, and would result in substantial tax and penalty exposure to Mr. Tricarichi personally. Defendants Rabobank, Utrecht, Seyfarth and Taylor knew the same thing, but they failed to disclose this material information to Mr. Tricarichi and otherwise facilitated the transaction that would result in harm to him.

7. As a result of Defendants' actions, Plaintiff was forced to defend himself before the IRS and in the U.S. Tax Court, and was found liable in October 2015 for millions of dollars in back taxes, penalties and interest, which Fortrend did not pay.

8. As further set forth below, Defendants' actions constitute gross negligence, the aiding and abetting of fraud, conspiracy and violations of the Nevada racketeering statute. Defendants should be held to account for these actions and for the tens of millions of dollars in damages that Mr. Tricarichi has suffered as a result.

PARTIES

9. Plaintiff, Michael A. Tricarichi, is an individual who has resided since May 2003 in the City of Las Vegas, Clark County, Nevada. Plaintiff was previously the president and sole shareholder of a company that provided telecommunications services. As a result of Defendants' improper actions in connection with the purchase of Plaintiff's shares in that company, Plaintiff has suffered millions of dollars in liabilities that he otherwise would not have faced.

10. Defendant PricewaterhouseCoopers LLP ("PwC") is a limited liability partnership organized and existing under the law of Delaware, and is registered with the Nevada Secretary of State to do business in the State of Nevada. PwC engages in the business of tax and business consulting and has maintained a Nevada CPA License (PART-0663) since at least 1990. PwC has offices and is doing business in the City of Las Vegas, Clark County, Nevada and PwC has partners who reside in the State of Nevada. At all times material to this Complaint, PwC held itself out to the public, including to the Plaintiff, as having specialized knowledge and skill possessed by a specialist in the field of income taxes, tax savings transactions, and business tax consulting.

11. Defendant Coöperatieve Rabobank U.A. ("Rabobank"), formerly known as Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., is a bank with principal branches in New York, New York and Utrecht, Netherlands. Rabobank is organized as a Dutch cooperative and regulated in the U.S. by the Federal Reserve Bank of New York and other agencies. Rabobank did business with Plaintiff in Nevada via its New York branch. Rabobank also has other offices throughout the world and the United States and does business in the U.S. and, on information and belief, Nevada via a number of branches, divisions and affiliates, including Defendant Utrecht-America Finance Co. During the period relevant to this complaint, Rabobank's business included financing and facilitating, via such

units, certain tax savings transactions promoted by third parties including Fortrend International, LLC and Midcoast Credit Corp. Rabobank purposefully did business with Plaintiff in Las Vegas, Clark County, Nevada in connection with such a transaction, including entering a deposit account agreement with Plaintiff in Las Vegas.

12. Defendant Utrecht-America Finance Co. ("Utrecht"), a wholly-owned subsidiary of Rabobank, is a Delaware corporation with its principal place of business in New York. Utrecht was, on information and belief, a subsidiary via which Rabobank financed transactions promoted by Fortrend, Midcoast and related entities, and financed the transaction into which Plaintiff was drawn. Utrecht purposefully directed its activities complained of herein toward and established contacts with Las Vegas, Clark County, Nevada in participating in the transaction described below.

13. Defendant Seyfarth Shaw LLP ("Seyfarth") is a law firm with its principal office in Chicago, Illinois. Seyfarth has offices and is doing business in a number of different cities and states including San Francisco, California, and, on information and belief, Nevada. At least one Seyfarth attorney maintains a Nevada bar license and on information and belief Seyfarth partners reside and/or do business in Nevada. During the period relevant to this complaint, Seyfarth's business included providing opinion letters that facilitated certain tax savings transactions promoted by third parties including Fortrend International, LLC.

14. Defendant Graham R. Taylor ("Taylor") is a disbarred lawyer residing, on information and belief, in Tiburon, California. During the period relevant to this complaint, Taylor was a partner at and agent of Seyfarth whose business included providing opinion letters that facilitated certain tax savings transactions promoted by third parties such as Fortrend International, LLC, including a transaction promoted to Plaintiff. After his involvement in this transaction, Taylor pleaded guilty in Utah federal court to conspiring to commit tax fraud, and was subsequently disbarred.

THIRD PARTIES

15. Fortrend International, LLC ("Fortrend") is, on information and belief, a defunct Delaware limited liability company that had its principal place of business in San Francisco, California. During the period relevant to this complaint, Fortrend and its affiliates were engaged in the promotion of certain tax-shelter transactions, including the transaction promoted to Plaintiff.

16. Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) ("Conn Vu") is an individual residing in San Francisco, California, who has held himself out as a tax practitioner. In or about March 2003, Conn Vu began working with Fortrend as its agent to promote and facilitate certain tax-shelter transactions, including the transaction promoted to Plaintiff. On information and belief, Conn Vu managed various companies acquired by Fortrend, which he and other co-promoters used to facilitate tax-avoidance transactions. These companies included Westside Cellular. Conn Vu is currently the subject of a federal criminal investigation in New York with respect to such conduct, and it is anticipated that he will be indicted.

17. John P. McNabola ("McNabola") is, on information and belief, an accountant residing is Dublin, Ireland. The U.S. Department of Justice, based on its investigation, has named McNabola as a co-promoter, along with Conn Vu, Taylor and others, of certain unlawful Midco and "DAD" tax shelter transactions during the period 2003-2010. McNabola was an agent of Fortrend and the president of the Fortrend affiliates involved in defrauding Plaintiff.

18. Midcoast Credit Corp. ("Midcoast") is, on information and belief, a defunct Florida corporation that had its principal place of business in West Palm Beach, Florida. During the period relevant to this complaint, Midcoast and its affiliates were engaged in the promotion of certain tax-shelter transactions, including a transaction promoted to Plaintiff. In October 2013, the principals of Midcoast, along with other individuals, were indicted and charged with

criminal conspiracy to commit fraud and other offenses for allegedly designing and implementing fraudulent tax schemes.

19. John E. Rogers ("Rogers"), an attorney residing, on information and belief, in Kenilworth, Illinois, was a Seyfarth partner and agent from July 2003 until he was forced to resign in May 2008. In early 2003, shortly before he joined Seyfarth, Rogers conceived of and created an illegal tax shelter that was subsequently used to facilitate the Fortrend transaction with Plaintiff and, on information and belief, numerous other such transactions. In 2010, the U.S. Department of Justice sought to enjoin Rogers from engaging in such fraudulent conduct, with Rogers agreeing to a permanent injunction in September 2011.

JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this matter pursuant to Art. 6, Sec. 6 of the Nevada Constitution.

21. This Court has personal jurisdiction over Defendants by virtue of their ongoing contacts with the state of Nevada, and/or because they purposefully availed themselves of, or directed their activities toward, the forum state of Nevada by participating in, substantially assisting and/or conspiring with Fortrend and other parties to advance the transaction that was promoted to and targeted Plaintiff, a Nevada resident, with Plaintiff's injuries arising in Nevada as a result, as set forth below.

22. Venue is proper before this Court because the Defendants, or one of them, reside in this District, and because the claims at issue arose in substantial part in this District.

23. This matter is properly brought as a business matter in business court pursuant to EDCR 1.61(a)(ii)-(iii).

FACTUAL BACKGROUND

Midco Transactions Generally

24. "Midco" transactions, a type of abusive tax shelter, were widely promoted during the late 1990s and early 2000s. 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. Fortrend and Midcoast were leading promoters of Midco-type transactions, with both companies being involved in numerous such transactions that were, years later, accordingly rejected by the tax courts.

25. Midco-type transactions were generally promoted to shareholders of closely held C corporations that had incurred large taxable gains. 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. 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. 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. This second step, unbeknownst to the selling shareholder(s), would itself constitute an improper tax-avoidance maneuver, frequently a "distressed asset/debt," or "DAD," tax shelter (discussed in more detail below). The promoter received cash via the transaction, and represented to the target company's shareholders that they would legitimately net more for their shares than they otherwise would absent the intermediary transaction.

26. As was the case with Plaintiff's transaction, however, such representations often proved, years later, to be false. As set forth below, Plaintiff (and others like him)

subsequently found himself "holding the bag" after the transaction that was promoted to him by Fortrend and Midcoast; facilitated by Defendants Rabobank, Utrecht, Seyfarth and Taylor; and blessed by Defendant PwC, resulted in substantial tax liabilities and penalties for Plaintiff personally.

The Midco Transaction Into Which Plaintiff Was Drawn

27. Prior to 2003, Plaintiff was the president and sole shareholder of Westside Cellular, Inc. ("Westside"). From 1991 through 2003, Westside undertook various telecommunication activities in Ohio, including the resale of cellular phone service. In particular, beginning in 1991, Westside purchased network access from major cellular service providers in order to serve its customers. Plaintiff, as Westside's president, soon came to believe, however, that certain of these providers were discriminating against Westside. So, in 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP ("Hahn Loeser"), to file a complaint with the Public Utilities Commission of Ohio ("PUCO") against certain of these providers, alleging anticompetitive trade practices. Westside's survival hung in the balance.

28. The PUCO ruled in Westside's favor on the liability issue, and the Ohio Supreme Court ultimately affirmed that decision. In early 2003 Westside returned to the lower court to commence the damages phase of the litigation. Not long thereafter a settlement was reached, pursuant to which Westside ultimately received, during April and May 2003, total settlement proceeds of $65,050,141. In exchange, Westside was required to terminate its business as a retail provider of cell phone service and to end all service to its customers in June 2003 – effectively relinquishing its assets in return for the settlement proceeds. From the approximately $65 million settlement, Westside would pay $25 million in legal fees and employee compensation and severance, leaving approximately $40 million in settlement proceeds.

29. Anticipating the settlement, Plaintiff asked Hahn Loeser to look into tax matters related to the anticipated settlement. Because Westside was a C Corporation, there was a concern that the settlement proceeds could be subject to double taxation. Hahn Loeser had prior experience with Midcoast and thought Midcoast might assist Plaintiff in this regard. So, a meeting between Plaintiff and Midcoast representatives was arranged for February 19, 2003.

30. At the February 19 meeting, Midcoast's representatives (including Donald Stevenson and Louis Bernstein) explained to Plaintiff that it was in the debt collection business and that, as part of its business model, it purchased companies in postures like Westside's.

31. Thereafter, Plaintiff was also introduced to Fortrend and received an informational letter from Fortrend's Steven Block. Plaintiff and his representatives subsequently had multiple calls and at least one face-to-face meeting with Fortrend representatives, including Block, in or about March/April 2003. Like Midcoast, Fortrend claimed that it was involved in the distressed debt receivables business and that it wanted to purchase Plaintiff's Westside stock as part of this business.

32. Midcoast and Fortrend each expressed interest in acquiring Plaintiff's Westside stock, and each made an offer proposing essentially the same transactional structure: An intermediary company would borrow money to purchase the stock. After the sale closed, the intermediary company would merge into Westside, and Fortrend / Midcoast would employ Westside in its distressed-debt collection business. The purchaser would fund its operations with Westside's remaining cash (Fortrend represented that financing for its distressed-debt recovery business was otherwise difficult to obtain), and employ Westside's tax liabilities to legitimately offset tax deductions associated with this business.

33. Fortrend and Midcoast represented to Plaintiff that the transactions they were each proposing would result in legitimate tax benefits and thus a greater net return to Plaintiff than he would otherwise realize. These representations included the assurance that the acquiring party had successfully undertaken numerous other transactions like the one being proposed to Plaintiff and that such transactions were proper under the tax laws. Neither party told Plaintiff that the IRS was scrutinizing and challenging similar transactions as improper tax shelters.

34. Absent Defendants' improper actions, Plaintiff would have left the settlement proceeds in Westside, paid the corporate-level tax and invested in other business ventures through Westside, thereby avoiding any shareholder-level tax on a distribution from Westside.

35. Because Plaintiff thought Midcoast and Fortrend were competitors, he began negotiating with both in the hope of stirring up a bidding war. Rather than continue to compete, though, Midcoast and Fortrend secretly agreed that Midcoast would step away from the transaction in exchange for a kickback of $1,180,000. As a result of this bid-rigging, Midcoast's final offer was intentionally unattractive, and Plaintiff chose to proceed with Fortrend.

36. Based on the representations made by Fortrend, Plaintiff was inclined to proceed with the Fortrend transaction. But, not wanting to run afoul of the tax laws, Plaintiff engaged a nationally regarded accounting firm, Defendant PwC, to independently evaluate the bids and proposed transactions for his Westside stock, verify that they and the purchasers were legitimate, and evaluate any potential tax issues.

37. On or about April 25, 2003, Plaintiff signed a letter agreement (the "PwC Engagement Letter") whereby PwC agreed to provide such tax research and evaluation services relating to the proposed sale of Westside's stock. The PwC Engagement Letter specifically noted that PwC had an obligation to determine whether Plaintiff would be

participating in a reportable transaction as defined by the IRS. The PwC Engagement Letter further noted that it would work with Plaintiff to avoid the imposition of any tax penalty. Plaintiff is unsophisticated in tax matters and was relying on PwC's expertise in deciding whether to proceed with the transaction.

38. Unbeknownst to Plaintiff, PwC had on at least one prior occasion brought Fortrend to the table to facilitate a Midco transaction that PwC itself had advocated. 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. As it did in Mr. Tricarichi's case, Rabobank also facilitated the Bishop transaction by loaning Fortrend the purchase price and serving as the conduit through which funds changed hands at closing, all in return for a substantial fee. PwC disclosed none of this to Plaintiff. 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.

39. Consistent with the Engagement Letter, during the period April-August 2003, a team of PwC tax professionals, including Rich Stovsky, Timothy Lohnes and Don Rocen, set out to examine and advise Plaintiff regarding the transactions proposed by Fortrend and Midcoast. PwC personnel put between 150 and 200 hours into this effort, for which PwC charged approximately $48,000 in fees. PwC participated in various calls with the parties and/or their representatives, reviewed transaction documentation, and undertook research. PwC understood, among other things, that Fortrend would borrow a substantial sum from Rabobank in order to finance the transaction; that Fortrend intended to employ Westside's

tax liability to offset gains and deductions associated with high basis / low value assets; and that Plaintiff was relying on Fortrend to satisfy Westside's tax obligations.

40. PwC further understood but failed to properly advise Plaintiff that IRS Notice 2001-16, which had been issued in January 2001, 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.

41. On or about July 22, 2003, Fortrend (via an affiliate) sent Plaintiff a letter of intent, signed by Conn Vu, regarding the proposed purchase of Plaintiff's Westside stock. The letter of intent proposed, among other things, that Fortrend would pay $34.9 million (later reduced slightly to $34.6 million) for the stock. The parties proceeded to discuss and negotiate a proposed stock purchase agreement, with PwC reviewing the terms thereof as part of its engagement.

42. Fortrend would use its affiliate Nob Hill, Inc. ("Nob Hill"), of which McNabola was the president, as the intermediary company to purchase the Westside stock. Nob Hill's sole shareholder was Millennium Recovery Fund, LLC, a Fortrend affiliate formed in the Cayman Islands. In the stock purchase agreement, which McNabola signed, Nob Hill represented that Westside would remain in existence for at least five years after the closing and "at all times be engaged in an active trade or business." Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause ... [Westside] to satisfy fully all United States ... taxes, penalties and interest required to be paid by ... [Westside] attributable to income earned during the [2003] tax year." Nob Hill agreed to indemnify Plaintiff in the event of liability arising from breach of its representation to satisfy Westside's 2003 tax liability, and represented that it had sufficient assets to cover this indemnification obligation. Nob Hill

further warranted that it had no intention of causing Westside to engage in an IRS reportable transaction.

43. Plaintiff relied on these material representations and warranties, as well as PwC's evaluation and assessment of them, in deciding to proceed with the Fortrend transaction. Unbeknownst to Plaintiff, however, these representations and warranties were false when made; and they were not subsequently fulfilled, as PwC knew or should have known that they would not be. Although the stock purchase agreement contained covenants by the purchaser to pay Westside's taxes, and despite the fact that the agreement contained an indemnification provision in that regard, such provisions were without any value because, upon information and belief, the indemnitor/purchaser had insufficient assets with which to satisfy them when they were made and going forward, and simply intended to misappropriate Westside's funds, offset its tax liabilities with a bogus deduction via a reportable transaction, and conduct no business of substance.

44. Defendants Rabobank and Utrecht provided Fortrend financing for the vast majority of the purchase price, and Rabobank was the key conduit for the funds that changed hands in order to close the transaction. Without such participation and substantial assistance by Rabobank and Utrecht, Fortrend would not have been able to proceed with the transaction. Rabobank frequently partnered with Fortrend in executing Midco deals, and had done dozens of transactions with Fortrend prior to Plaintiff's transaction.

45. On information and belief, from 1996 to 2003, Fortrend promoted almost one hundred Midco transactions, and worked closely with Rabobank to obtain financing for many of those transactions. In Plaintiff's case, of the $34.6 million agreed purchase price for Westside's stock, $29.9 million would come from Rabobank, via Utrecht. (The remainder was loaned to Nob Hill by another Fortrend affiliate, Moffat.) The loan and the closing were

structured in such a way that Defendants Rabobank and Utrecht considered that they really bore no risk of non-payment.

46. On August 13, 2003, Fortrend asked Chris Kortlandt at Rabobank for a $29.9 million short-term loan, setting forth how those funds would remain in and be transferred through accounts at Rabobank that the parties would open, before being quickly repaid to the bank. Kortlandt at Rabobank subsequently requested and received internal approval of this loan, with Nob Hill as the nominal borrower. Rabobank understood that Westside would be required to have cash in excess of $29.9 million on deposit with Rabobank when the stock purchase closed. Rabobank therefore considered the risk of nonpayment of the loan to be essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on collateral: R-1 (cash)." Rabobank used the R-1 risk rating to denote a loan that is fully cash collateralized.

47. Among the financing documents subsequently executed by Nob Hill (the Fortrend affiliate) were a promissory note for $29.9 million, a security agreement, and a pledge agreement dated as of September 9, 2003. McNabola signed all these documents as Nob Hill's president. Pursuant to the security agreement, the Tax Court subsequently found, Nob Hill granted Rabobank a first priority security interest in a Rabobank account that Plaintiff would open for Westside in connection with the transaction, in order to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, the Tax Court also found, Nob Hill granted Rabobank a first-priority security interest in the Westside stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation. Among the financing documents to be executed by Westside were security and guaranty agreements in favor of Rabobank, and a control agreement. McNabola also signed these documents. Via the security and guaranty agreements, the Tax Court further found, Westside unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and granted Rabobank a first priority security interest in

Westside's Rabobank account. The control agreement further gave Rabobank control over Westside's account – including all cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto – in order to ensure that Westside did not default on its commitments, the Tax Court determined, further concluding that these agreements effectively gave Rabobank a "springing lien" on Westside's cash at the moment it funded the loan. For all practical purposes, therefore, the Tax Court found, the Rabobank loan was fully collateralized with the cash in Westside's Rabobank account, consistent with the R-1 risk rating that Rabobank assigned to that loan.

48. As noted above, in order to facilitate the transaction, Plaintiff and Westside were required to open accounts at Rabobank. The account opening documentation reflects Plaintiff's and Westside's residence in Las Vegas, Clark County, Nevada, where Rabobank and Utrecht thus knew Plaintiff resided, and where they proceeded to do business with, and direct their actions toward, Plaintiff and Westside. Plaintiff was relying on Rabobank, a large bank with a worldwide presence, to serve as an independent escrow agent and lender, rather than as a self-interested facilitator and co-conspirator of Fortrend's fraud – which, unbeknownst to Plaintiff, was Rabobank's actual role.

49. Rabobank and Utrecht proceeded with the transaction and the loan to Fortrend (Nob Hill) despite knowing that the Fortrend transaction in this case was a Midco deal that constituted a reportable transaction considered by the IRS to be an improper tax-avoidance mechanism. During the years 1998 – 2002, Rabobank (via, on information and belief, subsidiaries including Utrecht) had financed a total of 88 Midco transactions, at the pace of about 18 transactions per year. Rabobank earned considerable and attractive fees via the loans, which ranged in amount between $6 million and $260 million, and were mostly for terms of only one to three days. At the time, Rabobank was experiencing difficulty in other areas of its

business, and opportunistically looked at the Midco financing transactions as "easy money" – short term loans with high yield and no credit risk.

50. The Midco transactions that Rabobank / its affiliates participated in with Fortrend included the following, among others:

a. Bishop Group: In or about October 1999, Rabobank facilitated the purchase of Bishop stock by loaning another special-purpose Fortrend affiliate (K-Pipe Merger Corp.) approximately $200 million short-term for the purchase price, and by serving as the conduit through which funds changed hands at closing, in return for a substantial fee. Like Nob Hill in this case, K-Pipe was a shell company with no assets and conducted virtually no business after the purchase. A federal court in Texas subsequently found that the Bishop transaction was a sham and constituted an improper Midco tax shelter, and that determination was affirmed by the U.S. Court of Appeals for the Fifth Circuit.

b. Town Taxi and Checker Taxi: In or about October 2000, Rabobank loaned Three Wood LLC, a newly formed Fortrend special-purpose affiliate, $30 million short-term to purchase the stock of Town Taxi Inc. and Checker Taxi Inc. from the Frank Sawyer Trust after those companies had sold all their assets. Rabobank again served as the conduit through which funds changed hands at closing, on information and belief in return for a substantial fee. On information and belief, in order to induce the Trust into the transaction, Fortrend falsely represented to the Trust that Fortrend had a strategy to legitimately offset the taxes due as a result of the taxi companies' asset sales. Within about two months of the closing, Fortrend stripped Town Taxi and Checker Taxi of their remaining funds, totaling millions of dollars, moving that money to other Fortrend affiliates. Late in 2000, Fortrend contributed to Town Taxi and

Checker Taxi the stock of other companies that had ostensibly declined in value, subsequently claiming tax losses that offset nearly all the gains from the Town Taxi and Checker Taxi asset sales. After the IRS examined the transaction, the U.S. Tax Court found in 2014 that it constituted an improper Midco tax shelter.

c. St. Botolph Holding Co.: In or about February 2001, Rabobank loaned $19 million to Monte Mar, Inc., a special-purpose Fortrend affiliate, to purchase from the Frank Sawyer Trust the stock of St. Botolph, which was in the process of selling its assets. Rabobank again served as the conduit through which funds changed hands at closing, on information and belief in return for a substantial fee. On information and belief, in order to induce the Trust into the transaction, Fortrend falsely represented to the Trust that Fortrend had a strategy to legitimately offset the taxes due as a result of St. Botolph's asset sales. Over the next ten months, Fortrend stripped St. Botolph of its remaining cash. In 2001, Fortrend contributed to St. Botolph stock that had ostensibly declined in value, subsequently claiming tax losses that offset nearly all the gains from the St. Botolph asset sale. After the IRS examined the transaction, the U.S. Tax Court found in 2014 that it constituted an improper Midco tax shelter.

d. Slone Broadcasting: In December 2001, after the assets of Slone Broadcasting had been sold, Utrecht loaned another special-purpose Fortrend affiliate, Berlinetta, Inc., $30 million short-term to purchase the stock of Slone. Fortrend represented to the shareholders of Slone that it had a legitimate strategy to reduce the taxes due as a result of the asset sale. On information and belief, Rabobank served as the conduit through which funds changed hands at closing, in return for a substantial fee. Slone Broadcasting and Berlinetta merged, and the company's named was changed to Arizona Media, which then claimed an

inflated basis for certain Treasury bills contributed to the company by another Fortrend affiliate. Conn Vu was also Arizona Media's president, secretary and treasurer. The IRS maintains that the Slone-Fortrend transaction was an illegal Midco tax shelter, with the former Slone shareholders having transferee liability, and the matter is currently in litigation.

51. However, on information and belief, in or about October 2002 – that is, approximately ten months before it financed the transaction involving Plaintiff – Rabobank determined that many if not all of the Midco transactions it had previously financed were reportable transactions as defined by the IRS. As a result, the number of Midco transactions executed by Rabobank after October 2002 decreased significantly. Rabobank undertook only five Midco financing transactions in 2003, one of those being the financing in Plaintiff's case. In 2004, Rabobank undertook only one Midco financing transaction, its last. A Rabobank internal audit further found in 2005 that Rabobank's internal controls had been inadequate in numerous respects with respect to the Midco transactions in which it had participated. The audit found, among other things, that it was at least "questionable" whether Midco promoters like Fortrend could be described as "reputable" companies with which Rabobank should be doing business. Rabobank would have stopped financing Midco transactions entirely after October 2002 were it not for the fact that it did not want to harm its existing relationships with Midco promoters like Fortrend.

52. In addition to its own activities directed toward Plaintiff and the Nevada forum, Rabobank/Utrecht knew or should have known – via their participation in this and prior Fortrend transactions – that their co-conspirators Fortrend, McNabola and Conn Vu were directing and undertaking the acts alleged herein at Plaintiff and in the Nevada forum. Rabobank's / Utrecht's actions caused harm to Plaintiff in Nevada.

53. Notwithstanding the problematic nature of the transaction proposed by Fortrend, which should have been apparent to PwC given its expertise in tax matters, PwC, based on its examination and due diligence, 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. 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. 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. PwC advised Plaintiff of its conclusions in or about August 2003. Relying upon PwC's advice, Plaintiff proceeded with the Fortrend transaction. Had PwC advised Plaintiff otherwise, Plaintiff would not have proceeded with the transaction.

54. The parties executed the stock purchase agreement, and the Fortrend transaction closed on September 9, 2003. As part of the closing, Nob Hill's Rabobank account was credited with the $29.9 million Rabobank loan proceeds; Nob Hill transferred the purchase price from its Rabobank account into the Rabobank account that Plaintiff had been required to open; Nob Hill acquired Plaintiff's Westside stock; Plaintiff's resignation as an officer and director of Westside became effective (with Plaintiff being replaced by Fortrend personnel); and Nob Hill paid Rabobank a $150,000 fee. After the Rabobank and Moffat loans were repaid the same day, however, Westside's remaining funds, rather than being used to facilitate Fortrend's debt-collection business as represented, were actually drained by Fortrend, as set forth below.

55. The day after the closing, Nob Hill merged into Westside with Westside being the surviving corporation. By that point, there was approximately $5.2 million left in Westside's bank account. Westside – now under Fortrend's control – proceeded over the next

seven months to transfer about $4.8 million of that amount to various Fortrend affiliates and co-promoters, including MidCoast, which in mid-September received its $1,180,000 payoff for stepping away from the transaction. After Conn Vu transferred the remaining funds to another bank in or about April 2004, Fortrend emptied the account and it was closed. Westside did not engage in the debt-collection business as Fortrend had represented to Plaintiff it would.

56. Notwithstanding the multiple representations of Fortrend and PwC to Plaintiff that the Fortrend transaction was proper under the tax laws, and the silence of Rabobank and Utrecht in this regard, Defendants and Fortrend knew that on January 18, 2001 the IRS had issued Notice 2001-16 ("the 2001 Tax Notice"). The 2001 Tax Notice describes transactions where a corporation disposes of substantially all of its assets and then the corporation's shareholders sell their stock to another party who seeks favorable tax treatment. The 2001 Tax Notice states that any transactions that are the same as, or substantially similar to, those described in the 2001 Tax Notice are "listed transactions." Listed transactions are deemed by the IRS to be abusive tax shelters. Persons failing to report these tax shelters may be subject to penalties. The IRS in the 2001 Tax Notice concluded that it "may challenge the purported tax results of these transactions on several grounds." It further warned that it "may impose penalties on participants in these transactions."

57. The publication of the 2001 Tax Notice put Defendants and Fortrend, who were experienced in tax matters, on notice that there was, at minimum, a significant likelihood that the IRS would consider the Fortrend transaction to be a listed transaction. In addition, as a result of the 2001 Tax Notice, Defendants and Fortrend, who were experienced in tax matters, knew or should have known that there was, at minimum, a significant likelihood that the IRS would hold Plaintiff liable as a transferee

for the unpaid taxes owed by Westside.

58. Defendants and Fortrend failed to properly advise Plaintiffs about the 2001 Tax Notice and its significance for the Fortrend transaction. To the contrary, PwC advised Plaintiff that the Fortrend transaction did not fall within, and was not substantially similar to the transaction listed in, the 2001 Tax Notice, and was not a listed transaction as defined by the IRS; PwC advised Plaintiff that he would not be exposed to transferee liability with respect to the Fortrend transaction; Fortrend also made such representations; and Rabobank and Utrecht remained silent, facilitating the transaction despite knowing that it was a listed transaction per the 2001 Tax Notice.

With Seyfarth and Taylor's Assistance,
Fortrend Closes the Loop on its Fraud Post-Closing

59. After the closing, Fortrend did not conduct business via Westside in the manner Fortrend had told Plaintiff it would. In fact, in order to draw Plaintiff into the Midco transaction, Fortrend had made various misrepresentations to Plaintiff when it described, represented and warranted how Westside's business would proceed after the stock sale. Contrary to what Fortrend represented, Fortrend's plan was never to operate Westside going forward as part of a legitimate debt-collection business, and its plan was never to "cause ... [Westside] to satisfy fully all United States ... taxes, penalties and interest required to be paid by ... [Westside] attributable to income earned during the [2003] tax year." Contrary to its representations via Nob Hill and otherwise, 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.

60. Unbeknownst to Plaintiff, Fortrend's efforts to set the stage in this regard dated back to at least 2001. As part of Fortrend's ongoing promotion of Midco transactions, in or about March 2001, Millennium (the Fortrend and Nob Hill affiliate) obtained a portfolio of

distressed Japanese debt then valued at $137,109 for a cost of $137,000. Although Millennium/Fortrend thus acquired the Japanese debt portfolio for only $137,000 in March 2001, it later claimed that its tax basis in that portfolio was actually more than $314 million.

61. As support for this claim, Fortrend looked to a canned opinion letter provided to McNabola at Millennium by Defendants Seyfarth and Taylor on or about August 21, 2003 (the "Seyfarth Opinion Letter"). Without a good-faith basis, the Seyfarth Opinion Letter stated, among other things, that it was appropriate for Millenium to claim more than $314 million in basis for the Japanese debt that it had acquired for a tiny fraction of that amount.

62. By obtaining and claiming an artificially high basis in the Japanese debt – and by "blessing" this maneuver – Fortrend, and Defendants Seyfarth and Taylor, facilitated the Midco transaction that defrauded Plaintiff by effectuating a maneuver that Fortrend, Seyfarth and Taylor all knew to be improper under the tax laws: a distressed asset/debt (or "DAD") scheme.

63. A DAD scheme uses purportedly high-basis, low-value distressed debt acquired from foreign entities that are not subject to United States taxation. The distressed debt is passed through one or more U.S. entities that fail to claim the proper basis for that debt. The U.S. taxpayer that finally ends up holding the debt – here, Westside under Fortrend's ownership – then claims the significant tax loss that has passed through in order to offset other U.S. income or gain. The effect is that the U.S. taxpayer (Westside under Fortrend's ownership) is seeking to benefit from the built-in economic losses in the foreign party's distressed asset when the U.S. taxpayer did not incur the economic costs of that asset.

64. As the Tax Court noted, Seyfarth "gained notoriety for issuing bogus tax-shelter opinions," and the opinion issued to Fortrend in Plaintiff's case "seems par for the course." Rogers conceived of and created a DAD shelter in early 2003, shortly before he became a

Seyfarth partner in July 2003, and Seyfarth, Rogers and Taylor subsequently promoted, facilitated and participated in numerous DAD and other illegal tax shelters thereafter with Fortrend and others. Upon information and belief, numerous clients of Seyfarth, Taylor and Rogers were – like Fortrend – themselves tax shelter promoters who used the purported losses from DAD and similar schemes as part of abusive Midco transactions.

65. Rogers and Taylor were both partners at the law firm Altheimer & Gray before joining Seyfarth, after Altheimer went bankrupt in 2003. Rogers and Taylor both left Seyfarth in 2008, Rogers after the firm – no longer comfortable with him promoting tax shelters – forced him to resign, and Taylor after he pleaded guilty in January of that year to conspiring to commit tax fraud.

66. In 2010, Taylor was disbarred, and the U.S. Department of Justice, based on a years-long investigation, filed a complaint in federal court in Illinois accusing Rogers of tax fraud and other offenses based on his creation and promotion of DAD shelters and similar tax schemes dating back to at least 2003. Rather than contest the complaint's allegations, Rogers agreed, in September 2011, to a permanent injunction against him directly or indirectly organizing, promoting, advising, implementing, carrying out, managing or selling DAD or similar transactions.

67. As was known at the time pertinent to this complaint by Fortrend, Seyfarth, Taylor and Rogers, who were sophisticated practitioners in the tax arena, a DAD shelter violates the legal doctrines of (1) economic substance; (2) substance over form; (3) step transaction; and (4) sham partnership. Even though they violated such doctrines from their inception, DAD shelters were widely promoted in the early 2000s by Fortrend, Seyfarth, Taylor, Rogers and others. As a result, Congress emphasized their illegality by outlawing all DAD schemes via the consideration and passage of the American Jobs Creation Act, with

which Fortrend, Seyfarth, Taylor and Rogers, as sophisticated tax practitioners, must have been familiar. *See* American Jobs Creation Act of 2004, P.L. 108-357 (amending, among other provisions, I.R.C. §§ 704(c), 734 and 743).

68. Fortrend, Seyfarth, Taylor and Rogers likewise knew, at the time pertinent to this complaint, that the DAD aspect of the transaction was a sham because Fortrend incurred no economic loss in connection with the deductions it was claiming.

69. In Plaintiff's case, and unbeknownst to Plaintiff, the second-stage DAD transaction continued (after the Westside stock sale) this way:

a. On November 6, 2003, Millennium contributed to Westside a subset of the Japanese debt portfolio, consisting of two defaulted loans (the "Aoyama Loans"). The Aoyama Loans had a purported tax basis of $43,323,069. Between November 6 and December 31, 2003, Westside wrote off the Aoyama Loans as worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003, Westside claimed a bad debt deduction of $42,480,622 on account of that write-off.

b. As the Tax Court found, Westside conducted no meaningful business operations after September 10, 2003; it reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business; and it undertook no efforts to collect the Aoyama Loans or contract with a third party to do so. During this period, Conn Vu served Fortrend as Westside's president, secretary and treasurer, signing Westside's tax returns and nominally presiding over the company's "business" until Fortrend drained it of its last assets.

c. On its tax return for 2003, Westside (under Fortrend's control) reported total income of $66,116,708 and total deductions of $67,840,521. The deductions

included purported bad debt losses of $42,480,622 based on the Aoyama Loans. Westside did not pay any amount of taxes.

70. By providing the purported justification for the $42,480,622 deduction claimed regarding the Aoyama Loans, Seyfarth and Taylor knowingly and substantially assisted the fraud that Fortrend perpetrated upon Plaintiff. On information and belief, Seyfarth and Taylor received a substantial fee in return for the Seyfarth Opinion Letter.

71. In addition to their own activities undertaken in or directed toward the Nevada forum, Seyfarth and Taylor, on information and belief, knew or should have known – via their participation in this transaction and otherwise – that their co-conspirators Fortrend, McNabola and Conn Vu were directing and undertaking the acts alleged herein at Plaintiff and in the Nevada forum. Seyfarth and Taylor's actions caused harm to Plaintiff in Nevada.

72. The Seyfarth Opinion Letter in this case was, on information and belief, not the only time that Seyfarth and Taylor were involved in similar transactions with McNabola, Conn Vu and Fortrend. The U.S. Department of Justice, based on its investigation, has stated that McNabola, with the assistance of Taylor, structured and/or assisted with setting up a DAD transaction by which First Active Capital Inc. ("First Active"), in or about August 2005, acquired distressed Chinese debt with a supposed basis of more than $57 million. First Active, which was incorporated in August 2005, and of which McNabola was the sole officer and director until 2006, then used this distressed debt to offset gains in connection with other transactions in which it participated in 2005, 2006, 2008, 2009 and 2010. In each of these transactions, the DoJ has stated, Conn Vu, who replaced McNabola as an officer and director of First Active, used the distressed debt that First Active had obtained to offset gains otherwise incurred. Per the DoJ, First Active had no legitimate business purpose and was used solely to facilitate illegal tax avoidance schemes. Moreover, while Taylor was indicted in November

2005 for tax fraud, and subsequently pleaded guilty to tax evasion, on information and belief, he continued to practice law and provide advice to McNabola through at least 2008.

Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts

73. Defendants and their co-conspirators engaged in affirmative conduct designed to prevent Plaintiff's discovery of their wrongdoing. These acts prevented Plaintiff's discovery of the fraud and other misdeeds. PwC and its personnel were fiduciaries of Plaintiff, and the remaining Defendants and conspirators were in a position of superior knowledge and/or trust, and thus owed Plaintiff a duty to disclose the concealed facts, which they nonetheless concealed or suppressed. Had Plaintiff known these facts, which came to light as a result of the Tax Court trial or thereafter, he would have acted differently, but instead was damaged as a result of the concealment.

74. Defendants' acts of concealment and omission included those set forth above, and also continued after Plaintiff's agreement to and participation in the Fortrend transaction, including: (i) Defendants' concealment of the second-stage DAD transaction with respect to Westside; (ii) Defendants' concealment of their ongoing involvement in similar illegitimate Midco and DAD transactions; (iii) Defendants' concealment of their knowledge of the illegitimacy of these transactions and the transaction involving Plaintiff; (iv) Fortrend's concealment of its ongoing involvement with Midcoast; and (v) Fortrend and Conn Vu's concealment of their post-closing actions despite the fact that Plaintiff's representatives were in touch with them in 2006 and 2007 regarding the filing of a claim for the refund of excise taxes for Westside.

Plaintiff Is Left Holding the Bag as a Result of the Foregoing Events

75. As a result of the foregoing events, the IRS audited Westside's 2003 tax return. At the conclusion of the audit, the IRS disallowed the $42,480,622 bad-debt deduction, and

another $1,651,752 deduction claimed by Fortrend for legal and professional fees (on the ground that these fees were incurred in connection with a transaction entered into solely for tax avoidance). During the audit, the IRS was unable to find any assets or current sources of income for Westside. On February 25, 2009, the IRS mailed a notice of deficiency to Westside determining a deficiency of $15,186,570 and penalties totaling $6,012,777 under the tax code.

76. Westside – which had no assets or resources by this 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. So, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of deficiency, plus accrued interest.

77. The IRS also proceeded with a transferee liability examination concerning Westside's 2003 tax liabilities. Transferee liability is a method of imposing tax liability on a person (here, Plaintiff) other than the taxpayer who is directly liable for the tax. This method is used by the IRS when a person transfers property and tax related to that property subsequently goes unpaid. In that case, the IRS goes after the person who made the transfer to recover the taxes.

78. As a result of its examination, the IRS determined that Plaintiff had transferee liability for Westside's tax deficiency and penalties – a total of about $21.2 million. The IRS sent Plaintiff a notice of liability to that effect on June 25, 2012. (Years before, Plaintiff had timely paid the IRS more than $5 million in taxes relating to the long-term gain incurred in 2003 as a result of the sale of Plaintiff's Westside stock.)

79. Plaintiff petitioned the U.S. Tax Court in September 2012 for review of the IRS notice of liability. The matter was litigated during 2013 and 2014, proceeding to a four-day trial in June 2014. After trial, the Tax Court found in October 2015 that – contrary to what Defendants and Fortrend had led Plaintiff to believe – the Fortrend transaction into which Plaintiff had been drawn 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 and interest penalties, which are estimated by Plaintiff to total approximately $17.8 million (and counting).

80. Moreover, as a further result of Defendants' actions, and in addition to such amounts, Plaintiff has been required to spend a considerable amount of money in fees and expenses in the IRS and Tax Court proceedings. To date these fees and expenses exceed about $5 million and continue to be incurred. Additionally, Plaintiff lost other sums in connection with the Fortrend transaction, including a $5.4 million Fortrend "premium" and $125,000 in professional fees paid upfront for review and advice regarding the transaction. All told, Plaintiff has suffered tens of millions of dollars in damages as a result of Defendants' actions.

COUNT I
GROSS NEGLIGENCE AS TO PwC

81. Plaintiff repeats and realleges paragraphs 1 through 80 above as though fully set forth herein.

82. In consulting with and otherwise representing Plaintiff with respect to the sale of Plaintiff's shares of stock in Westside and otherwise with respect to the transaction proposed by Fortrend, Defendant PwC owed a 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.

83. wC breached that duty by committing, among others, one or more or a combination of all of the following acts or omissions:

a. Failing to advise Plaintiff of PwC's prior dealings with Fortrend and advocacy of a Midco transaction in the Bishop deal;

b. Advising Plaintiff that the transaction proposed by Fortrend was legal and proper and in compliance with the tax laws;

c. Failing to properly advise Plaintiff about the significance of the 2001 Tax Notice or, in the alternative, failing to be fully aware of the 2001 Tax Notice and/or its potential adverse consequences to Plaintiff as a result of the Fortrend transaction; and

d. Failing to advise Plaintiff that because of the 2001 Tax Notice, there was an increased likelihood that the transaction might result in an audit by the IRS and possible liability under a theory of transferee liability.

84. Acting in reliance on the advice and opinions given by PwC, Plaintiff proceeded with the Fortrend transaction.

85. As a direct and proximate result of the gross negligence of PwC, Plaintiff has incurred damages in excess of $10,000, including fees incurred to respond to and defend the examination by the IRS and to litigate the matter in Tax Court, the assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

86. PwC's actions compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT II
NEGLIGENT MISREPRESENTATION AS TO PwC

87. Plaintiff repeats and realleges paragraphs 1 through 86 above as though fully set forth herein.

88. In consulting and otherwise representing Plaintiff with respect to the sale of Plaintiff's shares of stock in Westside and otherwise with respect to the Fortrend transaction, Defendant PwC owed a duty to Plaintiff to communicate accurate information to Plaintiff.

89. The statements made by PwC to Plaintiff that the transaction proposed was proper and according to the tax laws were false statements of material fact and otherwise communications of inaccurate information to Plaintiff.

90. PwC was grossly negligent in failing to ascertain that these statements were, in fact, false and in otherwise conveying inaccurate information to Plaintiff.

91. PwC made the said false and otherwise inaccurate statements with reckless disregard for their truth.

92. Plaintiff had no knowledge of the falsity or otherwise of the inaccuracy of the said false statements made by PwC.

93. Plaintiff was thereby induced into going forward with and completing the Fortrend transaction.

94. Plaintiff reasonably, justifiably and actually relied upon the said false and otherwise inaccurate statements made by PwC and went forward with and completed the transaction.

95. The said false and otherwise inaccurate statements made by PwC caused Plaintiff to incur damages in excess of $10,000, including but not limited to Plaintiff's expenditure of a considerable amount of money in fees and expenses to respond to and defend the examination by the IRS and to litigate the matter in Tax Court, and the assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

96. PwC's actions compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT III
AIDING AND ABETTING FRAUD
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

97. Plaintiff repeats and realleges paragraphs 1 through 96 above as though fully set forth herein.

98. Fortrend made false representations to Plaintiff, knowing or believing that such representations were false or that there was insufficient basis to make such representations, intending to induce Plaintiff to act or to refrain from acting in reliance upon such representations. These false representations included the statements that Fortrend was really in the debt-collection business; that, after purchasing Westside's stock, Fortrend would employ Westside and its remaining assets in this debt-collection business; that Fortrend would employ Westside's tax liabilities to legitimately offset tax deductions associated with its debt-collection business; that the transaction it was proposing to Plaintiff would result in legitimate tax benefits and a greater net return to Plaintiff than he would otherwise realize; that Fortrend's affiliate Nob Hill would satisfy Westside's tax obligations for the year 2003; that Nob Hill would indemnify Plaintiff if it failed to satisfy these tax obligations; and that Fortrend / Nob Hill had no intention of causing Westside to engage in an IRS reportable transaction.

99. Plaintiff justifiably relied upon such representations in proceeding with the Fortrend transaction described above, and suffered tens of millions of dollars in damages as a result.

100. As reflected by the Rabobank audit and the steep drop-off in the number of Midco transactions it participated in, Rabobank / Utrecht knew that Fortrend was engaged in fraud, but nonetheless knowingly and substantially assisted Fortrend by loaning Fortrend the lion's share of the funds to purchase the Westside shares and by

serving as the conduit through which funds changed hands at closing, all in return for a substantial "fee." Plaintiff was damaged as a result.

101. Given their background and training as sophisticated practitioners in the tax arena, Seyfarth and Taylor also knew that Fortrend was engaged in fraud, but nonetheless knowingly and substantially assisted Fortrend by providing the Seyfarth Opinion Letter "blessing" the DAD scheme that Fortrend used in order to claim a large deduction supposedly offsetting the Westside tax liabilities it had purchased. Fortrend relied upon the Seyfarth Opinion Letter in effectuating this maneuver. Plaintiff incurred damages in excess of $10,000 as a result.

102. Such actions by Rabobank, Utrecht, Seyfarth and Taylor were oppressive, fraudulent and/or malicious; and/or part of a scheme to defraud Plaintiff entered into by such Defendants, entitling Plaintiff to punitive damages.

103. Such actions by Rabobank, Urecht, Seyfarth, and Taylor compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT IV
CIVIL CONSPIRACY
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

104. Plaintiff repeats and realleges paragraphs 1 through 103 set forth above as though fully set forth herein.

105. The forgoing acts and omissions of the Defendants Rabobank, Utrecht, Seyfarth and Taylor (collectively, the "Conspiring Defendants") constitute and were part of an ongoing scheme or artifice to defraud in which the said Conspiring Defendant(s) agreed and conspired with Fortrend to unlawfully defraud the Plaintiff and others by means of false or fraudulent pretenses, representations, omissions, concealments and suppression of facts.

106. The foregoing acts and omissions of the Conspiring Defendant(s) were done in furtherance of the common scheme, and in concert with Fortrend, Vu, McNabola, Midcoast, Rogers and/or the other Conspiring Defendant(s).

107. As a result of the common scheme, Plaintiff has suffered, and will continue to suffer damages in an amount in excess of $10,000, including but not limited to Plaintiff's expenditure of a considerable amount of money in fees and expenses to respond to and defend the examination by the IRS and to litigate the matter in Tax Court, the assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

108. Such actions by Rabobank, Utrecht, Seyfarth and Taylor were oppressive, fraudulent and/or malicious; and/or part of a scheme to defraud Plaintiff entered into by such Defendants, entitling Plaintiff to punitive damages.

109. Such actions by Rabobank, Urecht, Seyfarth, and Taylor compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT V
RACKETEERING – VIOLATION OF NRS 207.400(1)(c)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

110. Plaintiff repeats and realleges paragraphs 1 through 109 set forth above as though fully set forth herein.

111. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone Broadcasting, Westside, First Active and other transactions described above, Rabobank, Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two crimes related to racketeering within five years that have the same or similar pattern,

intents, results, accomplices, victims or methods of commission, or are otherwise related by distinguishing characteristics and are not isolated incidents.

112. These crimes related to racketeering include obtaining possession of money or property valued at $650 or more, or obtaining signature by false pretenses (NRS 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

113. Defendants' actions violate NRS 207.400(1)(c), in that they conducted or participated, directly or indirectly, in the affairs of the enterprise through racketeering activity, or racketeering activity through the affairs of the enterprise. Plaintiff was injured by reason of such violation(s) in an amount in excess of $10,000, and has a cause of action against these Defendants for three times the actual damage sustained, plus attorney's fees and costs of investigation and litigation reasonably incurred, and costs and expenses of the proceeding, pursuant to NRS 207.470 and NRS 207.480.

COUNT VI
RACKETEERING – VIOLATION OF NRS 207.400(1)(h)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

114. Plaintiff repeats and realleges paragraphs 1 through 113 set forth above as though fully set forth herein.

115. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone Broadcasting, Westside, First Active and other transactions described above, Rabobank, Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two crimes related to racketeering within five years that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise related by distinguishing characteristics and are not isolated incidents.

116. These crimes related to racketeering include obtaining possession of money or property valued at $650 or more, or obtaining signature by false pretenses (NRS 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

117. Defendants' actions violate NRS 207.400(1)(h), in that they provided property to another person knowing that the other person intends to use the property to further racketeering activity. Plaintiff was injured by reason of such violation(s) in an amount in excess of $10,000, and has a cause of action against these Defendants for three times the actual damage sustained, plus attorney's fees and costs of investigation and litigation reasonably incurred, and costs and expenses of the proceeding, pursuant to NRS 207.470 and NRS 207.480.

COUNT VII
RACKETEERING – VIOLATION OF NRS 207.400(1)(i)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

118. Plaintiff repeats and realleges paragraphs 1 through 117 set forth above as though fully set forth herein.

119. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone Broadcasting, Westside, First Active and other transactions described above, Rabobank, Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two crimes related to racketeering within five years that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise related by distinguishing characteristics and are not isolated incidents.

120. These crimes related to racketeering include obtaining possession of money or property valued at $650 or more, or obtaining signature by false pretenses (NRS

207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

121. Defendants' actions violate NRS 207.400(1)(i), in that they conspired to violate one or more of the provisions of NRS 207.400. Plaintiff was injured in an amount in excess of $10,000 by reason of such violation(s) and has a cause of action against these Defendants for three times the actual damage sustained, plus attorney's fees and costs of investigation and litigation reasonably incurred, and costs and expenses of the proceeding, pursuant to NRS 207.470 and NRS 207.480.

COUNT VIII
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

122. Plaintiff repeats and realleges paragraphs 1 through 121 set forth above as though fully set forth herein.

123. Approximately $29.9 million of the PUCO settlement proceeds in Westside's bank account were used by Nob Hill to repay the Rabobank / Utrecht loan to Nob Hill. By keeping these funds as part of the improper tax scheme described above, in which they participated, Rabobank and/or Utrecht had and retained a benefit which in equity and good conscience belongs to another, namely, Plaintiff, the sole shareholder of Westside, who was wrongfully drawn into Defendants' scheme, as set forth above.

WHEREFORE, Plaintiff respectfully prays that this Honorable Court enter the following relief in favor of the Plaintiff and against Defendant(s):

A. A judgment for compensatory damages in favor of Plaintiff and against Defendant(s), jointly and severally on all applicable claims in an amount in excess of $10,000 to be determined at trial.

B. A judgment for punitive damages in favor of Plaintiff and against Defendant(s), jointly and severally on all applicable claims in an amount in excess of $10,000 to be determined at trial.

C. A judgment for three times compensatory damages in favor of Plaintiff and against Defendant(s), jointly and severally on all applicable claims in an amount to be determined at trial.

D. Costs of investigation and litigation reasonably incurred;

E. A judgment in favor of the Plaintiff and against such Defendant(s), ordering Rabobank and/or Utrecht, as the case may be, to turn over in restitution the sums unjustly retained, including interest;

F. Attorney's fees and costs and expenses for filing and proceeding with this suit.

G. Any other good and proper relief as this Court deems appropriate.

JURY DEMAND

Plaintiff demands trial by jury on all claims so triable as of right.

DATED this 29th day of April, 2016.

HUTCHISON & STEFFEN, LLC

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Todd W. Prall
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

A-16-735910-B

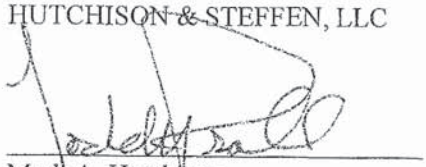
MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. DEPT NO. XV **INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)**

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above-entitled action as indicated below:

MICHAEL A. TRICARICHI, Plaintiff	$1,530.00
TOTAL REMITTED: **(required)**	**$1,530.00**

DATED this 29th day of April, 2016.

HUTCHISON & STEFFEN, LLC



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CLERK OF THE COURT

DMJT

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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 **DEMAND FOR JURY TRIAL**

Plaintiff Michael A. Tricarichi ("Plaintiff") hereby demands a trial by jury in the above captioned case. Pursuant to NRCP 38, Plaintiff deposited with the Court the sum of $400.00 for the juror fees for the first day of trial.

DATED this 17th day of May, 2016.

HUTCHISON & STEFFEN, LLC

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Scott F. Hessell
Thomas D. Brooks
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Chicago, IL 60603

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, LLC and that on this 17th day of May, 2016, I caused the document entitled **DEMAND FOR JURY TRIAL** 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

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Attorneys for Plaintiff

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

ACCEPTANCE OF SERVICE OF COMPLAINT & SUMMONS

Service of Complaint and Summons herein upon Defendant PricewaterhouseCoopers LLP is accepted this twentieth (20th) day of May, 2016, by Pat Byrne, Esq. and Snell & Wilmer, who warrants that he is duly authorized to accept service on behalf of named Defendant PricewaterhouseCoopers LLP specified above.

In return for agreeing to accept service of process, Plaintiffs agrees to provide PricewaterhouseCoopers LLP with an extension of time of 30 days to respond to the complaint. Because a 30 day extension of time results in a response date on a weekend (Saturday, July 9), PricewaterhouseCoopers LLP's response to the complaint will be due on July 11, the immediately following Monday.

The parties reserve, and do not waive, any and all rights concerning all claims and defenses.

Dated: May 20th, 2016

SNELL & WILMER L.L.P.

By: _____

Patrick G. Byrne (Nevada Bar 7636)
Sherry Ly (Nevada Bar 13529)
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Attorneys for Plaintiff

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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 ACCEPTANCE OF SERVICE

Service of Complaint, Demand for Jury Trial, and Summons herein upon Defendant Coöperatieve Rabobank U.A. is accepted this 26th day of August, 2016, by Dan R. Waite, Esq. and Lewis Roca Rothgerber Christie LLP, who warrants that he is duly authorized to accept service on behalf of the Defendant specified above.

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The undersigned also represents Utrecht-American Finance Company.

This acceptance of service is conditioned on Defendants Coöperatieve Rabobank U.A. and Utrecht-American Finance Co. ("Defendants") response to the Complaint being due on October 14, 2016.

By accepting service and/or recognizing service has been completed, Defendants do not waive, and therefore reserve, all defenses available to them, including jurisdictional defenses, other than service of process.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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Las Vegas, Nevada 89169

Attorney for Defendants
Coöperatieve Rabobank U.A. and
Utrecht-America Finance Co.

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Attorneys for Defendant
PricewaterhouseCoopers LLP

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 ANSWER TO COMPLAINT**

Defendant PricewaterhouseCoopers LLP ("PwC") submits its Answer to the Complaint filed by Plaintiff Michael A. Tricarichi as follows:

Snell & Wilmer
LLP.
LAW OFFICES
3883 HOWARD HUGHES PARKWAY, SUITE 1100
LAS VEGAS, NEVADA 89169
(702) 784-5200

ANSWER

INTRODUCTION

1. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 1. To the extent a response is required, PwC denies the allegations.
2. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 2. To the extent a response is required, PwC denies the allegations.
3. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services. PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding Plaintiff's transaction with Fortrend International, LLC (the "Fortrend Transaction"). PwC otherwise denies the allegations in paragraph 3.
4. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 4. To the extent the allegations in paragraph 4 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
5. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 5. To the extent the allegations in paragraph 5 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
6. PwC denies the allegations in paragraph 6 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 6. To the extent the allegations in paragraph 6 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.
7. PwC denies the allegations in paragraph 7 as to PwC. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or

legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 7. To the extent the allegations in paragraph 7 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

8. PwC denies the allegations in paragraph 8 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 8 as to the other defendants. To the extent the allegations in paragraph 8 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

PARTIES

9. PwC denies the allegations in paragraph 9.

10. Regarding the allegations contained in paragraph 10:

    a. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services.

    b. PwC admits that it is a limited liability partnership organized and existing under the laws of Delaware.

    c. PwC admits it is registered with the Nevada Secretary of State to do business in the State of Nevada.

    d. PwC admits that it maintains a Nevada CPA License (PART-0663).

    e. PwC admits that it has one office in, and does business in, the City of Las Vegas.

    f. PwC admits that certain PwC partners reside in the State of Nevada.

11. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 11. To the extent the allegations in paragraph 11 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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12. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 12. To the extent the allegations in paragraph 12 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

13. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 13. To the extent the allegations in paragraph 13 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

14. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 14. To the extent the allegations in paragraph 14 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

THIRD PARTIES

15. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 15. To the extent a response is required, PwC denies the allegations.

16. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 16. To the extent a response is required, PwC denies the allegations.

17. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 17. To the extent a response is required, PwC denies the allegations.

18. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 18. To the extent a response is required, PwC denies the allegations.

19. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 19. To the extent a response is required, PwC denies the allegations.

JURISDICTION AND VENUE

20. Paragraph 20 states a legal conclusion to which no response is required.

21. Paragraph 21 states a legal conclusion to which no response is required.

22. Paragraph 22 states a legal conclusion to which no response is required.

23. Paragraph 23 states a legal conclusion to which no response is required.

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FACTUAL BACKGROUND

Midco Transactions Generally

24. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 24. Paragraph 24 states a legal conclusion to which no response is required. PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16.

25. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 25. PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16.

26. PwC denies the allegations in paragraph 26 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 26 as to the other defendants. To the extent the allegations in paragraph 26 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

The Midco Transaction Into Which Plaintiff Was Drawn

27. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 27. To the extent a response is required, PwC denies the allegations.

28. PwC refers to the referenced legal proceedings and decisions for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the legal decisions and any factual inferences or legal conclusions made by Plaintiff based on the referenced court decisions. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 28. To the extent a response is required, PwC denies the allegations.

29. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 29. To the extent a response is required, PwC denies the allegations.

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30. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 30. To the extent a response is required, PwC denies the allegations.

31. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 31. To the extent a response is required, PwC denies the allegations.

32. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 32. To the extent a response is required, PwC denies the allegations.

33. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 33. To the extent a response is required, PwC denies the allegations.

34. PwC denies the allegations in paragraph 34 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 34. To the extent the allegations in paragraph 34 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

35. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 35. To the extent a response is required, PwC denies the allegations.

36. In response to Plaintiff's characterization of PwC's services, PwC refers to its website, www.pwc.com, for a description of PwC's professional services and its qualifications to provide such services. PwC otherwise denies the allegations in paragraph 36 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 36.

37. PwC admits that on or about April 25, 2003, Plaintiff and PwC entered into an Engagement Agreement. PwC refers to the Engagement Agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Engagement Agreement and any factual inferences or legal conclusions made by Plaintiff based on the Engagement Agreement. PwC otherwise denies the allegations in paragraph 37.

38. PwC denies the allegations in paragraph 38. PwC refers to the referenced court proceedings and opinions for the true and correct contents thereof. PwC denies any

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paraphrasing, summarizing, or characterization of the referenced court proceedings and opinions and any factual inferences or legal conclusions made by Plaintiff based on the court proceedings and opinions.

39. PwC admits that PwC was retained by Plaintiff from April 2003 to August 2003 to provide certain advice pursuant to the Engagement Agreement. PwC further admits that the PwC professionals working on the Engagement included Rich Stovsky, Timothy Lohnes and Don Rocen. PwC admits that PwC professionals worked over 150 hours on the engagement with Plaintiff and that Plaintiff paid approximately $48,000 in fees.

40. PwC denies the allegations in paragraph 40.

41. PwC admits it reviewed certain terms of drafts of the stock purchase agreement. PwC refers to the Engagement Agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Engagement Agreement and any factual inferences or legal conclusions made by Plaintiff based on the Engagement Agreement. PwC is otherwise without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 41. To the extent a response is required, PwC denies the allegations.

42. PwC refers to the stock purchase agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the stock purchase agreement and any factual inferences or legal conclusions made by Plaintiff based on the stock purchase agreement.

43. PwC denies the allegations in paragraph 43 as to PwC. PwC refers to the stock purchase agreement for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the stock purchase agreement and any factual inferences or legal conclusions made by Plaintiff based on the stock purchase agreement. PwC otherwise is without information sufficient to form a belief as to the truth of the allegations in paragraph 43.

44. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 44. To the extent a response is required, PwC denies the allegations.

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45. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 45. To the extent the allegations in paragraph 45 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

46. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 46. To the extent the allegations in paragraph 4 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

47. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 47. To the extent the allegations in paragraph 47 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

48. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 48. To the extent the allegations in paragraph 48 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

49. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 49. To the extent the allegations in paragraph 49 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

50. PwC refers to the relevant publicly available court decisions, referenced in paragraph 50, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the court decisions and any factual inferences or legal conclusions made by Plaintiff based on the referenced court decisions.

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51. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 51. To the extent the allegations in paragraph 51 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

52. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 52. To the extent the allegations in paragraph 52 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

53. PwC denies the allegations in paragraph 53.

54. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 54. To the extent the allegations in paragraph 54 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

55. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 55. To the extent the allegations in paragraph 55 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

56. PwC denies the allegations in paragraph 56 as to PwC. PwC refers to IRS Notice 2001-16 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2001-16 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2001-16. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 56. To the extent the allegations in paragraph 56 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

57. PwC denies the allegations in paragraph 57 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 57. To the extent the allegations in paragraph 57 are addressed to other defendants, PwC

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states that no response is necessary. To the extent a response is required, PwC denies the allegations.

58. PwC denies the allegations in paragraph 58 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the remaining allegations in paragraph 58. To the extent the allegations in paragraph 58 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

With Seyfarth and Taylor's Assistance,
Fortrend Closes the Loop on Its Fraud Post-Closing

59. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 59. To the extent a response is required, PwC denies the allegations.

60. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 60. To the extent a response is required, PwC denies the allegations..

61. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 61. To the extent the allegations in paragraph 61 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

62. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 62. To the extent the allegations in paragraph 62 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

63. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 63. To the extent a response is required, PwC denies the allegations.

64. PwC refers to the Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 64. To the extent the allegations in paragraph 64 are

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addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

65. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 65. To the extent the allegations in paragraph 65 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

66. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 66. To the extent the allegations in paragraph 66 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

67. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 67. PwC refers to the American Jobs Creation Act of 2004 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the American Jobs Creation Act of 2004 and any factual inferences or legal conclusions made by Plaintiff based on the American Jobs Creation Act of 2004. To the extent the allegations in paragraph 67 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

68. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 68. To the extent the allegations in paragraph 68 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

69. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 69. PwC refers to the Tax Court proceeding and Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion. To the extent the allegations in

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paragraph 69 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

70. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 70. To the extent the allegations in paragraph 70 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

71. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 71. To the extent the allegations in paragraph 71 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

72. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 72. To the extent the allegations in paragraph 72 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts

73. PwC denies the allegations in paragraph 73 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 73. To the extent the allegations in paragraph 73 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

74. PwC denies the allegations in paragraph 74 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 74. To the extent the allegations in paragraph 74 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

Plaintiff Is Left Holding the Bag as a Result of the Foregoing Events

75. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 75. To the extent a response is required, PwC denies the allegations.

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76. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 76. To the extent a response is required, PwC denies the allegations.

77. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 77. To the extent a response is required, PwC denies the allegations.

78. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 78. To the extent a response is required, PwC denies the allegations.

79. PwC denies the allegations in paragraph 79 as to PwC. PwC refers to the Tax Court proceeding and Tax Court Opinion for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Tax Court Opinion and any factual inferences or legal conclusions made by Plaintiff based on the Tax Court Opinion.

80. PwC denies the allegations in paragraph 80 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 80. To the extent the allegations in paragraph 80 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT I
GROSS NEGLIGENCE
AS TO PwC

81. Paragraph 81 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 80, inclusive, and incorporates those answers herein by this reference.

82. PwC denies the allegations in paragraph 82.

83. PwC denies the allegations in paragraph 83.

84. PwC denies the allegations in paragraph 84.

85. PwC denies the allegations in paragraph 85.

86. PwC denies the allegations in paragraph 86.

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COUNT II
NEGLIGENT MISREPRESENTATION
AS TO PwC

87. Paragraph 87 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 86, inclusive, and incorporates those answers herein by this reference.

88. PwC denies the allegations in paragraph 88.

89. PwC denies the allegations in paragraph 89.

90. PwC denies the allegations in paragraph 90.

91. PwC denies the allegations in paragraph 91.

92. PwC denies the allegations in paragraph 92.

93. PwC denies the allegations in paragraph 93.

94. PwC denies the allegations in paragraph 94.

95. PwC denies the allegations in paragraph 95.

96. PwC denies the allegations in paragraph 96.

COUNT III
AIDING AND ABETTING FRAUD
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

97. Paragraph 97 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 96, inclusive, and incorporates those answers herein by this reference.

98. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 98. Moreover, the allegations in paragraph 98 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

99. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 99. Moreover, the allegations in paragraph 99 are addressed to other

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defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

100. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 100. Moreover, the allegations in paragraph 100 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

101. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 101. Moreover, the allegations in paragraph 101 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

102. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 102. Moreover, the allegations in paragraph 102 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

103. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 103. Moreover, the allegations in paragraph 103 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT IV
CIVIL CONSPIRACY
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

104. Paragraph 104 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 103, inclusive, and incorporates those answers herein by this reference.

105. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 105. Moreover, the allegations in paragraph 105 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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106. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 106. Moreover, the allegations in paragraph 106 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

107. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 107. Moreover, the allegations in paragraph 107 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

108. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 108. Moreover, the allegations in paragraph 108 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

109. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 109. Moreover, the allegations in paragraph 109 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT V
RACKETEERING – VIOLATION OF NRS 207.400(1)(c)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

110. Paragraph 110 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 109, inclusive, and incorporates those answers herein by this reference.

111. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 111. Moreover, the allegations in paragraph 111 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

112. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 112. Moreover, the allegations in paragraph 112 are addressed to other

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defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

113. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 113. Moreover, the allegations in paragraph 113 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT VI
RACKETEERING – VIOLATION OF NRS 207.400(1)(h)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

114. Paragraph 114 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 113, inclusive, and incorporates those answers herein by this reference.

115. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 115. To the extent a response is required, PwC denies the allegations.

116. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 116. Moreover, the allegations in paragraph 116 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

117. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 117. Moreover, the allegations in paragraph 117 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT VII
RACKETEERING – VIOLATION OF NRS 207.400(1)(i)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

118. Paragraph 118 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 117, inclusive, and incorporates those answers herein by this reference.

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119. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 119. Moreover, the allegations in paragraph 119 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

120. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 120. Moreover, the allegations in paragraph 120 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

121. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 121. Moreover, the allegations in paragraph 121 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

COUNT VIII
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

122. Paragraph 122 is a characterization of the Complaint to which no response is required. To the extent a response is required, PwC denies the allegations. Furthermore, PwC refers to its answers to paragraphs 1 through 121, inclusive, and incorporates those answers herein by this reference.

123. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 123. Moreover, the allegations in paragraph 123 are addressed to other defendants, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

A. PwC denies that Plaintiff is entitled to the requested relief in paragraph A.

B. PwC denies that Plaintiff is entitled to the requested relief in paragraph B.

C. PwC denies that Plaintiff is entitled to the requested relief in paragraph C.

D. PwC denies that Plaintiff is entitled to the requested relief in paragraph D.

E. PwC denies that Plaintiff is entitled to the requested relief in paragraph E.

F. PwC denies that Plaintiff is entitled to the requested relief in paragraph F.

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G. PwC denies that Plaintiff is entitled to the requested relief in paragraph G.

JURY DEMAND

PwC avers that Plaintiff waived his right to jury trial on his claims against PwC pursuant to the Engagement Agreement.

GENERAL DENIAL AND RESERVATION OF RIGHTS

PwC generally denies any allegation not expressly admitted above. When PwC responded that no response was required, it did so in good faith. If there is any dispute over whether a response should have been provided in such circumstances, then PwC hereby denies the allegations. PwC reserves the right to supplement or amend this answer based on the information revealed in discovery. PwC's responses are all subject to the Affirmative Defenses stated below.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Plaintiff's Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitations and statute of repose.

THIRD AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of laches.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of waiver.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrine of *in pari delicto*.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred under the doctrines of collateral estoppel and/or res judicata.

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NINTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the doctrine of comparative negligence/fault.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the intervening and superseding negligence or intentional actions of third-parties.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's breach of the Engagement Agreement.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred because Plaintiff would be unjustly enriched if he were permitted to obtain any recovery in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by Plaintiff's failure to join necessary parties.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced due to Plaintiff's failure to mitigate his own damages.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be reduced by the doctrines of offset and/or contribution.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiff's damages, if any claims succeed, should be limited to the limitation of liability clause in the Engagement Agreement.

RESERVATION OF RIGHT TO ADD AFFIRMATIVE DEFENSES

By alleging the matters set forth below as "Affirmative Defenses," PwC does not thereby allege or admit that it has the burden of proof or the burden of persuasion with respect to any of those matters. PwC presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. Accordingly, PwC hereby gives notice that it intends to rely upon such other and further defenses as may become available or apparent during pre-trial proceedings in this case and hereby reserves its

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rights to assert such defenses. PwC further reserves the right to amend its Answer and affirmative defenses accordingly and to delete affirmative defenses that PwC determines are not applicable during the course of this litigation.

WHEREFORE, Defendant PwC prays for relief as follows:

1. Plaintiff takes nothing by way of his Complaint;
2. That the Complaint be dismissed with prejudice;
3. That PwC be awarded its attorneys' fees and costs; and
4. For such other and further relief as the Court may deem just and proper.

Dated: January 17, 2017.

SNELL & WILMER L.L.P.

By: /s/ Sherry Ly

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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 17, 2017, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO COMPLAINT** 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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/s/ Patricia Larsen
An Employee of Snell & Wilmer L.L.P.

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CLERK OF THE COURT

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Attorneys for Plaintiff

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 **AFFIDAVIT OF MICHAEL A. TRICARICHI IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR SUMMARY JUDGMENT** JURY TRIAL DEMANDED

I, Michael A. Tricarichi, having first been duly sworn upon oath, hereby depose and state as follows:

1. I am over 18 years of age, and otherwise am fully competent to execute this affidavit. I have personal knowledge of all of the facts stated herein.

2. I am the Plaintiff in the above-captioned case.

3. In April 2003, when I was considering a proposed transaction by Fortrend to purchase my shares in Westside Cellular, I asked Pricewaterhouse Coopers LLP ("PwC"), the defendant in this case, to give me advice regarding the proposed transaction. In connection with this request, PwC sent me an engagement letter and asked me to sign it. A copy of the engagement letter is included in Exhibit 2 to PwC's Motion for Summary Judgment filed March 6, 2017 ("PwC's Motion"). (The second page of that exhibit contains some handwritten notes that are not mine.) There were no other drafts of the engagement letter, or of the rider attached to the letter, exchanged with me.

4. PwC's Motion refers to a choice-of-law provision on page 2 of the rider to the engagement letter. There were no negotiations or discussions between me and anyone at PwC regarding the choice-of-law provision. In fact, that provision was not even called to my attention. I had no understanding that New York statutes of limitations might apply to any claims that I might need to bring against PwC, particularly to claims such as those I have filed in this case for PwC's gross negligence. PwC's Motion (at page 9) says that I "affirmed [my] understanding and agreement that the choice-of-law clause governed the relationship between the Parties." I did not do so, and did not understand that, by signing the engagement letter, I was agreeing to have the choice-of-law provision, which had not even been discussed or called to my attention, govern as PwC now says.

5. In addition to federal tax advice regarding the Fortrend transaction, I also sought advice from PwC regarding changing my residence to Nevada. My brother, James Tricarichi,

initially reached out to PwC about these topics on my behalf. PwC did, in fact, give me advice about changing my residence to Nevada, in addition to giving me other advice about the proposed Fortrend transaction. Exhibit G in the Appendix of Exhibits in Support of Plaintiff's Opposition to Defendant Pricewaterhouse Coopers LLP's Motion for Summary Judgment (the "Appendix") is a copy of documents reflecting that such advice was sought and provided. I understand that the PwC personnel providing the advice, including Mr. Stovsky and Mr. Lohnes, were located in PwC's Cleveland and Washington, D.C. offices. I had no dealings with any PwC personnel from a PwC New York office, and understand that PwC personnel from New York did not participate in advising me. PwC's work and advice to me about proceeding with the Fortrend transaction extended into August 2003, after (as PwC knew) I had moved to Nevada in May 2003.

6. In addition to the foregoing points, I understand that other facts justifying my opposition to PwC's motion are unavailable to me without being able to proceed with discovery in this case. These include PwC documents and testimony regarding the origin and intent of the choice-of-law provision in the PwC rider, and possible admissions from PwC (via testimony, documents or both) that (i) there were no negotiations or discussions with me about the choice-of-law provision, (ii) there were no drafts reflecting such negotiations or discussions, and (iii) PwC's New York office had no involvement in advising me.

7. Starting in October 2012, after the IRS sent me a notice of transferee liability in June 2012, PwC entered into a series of retroactive tolling agreements with me. Exhibit I in the Appendix consists of copies of those tolling agreements.

8. After the Tax Court issued its ruling in my case in October 2015, I learned that, in late 1999, PwC had advocated that a similar transaction structure be used in the purchase of the Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; that PwC approached Fortrend to serve as an intermediary in the transaction; and that a Fortrend

affiliate in fact served as an intermediary, purchasing the Bishop stock in a "Midco" transaction that PwC helped negotiate. Exhibit J in the Appendix is a copy of the decision in *Enbridge Energy Co., Inc. v. U.S.*, which makes note of these facts. That decision also notes that, as was the case with my Fortrend transaction, Rabobank facilitated the Bishop transaction by loaning Fortrend the purchase price and serving as the conduit through which funds changed hands at closing, in return for a substantial fee. PwC disclosed none of these facts to me in 2003 or at any point thereafter. Had PwC disclosed these facts to me, I would have proceeded differently with respect to the proposed Fortrend transaction. I now also understand that the Bishop transaction was audited by the IRS starting in late 2003 (but before I had reported the Westside stock sale on any tax returns), and found deficient by the IRS in 2004. PwC did not tell me about this, either.

9. Similarly, PwC did not tell me that, before it gave me contrary advice about the Fortrend transaction, PwC had advised at least one other client *not* to proceed with a similar transaction. I only learned in December 2016 that, in March 2003, before it advised me regarding the proposed Fortrend transaction, PwC had advised another taxpayer, John Marshall, to steer clear of such a transaction. Exhibit K in the Appendix is a copy of the decision in *Estate of Marshall v. Commissioner of Internal Revenue*, which makes note of PwC's conflicting advice. Again, had PwC disclosed these facts to me, I would have proceeded differently with respect to the proposed Fortrend transaction, and not gone ahead with it.

10. I further understand that there are various facts regarding the foregoing points that are also unavailable to me without discovery in this case. These include PwC documents and testimony regarding the Bishop transaction; the Marshall transaction; PwC's review, promotion or advocacy of, or other advice regarding transactions similar to these and to my own transaction; and the reasons why PwC did not make me aware of same – not to mention information regarding what PwC knew or reasonably should have known about the transaction

(but never disclosed to me) and when PwC knew it; and regarding PwC's review of, advice regarding, and involvement in my transaction with Fortrend.

11. It was my understanding when I sought and received PwC's advice about the Fortrend transaction that PwC would continue to be available to assist me should there be subsequent inquiries from the IRS in connection with the transaction. In fact, when I received a notice from the IRS in 2009 that it was looking into the matter, I did reach out and contact PwC.

Further affiant sayeth not.

Michael A. Tricarichi

Subscribed and sworn to before me

this 7th day of April, 2017.

Kevin J. Brennan, Esq. (Ohio S.C.#0075699)

My commission has no expiration date.

O.R.C. §147.03

APEN

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Attorneys for Plaintiff

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 **APPENDIX OF EXHIBITS IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR SUMMARY JUDGMENT** JURY TRIAL DEMANDED

TABLE OF CONTENTS

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EXHIBIT PAGE ONLY

EXHIBIT A

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A PROFESSIONAL LLC

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DISTRICT COURT

CLARK COUNTY, NEVADA

CANTOR G&W (NEVADA) HOLDINGS, L.P., a Delaware limited partnership, CANTOR G&W (NEVADA), L.P., a Nevada limited partnership, CF NOTES, LLC, a Delaware limited liability company, and CANTOR FITZGERALD, L.P., a Delaware limited partnership, Plaintiffs, vs. JOSEPH M. ASHER, an Individual, and BRANDYWINE BOOKMAKING LLC, a Delaware limited liability company; DOES 1 through 5; and ROE BUSINESS ENTITIES 6 through 10, Defendants.	Case No.: A-11-646021-B Dept. No.: XIII **ORDER:** **DENYING DEFENDANTS/ COUNTERCLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING PLAINTIFFS' CLAIMS FOR (1) BREACH OF CONTRACT (2) BREACH OF FIDUCIARY DUTY (3) UNJUST ENRICHMENT AND (4) AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY; AND** **GRANTING PLAINTIFFS/ COUNTERDEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS AFFIRMATIVE DEFENSE**
JOSEPH M. ASHER, an Individual, Counterclaimant vs. CANTOR G&W (NEVADA) HOLDINGS, L.P., a Delaware limited partnership, CANTOR G&W (NEVADA), L.P., a Nevada limited partnership, CF NOTES, LLC, a Delaware limited liability company, and CANTOR FITZGERALD, L.P., a Delaware limited partnership, DOES I- X; and ROE ENTITIES I-X, inclusive, Counterdefendants.	Date of Hearing: September 19, 2013 Time of Hearing: 9:00 a.m.

PISANELLI BICE
3883 HOWARD HUGHES PARKWAY, SUITE 800
LAS VEGAS, NEVADA 89169

Before this Court is Defendants/Counterclaimant's Motion for Partial Summary Judgment Regarding Plaintiffs' Claims for (1) Breach of Contract (2) Breach of Fiduciary Duty (3) Unjust Enrichment and (4) Aiding and Abetting a Breach of Fiduciary Duty ("Motion") and Plaintiffs/Counterdefendants' Counter Motion for Partial Summary Judgment on Defendants/Counterclaimants' statute of limitations affirmative defense ("Countermotion"). Todd L. Bice, Esq., and Jarrod L. Rickard, Esq. of the law firm Pisanelli Bice PLLC, appeared on behalf of the Plaintiffs/Counterdefendants Cantor G&W (Nevada) Holdings, L.P. ("CGW Holdings"), Cantor G&W (Nevada), L.P. ("CGW Nevada"), CF Notes, LLC ("CF Notes"), and Cantor Fitzgerald, L.P. ("Cantor Fitzgerald") (collectively, "Cantor") and Nicholas J. Santoro, Esq. and Oliver Pancheri, Esq. of the law firm Santoro Whitmire, Ltd. appeared on behalf of Defendants/Counterclaimants Joseph M. Asher ("Asher") and Brandywine Bookmaking, LLC ("Brandywine") (collectively, "Asher").

Good cause appearing, the Court denies Asher's Motion and grants Cantor's Countermotion for the following reasons:

1. Asher was a limited partner in Cantor Fitzgerald pursuant to the Agreement of Limited Partnership of Cantor Fitzgerald, amended and restated as of May 21, 2004 (the "CFLP Agreement").

2. Subsequently, Asher also became a limited partner in CGW Holdings pursuant to the Agreement of Limited Partnership of CGW Holdings, dated as of September 27, 2004 ("CGW Holdings Agreement").

3. Asher's Motion focuses on the choice of law provision contained at Section 20.07 of the CGW Holdings Agreement. This provision states:

> **Applicable Law. THIS AGREEMENT AND THE RIGHTS OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS.**

4. The parties agree that this choice of law provision is enforceable, without conceding or agreeing upon the interpretation and/or enforceability of other terms contained in the CFLP Agreement and the CGW Holdings Agreement.

5. Cantor filed its original Complaint against Asher on August 2, 2011, alleging claims for: (i) breach of contract; (ii) breach of fiduciary duty; (iii) unjust enrichment; (iv) aiding and abetting breach of fiduciary duty; and (v) breach of contract for failure to pay on promissory notes.

6. Asher's Motion claims that Cantor's claims, with the exception of its claim for breach of contract for failure to pay on promissory notes, are barred by the applicable statute of limitations.

7. Whether Nevada or Delaware's statute of limitations applies is a threshold issue for Asher's Motion and Cantor's Countermotion. The parties agree that if Nevada's statute of limitations applies, Asher's Motion fails.

8. Pursuant to NRCP 56, summary judgment "shall be entered forthwith" where there is no "genuine issue as to any material fact . . . and the moving parties entitled to judgment as a matter of law."

9. The defense that a claim is barred by the statute of limitations is a procedural matter governed by the law of the forum. *Seely v. Illinois-California Express, Inc.*, 541 F. Supp. 1307, 1309 (D. Nev. 1982); *see also Tipton v. Heeren*, 109 Nev. 920, 922 n.3, 859 P.2d 465, 466 n.3 (1993) (where there is a valid choice of law agreement, the chosen state's laws govern substantive issues, but Nevada law governs the procedural issues).

10. Although Asher claims that the parties' choice of Delaware law includes Delaware's statute of limitations, Section 20.07 applies to "THIS AGREEMENT AND THE RIGHTS OF THE PARTIES HEREUNDER . . . ." In *Wilcox v. Williams*, 5 Nev. 206, 211 (1869), the Nevada Supreme Court held that "the Statute of Limitations applies only to a remedy, and not to a right or obligation."

11. Moreover, even under Delaware law, a choice of law "provision[] will only include the statute of limitations of the chosen jurisdiction if their inclusion is specifically noted." *Juron*

PISANELLI BICE
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LAS VEGAS, NEVADA 89169

v. Bron, No. Civ.A. 164642000, WL 1521478 at *11 (Del. Ch., Oct. 6, 2000). Here, the parties' choice of law provision does not incorporate the statute of limitations of the chosen jurisdiction.

In light of the foregoing,

THE COURT HEREBY ORDERS, ADJUDGES AND DECREES that Asher's Motion is DENIED;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Cantor's Countermotion is GRANTED.

IT IS SO ORDERED.

DATED: November 26, 2013

THE HONORABLE MARK R. DENTON
EIGHTH JUDICIAL DISTRICT COURT

Respectfully submitted:

PISANELLI BICE PLLC

By: _____
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Jarrod L. Rickard, Esq., Bar No. 10203
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Attorneys for Plaintiffs/Counterdefendants

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EXHIBIT B

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. ASHER; AN INDIVIDUAL; AND BRANDYWINE BOOKMAKING, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

No. 67767

FILED

APR 21 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION

This is a petition for a writ of mandamus, or in the alternative, prohibition, directing the district court to apply Delaware's statute of limitations on contract disputes to a contract containing a choice-of-law provision favoring Delaware law. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

After considering the petition, briefs, parties' oral arguments, and post-hearing motions, we conclude that our extraordinary relief is not warranted at this time. Accordingly we

ORDER the petition DENIED.

Douglas, J.
Douglas

Cherry, J.
Cherry

Gibbons, J.
Gibbons

cc: Hon. Mark R. Denton, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Santoro Whitmire
Pisanelli Bice, PLLC
Eighth District Court Clerk

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EXHIBIT C

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. ASHER; AN INDIVIDUAL; AND BRANDYWINE BOOKMAKING, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

No. 67767

FILED

JUL 28 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Cherry, J.
Cherry

Douglas, J.
Douglas

Gibbons, J.
Gibbons

SUPREME COURT
OF
NEVADA

(O) 1947A

16-23562

cc: Hon. Mark R. Denton, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Santoro Whitmire
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Eighth District Court Clerk

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EXHIBIT D

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. ASHER; AN INDIVIDUAL; AND BRANDYWINE BOOKMAKING, LLC, A DELAWARE LIMITED LIABILITY COMPANY,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
CANTOR G&W (NEVADA) HOLDINGS, L.P., A DELAWARE LIMITED PARTNERSHIP; CANTOR G&W (NEVADA) HOLDINGS, L.P., A NEVADA LIMITED PARTNERSHIP; CF NOTES, LLC, A DELAWARE LIMITED LIABILITY COMPANY; AND CANTOR FITZGERALD, L.P., A DELAWARE LIMITED PARTNERSHIP,
Real Parties in Interest.

No. 67767

FILED

OCT 21 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING EN BANC RECONSIDERATION

Having considered the petition on file herein, we have

concluded that en banc reconsideration is not warranted. NRAP 40A. Accordingly, we

ORDER the petition DENIED.

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Gibbons, J.

Pickering, J.

cc: Hon. Mark R. Denton, District Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Santoro Whitmire
Pisanelli Bice, PLLC
Eighth District Court Clerk

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EXHIBIT E

HUTCHISON & STEFFEN

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Attorneys for Plaintiff

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 **AFFIDAVIT OF MICHAEL A. TRICARICHI IN SUPPORT OF (1) PLAINTIFF'S OPPOSITION TO DEFENDANTS RABOBANK AND UTRECHT'S MOTION TO DISMISS, AND (2) COUNTER-MOTION FOR LEAVE TO TAKE JURISDICTIONAL DISCOVERY** JURY TRIAL DEMANDED

I, Michael A. Tricarichi, having first been duly sworn upon oath, hereby depose and state as follows:

1. I am over 18 years of age, and otherwise am fully competent to execute this affidavit. I have personal knowledge of all of the facts stated herein.

2. I am the Plaintiff in the above-captioned case.

3. I have been a resident of Las Vegas, Nevada, since May 2003.

4. I purchased and (with my family) moved into a home at 341 Arbour Garden Avenue in Las Vegas in May 2003. Exhibit A in the Appendix of Exhibits in Support of Plaintiff's Opposition to Defendants Rabobank and Utrecht's Motion to Dismiss (the "Appendix") are records from the Clark County Assessor's Office reflecting this purchase.

5. In June 2003 I obtained a Nevada driver's license. Exhibit B in the Appendix is a receipt, dated June 24, 2003, reflecting this.

6. In June 2003 I registered to vote in Nevada. Exhibit C in the Appendix is a copy of my voter registration application dated June 24, 2003.

7. I changed the insurance on my vehicle to reflect my Nevada address in July 2003. Exhibit D in the Appendix is a Nevada motor vehicle insurance card reflecting this, dated July 14, 2003. I also changed the registration on my vehicle to reflect my Nevada address in August 2003. Exhibit E in the Appendix is a receipt reflecting this, dated August 13, 2003.

8. In addition to doing these things upon moving to Nevada, at that time I also, for example, changed my mailing address to my Nevada address and opened bank and utility accounts in Nevada.

9. Since moving to Nevada in May 2003, including during the period May – September 2003, I have spent most of my time physically present in Nevada.

10. Exhibit F in the Appendix is a copy of the letter of intent that Fortrend affiliate Nob Hill Holdings, Inc. ("Nob Hill") sent to me in Las Vegas, Nevada on or about July 22,

2003, in connection with Nob Hill's purchase of all the stock in my company, Westside Cellular, Inc. ("Westside").

11. During the negotiation of the stock purchase, I was informed that Nob Hill would be financing most of the purchase price via Rabobank, and that Westside would need to open a Rabobank escrow account in order to facilitate the closing if the transaction went forward. Exhibit H in the Appendix are account opening documents for that Westside account, dated August 19, 2003, which I completed and signed then at Rabobank's request.

12. Exhibit I in the Appendix is a copy of an amendment of the letter of intent that Nob Hill sent to me in Las Vegas, Nevada on or about August 28, 2003.

13. During the stock-purchase negotiations, I had asked that Nob Hill, as part of the closing, transfer the purchase price for my stock to my account at Pershing bank. Nob Hill did not object to this request.

14. As the closing approached, however, Rabobank, which I understood was loaning most of the purchase price to Nob Hill, said that it would not proceed with the transaction if the purchase price was going to be transferred directly to my Pershing account. Rabobank said that, in order for the purchase funds to be released to me, it wanted to make sure that I resigned as a director and officer of Westside. Rabobank said that it wanted me to resign so that I would not have control over the Westside account at Rabobank post-closing. I was reluctant to resign, however, without first knowing that I had received the purchase price.

15. Rabobank then told me that Rabobank needed me to open another account, in my name, at Rabobank. Rabobank said that the purchase price it was loaning Nob Hill would be placed into this account by Nob Hill while I submitted my resignation as a Westside director and officer into escrow; and that Rabobank would then release the purchase funds in the account to me per my instructions.

16. So Rabobank sent me documents to open this account. Exhibit M in the Appendix is a copy of the account opening documents which I received from Rabobank, and which I returned to Rabobank in early September 2003. The documents reflect my residence in Nevada.

17. Before the closing of the stock purchase, I sent my resignation to Rabobank, noting that the resignation was not effective until such time as the purchase price had been credited to my account at Rabobank. This is reflected in Exhibit N to the Appendix, which contains a copy of a letter and resignation I sent to Rabobank.

18. At this time, I also sent instructions to Rabobank for release of the purchase price from my Rabobank account to my account at Pershing. Exhibit O in the Appendix includes a copy of those instructions.

19. The stock purchase closed on September 9, 2003. Exhibit P in the Appendix is a copy of the Stock Purchase Agreement between Nob Hill, as buyer, and myself, as seller, dated as of September 9, 2003

20. Rabobank released the purchase price to my Pershing account per my instructions, and my resignation from Westside became effective.

Further affiant sayeth not.

Michael A. Tricarichi

Subscribed and sworn to before me

this 6th day of December, 2016.

Kevin J. Brennan, Esq. (SC#0075699)
My commission has no expiration date O.R.C.§147.

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EXHIBIT PAGE ONLY

EXHIBIT F

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

968

Petitioner?
MR. DESMOND: We have no cross on the questions you did ask regarding his work experience and formal education.
THE COURT: Mr. Klink, you are dismissed.
THE WITNESS: Thank you, Your Honor.
MS. WILLIAMS: Your Honor, Respondent requests --
THE COURT: Yes, before we -- I think, as I mentioned before, I'm not going to rule on the relevancy objections now. But they have been preserved, and I will address them if necessary in the opinion. What I would propose is that if Respondent, I think we're going to have simultaneous opening briefs in this case, we'll talk about that later, but I would request that any use Respondent proposes to make of Mr. Klink's testimony be made in your opening brief. And if you do make use of it, Petitioner can respond to it in their response brief and I will address it in the opinion. If you do not use any of his testimony in your opening brief, I will decide and will deem you not to have -- that it won't be necessary to address that question. Because I don't want to have to rule on it if I don't have to rule on it. So in other words, if you don't feel

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like you need it in your opening brief, then we'll just deem the issue to have been gone away.
MS. WILLIAMS: Thank you, Your Honor.
THE COURT: Very good.
MS. WILLIAMS: Your Honor, Respondent requests a 15-minute break.
THE COURT: Okay. And what's next?
MS. LAMPERT: Your Honor, that's what we're going to discuss.
THE COURT: Good luck.
MS. LAMPERT: Thank you.
(Court in recess at 10:43 a.m.)
(Court resumes at 11:16 a.m.)
MS. LAMPERT: Your Honor, I'd like to make a few representations for the record, so that you can understand why we didn't call some of the witnesses today, and then we'll rest our case. We attempted to call Alice Dill-Wendland to the stand for her testimony. And we believe she's located in Bali. We contacted our foreign tax attachthat covers Bali and have been unable to locate her to serve her with a subpoena to appear. We have also attempted to call John McNabola to the stand. I believe that we've also heard testimony that we believe he's in Ireland. We contacted our foreign tax attachthat covers

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Ireland, and we were unable to serve him. We have also attempted to call Graham Taylor, who was with C. Farkland Shaw I believe, and we have contacted his attorney. And it is our understanding from the last time that we talked to his attorney that he is out of the country in Australia, so we have been unable to serve him as well. Those are my representations for the record. We are ready to rest our case, Your Honor.
THE COURT: Okay. And Petitioner, you may put on what is left of your case.
MR. RIDLEHOOVER: Thank you, Your Honor. I don't think it'll take too long. At this time we call James Tricarichi to the stand.
WHEREUPON,
JAMES TRICARICHI
Called as a witness, and having been first duly sworn, was examined and testified as follows:
THE COURT: And he is the last witness?
MR. RIDLEHOOVER: We have our (INAUDIBLE)
THE COURT: They don't have to give any exclusion advise?
MR. RIDLEHOOVER: No. There are no more fact witnesses, Your Honor.
THE COURT: All right. Very good.

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THE CLERK: State your name and address.
THE WITNESS: Jim Tricarichi. 17558 Merry Oaks Trial, Scranton Falls, Ohio 44023.
DIRECT EXAMINATION OF JAMES TRICARICHI
BY MR. RIDLEHOOVER:
Q Good morning, Mr. Tricarichi. Thank you for being here. My name is Brad Ridlehoover. I'm an attorney for the Petitioner. I think we can establish that you do know the Petitioner.
A Yes, I do.
Q How do you know the Petitioner?
A He's my brother.
Q Thank you. Mr. Tricarichi, where are you originally from?
A Cleveland. Suburbs of Cleveland.
Q And did you go to high school in Cleveland?
A Yes, Bedford Heights High School.
Q And where did you take college?
A College, I attended John Carroll for two years until my father passed away, and then I graduated from Kent State.
Q And after finishing college, can you please describe to the Court your general work experience?
A First job out of college I started entry level. I was working for a company called Dunn

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proposal with anyone in particular?
A There was, you know, like I said, it was all new to me, the process and everything. And I knew the guy that I played golf with, he had a CPA firm. And I don't remember what the circumstances were that I talked to him about this meeting. And he said before you do anything with them, I have another firm you need to talk to. And that was Fortrend.
Q And who's the individual you were talking about?
A Don Jesco.
Q Don Jesco is what type of professional you said?
A He has his own CPA practice the east side of Cleveland.
Q And at some point, did Mr. Jesco put someone in touch with Fortrend?
A He had some other guy, Gary Zwick, I believe his name is. I don't know if they did dealings; I can't recall. But they're the ones that introduced Fortrend to me. Which I in turn passed the information onto Mike and whoever else.
Q So you had no prior experience with Fortrend before this?
A No.

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Q Or Midcoast?
A No.
Q Did you have any general understanding of what Fortrend was planning to do or offer to do?
A I think it was very similar. But again, I don't recall the details of, you know, or nor really understood what they were proposing.
Q And you conveyed this introduction or someone introduced it to your brother?
A Yes.
Q And after this introduction to Fortrend, did they make any type of proposal that you know of?
A Yes, there was some kind of proposal that was based on some kind of formula that they had. And I think at that time, they were all estimates. But I can't recall the detail.
Q Were they offering to also purchase the stock like Midcoast?
A I think they were similar, but I'm not sure; I don't remember.
Q All right. As far as once these two proposals came in, did you make any recommendations to your brother about these proposals?
A Yes, I recommended that he engage PWC to get a second opinion on the transaction.

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Q And you say second opinion. Who was giving --
A Well, Hahn Loeser.
Q Hahn Loeser. And that's law firm?
A That he was using, yes.
Q Did you know the law firm?
A I knew one of the partners in the law firm, that was it.
Q Which partner?
A Randy Hart.
Q And who at PWC did you ask your brother or suggest your brother speak to?
A Rich Stovsky.
Q And who is Mr. Stovsky?
A Rich is, now he's the director of their national for their private clients. But at that time I think he was just a regular partner. But he was a tax partner originally.
Q And you had some dealings or experience with him?
A Yes. I hired him in 1990 when he was with Coopers to do our audit and tax book. The company I was working for.
Q Oh, the company you worked for. Let's turn in your exhibit binder there 103. Let me know when

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you get it.
A First page?
Q Yes, first page.
A Okay.
Q Can you identify this document for the Court?
A It looks like an email I sent to Rich telling him that we needed to add on the debts and document.
Q And what's the date on this email?
A 4-8-2003.
Q Let's just turn to page 2, which I believe we've agreed to a tax shield that came out. Can I give you this document?
A Yes. Yes. You've got statements of account.
Q Sorry. Do you recognize this document?
A Yes.
Q All right. And what is the purpose of this document?
A This is the points that I thought were relevant, again, that he should have looked at, the two deals, one from each company. Because there were basically two offers. The second one, I'm not going in order, because it's hard for me to see.

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EXHIBIT PAGE ONLY

EXHIBIT G

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

"Jim Tricarichi" <jtricarichi@softflexinc.com>
04/08/2003 01:33 PM

To: Richard P Stovsky/US/TLS/PwC@Americas-US
cc: "Anthony J. Tricarichi \(E-mail\)" <atricarichijr@kpmg.com>
Subject: Tax issues

Please respond to jtricarichi

1 attachment

Tax Issues for Cellnet and Mike Tricarichi.doc

Rich,

Attached are the tax issues we need to have you help us with. I will call you at 4:30 pm Today.

Thanks,

Jim Tricarichi
SoftFlex, Inc.
Cell: 216-978-9008
Office: 216-514-4900
Fax: 216-765-0885
www.softflexinc.com

Tax Issues for Cellnet and Mike Tricarichi

1. Engage PWC to advise on the possible sale of Mike Tricarichi's stock in Cellnet to one of two companies. The companies are Mid Coast and Fortrend. We want to set up conference calls on Thursday, April 10. The purpose of the call is so PWC can understand the transaction and advise us on the potential tax issues and the associated risks to Mike Tricarichi.
2. If the stock is sold, the issue of change of residence to Nevada becomes on issue. Advise on what the requirements the State of Ohio would look at once they realize no taxes would be paid to Ohio. Examples of issues: how long does Mike need to live in Nevada. Does he need to show permanent intent to live in Nevada? Would he have to sell his home in Chesterland? Please provide a list of items the State of Ohio would scrutinize.
3. Compensation to key employees and if there are issues for excess compensation regarding deductions for wages at the corporate level. See table below.

Title	Annual Wages	Propsed Bonus
Operations Mgr.	81,000	2,500,000
Controller	80,000	2,000,000
Credit mgr./Attorney	76,000	1,500,000

4. If the stock is not sold and the C Corp. continues to operate, what can be done to mitigate the tax liability.

David L Cook
05/19/2003 01:08 PM
216-875-3027
Cleveland
US

To: Ray Turk/US/TLS/PwC@Americas-US
cc:
Subject: Re: Tricarichi Memo

Ray,

You were right. I checked up on the Nevada homestead exemption and it appears that they don't have one like Florida does. I did verify previously that they do have a "statement of domicile" of all things, but should have also checked the property exemption. Sorry for the slip. I have removed the line item from the checklist, which is re-attached below along with the CCH discussion on the lack of the property exemption.

I'll keep an eye out for your suggested revisions.

Dave

NV residency conversion checklist.d No NV Homestead Exemption

----- Forwarded by David L Cook/US/TLS/PwC on 05/19/2003 01:05 PM -----

Ray Turk
05/19/2003 07:26 AM
216-875-3074
Cleveland, Ohio
US

To: David L Cook/US/TLS/PwC@Americas-US
cc:
Subject: Re: Tricarichi Memo

Dave
I looked at the memo over the weekend and will pass along a version to you and Rich with some suggested changes later today. Nothing major, as usual you did a great job with it. One small question on the attachement. Does Nevada have a homestead exemption? I did not think all states did. If you could just double check that. Thanks
<Removed files: Ohio Taxation of Gain.doc, NV residency conversion checklist.doc>

David L Cook

David L Cook
05/16/2003 11:37 AM
216-875-3027
Cleveland
US

To: Richard P Stovsky/US/TLS/PwC@Americas-US, Ray Turk/US/TLS/PwC@Americas-US
cc:
Subject: Tricarichi Memo

Rich and Ray,

Attached for your review is the my final version of the memo. I have NOT yet sent this to Jim, as I assumed that you would prefer to see if first, especially with respect to the installment sale issue.

Please contact me with any questions.

Dave

EXHIBIT 11-J

PWC-WS 0035

David L Cook
05/20/2003 09:11 AM
216-875-3027
Cleveland
US

To: Richard P Stovsky/US/TLS/PwC@Americas-US
cc: Ray Turk/US/TLS/PwC@Americas-US
Subject: Tricarichi Memo

Rich,

Attached are the final versions of the memo and the residency conversion checklist. Ray has reviewed, revised, and approved of the memo, so it should be complete unless you have any changes of your own. Are you comfortable with our conclusion that the installment sale doesn't really create any state benefit for us?

Dave


Tricarichi Ohio Taxation of Gain (final).c


NV residency conversion checklist.d

EXHIBIT 12-J

PWC-WS 0038

PRICEWATERHOUSECOOPERS

Memo

To: / Location:	Taxpayer File / Cleveland BP Tower
From: / Location:	Cleveland SALT Group / Cleveland BP Tower
Date:	May 16, 2003
Subject:	Ohio Taxation of Capital Gain from the Sale of Stock

FACTS

The Taxpayer is a 100% owner of a C corporation that has operations primarily in Ohio. The Taxpayer will be selling the stock of the C corporation, which will result in a significant gain of approximately $50,000,000. The sales contract will most likely be signed on or about July 1, 2003. The sale of stock may be made on an installment sale basis with a small portion of the gain being recognized in 2003 and the remainder of the gain being recognized in 2004.

The Taxpayer is currently an Ohio resident, and owns a home in Ohio where he lives with his wife and two children. The Taxpayer recently purchased a house in Nevada and plans to move his family into that house at some future date in 2003. The Taxpayer will not sell the Ohio house, but will maintain it as a second or vacation home.

The Taxpayer also owns other S corporations with business operations in Ohio. Additionally, the Taxpayer may start a new real estate investment business, with operations likely to be in Ohio, with some of the proceeds from the sale.

ISSUE

I. What is the Ohio tax treatment of capital gain income for Ohio residents and non-residents?

II. What steps does the Taxpayer need to take to change residency and assure that the gain will not be taxable in the State of Ohio?

III. If a portion of the federal gain is recharacterized as ordinary income related to services performed, what is the Ohio taxation impact?

CONCLUSION

I. Ohio residents are subjected to taxation on all items of income, including capital gain income. Non-residents are taxable only on items of income that are

EXHIBIT 13-J

PWC-WS 0039

considered earned or received in Ohio, determined by a set of explicit allocation and sourcing rules. For a non-resident taxpayer, capital gain income attributable to the sale of intangible property is allocated to Ohio if the taxpayer was domiciled in Ohio at the time of the sale.

II. In order to have any viable position that the Taxpayer's change in residency has occurred and to assure that the gain will not be taxable by the State of Ohio, the Taxpayer needs to complete the following steps: (1) Take ownership of the new Nevada home prior to the stock sale; (2) Physically move into the new Nevada home prior to the stock sale; and (3) have fewer than 120 contact periods in Ohio during the 2004 calendar year. In addition, if the Taxpayer's family could also physically move with him to the new Nevada home prior to the stock sale, it would significantly strengthen his position. Finally, a number of additional steps, identified on Attachment 1, would be helpful in building evidential support for the position. Completion of as many of these steps as possible is highly recommended.

III. If the federal gain is recharacterized as ordinary income related to services performed, then the gain would be taxable to Ohio if the services were performed in Ohio. If the services were performed outside Ohio after residency conversion, then the gain would not be taxable in Ohio. Since the C corporation's business is based in Ohio and it is likely that the ordinary income is for prior services performed in Ohio, it is most likely that the ordinary income would be taxable for Ohio purposes.

ANALYSIS

I. Taxation of Capital Gains

Ohio residents are subjected to taxation on all of their income, regardless of where it is earned or what the income is related to (with the exception of specifically exempted items such as federal interest income, etc.). To the extent that a resident's income is subjected to taxation in another state, the resident will receive a credit against the Ohio tax liability computed on the same income.

Non-residents are essentially subjected to taxation on only income that is earned or received in Ohio. As part of the non-resident credit computation, a non-resident allocates his total income between Ohio-sourced income, which is ultimately taxable, and non-Ohio sourced income, which is not subjected to taxation. In determining how capital gains are sourced, the Ohio statutes provide guidance. Capital gains are considered non-business income, pursuant to Ohio Revised Code (ORC) §5747.01(c), which states:

> ""Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards." (Emphasis added).

Non-business income items are subject to explicit allocation rules, and ORC §5747.20(B)(2)(c) states that "capital gains or losses from the sale or other transfer or intangible personal property are allocable to this state if the taxpayer's domicile was in this state at the time of such sale or other transfer." (Emphasis added). Accordingly, if the Taxpayer is domiciled in Ohio at the time of the sale that generated the capital gain, the gain will be allocated or sourced to Ohio and subjected to taxation. However, if the Taxpayer is not domiciled in Ohio at the time of the sale, which is generally the case for non-residents, the gain will not be allocated to Ohio and will not be subjected to tax. There are some special rules for taxation of capital gains from the sale of an interest in a pass through entity that are discussed below, but those rules are not applicable here with the sale of C corporation stock.

II. Steps to Change Residency

In the vast majority of cases, it is very clear when a person has changed his or her residence: They purchase a new house, sell the old one, pack up and move their belongings to the new home. In these situations, there is little doubt that the person has changed their domicile, and almost nothing for the former state of residence to challenge. Furthermore, the timing of the change is generally clear as well, based upon the date when the individual moved into the new home.

But what about a situation where the individual maintains a significant number of ties back to the old state of residence, including maintaining the original home? And what if there is a significant difference in the tax liability of the individual if he or she is determined to still be a resident of the old state? In these cases, the facts become less clear, and there is a significant motivation for the former state of residency to argue that the individual is still a resident and subject to taxation. It is exactly this "vague" situation that we must address in order to determine what steps the Taxpayer should take to minimize the likelihood of Ohio being able to subject the gain to taxation.

Ohio Bright Line Test

In 1993, Ohio enacted ORC §§ 5747.24 and 5737.25, commonly referred to as the "Bright-Line" Test. These statutes were meant to address the residency status of a growing number of "snow-birds," former Ohio resident individuals that spend the summers in Ohio and the winters in Florida. The statutes provide a clear numerical standard to determine an individual's residency status in a given year:

1. A person in Ohio for less than 120 contact periods[1] is presumed to be a non-resident.
2. A person in Ohio between 120 and 183 contact periods is presumed to be a resident, but this position may be rebutted with a "preponderance of evidence" to the contrary.
3. A person in Ohio for 183 or more contact periods is presumed to be a resident, but this position may be rebutted with "clear and convincing evidence" to the contrary.

Unfortunately, the Bright Line Test is not applicable in the year of a change in residency, because an individual will be both a resident and a non-resident for some portion of the year. Therefore, while the Bright Line Test will be relevant to the Taxpayer for 2004 and future tax years, it does not help us determine exactly when a change in residency occurs in the year of transition. Furthermore, even the non-resident presumption associated with fewer than 120 contact periods is based upon the ability of the individual to claim that he or she was not "domiciled" in Ohio at any time during the year[2].

Determination of Domicile

ORC §5747.01(I)(1) defines a "resident" of the state as "an individual who is domiciled in this state." However, the critical term "domicile" is never statutorily defined, leaving it open to interpretation. Case law in Ohio and other states, as well as statutes in other states, have tended to define "domicile" as the "the place to which an individual intends to return." Therefore, an evaluation of a person's intentions is effectively drawn into the analysis, which, because intentions are difficult if not impossible to prove, is generally based upon the facts and circumstances of each specific case.

One of the most basic tenets in residency case law is that in order to complete a change in residency, a new domicile must be established before the old domicile can be abandoned[3].

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[1] Pursuant to ORC §5747.24(A)(1)(a) and (b), an individual has "one contact period in Ohio" if the individual is away overnight from her/his abode located outside this state and while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days in this state.

[2] Pursuant to ORC 5747.24(B) the Tax Commissioner may require the Taxpayer submit an affidavit under penalties of perjury stating that during the entire taxable year, the Taxpayer (1) was not domiciled in Ohio and (2) had at least one abode outside the state.

[3] In fact, there are a number of cases where an individual on an extended assignment in a foreign country has sold their home and placed all their property in storage, subsequently claiming that they are no longer a resident of the state. However, because they had never established a new domicile in a different state or country and did not

Clearly, a new domicile must be established in order to have a new residence to move to, but how absolutely must the old domicile be "abandoned" in order to convince the former state of residence that domicile has truly changed? If the former residence is retained as a vacation home or second residence, does it essentially become impossible to change the state of domicile?

Obviously, keeping the original home is a hurdle that must be overcome, but it is not impossible to effectuate a domicile change in this situation. Again, the case law indicates that each situation is based upon the facts and circumstances. It is important to remember that the Taxpayer is essentially building a position, and that each favorable fact or circumstance supporting a change to Nevada domicile will strengthen the argument. However, the converse is also true. Therefore, it is critical to amass as much favorable evidence as possible, especially when there are unfavorable facts and circumstances (such as the retention of the original home or ties back to the original domicile) that must be overcome.

It is also important to note that, based upon the normal audit cycle, the State of Ohio is not likely to complete a review or audit of the Taxpayer's return and filing position for several years. It would not be unusual for the 2003 return, which is generally filed in calendar year 2004 and open under the statute of limitations through 2008, to not be reviewed until 2006 or 2007. Therefore, the Taxpayer should be aware that actions in future years may very well have an impact upon the residency determinations for 2003 and 2004. Specifically, if the Taxpayer relocates back to the original home in Ohio in 2005, after a two-year absence, this fact will be considered in the residency determination for 2003. Remember that an individual's intentions are a critical component in a determination of domicile, and the state would have a strong argument that the Taxpayer never truly intended to abandon the Ohio domicile, but merely was temporarily absent during a period of years when, coincidentally, his income was very high.

Accordingly, based upon the above discussion and a review of the relevant case law, the following steps should be completed by the Taxpayer to put himself in the best possible position. Again, it should be noted that completion of the following steps prior to the sale in 2003 does not guarantee a favorable result for 2003, and that all of the facts and circumstances, including actions in the future, will impact the ultimate determination.

Required Steps

At a minimum, the following steps must be taken in order to meet the basic requirements to change the Taxpayer's domicile from Ohio to Nevada. Failure to complete these steps will result in the Taxpayer clearly being considered an Ohio resident and subject to taxation on the gain. For simplicity, all of the steps have assumed that the stock sale contract is signed on July 1, 2003.

---

intend to reside permanently in the country to which they were temporarily assigned, the courts held that they were still a resident and subject to taxation.

1. Taxpayer must acquire a new Nevada residence (home) before July 1, 2003.
2. Taxpayer must physically move from Ohio to the new Nevada residence before July 1, 2003.
3. Taxpayer must have less than 120 contact periods with Ohio during 2004. This will prevent the Taxpayer from being presumed to be an Ohio resident during 2004 as a result of greater than 120 contact periods.

Beneficial Steps

The following steps will help the Taxpayer build additional "facts and circumstances" evidence to support the position that his domicile has changed to Nevada prior to the stock sale in 2003. No one step is critical or required, but all are beneficial.

1. Taxpayer's family should physically move from Ohio to the new Nevada residence before July 1, 2003. If not possible by July 1, 2003, the family should move as soon as possible after that date (but no later than December 31, 2003), and a reasonable argument constructed for why it was important for the Taxpayer to move to Nevada ahead of his family.
2. Any legal documents associated with the stock sale transaction should refer to the Taxpayer as a Nevada resident and provide the Nevada address and phone number as his place of residence.
3. Assure that the Nevada residence is more expensive and elaborately decorated than the Ohio residence to support the position that the Ohio home is not the primary residence. Keep all-important furnishings (such as family heirlooms, etc.) in the Nevada residence.
4. Establish as many ties to Nevada and sever as many Ohio ties as possible (bank accounts, voter registration, driver's license, club memberships, etc.). Please refer to the attached Residency Conversion Checklist for a complete listing and description of additional steps to support the Nevada domicile change.

Timing of the Move

As indicated above, it is absolutely critical that the Taxpayer at a minimum has physically moved to Nevada prior to the sales contract is signed. In addition, it is beneficial, but not critical, if the Taxpayer's family also physically moves into the Nevada residence prior to the sale date. The timing is critical for the Taxpayer since the Ohio statutes indicate that capital gains are allocated to the domicile of the Taxpayer at the time of the sale. Therefore, the Taxpayer needs to assure that he has changed his domicile prior to signing the sales contract.

It should be relatively obvious that the optics of the residency conversion will improve to the extent that more time elapses between the move to Nevada and the sale of the stock. If the Taxpayer completes the physical move on June 30, 2003 and signs the sales contract on July 1, 2003, the residency conversion date obviously appears somewhat contrived. Although the residency determination will ultimately depend upon all of the facts and circumstances, it is important to build as strong of a position as possible around the date of the move. Therefore,

it would be recommended that the Taxpayer and his family physically move to Nevada as far in advance of the sale date as possible. This will allow for more time to elapse and more Nevada ties to be established, making it that much more difficult for Ohio to question the change in domicile or its timing.

Installment Sale Considerations

As the above analysis indicates, the Ohio taxation of the gain is entirely dependent upon the domicile of the Taxpayer on the date of the sale. The discussion addresses all of the issues associated with how the Taxpayer's domicile is determined, as well as the steps he needs to take to effectuate a change in his domicile. However, the manner in which the stock sale is completed has no bearing upon the domicile determination, and hence does not have any impact upon its ultimate taxability by Ohio, other than the timing of the liability.

At first, it might appear under the installment sale method that the recognition of a smaller gain in the year of residency conversion would appear less obvious to the State of Ohio, and that the 2004 portion of the gain would not be visible because the Taxpayer is no longer filing a resident return. However, it should be noted that the Taxpayer is still likely to have other Ohio source income (from his other S corporations and/or other investments), and may therefore still be required to file a non-resident return. Furthermore, as indicated, it is likely that the state will not review the Taxpayer's returns for several years, and in the event the returns are reviewed, it is likely that the State will audit a period of several years rather than just 2003. On the other hand, electing the installment sale method does complicate the transaction, as it defers the receipt of the sale proceeds, creates a federal interest cost, and creates additional legal complexities and risks. Accordingly, it should be understood that the state tax optics are only marginally improved by using the installment sales method.

Non- Resident Taxation Considerations

As noted, the Taxpayer owns additional S corporations with business operations in the State of Ohio. It is important to note that any income generated by flow through entities doing business in Ohio will be treated as Ohio business income and subjected to Ohio taxation, even though the Taxpayer is no longer an Ohio resident. Additionally, flow through entities are also subject to the withholding and filing requirements associated with the Ohio Pass-Through Entity Tax rules, and may be required to withhold and remit taxes on the income generated. Finally, it should also be noted that the Ohio statutes require that any capital gains on the sale of a pass-through entity interest be apportioned to Ohio (using the entity's historical factors) to the extent that the owner owns more than 20% of the pass-through entity, rather than allocating the gains to the owner's state of domicile. A more detailed explanation of these topics is beyond the scope of this memorandum.

III. Ohio Impact of Federal Recharacterization of Gain

Again, all of the income of a resident is subjected to taxation. Assuming that the Taxpayer can complete his change in domicile prior to the sale, he will be a non-resident. ORC §

5747.20(B)(1) states that "all items of compensation paid to an individual for personal services performed in this state who was a non-resident at the time of payment and all items of deduction directly allocated thereto shall be allocated to this state." Accordingly, non-residents are subjected to tax on income paid for services rendered to the extent those services were performed in Ohio.

The Ohio taxability of the services is therefore highly dependent upon the actual facts and circumstances. Because the business is based in Ohio, there would likely be a strong presumption that any services performed were most likely to have occurred in Ohio.

PROCEDURES FOR CONVERSION OF RESIDENCY FROM OHIO TO NEVADA

1. File with the Clerk of Courts, in the Nevada county of domicile, a ***Statement of Domicile*** (pursuant to NRS §§ 41.191 to 41.197) stating that Nevada has become the state of domicile (a copy should be kept with the individual's other important documents).

2. Register to vote in Nevada and actually vote whenever possible, including by absentee ballot if you are outside the state.

3. File federal income tax returns with the Internal Revenue Service Center in Fresno, and file any federal estimated payment vouchers with the Internal Revenue Service Center in Fresno.

4. Consider executing new estate planning documents, which recite the new domicile.

5. Change the title and registration of automobiles to Nevada.

6. Obtain a Nevada driver's license.

7. Use the Nevada address on all documents and records, such as Social Security records, hotel registration, credit card applications, etc. File a change in address form at the old post office. Register the new address with the Federal Social Security Office.

8. Change principal bank accounts to Nevada. Maintaining a convenience account in Ohio for use during periods in Ohio should not present a problem.

9. Become a member of, and be active in clubs, religious or social organizations in Nevada.

10. Generate the maximum possible amount of business activity from the Nevada residence.

11. Furnish the Nevada residence more substantially than the Ohio residence and keep objects of sentimental value or family interest (e.g. photographs, family heirlooms, etc.) in the Nevada residence.

12. Transfer contents of any safe deposit boxes to safe deposit boxes located in Nevada.

13. Use stationery printed with the Nevada address whenever possible for business and social occasions.

EXHIBIT 14-J

PWC-WS 0047

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EXHIBIT PAGE ONLY

EXHIBIT H

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

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PROCEEDINGS
(9:00 a.m.)
THE COURT: Good morning. Please be seated.
THE CLERK: Resuming Docket Number 23630-12, Michael A. Tricarichi, Transferee.
MS. LAMPERT: Good morning, Your Honor. Heather Lampert for Respondent. Your Honor, this morning we would like to call Richard Stovsky to the stand.
THE COURT: Please proceed.
WHEREUPON,
RICHARD STOVSKY
called as a witness, and having been first duly sworn, was examined and testified as follows:
THE WITNESS: Yes.
THE CLERK: Please state your name and address.
THE WITNESS: Richard P. Stovsky. My business address is 200 Public Square, Cleveland, Ohio 44194.
THE COURT: Okay. Before we get to you, Mr. Stovsky, I'd like to remind you that you're not allowed to discuss your testimony with anybody else, any other witness in the case, until the case is

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completely complete. Okay?
THE WITNESS: Yes.
MS. LAMPERT: And, Your Honor, before we get started today, if I may. Can I have Mr. Stovsky's representatives that are here with him today stand up and identify themselves so that we're all clear on who is in the courtroom today?
THE COURT: Yes.
MS. LAMPERT: Thank you.
MR. MARKUS: May it please the Court, Your Honor, my name is Stephen Markus. I'm a partner with the Cleveland law firm of Ulmer and Berne.
MR. DEMARCO: I'm Richard DeMarco from the office of general counsel at PricewaterhouseCoopers.
THE COURT: Thank you.
MS. LAMPERT: Thank you, Your Honor.
DIRECT EXAMINATION
BY MS. LAMPERT:
Q Mr. Stovsky, if it's okay with you, I'm going to sit down while we do our examination today. Can you hear me all right?
A Yes.
Q Okay. Could you give me a brief description of your educational background?
A Sure. Starting with college?

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Q Yes, please.
A I went to Ohio State University and majored in accounting, and my degree was a bachelor of science in business administration.
From there I went to Cleveland Marshall College of Law, which is a law school at Cleveland State University. Received a law degree from Cleveland State.
Q Okay. And do you have any professional licenses?
A Yes. I'm a certified public accountant, a member of the Ohio bar.
Q Okay. Any other licenses?
A Other than associations, no.
Q Okay. And can you give me a brief history of your work experience since you finished law school?
A Sure. I graduated from law school in 1983, and immediately after the bar started with Coopers and Lybrand, which was the predecessor firm to PricewaterhouseCoopers, one of the two firms.
I was admitted to the partnership in 1992. I've always been in the tax area at PricewatershouseCoopers. I've been a tax partner since 1992.

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I've had various additional roles in the firm. In addition to client service, I was the market -- the Cleveland market leader for private companies, the little market practice. I was also the Midwest region leader for middle market for PwC. I was the office managing partner in Cleveland. And my current role is that I'm the United States private company services leader for PricewaterhouseCoopers.
So my practice includes all -- services to most of our private companies in the U.S., all services to those companies. And I'm also a member of our firm's executive -- excuse me, extended leadership team, which is one of the bodies that governs the firm.
Q I'm having a little problem hearing you.
A Oh, I'm sorry.
Q Do you think that you could speak into the microphone?
A Sure. Is that better?
THE COURT: That's better, yes.
THE WITNESS: I'm sorry.
BY MS. LAMPERT:
Q That's perfect. Thank you. I want to make sure that I hear everything that you say.
And in 2003, what were your

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THE WITNESS: Correct. The reason why there's two pages, when we produced the file, we produced every --
THE COURT: Correct.
THE WITNESS: -- piece of paper in the file. And there were two pieces, so I produced both. But these -- but that's exactly right.
THE COURT: And what's page 5? Was that -- I suppose that was an internal note you made to yourself --
THE WITNESS: Yes.
THE COURT: -- in the file?
THE WITNESS: It was -- it was attached to the page -- it was attached to -- I believe it was attached to page -- this page 2 in the file.
THE COURT: And so did -- and that means that the way the opinion -- this was initially issued was as we see on the first page --
THE WITNESS: Correct.
THE COURT: -- without the strikeout?
THE WITNESS: Right.
THE COURT: Thank you.
BY MS. LAMPERT:
Q Can you please turn to Exhibit 25? Can you look through this exhibit for me, please, and when

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you're done, let me know.
A (Brief pause.) Okay.
Q Do you recognize this document?
A I do.
Q And can you identify this document for us?
A Right. This is my internal memo to the file that I drafted throughout the transaction.
Q And there is some handwriting on the first five --
A Right.
Q -- pages of this exhibit. Pages 1 through 5 there's handwriting. Do you recognize this handwriting?
A I do.
Q And whose handwriting is this?
A It's mine.
Q It's yours. So these notes are your notes?
A They are.
Q And it appears that there might be two different writing utensils that were used for some of these notes.
A Right.
Q Does that -- is that indicative of anything?
A Well, if you refer to page 1, it says up in

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the top left: "red comments," and then the second note says: "pencil comments." So I wrote in red and pencil to identify different meetings that the notes related to.
Q And you said this was an internal memorandum?
A Yes.
Q Was this memo given to anyone outside of PwC?
A Not to my knowledge, no.
Q And did you draft all parts of this memo?
A Yes.
Q Did you draft all parts of this mem- -- did you have any input from anybody else when you were writing this memo?
A Yes. The entire -- anybody who worked on the project. I was collecting -- I was coordinating the project and collecting information as we went through the project.
Q Okay. Can you talk to me about who else was on the project at PwC?
A Sure. The project had two main components: a federal tax component and a state tax component. The federal side, Tim Lohnes of our Washington National Tax practice led the efforts relative to any

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federal tax questions that we were addressing.
Tim is a subject-matter expert in our Washington National Tax Practice and specializes in other corporate tax provisions. In addition, Tim relied upon others with the National Tax. But the one that appears in this memo is Don Rooken (phonetic).
Don was -- actually, Don had a career with the Internal Revenue Service. He was deputy chief counsel with assistant commissioning. When he went -- when he left the service after years, he joined our firm, and he also had input into this memo.
On the state and local side, Ray Turk, who's a partner at PwC, is a state and local tax partner. And he and David Cook, who is a director at our practice, and others, handled the state and local side.
So there was input from numerous people because our practice is to go to our experts. Whenever we're doing really any project, we rely on our experts. And in this case, we relied on our National Tax experts, as well as our state and local experts.
Q And you might have said this, but I missed what you said. On Don Rooken --

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EXHIBIT PAGE ONLY

EXHIBIT I

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Richard J. DeMarco, Jr.
Office of the General Counsel

October 23, 2015

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

Dear Mr. Levin:

This letter agreement is made in order to confirm the entire and exclusive understanding concerning its subject matter between PricewaterhouseCoopers LLP and Richard P. Stovsky (collectively "PwC") on the one hand and Michael Tricarichi and Barbara Tricarichi (collectively "Tricarichi") on the other.

An issue has arisen in connection with professional services provided by PwC to Tricarichi relating to the sale of West Side Cellular to Fortrend International LLC in or around September 2003. In order to permit discussion of matters at issue between the parties to this Agreement, PwC and Tricarichi have agreed that as of January 19, 2011, any statutes of limitations that would expire during the period of time from January 19, 2011 through May 1, 2016, or any other defense that would have been available based on the passage of time during such period pertaining to any claim or defense that Tricarichi may have available to them arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular, or pertaining to any claim or defense that PwC may have available to it arising from the services performed by PwC for Tricarichi relating to the sale, is tolled and waived. Any such statutes that would have expired during such period shall expire, and any such other defenses shall be available, only upon the expiration of this letter agreement in accordance with its terms. This agreement is non-assignable and non-transferable, and any attempt to transfer or assign this agreement shall immediately render it null and void.

This letter agreement shall expire at 11:59 P.M. on May 1, 2016, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this

PricewaterhouseCoopers LLP, 300 Madison Avenue, New York, NY 10017
T: (646) 471 1126, F: (813) 282 6298, richard.j.demarco@us.pwc.com

pwc

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This letter agreement shall be construed in accordance with the laws of New York. Tricarichi and PwC will not disclose the existence or terms of this agreement to any third party without the written consent of the other party, provided that no such consent will be required in connection with any disclosure (i) that is required by law or regulation, so long as the other party is given adequate prior notice and an opportunity to object to the disclosure, (ii) to a party's counsel or insurer, or (iii) as necessary to enforce the terms of this agreement. Nothing contained in this letter agreement shall be taken to suggest or imply that any party has agreed to the jurisdiction of any court.

Nothing contained in this letter will prevent any party from asserting any claim prior to or after the expiration date set forth above. Nothing contained in this letter will prevent any party from seeking to obtain discovery in accordance with applicable law, and nothing contained in this letter shall limit any party from exercising all its rights to object thereto.

Neither this Agreement nor any action taken pursuant to this Agreement shall be offered or received into evidence in any action or proceeding as an admission of liability or wrongdoing by any party.

If this letter agreement is acceptable to Tricarichi, please acknowledge acceptance of its terms by signing the enclosed counterpart of this letter agreement and returning it to me. Your signature below will constitute a representation that you have been duly authorized to do the same on behalf of Tricarichi.

Very truly yours,

By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/24/15

By: _____
Joel Levin, Esq.

pwc

Richard J. DeMarco, Jr.
Office of the General Counsel

September 16, 2014

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

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This letter agreement shall expire at 11:59 P.M. on November 1, 2015, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this

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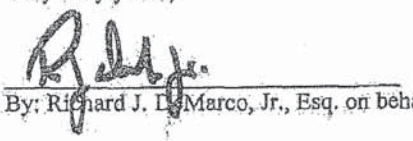
Very truly yours,



By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 9/16/14

By: Joel Levin, counsel for Tricarichis
Joel Levin, Esq.

pwc

Richard J. DeMarco, Jr.
Office of the General Counsel

January 20, 2014

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

Dear Mr. Levin:

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Very truly yours,

By: Richard J. DeMarco, Jr., Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 1/21/14

By: _____
Joel Levin, Esq.

pwc

Margaret M. Enloe
Associate General Counsel

October 11, 2012

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

March 1, 2014
J.L.L.

Re: Tolling Agreement between PricewaterhouseCoopers LLP, Richard P. Stovsky, Michael Tricarichi and Barbara Tricarichi

Dear Mr. Levin:

This letter agreement is made in order to confirm the entire and exclusive understanding concerning its subject matter between PricewaterhouseCoopers LLP and Richard P. Stovsky (collectively "PwC") on the one hand and Michael Tricarichi and Barbara Tricarichi (collectively "Tricarichi") on the other.

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PricewaterhouseCoopers LLP, 300 Madison Avenue, New York, NY 10017
T: (646) 471 1123 F: (813) 637-7747, margaret.m.enloe@us.pwc.com

pwc

March 1, 2014

This letter agreement shall expire at 11:59 P.M. on ~~May 1, 2013~~, unless renewed by a written instrument signed by authorized representatives of PwC and Tricarichi prior to that date and time. Upon the expiration of this letter agreement, all provisions of said agreement shall become null and void, and all statutes of limitations shall be deemed to have never been tolled, unless a lawsuit relating to the above subject matter is filed and served by a party to this letter agreement before the expiration of this agreement. PwC and Tricarichi agree to provide notice in writing no less than fifteen (15) days prior to the commencement of a lawsuit relating to the above subject matter, but such requirement is waived within 15 days of expiration of this letter agreement. Nothing in this letter shall be taken as an admission by any of the parties as to the applicability, running, expiration or non-expiration of any statute of limitations or similar rule of law or equity prior to the date of this letter.

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pwc

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Very truly yours,

Margaret M. Enloe

By: Margaret M. Enloe, Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/14/12

By: Joel Levin

Joel Levin, Esq.

pwc

Margaret M. Enloe
Associate General Counsel

October 11, 2012

Joel Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at ErieView, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

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pwc

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Very truly yours,

Margaret M. Enloe

By: Margaret M. Enloe, Esq. on behalf of PricewaterhouseCoopers LLP and Richard P. Stovsky

Agreed:

Michael Tricarichi and Barbara Tricarichi

Date: 10/4/12

By: Joel Levin

Joel Levin, Esq.

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EXHIBIT PAGE ONLY

EXHIBIT J

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

553 F.Supp.2d 716
United States District Court,
S.D. Texas,
Houston Division.

ENBRIDGE ENERGY COMPANY, INC. and Enbridge Midcoast Energy, L.P. f/k/a Enbridge Midcoast Energy, Inc. f/k/a Midcoast Energy Resources, Inc., Plaintiffs
v.
UNITED STATES of America, Defendant.

Civil Action No. H–06–657.
|
March 31, 2008.

Synopsis
Background: Corporate taxpayer that acquired assets of pipeline business through sale of stock to third party brought action against United States seeking refund for taxes and penalty paid for acquisition. Cross-motions for summary judgment were filed.

Holdings: The District Court, Melinda Harmon, J., held that:

[1] transaction was sale of stock, rather than sale of assets;

[2] corporate taxpayer was not entitled to ordinary loss for partnership losses or capital or ordinary loss for termination of partnership;

[3] imposition of penalty for substantial understatement of income was warranted; and

[4] corporate taxpayer could not avail itself of reasonable cause/good faith exception to fraud penalties.

Plaintiffs' motion denied; Defendant's motion granted.

West Headnotes (11)

[1] **Internal Revenue**
Presumptions and Burden of Proof

In a refund suit, the taxpayer has the burden of proving that the Internal Revenue Service's (IRS) determination is incorrect.

Cases that cite this headnote

[2] **Internal Revenue**
Substance or Form of Transaction

A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form.

Cases that cite this headnote

[3] **Internal Revenue**
Substance or Form of Transaction

In the conduit theory of the substance over form doctrine of taxation, the court may disregard an entity if it is a mere conduit for the real transaction at issue.

4 Cases that cite this headnote

[4] **Internal Revenue**
Substance or Form of Transaction

Under the conduit theory of the substance over form doctrine of taxation, the tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title; rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant.

2 Cases that cite this headnote

[5] **Internal Revenue**
Grantors

Under the conduit theory of the substance over form doctrine of taxation, a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title; to permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

2 Cases that cite this headnote

[6] **Internal Revenue**
Grantors

Court would not consider role of third party company that acquired stock in pipeline business from business owner and sold assets to corporate taxpayer, for purposes of determining tax implications of transaction for corporate taxpayer; third party company that acquired stock was conduit for real transaction at issue, corporate taxpayer's tax advisors helped structure transaction, and all communications regarding transaction involved corporate taxpayer.

Cases that cite this headnote

[7] **Internal Revenue**
Sale or Exchange of Property

Transaction during which corporate taxpayer acquired pipeline business was sale of stock, rather than sale of assets, and thus government's recharacterization as stock sale was appropriate for tax purposes, although corporate taxpayer purchased assets from third party buyer of stock; third party was conduit for transaction, seller of business would not agree to direct asset sale and corporate taxpayer negotiated extensively to obtain assets through stock purchase and liquidation. 26 U.S.C.A. § 338.

Cases that cite this headnote

[8] **Internal Revenue**
Creation and Existence

Third party company that acquired stock in pipeline business and corporate taxpayer entered into partnership for purpose of tax avoidance, and thus corporate taxpayer was not entitled to ordinary loss for partnership losses or capital or ordinary loss for termination of partnership; partnership was part of preconceived plan to provide "good facts" to third party company's participation in transaction involving transfer of pipeline business assets and disguise true nature of transaction. 26 U.S.C.A. §§ 162, 165.

Cases that cite this headnote

[9] **Internal Revenue**
Substance or Form of Transaction

Where there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation.

Cases that cite this headnote

[10] **Internal Revenue**
Grounds and Amount

Imposition of penalty for substantial understatement of income on corporate taxpayer that acquired assets to pipeline business through transaction involving conduit that purchased stock from business owner and sold assets to corporate taxpayer was warranted, even if

transaction was not a tax shelter, absent substantial authority to support deductions or adequate disclosure of relevant facts relating to deductions and a reasonable basis for tax treatment claimed. 26 U.S.C.A. § 6662.

Cases that cite this headnote

[11] **Internal Revenue**
Reasonable Cause

Corporate taxpayer knowingly participated in a scheme to obfuscate real transaction at issue in transfer of assets of pipeline business, during which transaction third party company purchased stock from business owner and sold assets to corporate taxpayer, and taxpayer's reliance on tax advisors who orchestrated plan was unreasonable, and thus corporate taxpayer could not avail itself of reasonable cause/good faith exception to fraud penalties under Tax Code. 26 U.S.C.A. § 6664.

Cases that cite this headnote

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OPINION AND ORDER

MELINDA HARMON, District Judge.

Pending before the court in this federal tax suit are cross motions for summary judgment filed by the Plaintiffs (Doc. 24) and the Defendant (Doc. 23). Having considered these motions, the responses and replies thereto, the complete record before the court, and all applicable legal standards, and for the reasons articulated below, the court DENIES Plaintiffs' motion for summary judgment; and GRANTS Defendant's motion for summary judgment.

***718 I. Background and Relevant Facts**

In November 1999, Dennis Langley ("Langley") allegedly sold all of the stock (the "Bishop Stock") of his solely-owned pipeline business, The Bishop Group, Ltd. ("Bishop"), to K–Pipe Merger Corporation ("K–Pipe"). With the sale of the Bishop Stock, Bishop simultaneously changed its name to K–Pipe Group, Inc. K–Pipe and K–Pipe Group, Inc. then merged, with K–Pipe Group, Inc. as the survivor ("K–Pipe Group"). The next day, the newly-merged K–Pipe Group allegedly sold substantially all of the assets of Bishop (the "Bishop Assets"), which consisted primarily of natural gas pipelines, to Midcoast Energy Resources, Inc. ("Midcoast"). Midcoast began taking depreciation and amortization deductions based on its acquisition of the Bishop Assets. The Government disallowed these deductions, as well as others, because it claimed that the overall transaction was a sham. The Government contends that, for federal tax purposes, K–Pipe's involvement should be disregarded and Midcoast should be treated as having acquired the Bishop Stock. Midcoast, having paid the taxes flowing from this characterization, as well as a twenty percent penalty, has brought the current suit to obtain a refund.

A. *The Challenged Transaction(s)*

The material facts of this case are undisputed. In mid–1999, Langley decided to sell Bishop. Based on his tax advisors' advice, Langley was interested in a stock, rather than asset, sale because an asset sale would generate greater taxes. Engaging the services of an investment banking firm, Chase Securities, Inc. ("Chase"), Langley initiated a modified auction process to gauge interest in and contact potential buyers of the Bishop Stock. After signing a confidentially agreement, interested buyers were provided with a Confidential Offering Memorandum and invited to submit "preliminary non-binding indications of interest." (Gov't Ex. 9, Doc. 23).

One potential buyer was Midcoast, a publically-traded company engaged in the business of constructing and operating natural gas pipelines. Midcoast was interested in owning the Bishop Assets, which included an interstate natural gas pipeline system located in Kansas, Oklahoma, and Missouri, because the assets "provided a stable cash flow from long-term transportation contracts and would

nearly double Midcoast's existing pipeline asset base, providing Midcoast with the critical mass it sought to achieve." (Kaitson Aff. ¶ 3, Doc. 26). On July 21, 1999, Midcoast responded to Chase with a preliminary non-binding indication of interest stating that it would be prepared to pay $157 million in cash for the Bishop Stock. (Gov't Ex. 9.1, Doc. 23). On August 30, 1999, after conducting due diligence, Midcoast sent Langley a non-binding proposal to purchase the Bishop Stock for $184.2 million, subject to certain conditions. (Gov't Ex. 25, Doc. 23). The proposal also included "supplemental offers" by Midcoast to give Langley (i) half of any rate increase that might result following an application by Bishop with the Federal Energy Regulatory Commission ("FERC"); and (ii) an opportunity to negotiate and enter into "Project Development Agreements" ("PDAs") concerning, *inter alia,* certain future pipeline expansion projects and the use of certain pipeline rights-of-way. (*Id.*). Langley did not accept this offer, but the negotiations continued. Due to continued due diligence, Midcoast's offer to purchase the Bishop Stock dropped to $163 million by the end of the first week of September 1999. (Kaitson Aff. ¶ 4, Doc. 26). According to Midcoast, "[t]his resulted in a significant gap between the price Midcoast was willing to pay and the price Langley indicated he was willing to accept." (*Id.*).

***719** To help "bridge this gap," Midcoast's tax advisor at the time, PricewaterhouseCoopers, L.L.P. ("PWC"), suggested Midcoast pursue a "Midco transaction," whereby Langley could sell the Bishop Stock to a third party who would, in turn, sell the Bishop Assets to Midcoast. This structure would provide the best of both tax worlds: Langley would only be taxed once on his capital gains, and Midcoast would receive the step-up in basis on the Bishop Assets. Thus, PWC approached Fortrend International LLC ("Fortrend")[1] about "facilitating" Midcoast's purchase of the Bishop Assets. (*See* Palmisano Dep., dated Feb. 22, 2007, at 48, Doc. 23).

In early September 1999, Fortrend began negotiating with Langley about acquiring the Bishop Stock. Langley provided Fortrend with the same auction material that he had given to other potential bidders. Although they had not participated in the negotiations between Langley and the other bidders, Midcoast and PWC participated in the negotiations between Langley and Fortrend. For example, Langley's representative faxed to Fortrend and PWC a draft Mutual Confidentiality Agreement and a draft letter of intent (Gov't Exs. 35 and 36, Doc. 23), and Langley's representatives emailed to PWC a draft Stock Purchase Agreement between Fortrend and Langley, which was a red-lined version of the agreement that had been drafted between Midcoast and Langley, with Fortrend substituted for Midcoast (Gov't Ex. 37, Doc. 23). On September 30, 1999, K–Pipe Holdings Partners, L.P., affiliated with Fortrend and the holding company of K–Pipe Merger Corporation, submitted a nonbinding letter of intent, offering to purchase the Bishop Stock for approximately $188 million. (Gov't Ex. 65, Doc. 23). The letter of intent also indicated that "other agreements" would be negotiated. (*Id.*).

On October 1, 1999, K–Pipe and Midcoast signed a non-binding letter of intent concerning the sale to Midcoast of the Bishop Assets. (Gov't Ex. 66, Doc. 23). In this letter of intent, Midcoast agreed to pay either $187,868,000 or $182,068,000 for the Bishop Assets, depending on certain variables. Additionally, the asset letter of intent provided that Midcoast could exercise its option to purchase the "Butcher Interest," a royalty interest that Bishop had acquired years earlier. Bishop had both an obligation to pay the royalty, as well as a right to receive payment; thus, no royalties were paid from 1989 to 1999.

The parties negotiated numerous issues in the lead up to the financing and execution of the final stock and asset purchase agreements (hereafter "Stock Purchase Agreement" and "Asset Purchase Agreement"). In general, Midcoast continued discussions with Langley regarding certain issues affecting the Bishop Assets. These issues included a PDA that Langley was causing Kansas Pipeline Company ("KPC"), a partnership included in the Bishop Assets, to enter with a Langley affiliate. (Kaitson Aff. ¶ 9, Doc. 26). Midcoast claims it became so concerned about a continuing relationship with Langley through the PDA that it indicated it would not buy the Bishop Assets unless there was a provision for terminating the PDA relationship. Langley, therefore, put in place an agreement giving KPC the option to terminate the PDA upon the payment of $10.75 million. K–Pipe agreed to pay Langley $3 million more for the Bishop Stock, and Midcoast agreed to pay K–Pipe ***720** a corresponding amount for the Bishop Assets.

With respect to the Stock Purchase Agreement, Langley requested that K–Pipe agree to pay a $15 million "break-up fee" if K–Pipe failed to close the Stock Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 2–32, Doc. 23). K–Pipe also agreed not to liquidate Bishop for at least two years. (*Id.*). Finally, Fortrend agreed to guarantee K–Pipe's obligations under the Stock Purchase Agreement. (*See* Guaranty, Stern Aff. Ex. 30, Doc. 25).

With respect to the Asset Purchase Agreement, Midcoast

agreed to pay K–Pipe $15 million if Midcoast failed to close the Asset Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 1–5, Doc. 23).[2] Midcoast also agreed to be liable to any third-party donee or creditor beneficiaries of K–Pipe should the deal fall through. (*Id.*). Finally, Midcoast agreed to certain guarantees of K–Pipe's obligations under the Stock Purchase Agreement, including an obligation to indemnify Langley should he receive anything other than capital gain tax on the sale of the Bishop Stock to K–Pipe.[3]

Langley and K–Pipe executed the Stock Purchase Agreement on November 4, 1999, effective as of October 25, 1999. (*See* Stock Purchase Agreement, Gov't Ex. 2–34, Doc. 23). The following day, November 5, 1999, K–Pipe and Midcoast executed the definitive Asset Purchase Agreement. (*See* Asset Purchase Agreement, Gov't Ex. 1–4, Doc. 23).

K–Pipe financed its acquisition of the Bishop Stock with a loan from Rabobank Nederland ("Rabobank"). Although Fortrend had requested a 30–day secured term loan for an amount up to $195 million, the loan was expected to be repaid in a week. (Gov't Ex. 85, Doc. 23). As part of its protection regarding the loan, Rabobank required the following "pledges": (i) the membership interest of K–Pipe Holdings Partners, L.P.; (ii) an escrow account in the name Langley, established at Rabobank, into which the $195 million would be deposited and would be distributed upon the closing of the sale of the Bishop Stock; and (iii) a second escrow account held at Rabobank with account balances in excess of $200 million, which Midcoast would establish through its own secured financing with Bank of America. (*Id.* at 2). For reasons that are not entirely clear from the record, Fortrend requested that the loan amount be increased from $195 to $215 million. (Gov't Ex. 92, Doc. 23). Fortrend also requested that the pledge of the membership interests of K–Pipe Holdings, L.P. be removed. (*Id.*).

On November 4, 1999, but dated "as of November 8, 1999," K–Pipe executed a Promissory Note to pay Rabobank up to $195 million on November 28, 1999, plus interest, as well as a Security and Assignment Agreement. (Gov't Exs. 148 and 149, Doc. 23). The $195 million, to be deposited into K–Pipe's account at Rabobank on November 8, 1999, was conditioned on, *inter alia,* (i) K–Pipe executing and delivering the Security and Assignment *721 Agreement; (ii) K–Pipe, Langley, Midcoast, and Rabobank entering into an escrow agreement (the "Escrow Agreement");[4] (iii) Rabobank, as escrow agent, receiving the escrow amount equal to at least the principal ($195 million) plus all interest to be due on the advance through maturity, plus $1 million (the "Escrow Amount"); (iv) Rabobank receiving an upfront fee of $750,000; and (v) K–Pipe using the proceeds to purchase the Bishop Stock. (Gov't Ex. 148, Doc. 23). Under the Security and Assignment Agreement, K–Pipe pledged as collateral (i) the Escrow Agreement and the Escrow Amount; (ii) all of its accounts with Rabobank; (iii) all other accounts; (iv) all personal property; and (v) any proceeds of any of the collateral. (Gov't Ex. 149, Doc. 23). The Escrow Agreement was entered into by K–Pipe, as the seller, Midcoast, as the buyer, Rabobank, as the escrow agent, and Bank of America, as the lender. (Gov't Ex. 1–6, Doc. 23). Under the Escrow Agreement, Bank of America agreed to fund $198.1 million into an escrow account set up with Rabobank ("Rabobank Escrow Account # 18359"). (*Id.*). Thus, the $198.1 million loan acted as security for K–Pipe's loan from Rabobank for the purchase of the Bishop Stock.

On November 8, 1999, the stock purchase transaction closed. As noted above, Bishop changed its name to K–Pipe Group, Inc. and merged with K–Pipe Merger, with K–Pipe Group, Inc. as the surviving entity. K–Pipe Group requested, in writing, a drawdown of $123,345,000 under the Promissory Note to be credited into its Rabobank account ("K–Pipe Group Rabobank # 18313") and authorized Rabobank to debit its up-front fee of $750,000 from the account. (Stern Aff. Ex. 35 at 1160, Doc. 25). K–Pipe Group then authorized the wire transfer of $122,594,852 to Langley under the Stock Purchase Agreement. (Gov't Ex. 1–5 at ENB 317, Doc. 23).

On November 9, 1999, the asset purchase transaction closed. As contemplated by the Escrow Agreement, the following amounts were wired from Rabobank Escrow Account # 18359: (i) $112,695,895 to K–Pipe Group Rabobank # 18313 in consideration for the Bishop Assets; (ii) approximately $79 million directly to Bishop's creditors; and (iii) $6.1 million to Bank of America "for the benefit of Butcher Interest Partnership." (*See* Gov't Exs. 1–6 and 117, Doc. 23). As noted above, the Butcher Interest was a royalty interest in which Bishop had both an obligation to pay and a right to receive payment. Nevertheless, in exchange for a partnership interest and a distribution of $6.225 million, K–Pipe Group transferred the Butcher Interest to a partnership, The Butcher Interest Partnership, owned 55% by K–Pipe Group and 45% by Midcoast. (Kaitson Aff. ¶ 12, Doc. 26). Midcoast retained the option to purchase K–Pipe Group's interest, and K–Pipe Group retained the option to sell its interest. (*Id.*). On November 9, Midcoast, on behalf of the Butcher Interest Partnership, transferred $6.225 to K–Pipe Group Rabobank # 18313. Finally, K–Pipe Group received approximately $10 million from a cash reserve account held by a Bishop partnership that was released once

Midcoast paid the related Bishop debt. In total, K–Pipe Group received $128,960,431 for the sale of the Bishop Assets. (*See* Gov't Ex. 116, Doc. 23). From these funds, K–Pipe Group repaid the Rabobank loan and approximately $2 million in fees to advisors involved in the transactions, including $299,750 to LeBoeuf, Lamb, Greene & MacRae, which *722 allegedly acted as K–Pipe's counsel on the negotiations. (*See id.*). The price differential between the stock purchased and the assets sold totaled $6,364,579, which the Government contends was K–Pipe's "fee" for the transaction.

After the transactions, K–Pipe Group retained title to the Bishop Stock, the interest in the Butcher Interest Partnership, $10 million in cash reserves, and certain causes of action against third parties. Because K–Pipe Group had a substantial reportable gain from the sale of the Bishop Assets, K–Pipe Group's parent company, Signal Capital Associates, L.P., allegedly contributed high basis, low fair market value assets to K–Pipe Group in order to offset the gain on the assets.[5] K–Pipe Group filed tax returns for the years 2000, 2001, and 2002, but it engaged in virtually no business activity during that time. K–Pipe Group was ultimately sold to Baguette Holdings, LLC, an entity affiliated with Fortrend, in 2000.

Midcoast took a basis in the Bishop Assets of approximately $192 million, which represents the $122.7 million in cash and $79 million in assumed liabilities that it paid to K–Pipe Group. Midcoast began taking depreciation and amortization deductions in accordance with this basis in 1999.

On January 31, 2000, Midcoast, through KPC, allegedly terminated the Project Development Agreements and paid Langley $10.75 million. (Stern Aff. Ex. 38, Doc. 25). In its 2000 corporate tax return, Midcoast deducted this payment "because it was made to terminate a contractual obligation." (Jordan Aff. ¶ 5, Doc. 27).

On November 10, 2000, Midcoast paid K–Pipe Group $244,750 for K–Pipe Group's interest in the Butcher Interest Partnership. Midcoast, through a subsidiary, then terminated the Butcher Interest, effective January 1, 2001. (*See* Termination Agreement of the Butcher Interest, Kaitson Aff. Ex. 1, Doc.26). Midcoast claims that it had an adjusted basis in the Butcher Interest of $5,775,416. (Jordan Aff. ¶ 8, Doc. 27). In its 2001 corporate tax return, Midcoast deducted the alleged loss associated with the termination of the Butcher Interest Partnership in the amount of $5,775,416. (*See id.*).

Enbridge Energy Company, Inc. ("Enbridge"), the present taxpayer, acquired Midcoast in 2001.

B. *The IRS Audit of Midcoast and the Notice of Deficiency*

In February 2001, the IRS issued Notice 2001–16 designating certain intermediary transaction tax shelters as "listed transactions" that can be challenged by the Government. The notice describes the intermediary transaction as follows:

> These transactions generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or *723 § 1.337(d)–4 of the Income Tax Regulations), resulting in no reported gain on M's sale of T's assets.
>
> Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

(*See* Notice 2001–16, 2001–1 C.B. 730). PWC brought the notice to Midcoast's attention, but advised that disclosure of the Bishop transaction was unnecessary because it was not the "same or substantially similar" to the transaction described in Notice 2001–16. (*See* Robert Aff. ¶ 3, Doc. 28). According to Midcoast, the IRS subsequently broadened the meaning of "substantially similar" such that it found it found it prudent to disclose the Bishop transaction. (*See* Jordan Aff. ¶ 2, Doc. 27). Enbridge, as the successor in interest to Midcoast, finally