No. ____________________

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

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Elizabeth A. Brown
Clerk of Supreme Court

v.

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

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

VOLUME II

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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 II** by the method indicated:

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

Honorable Elizabeth Gonzalez
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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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disclosed the transaction to the Office of Tax Shelter Analysis of the Internal Revenue Service on January 3, 2003. (*See* Disclosure Statement, Gov't Ex. 62, Doc. 23).

In November 2003, the IRS began its audit of the transaction and examined Midcoast's Forms 1120 for tax years ending December 31, 2000, and May 31, 2001. (*See* Jordan Aff. ¶ 2, Doc. 27). It examined Midcoast's Form 1120 for tax year ending December 31, 1999, to the extent any losses had been carried back from Midcoast's 2000 tax year. (*See id.*).

On September 14, 2004, the IRS issued its Notice of Deficiency to Midcoast, listing deficiencies of $573,470 for 1999 and $3,276,338 for 2000. (*See* Notice of Deficiency, Stern Aff. Ex. 13, Doc. 25). Additionally, the IRS assessed a twenty percent penalty on the 2000 deficiency in the amount of $655,267.60. The IRS explained that Midcoast's "returns had been adjusted to reflect the acquisition of stock in 1999 of The Bishop Group, Ltd., also known as (a/k/a) K–Pipe Group, Inc., rather than the assets of that entity." (*Id.*). The IRS also explained that it would not allow the deductions from the Butcher Interest Partnership because there was no evidence that the Butcher Interest had a basis in the hands of Bishop. Finally, the IRS explained that it would not allow the capitalization of terminating the PDA because the costs were included in the purchase price of the Bishop Stock. (*See id.*).

Midcoast paid the amounts set forth in the Notice of Deficiency under protest. (Stern Aff. Ex. 73, Doc. 25). Midcoast also paid under protest the interest associated with these amounts, $911,641. (Jordan Aff. ¶ 7, Doc. 27). Midcoast then filed a tax refund claim with the IRS. Midcoast claimed that, because it acquired assets, not stock, it was entitled to take total depreciation, alternative minimum tax ("AMT") depreciation, and amortization deductions in the amounts of $23,816,420, $22,686,331, and $1,749414, respectively, for the 2000 tax year. (*Id.* ¶ 5). Midcoast also claimed it was entitled to take total depreciation and amortization deductions on the assets in the amounts of $7,228,853 and $745,973, respectively, for the 2001 tax year. (*Id.* ¶ 8). Additionally, for the 2000 tax year, Midcoast claimed that it was entitled to a $10.75 million deduction for the cancelled PDA and a $182,138 deduction for losses from the Butcher Interest Partnership. (*Id.* ¶ 5). Finally, Midcoast stated in its refund claim that it was entitled ***724** to deduct the loss associated with the termination of the Butcher Interest Partnership in the amount of $5,775,416 for the 2001 tax year. (*Id.* ¶ 8).

The IRS denied, in relevant part, Midcoast's refund request for these amounts. (*See* Stern Aff. Ex. 17, Doc. 25).

C. *The Current Case*

On February 28, 2006, Midcoast[6] filed the current suit against the Government, seeking a refund of the total amount paid, plus interest. It claims that it purchased the Bishop Assets, not the Bishop Stock, and that the Government's characterization otherwise is erroneous.

The court has jurisdiction over this action pursuant to 28 U.S.C. 1346(a)(1) ("The district courts shall have original jurisdiction ... [over] ... [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]").

The parties have each moved for summary judgment. The key issue is whether the substance of the transaction matches its form. The cross motions for summary judgment are now ripe for ruling.

II. Summary Judgment Standard

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The initial burden falls on the movant to identify areas essential to the nonmovant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna,* 401 F.3d 347, 349 (5th Cir.2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc). Moreover, if the party moving for summary judgment bears the burden of proof on an issue, either as a plaintiff or as a defendant asserting an affirmative defense, then that party must establish that no dispute of material fact exists regarding all of the essential elements of the claim or defense to warrant judgment in his favor.

Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir.1986) (the movant with the burden of proof "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis in original).

Once the movant meets its burden, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. ***725** *Celotex,* 477 U.S. at 323–24, 106 S.Ct. 2548. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). Instead, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505; *see also DIRECTV Inc. v. Robson,* 420 F.3d 532, 536 (5th Cir.2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." *Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A.,* 139 F.3d 532, 536 (5th Cir.1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir.1998); *Grimes v. Texas Dept. of Mental Health and Mental Retardation,* 102 F.3d 137, 139–40 (5th Cir.1996); *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.1994), *cert. denied,* 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994); *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.1992), *cert. denied,* 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Tex. Tech Univ.,* 80 F.3d 1042, 1046 (5th Cir.1996) (citing *Little,* 37 F.3d at 1075). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter,* 980 F.2d 299, 305 (5th Cir.1992); *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir.1998) (citing *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915–16 & n.7 (5th Cir.1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the non-moving party. *Matsushita,* 475 U.S. at 587–88, 106 S.Ct. 1348; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.,* 336 F.3d 410, 412 (5th Cir.2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle South Utilities, Inc.,* 847 F.2d 186, 198–200 (5th Cir.1988). The non-moving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.,* 910 F.2d 167, 178 (5th Cir.1990). In reviewing evidence favorable to the party opposing a motion for summary judgment, a court should be more lenient in allowing evidence that is admissible, though it may not be in admissible form. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.,* 831 F.2d 77, 80 (5th Cir.1987).

[1] In a refund suit, the taxpayer has the burden of proving that the IRS's determination is incorrect. *Yoon v. Comm'r,* 135 F.3d 1007, 1012 (5th Cir.1998).

III. Analysis

A. *The Substance of the Transaction: Sale of Stock or Sale of Assets?*

It is undisputed that Midcoast wanted to own the Bishop Assets. The Government contends that there were two "direct" routes in which Midcoast could have purchased the Bishop Assets: (1) a direct asset sale, or (2) a stock sale, followed by a ***726** liquidation of Bishop. In a direct asset sale, the purchaser (Midcoast) gets a cost basis in the assets, the corporation (Bishop) is liable for the tax on the gain, and the shareholders (Langley), who receive the asset proceeds, are liable for a gain on their shares. *See* I.R.C. §§ 1001, 331, and 1012. In the stock sale/liquidation scenario, the selling shareholders (Langley) are liable for the tax on any gain in their shares, and, while the liquidation of the target (Bishop) into its acquiring parent corporation (Midcoast) will be tax free, the assets will take their historic or "carryover" basis. *See* I.R.C. §§ 1001, 332, and 334. For situations in which a buyer cannot directly purchase the assets, like where a seller mandates a stock sale, the Code authorizes certain purchasers to elect to treat the price they paid for the stock as the asset basis. *See* I.R.C. § 338. However, the election effects a deemed sale of the assets, and the corporate level tax on the deemed sale must be paid by the newly acquired target corporation. A section 338 election would, therefore, have provided less value to Midcoast had it chosen that route. Thus, there were definite tax benefits to all the parties involved in using an intermediary to purchase the stock and sell the assets. In particular, Midcoast enjoyed a substantial step up in basis on the Bishop Assets.

[2] A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form. *See Gregory v. Helvering,* 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596 (1935); *see also Freytag v. Comm'r,* 904 F.2d 1011, 1015 (5th Cir.1990) ("The fundamental premise underlying the Internal Revenue Code is that taxation is based upon a transaction's substance rather than its form. Thus sham transactions are not recognized for tax purposes ..."). There are numerous iterations of the substance over form doctrine, which include, in relevant part, (1) the conduit theory; (2) the step transaction doctrine, and (3) the economic substance doctrine. Here, the Government contends that under any one of the substance over form doctrines, the participation of K–Pipe should be disregarded, and Midcoast should be deemed to have purchased the Bishop Stock and to have liquidated Bishop. The court finds that the conduit theory is the most analogous to the facts in this case and applies this substance over form doctrine to affirm the Government's recharacterization of the transaction as one of stock rather than assets.

[3] [4] [5] In the conduit theory of the substance over form doctrine, the court may disregard an entity if it is a mere conduit for the real transaction at issue. As the Supreme Court stated in *Comm'r v. Court Holding Co.,* 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981 (1945),

> 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. 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.

Id. at 334, 65 S.Ct. 707 (internal citations omitted). The contours of the conduit theory are not well defined. Nevertheless, a close scrutiny of the precedent discussing conduits provides the court with guidance on when and how to apply this theory.

In *Court Holding,* an apartment house was the sole asset of a corporation. ***727** *Id.* at 332, 65 S.Ct. 707. The corporation wanted to sell this asset and had reached an oral agreement with a third party purchaser. *Id.* at 333, 65 S.Ct. 707. Before the agreement for the asset sale could be reduced to writing, the corporation's attorney informed the purchaser that the sale could not be consummated because it would result in a sizable income tax on the corporation. *Id.* Rather than consummate the sale, the corporation transferred the apartment house in the form of a liquidating dividend to the corporation's two shareholders. *Id.* The two shareholders, in turn, formally conveyed the asset to a purchaser who had originally negotiated for the purchase of the asset from the corporation. *Id.* The Supreme Court affirmed the Tax Court's conclusion that, under these facts of the entire transaction, the role of the intermediary should be disregarded and the corporation should be deemed as having sold the asset. *Id.* at 334, 65 S.Ct. 707.

The Supreme Court faced a similar situation in *United States v. Cumberland Pub. Serv. Co.,* 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251 (1950). In that case, the shareholders of a closely-held corporation offered to sell all the corporate stock to a local cooperative. *Id.* at 452, 70 S.Ct. 280. The cooperative refused to buy the stock, but countered with an offer to buy certain assets from the corporation. *Id.* The corporation refused, not wanting to pay the heavy capital gains tax from the asset sale transaction. *Id.* The shareholders agreed to acquire the assets as a liquidated dividend and then sell them to the cooperative. *Id.* at 452–53, 70 S.Ct. 280. The cooperative accepted, and the assets were transferred in this manner. *Id.* at 453, 70 S.Ct. 280. The corporations remaining assets were sold, and the corporation dissolved. *Id.* The Tax Court found that the sale was made by the shareholders and not the corporation, concluding that the liquidation and dissolution were genuine transactions and that at no time did the corporation plan to make the sale itself. *Id.* The Supreme Court accepted the Tax Court's finding of fact that the sale was made by the stockholders rather than the corporation. *Id.* at 455. As the Court noted, "[t]he Government's argument that the shareholders acted as a mere 'conduit' for a sale by respondent corporation must fall before this finding." *Id.*

These Supreme Court cases form the backdrop of the conduit analysis, but neither *Court Holding Co.* nor *Cumberland* deal with the same factual scenario as in this case, i.e., when a corporation sells its stock to an entity, which turns around and sells the assets to a third party. The parties have directed the court's attention to three 5th Circuit cases addressing more analogous factual scenarios: *Davant v. Comm'r,* 366 F.2d 874 (5th Cir.1966); *Blueberry Land Co. v. Comm'r,* 361 F.2d 93 (5th Cir.1966); and *Reef Corp. v. Comm'r,* 368 F.2d 125 (5th Cir.1966). The court addresses each in turn.

In *Davant,* two corporations, Warehouse and Water, were owned by common owners, who wanted to sell the assets of Warehouse to Water and liquidate Warehouse. 366 F.2d at 877–88. The corporations' attorney, Bruce Sr., advised against the direct sale of assets because he believed that the IRS would take the position that the stockholders had received a dividend taxable at ordinary rather than capital rate. *Id.* at 878. Therefore, Bruce Sr. suggested that the stockholders make a sale of their stock to an unrelated third-party, who could, in turn, sell Warehouse's operating assets to Water and liquidate Warehouse without compromising the original stockholders' capital gain treatment. *Id.* The attorney's son, Bruce Jr., who was himself an attorney, agreed to purchase the stock and sell the assets. *Id.* Bruce Sr. contacted the bank holding the corporations' ***728** accounts and secured a loan for Bruce Jr. to purchase Warehouse. *Id.* The stock of Warehouse was the collateral for the loan, and it was understood that Water would then buy the assets Warehouse. *Id.* This money, plus part of the money that Warehouse had in its bank account, would then be used to repay the loan. *Id.* Bruce Jr. received $15,583.30 for his part in the transaction, and the Bank received one day's interest on the loan. *Id.* Bruce Jr. played almost no role in negotiating the transactions or the loan. *See id.* The taxpayers reported capital gain from the sale of the Warehouse stock; the Commissioner disregarded sale of stock to Bruce Jr., arguing that the substance of the transaction was a corporate reorganization with the taxpayers receiving dividends taxable as ordinary income to the extent of earnings and profits. *Id.* at 879. The Tax Court agreed with the Commissioner's characterization, and the Fifth Circuit affirmed. The Fifth Circuit examined and viewed the relevant portions of the Tax Code "as a functional whole" to determine that "[d]istributions of corporate funds to stockholders made with respect their stockholdings must be included in their gross income to the extent that those distributions are made out of the corporation's earnings and profits." *Id.* The 5th Circuit concluded that all the steps by the taxpayer were for the sole purpose of turning what otherwise would be a dividend taxed at the ordinary income rate into a capital gain. *Id.* at 880. It disregarded Bruce Jr.'s participation because "his presence served no legitimate nontaxavoidance business purpose." *Id.* at 881. He was, in the Tax Court's factual determination, "not a purchaser of the stock in any real sense but merely a conduct through which funds passed from Water to Warehouse and from Warehouse to [the stockholder petitioners]." *Id.* at 880.

In *Blueberry Land Co.,* the corporate taxpayers, involved in the real estate development business, owned certain mortgages and unpaid installment obligations (collectively, "Mortgages"), which they wanted to sell. 361 F.2d at 94–95. A prospective buyer for the assets was First Federal, and the parties began negotiating an asset purchase agreement. *Id.* at 95. First Federal and the taxpayers entered into such an agreement, but the agreement was later rescinded when the taxpayers' attorney advised against a direct asset sale due to the tax consequences. *Id.* at 96. Another attorney, familiar with the nature of the proposed transaction, came forward with an offer to purchase the taxpayer corporations' stock, liquidate the corporations, and sell the assets to First Federal. *Id.* at 97. The attorney formed a shell corporation, Pemrich, to complete the transaction. *Id.* According to plan, Pemrich purchased the stock, dissolved the corporations, and sold the Mortgages to First Federal. *Id.* Pemrich retained as an apparent profit $1,931.71 on the deal. *Id.* at 98. The taxpayer corporations and their stockholders "were not divorced from the transaction," as the stockholders were required to open certain savings accounts at First Federal as collateral for the transferred Mortgages. *Id.* These savings accounts represented 15% of the original sales price of the mortgaged properties. *Id.* In upholding the Tax Court's determination that Pemrich had been a mere conduit for the real obligation flowing between the taxpayer corporations and First Federal, the Fifth Circuit found that Pemrich was entirely dependent on the pre-existing negotiations between the taxpayers and First Federal and that the substance of the transaction was a sale by the taxpayers of their Mortgages, i.e., their assets. *Id.* 101–102. The Court was careful to note, however, that its opinion should not be construed as preventing or discouraging "a real and bona fide sale of stock by stockholders of one corporation to a second ***729** corporation, and liquidation of the first by the acquiring corporation to obtain its assets." *Id.* at 102. The key is the transaction must be substantively real and bona fide. The tension between legitimate and sham transactions is reflected in the Fifth Circuit's following comments in the case:

> We have said many times, and we here reiterate, that one may not only lawfully yearn for tax savings, but he may utilize and exploit every available legitimate means of arranging his affairs to achieve this end. Thus Taxpayers and their stockholders were entitled to avail themselves of the sale of stock method of disposing of

> Taxpayers if they so chose. But the stumbling block here is that First Federal, which throughout this transaction was the only party actually interested in obtaining Taxpayers' mortgages, could not—and hence would not—itself purchase Taxpayers' stock from the stockholders, because of restrictions on the types of investments open to it. This made necessary the use of an intermediary, which would purchase all of Taxpayers' stock, liquidate Taxpayers into it and thereby obtain their assets (principally the mortgages), and then sell the mortgages to First Federal.
>
> This plan certainly presents a legitimate method whereby the stockholders of one corporation can dispose of their stock to a second corporation, which in turn liquidates, and sells the assets of, the acquired corporation. If this actually takes place, a transaction conducted in this way would be upheld and given effect for Federal income tax purposes. But the question here is not whether a plan of this type is valid or invalid. The question rather is whether under the circumstances of this case, the plan was really what it purported to be. Stated another way, the issue is whether in substance the transaction was as formally cast by the parties; and if not, whether the form, or the substance, should control for tax purposes.
>
> We must take guard against oversimplification, for a glib generalization that substance rather than form is determinative of tax consequences not only would be of little assistance in deciding troublesome tax cases, but also would be incorrect. The fact—at least the tax world fact—is that in numerous situations the form by which a transaction is effected does influence and may indeed decisively control the tax consequences. This generalization does, however, reflect the fact that courts will, and do, look beyond the superficial formalities of a transaction to determine the proper tax treatment.

Id. at 100–101.

Finally, in *Reef Corp.,* one of the issues to be determined was whether the taxpayer was entitled to a stepped-up basis in assets acquired in a transaction involving an intermediary. *See* 368 F.2d at 127–30. There, two shareholder groups owned the taxpayer corporation, Reef Fields Gasoline Corporation ("Reef Fields"). *Id.* at 128. One group, the Butler group, decided to buy out the other, the Favrot group. *Id.* One plan that was formulated involved the liquidation of Reef Fields, which would sell its operating assets to a new corporation to be formed in exchange for cash and notes. *Id.* The Favrot group would receive cash and notes while the Butler group would receive only notes. *Id.* The Butler group rejected this plan after learning it would have to pay taxes on the gain and would not be receiving the cash to pay the taxes. *Id.* Thus, the parties agreed to and executed a new plan. *Id.* The Butler group formed another corporation, Reef Corporation ("New Reef"), and received all of the common stock of New Reef in exchange for a portion of their stock in Reef Fields. *Id.* On the same day, Reef Fields contracted ***730** to sell its properties to New Reef, but before the sale of the properties, and in accordance with a pre-arranged plan, all of the stock of Reef Fields was sold to an intermediary, who was to carry out the sale of the assets of Reef Fields to New Reef with New Reef giving promissory notes to Reef Fields as consideration. *Id.* Reef Fields distributed the promissory notes to the intermediary, an attorney named George Strong ("Strong") with a business connection to the Favrot group, and Strong pledged the notes to Butler group, Favrot group, and New Reef for the stock they sold to him. *Id.* In affirming the Tax Court's decision to disregard the sale of Reef Fields to Strong, the Fifth Circuit stated as follows:

> [Strong] was a mere conduit in a preconceived and prearranged unified plan to redeem the stock of the Favrot group in Reef Fields. His activity was but a step in the plan. He carried out a sales contract already entered into between the corporations. He assumed no risk, incurred no personal liability, paid no expenses and obtained only bare legal title to the stock. There was an insufficient shifting of economic interests to Strong. It is settled that under such circumstances substance must be given effect over form for federal tax purposes. The holding of the Tax Court in this regard was not clearly erroneous.

Id. at 130.

[6] All of these cases turn on the trial court's particular findings of fact, which requires examining the transaction as a whole to determine whether it is bona fide. Several facts stand out as particularly relevant and include (1) whether there was an agreement between the principals to do a transaction before the intermediary participated; (2) whether the intermediary was an independent actor; (3) whether the intermediary assumed any risk; (4) whether the intermediary was brought into the transaction at the

behest of the taxpayer; and (5) whether there was a nontax-avoidance business purpose to the intermediary's participation. Many of these facts are present in this case and weigh in favor of declaring K–Pipe a mere conduit in the transaction.

Although there was not a formal agreement between Langley and Midcoast regarding the stock sale, the evidence reflects that K–Pipe was able to facilitate that agreement by acting as an intermediary. Midcoast goes to great lengths to distance itself from Fortrend and K–Pipe in order to infuse legitimacy into the intermediary transaction. However, the undisputed facts reveal that it was Midcoast's tax advisors, PWC, who brought Fortrend into the picture and helped to structure the Midco transaction. Ultimately, Fortrend's participation was far less fortuitous than Midcoast intimates. Moreover, there is no objective evidence in the record that K–Pipe negotiated the stock sale at all. All of the communications involved Midcoast, and it was at the insistence of Midcoast's tax advisors that certain actions be undertaken, such as the agreement not to liquidate Bishop for two years and the formation of the Butcher Interest Partnership to add "good facts" to the transaction. Additionally, K–Pipe's obligations were almost entirely indemnified by Midcoast through various side agreements and under the Stock and Asset Purchase Agreements. It was Midcoast's loan that acted as security for the $195 million, which K–Pipe borrowed. K–Pipe, having been created for the purposes of this transaction, could not have provided any assets as security. After the transaction, K–Pipe engaged in virtually no business activity and was, in substance, a mere shell. Finally, K–Pipe's sole purpose in participating in the transaction was to allow Midcoast to step up the basis of the Bishop Assets. Under the facts of this case, the court ***731** finds that K–Pipe's role in the transaction should be disregarded.

[7] Disregarding K–Pipe leaves the court with the question of what was the real substance of the transaction: a sale of stock or a sale of assets. In *Blueberry Land Co.*, the Fifth Circuit affirmed the Tax Court's determination that a similar transaction was, in substance, a sale of assets. Nevertheless, in that case, the parties had initially agreed to sell and purchase the assets. Here, by contrast, Langley would not entertain a direct asset sale. Thus, the only way in which Midcoast could have obtained the Bishop Assets was to purchase the Bishop Stock and liquidate. Indeed, it negotiated extensively with Langley for this very purpose. The fact that Midcoast and Langley did not ultimately reach a formal agreement as to the stock purchase is not dispositive. Without K–Pipe's participation, Midcoast must be treated as having purchased the Bishop Stock and liquidated. The Government's recharacterization of the sale as such for tax purposes was, therefore, appropriate.

B. *The Butcher Interest*

[8] Midcoast makes two claims relevant to the Butcher Interest: first, Midcoast claims that it is entitled to an ordinary loss in the amount of $182,138 arising from its 45 percent share of the losses from the Butcher Interest Partnership in 2000; and, second, Midcoast claims that it is entitled to either a capital loss or an ordinary loss under IRC §§ 162 or 165 in the amount of $5,775,416 relating to the termination of the Butcher Interest Partnership in 2001. The Government argues that Midcoast cannot take any deductions related to the Butcher Interest Partnership because the partnership was a sham.

[9] To determine whether the Butcher Interest Partnership was a sham, the court must examine whether entering into the partnership had economic substance. *See Merryman v. Comm'r,* 873 F.2d 879, 881 (5th Cir.1989) ("transactions which have no economic purpose or substance other than the creation of income tax losses or credits are to be disregarded for tax purposes"). The court must examine the objective realities of the transaction in resolving whether economic substance is present. *See id.* "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." *Id.* (quoting *Frank Lyon Co. v. United States,* 435 U.S. 561, 583–84, 98 S.Ct. 1291, 55 L.Ed.2d 550 (1978)). Here, the court finds that K–Pipe and Midcoast entered the Butcher Interest Partnership solely for the purpose of tax avoidance. The Butcher Interest Partnership was a part of a preconceived plan to provide "good facts" to K–Pipe's participation and disguise the true nature of the Midco transaction. The court is not persuaded that the Bishop Interest had any inherent value to Midcoast other than as a means to bolster its tax position. The court finds, therefore, that the Butcher Interest Partnership was a sham and that Midcoast is not entitled to any deductions relating thereto.

C. *The PDA*

Midcoast is claiming that it is entitled to deduct the entire $10.75 million relating to the terminated Project Development Agreement as an ordinary and necessary business expense under I.R.C § 162. The Government contends that the $10.75 million was, like the $3 million, additional consideration paid for the Bishop stock. The court finds that the facts support the Government's position and holds that Midcoast is not entitled to an additional deduction for this amount.

*732 D. *The I.R.C. § 6662 Penalty*

[10] The IRS may impose a twenty percent penalty for, *inter alia,* negligence or disregard of rules or regulations or a substantial understatement of income tax. I.R.C. § 6662(b).[7] Negligence "includes any failure to make a reasonable attempt to comply with the provisions of [the Internal Revenue Code]" or to exercise ordinary and reasonable care in preparing a tax return. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662–3(b)(1). According to the regulations, "[n]egligence is strongly indicated where ... a taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances[.]" Treas. Reg. § 1.6662–3(b)(1) (ii). "Disregard of rules and regulations" includes any careless, reckless, or intentional disregard of the rules and regulations relating to the Internal Revenue Code. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662–3(b)(2). A "substantial understatement of income tax" occurs, in the context of a corporation taxpayer, if the amount of understatement exceeds greater of (i) 10 percent of the tax required to be shown on the return or (ii) $10,000. I.R.C. § 6662(d)(1)(B). Because it is undisputed that, having recharacterized the Bishop transaction as an acquisition of stock, Midcoast understated its income tax by 10 percent, the court shall begin by discussing the substantial understatement of income tax provision.

Meeting the mathematical element of the substantial understatement of income tax, standing alone, does not carry the day for the Government because certain statutory exceptions may be applicable. *See Klamath Strategic Inv. Fund, LLC v. United States,* 472 F.Supp.2d 885, 900 (E.D.Tex.2007). Under section 6662, the penalty for a substantial understatement of income tax may not be applicable if Midcoast (1) had "substantial authority" to support the deductions at issue or (2) adequately disclosed the relevant facts relating to the deductions and there is a reasonable basis for the tax treatment claimed. *See* I.R.C. § 6662(d)(2) (B). I.R.C. § 6664 provides an additional exception and states,

> No penalty shall be imposed ... with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

I.R.C § 6664(c)(1). There are, however, special rules in cases involving tax shelters, which are defined under the Code as "(I) a partnership or other entity, (II) any investment plan or arrangement, or (III) any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax." I.R.C. § 6662(d)(2)(C)(iii). If a tax shelter is involved in a case with a corporate taxpayer, neither the substantial authority or the adequate disclosure/reasonable basis exceptions under section 6662(d)(2)(B) applies. I.R.C. § 6662(d)(2)(C)(ii).[8] Even if a tax shelter is implicated, the corporate taxpayer may still rely on the reasonable cause/good faith exception in section 6664.

*733 The court finds that the Midco transaction in this case meets the definition of a tax shelter under the Code. It is clear that Midcoast undertook the intermediary transaction with the sole purpose of inflating its basis in the Bishop Assets to increase deductions for depreciation and amortization. This qualifies as a plan whose significant purpose is the avoidance or evasion of Federal income tax. As such, the substantial authority or the adequate disclosure/reasonable basis exceptions are not applicable in this case.

Assuming, *arguendo,* that the transaction was not a tax shelter, Midcoast has still failed to show that substantial authority existed for its tax position or that it adequately disclosed the relevant facts of the transaction and had a reasonable basis for its tax position. "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50–percent likelihood of the position being upheld), but more stringent than the reasonable basis standard." Treas. Reg. § 1.6662–4(d)(2). For substantial authority to exist, "the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment." Treas. Reg. § 1.6662–4(d)(3)(i); see also *Klamath,* 472 F.Supp.2d at 900. Here, the weight of authorities does not support Midcoast's deductions at issue. Indeed, the weight of authorities counseled against the use of an intermediary in this manner. *See* Part III.A, *supra.* These authorities are more persuasive than those on which Midcoast purportedly relied. With respect to the adequate disclosure/reasonable basis exception, it is undisputed that Midcoast did not adequately disclose the relevant facts surrounding the deductions at issue. As such, neither exception under section 6662 applies to immunize Midcoast from the 20 percent penalty assessed by the Government.

[11] Finally, the court finds that Midcoast cannot avail itself of the reasonable cause/good faith exception under section 6664. The evidence in the record reflects a knowing participation by Midcoast in a scheme to obfuscate the real transaction at issue. While reliance on the tax advice of professionals will typically satisfy the requirements of section 6664, the court finds that Midcoast's reliance on PWC under the facts of this case to be unreasonable.

IV. Conclusion

Accordingly, and for the reasons explained above, it is hereby

ORDERED that Defendant's motion for summary judgment (Doc. 23) is GRANTED; and, it is further

ORDERED that Plaintiffs' motion for summary judgment (Doc. 24) is DENIED.

All Citations

553 F.Supp.2d 716, 101 A.F.T.R.2d 2008-1733, 2008-1 USTC P 50,266, 171 Oil & Gas Rep. 537

Footnotes

1 According to the promotional materials provided to Langley, Fortrend is an investment bank specializing "in structuring and managing economic transactions that accomplish specific tax or accounting objectives" by providing "unique" and "creative" planning techniques. (Gov't Ex. 26, Doc. 23).

2 Although Midcoast agreed to pay $15 million, it escrowed only $14 million, which subjected K–Pipe to the $1 million risk should the closings be delayed. When asked about this discrepancy, Gary Wilson ("Wilson") from PWC testified that K–Pipe's contractual risk would be a "favorable fact" should the Government challenge K–Pipe's participation. (Wilcox Dep., dated Feb. 19, 2007, at 146–47, Doc. 23).

3 Indeed, in November 2004, Langley filed suit against Fortrend, K–Pipe, Midcoast, and others in the United States District Court for the District of Kansas, *Langley v. Fortrend Int'l, L.L.C., et al.,* Cause No. 04–2546–JWL, after the Government challenged the Bishop Stock sale. (*See* Kaitson Aff. Ex. 2, Doc. 26).

4 There is no evidence in the record that Langley entered into a separate escrow agreement.

5 The IRS subsequently audited K–Pipe Group and disallowed these losses.

6 Enbridge Midcoast Energy Inc., formerly known as Midcoast Energy Resources, Inc., filed the original complaint. (Pl.'s Compl., Doc. 1). On April 20, 2006, Enbridge Energy Company, Inc. and Enbridge Midcoast Energy, L.P., formerly known as Enbridge Midcoast Energy, Inc., formerly known as Midcoast Energy Resources, Inc., filed an amended complaint. (Pls.' Am. Compl., Doc. 10). Plaintiffs are collectively herein referred to as "Midcoast."

7 This particular provision was substantively amended in 2004 and 2005. Unless otherwise noted, the court cites to the provision as it existed before the 2004 amendments, which covers the tax years at issue in this case.

8 For non-corporate taxpayers, an understatement of taxes attributable to a tax shelter removes the adequate disclosure/reasonable basis exception, but the substantial authority exception remains applicable if the taxpayer can show that he reasonably believed that the tax treatment claimed was more likely than not the proper treatment. *See* I.R.C. 6662(d)(2)(C)(i) (II).

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EXHIBIT K

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

T.C. Memo. 2016-119
United States Tax Court.

Estate of Richard L. Marshall, Deceased, Patsy L. Marshall, Personal Representative, and Patsy L. Marshall, Transferees, et al.,[1] Petitioners
v.
Commissioner of Internal Revenue, Respondent

Docket Nos. 27241-11
|
28661-11
|
28782-11
|
Filed June 20, 2016.

1 Cases of the following petitioners are consolidated herewith: Marshall Associated, LLC, Transferee, docket No. 28661-11; and John M. Marshall and Karen M. Marshall, Transferees, docket No. 28782-11.

Synopsis
Background: Related taxpayers who formerly owned C corporation, and their limited liability company (LLC), petitioned for review of IRS determination that taxpayers and LLC were liable as transferees for corporation's income-tax liability.

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

[1] taxpayers had constructive knowledge of transfers that left their former C corporation unable to pay taxes;

[2] C corporation's transfer of over $33.7 million in exchange for taxpayers' stock was fraudulent as to IRS under Oregon Uniform Fraudulent Transfer Act (OUFTA);

[3] C corporation's fraudulent transfer had no economic effects other than the creation of a loss for corporation.

Decision for IRS.

Attorneys and Law Firms

Robert J. Chicoine, Christopher R. Chicoine, and David B. Bukey, for petitioners.

Melanie E. Senick, William D. Richard, Patsy A. Clarke, and Gregory Michael Hahn, for respondent.

[*2] MEMORANDUM FINDINGS OF FACT AND OPINION

GOEKE, Judge:

*1 In these three consolidated transferee liability cases the Government seeks to collect from petitioners, as transferees, Federal income tax of $15,482,046 and a penalty of $6,192,818 assessed against First Associated Contractors, Inc., formerly known as Marshall Associated Contractors, Inc. (MAC), for its fiscal year ending (FYE) March 31, 2003.[2] On March 7, 2003, MAC entered into a complex set of agreements which resulted in all or substantially all of its assets' being transferred to Richard Marshall (Richard), Patsy Marshall (Patsy), John Marshall (John), and Karen Marshall (Karen) (collectively Marshalls) and Marshall Associated, LLC (MA LLC), an Oregon limited liability company wholly owned by the Marshalls (MAC transaction).

2 All dollar amounts are rounded to the nearest dollar.

The issue for decision is whether petitioners are liable as transferees under section 6901 for MAC's unpaid Federal income tax liability, penalty, and interest.[3] For the reasons stated herein, we find that petitioners are liable.

3 Unless otherwise indicated, all section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[*3] FINDINGS OF FACT

The Marshalls were residents of Oregon at the time they filed petitions, and MA LLC's principal place of business was in Oregon at all relevant times. Richard, Patsy, John, and Karen each owned 25% of MAC. MAC was incorporated in 1965 under the laws of the State of Oregon as a C corporation, where it also had its principal place of business. John and Richard were brothers. Richard and Patsy were married, as were John and Karen, for all relevant periods. Richard Marshall died on October 29, 2013.

Beginning in 1965 MAC operated as a construction contractor specializing in heavy construction, including sewer and water pipe installation. Richard was responsible for MAC's business operations. His duties included managing MAC's finances and doing most of MAC's bidding on construction projects. John was responsible for MAC's field operations. His duties included assembling crews for MAC's construction projects and overseeing the construction worksites.

U.S. Bureau of Reclamation Work and Subsequent Litigation

In 1982 MAC entered into a contract with the U.S. Bureau of Reclamation (US BOR) to supply approximately 1,061,400 cubic yards of sand and coarse aggregate for the construction of the Upper Stillwater Dam in central Utah (Stillwater project), which MAC completed. Construction of the dam was to begin [*4] in 1983. In or about 1983 MAC entered into a contract with the US BOR to build a two-lane road in the mountains near Thistle, Utah (Sheep Creek project). In 1984 Union Bank of California (UBOC) lent $2 million to MAC for the Stillwater project. Richard and John personally guaranteed the UBOC loan to MAC.

A contract dispute arose regarding the Stillwater project and the contract was terminated. MAC filed a claim for equitable adjustment, which was denied, and subsequently appealed in 1984 (Stillwater appeal). Another contract dispute arose regarding the Sheep Creek project, and MAC subsequently filed a claim for additional compensation in 1984 following completion of the project. This claim was also denied, and MAC appealed (Sheep Creek appeal). The Marshalls and US BOR agreed to resolve the Stillwater appeal before addressing the Sheep Creek appeal.

*2 In 1999 Richard suffered a stroke that left him with hemiparalysis, difficulty moving one side of his body; and expressive aphasia, difficulty expressing himself using spoken language. After his stroke Richard was unable to speak, but "his memory and understanding [were] good." Dr. Ellen Mayock, Richard's treating physician, does not know what Richard understood or did not understand because he was unable to tell her what he could understand. Richard relied on his family [*5] and on his legal advisers with respect to the MAC transaction. Richard's answer to the question of whether he wanted to sell his MAC stock would reflect his intention to sell. John represented to third parties that after the stroke Richard "could not communicate very well but could understand what was going on."

After Richard's stroke, John took over Richard's responsibilities at MAC, including maintenance of MAC's books and records. MAC wound down its contracting business and had not contracted on any construction jobs since 2000. MAC shifted its primary focus to the pursuit of the Stillwater appeal. MAC's only business activity after 2000 was the rental of its heavy equipment and its land.

On March 22, 2002, the Department of the Interior Board of Contract Appeals ruled in favor of MAC in the Stillwater appeal. On May 16, 2002, MAC received a $40,033,130 litigation award from US BOR, which represented contract damages and interest for the Stillwater appeal (Stillwater litigation award). On August 2 and October 9, 2002, MAC received additional interest payments on the Stillwater litigation award of $265,743 and $556,005, respectively. The total amount of MAC's Stillwater litigation award, with interest, was $40,854,878, all of which MAC received during its FYE March 31, 2003.

[*6] Following receipt of the Stillwater litigation award, MAC made estimated tax payments of $889,990 to the State of Oregon and $3,825,000 to the Internal Revenue Service (IRS) for its FYE March 31, 2003.

MAC and the Marshalls' Search for a Solution to the Tax Problem

In anticipation of MAC's receipt of the Stillwater litigation award, John sought help from John Dempsey and Michael Weber at PricewaterhouseCoopers (PwC). Mr. Dempsey was a senior manager at PwC in Portland, Oregon, and Mr. Weber was one of the partners that oversaw Mr. Dempsey.

Mr. Dempsey and Mr. Weber oversaw the preparation of the Marshalls' personal income tax returns, including those for taxable year 2003, and Mr. Weber signed them as the preparer. In anticipation of the Stillwater litigation award, John asked PwC to find out what liability MAC and the Marshalls would incur and whether there were any strategies that could help the Marshalls shelter some of the gain from the Stillwater litigation award.

Through consultations with PwC, the Marshalls considered a liquidation of MAC, an S corporation election for MAC, refreshing MAC's expired net operating losses (NOLs), and a sale of their MAC stock in 2002. The Marshalls decided not to pursue any of the tax planning options that Mr. Dempsey and Mr. [*7] Weber recommended because John Marshall was uncomfortable with PwC's recommendations.

Peachtree Financial

John's insurance agent, Kenneth Evanson, introduced the Marshalls to Peachtree Financial. Peachtree Financial proposed to purchase the Marshalls' MAC stock in an installment sale. The Marshalls evaluated and rejected Peachtree Financial's proposal to purchase their MAC stock because they would lose control over their money.

Through Peachtree Financial, John was introduced to Fortrend International, Inc. (Fortrend). Peachtree Financial received a $306,000 referral fee for introducing John to Fortrend. Initially, John communicated and negotiated directly with representatives of Fortrend and represented the other MAC shareholders in his communications with Fortrend.

Fortrend

*3 In a letter to John dated October 15, 2002, Steve Irgang of Fortrend represented that Fortrend "specializes in structuring transactions to solve specific corporate tax problems." A Fortrend promotional brochure that Mr. Irgang transmitted to John represented that "[c]lients of Fortrend have benefitted from our ability to structure transactions that minimize shareholder and corporate [*8] liabilities." On October 22, 2002, John had a telephone conference with Mr. Irgang, Jeffrey Furman of Fortrend, Howard Kramer of Fortrend, Michael Bittner, a return preparer for Fortrend, Charles Klink, a lawyer representing Fortrend, and Mr. Dempsey.

On October 28, 2002, Alice Dill of Fortrend sent John, as representative of the MAC shareholders, a letter of intent to purchase the Marshalls' MAC stock. The letter of intent was from Essex Solutions, Inc. (Essex), signed by its president, Richard Leslie. On January 31, 2003, the shareholders of Essex were Willow Investment Trust (Willow) and MidCoast Credit Corp. (MidCoast). As of April 10, 2003, Essex was wholly owned by Willow. The Essex letter of intent reflected that $4,700,000 of the purchase price would consist of a promissory note "secured by tax refunds".

John reviewed and marked up the Essex letter of intent. On November 8, 2002, Randy Bae of Fortrend sent an email to John regarding "acquisition of Marshall Associated Contractors, Inc." with an attachment "illustrating the buyer's calculation of the stock purchase price." As proposed, the stock purchase price would be determined by taking the net value of the company after taxes and adding 50% of MAC's tax liability, resulting in an amount greater than the net asset value of the company. John himself calculated a "scenario sale" purchase [*9] price and the split of MAC's tax liability between the Marshalls and Essex. John mulled over the Essex letter of intent for several weeks before deciding that he wanted the Marshalls to sell their MAC stock.

The Marshalls' Search for Advice

The Marshalls engaged PwC and the law firm of Schwabe Williamson & Wyatt (Schwabe) to advise them in connection with the Essex letter of intent. John interacted with Schwabe and PwC on behalf of Richard, Patsy, and Karen.

In late October 2002 John brought the Essex letter of intent to Mr. Dempsey and Mr. Weber of PwC. Both Mr. Dempsey and Mr. Weber had significant tax experience. Mr. Dempsey prepared a spreadsheet comparing the net cash after taxes that the Marshalls would receive in a liquidation of MAC versus a stock sale pursuant to the terms of the Essex letter of intent. Mr. Dempsey concluded that the Marshalls would receive approximately $6,800,000 more in net proceeds if they sold their MAC stock than if they liquidated MAC.

At the time that the Marshalls received the Essex letter of intent, MAC's assets consisted of: (i) an office and construction shop on 11 acres of land and heavy machinery and equipment, with a combined value of $2,776,500; (ii) an interest in Pearl Condo, LLC, valued at $4 million; (iii) $34,500,000 in cash; (iv) the Stillwater Equal Access to Justice claim for attorney's fees (Stillwater EAJA [*10] claim) and the Sheep Creek appeal with projected future proceeds of $2,897,500; (v) $3,825,000 in prepaid Federal tax; and (vi) $889,990 in prepaid Oregon State taxes. MAC's liabilities consisted of: (i) $4,433,866 to UBOC (UBOC liability); (ii) $500,000 to Mr. Jochim (Jochim liability); and (iii) Federal and State taxes for its FYE March 31, 2003, due on the Stillwater litigation award.

Schwabe

In late November 2002 John took the Essex letter of intent to Schwabe. Schwabe had been the Marshalls' long-time legal advisers. They represented the Marshalls in the MAC transaction in their capacity as shareholders but did not represent MAC in the MAC transaction. The Marshalls relied on Schwabe to advise and represent them in the MAC transaction. Mitchell Hornecker was a business lawyer and the lead attorney at Schwabe representing the Marshalls with respect to the MAC transaction. Also involved in the MAC transaction for Schwabe were Kevin Kerstiens, Craig Russillo, Alan Pasternack, and Deric Luoto. John met with Mr. Hornecker on November 20, 2002, to discuss the Essex letter of intent. At the November 20, 2002, meeting, John told Mr. Hornecker that the purchase price was the value of the stock plus half of MAC's tax liability and that Essex was splitting the tax benefit with the Marshalls.

*4 [*11] John was planning on developing MAC's 11 acres of land. He also intended to stay in the construction business and was considering starting a new construction company. John informed Mr. Hornecker that the Marshalls wanted to keep MAC's 11 acres of land, MAC's interest in Pearl Condo, LLC, MAC's heavy machinery and equipment, and control over the remaining US BOR litigation.

Essex proposed to use the cash in MAC's bank account to pay the purchase price for the MAC stock to the Marshalls. This caused Schwabe some concern. Mr. Hornecker was concerned that MAC could be pulled into bankruptcy if Essex used MAC's cash to pay the purchase price to the Marshalls. Mr. Russillo stated to Mr. Hornecker and Mr. Kerstiens on November 24, 2002, that "there is the possibility that the proposed stock sale can be attacked by the [bankruptcy] trustee as a fraudulent transaction under 11 USC 548" and concluded that "[i]f Essex is paying FMV for the stock, and has no intent to defraud any of its creditors, I think we're ok."

Mr. Kramer of Fortrend provided two references to Mr. Hornecker. The "nuts and bolts" of Schwabe's due diligence was done by Schwabe associates and Mr. Luoto, so Mr. Hornecker did not contact the references. Schwabe only conducted database and Internet research on Essex and Fortrend. Despite the "sketchy information" that Schwabe uncovered about related Fortrend entities' tax [*12] noncompliance, Schwabe did not inquire about Fortrend's past deals. They also researched transferee liability and communicated to the Marshalls that if Essex took steps to render MAC unable to pay its tax liability, the IRS could pursue transferee liability against the Marshalls.

Schwabe had concerns regarding whether the buyer was going to defraud creditors and carefully structured the transaction to try to avoid any potential problems with that. Because of Schwabe's concern about transferee liability, Mr. Pasternack was asked to research the issue and prepare a memorandum. After extensive research, Mr. Pasternack concluded in his "Transferee Liability" memorandum that "the selling Marshall shareholders would likely be considered transferees of * * * [MAC's] property" with respect to the partial redemption and that "if Essex took steps that rendered * * * [MAC] unable to pay tax liabilities existing at the time of the redemption and the stock sale, there could be a basis for the IRS to seek to impose transferee liability on the selling shareholders" with respect to the stock sale. Mr. Hornecker discussed the risk of transferee liability with the Marshalls after Mr. Hornecker reviewed Mr. Pasternack's "Transferee Liability" memorandum and before the MAC transaction closed.

The Marshalls decided to sell their MAC stock in the MAC transaction under the negotiated terms despite being advised of the risks of the MAC [*13] transaction by Schwabe. Mr. Hornecker provided the Marshalls with a followup letter dated April 24, 2003, which was after the MAC transaction closed. It did not contain any legal analysis and was intended "to remind [the Marshalls] of a few of the more significant issues arising from these transactions."

PricewaterhouseCoopers

After gathering information and conducting an analysis of the stock sale proposed by the Essex letter of intent, Mr. Dempsey became concerned about Fortrend's plan to offset MAC's income with its losses because it was similar to a listed transaction. Mr. Dempsey discussed his concerns about the proposed stock sale with Mr. Weber, who expressed similar concerns. Mr. Weber thought the MAC transaction seemed inconsistent with other transactions in which he had been involved. Mr. Weber was concerned because Fortrend had used transactions like the proposed stock sale in the past to shelter income and avoid taxes. Mr. Weber and Mr. Dempsey contacted PwC's national office to obtain advice.

*5 Dan Mendelson was a national partner in PwC's tax quality and risk management (QRM) group in 2002 and 2003. He assessed transactions that other PwC personnel were uncomfortable with or were concerned could be listed transactions to determine whether PwC could remain involved. PwC's QRM group assessed PwC's compliance with IRS regulations to reduce the risk of [*14] noncompliance and penalties' being imposed on PwC and PwC employees, among other things. Mr. Mendelson advised Mr. Dempsey and Mr. Weber that

PwC should not consult or advise on the proposed stock sale. PwC concluded that the stock sale proposed by Essex was similar to a listed transaction and that it could not consult or advise on the proposed stock sale any further.

When Mr. Weber and Mr. Dempsey spoke with John about their concerns regarding the proposed stock sale, they were "trying to convey absolute concern over the transaction and the chances that it could be challenged by the IRS" to John. Mr. Dempsey and Mr. Weber told John before March 7, 2003, that the proposed stock sale was similar to a listed transaction, explained to John what a listed transaction was, and tried to discourage John from entering into the proposed stock sale. After advising John not to do the proposed stock sale, Mr. Weber thought that John understood the risks, including the risks associated with losing control over MAC. John's response to Mr. Weber's and Mr. Dempsey's warnings about the proposed stock sale was silence. After the MAC transaction closed on March 7, 2003, but before the Marshalls' personal returns were filed in October 2004, Mr. Weber and Mr. Dempsey informed John that the MAC transaction was similar to a listed transaction and would need to be disclosed on petitioners' returns.

[*15] Mr. Dempsey informed John in person that PwC could not consult or advise on the proposed stock sale, which meant PwC could not be involved in discussions or negotiations with Fortrend regarding it. MAC did not remain a client of PwC although the Marshalls did remain clients. PwC provided services with respect to the preparation of the Marshalls' Forms 1040, U.S. Individual Income Tax Return. PwC still needed to determine the net cash that the Marshalls would receive from the MAC transaction so that PwC could compute their estimated tax and prepare their Forms 1040.

After PwC warned John about the proposed stock sale, Fortrend learned of PwC's concerns that the stock sale proposed by the Essex letter of intent was similar to a listed transaction. Fortrend's Mr. Kramer and Mr. Bernstein of Midcoast telephoned Mr. Dempsey to try to persuade him that it was not similar to a listed transaction. The telephone call from Mr. Kramer and Mr. Bernstein did not alleviate Mr. Dempsey's concerns about the proposed stock sale. In January 2003, MidCoast sent the Marshalls, PwC, and Schwabe letters and promotional materials that represented that their tax strategy was "not the same as, or substantially similar to, the tax strategy contained in Notice 2001-16."

[*16] Carrying Out the Transaction

Utrecht-America Finance Co. (UAFC) was a Delaware company and subsidiary of Utrecht-America Holdings, which was a U.S. subsidiary of Rabobank Nederland (Rabobank). Rabobank provided financing to Fortrend to purchase corporations in transactions similar to the MAC transaction. Before Rabobank would fund a loan to Fortrend, it required security interest agreements in place securing the loan with the corporation's assets to allow Fortrend's use of the loan proceeds to acquire the corporation's stock. Once Fortrend had title to the corporation, the corporation's cash would be used to pay off the Rabobank loan. Rabobank typically analyzed audited financials during its credit check process. Rabobank did not conduct a credit analysis if the corporation had sufficient cash to repay Rabobank's loan to the buyer.

*6 On or about January 28, 2003, John executed a revised Essex letter of intent as the director of MAC (final Essex letter of intent). On January 30, 2003, Cruz Alderete executed the final Essex letter of intent as the president of Essex.[4] The final Essex letter of intent reflected that the purchase price for the Marshalls' MAC stock was to be calculated as follows:

> [*17] An amount equal to (i) four million three hundred thousand dollars ($4,300,000) plus (ii) (A) one hundred percent (100%) of the Company's cash at Closing minus (B) forty percent (40%) of the tax liability of the Company as of the Closing based on the balance sheet of the Company, dated October 21, 2002, as amended.

4 It is unclear when or why Mr. Alderete replaced Mr. Leslie as president of Essex.

The $4,300,000 amount in the final Essex letter of intent represented a discounted value for MAC's prepaid Federal and State taxes, which equaled $4,714,990. Initially, Essex proposed to pay the Marshalls 50% of MAC's tax liability as a premium over MAC's net asset value. Mr. Hornecker was able to negotiate the percentage of MAC's tax liability that would be paid as a premium to the Marshalls up to 60%. The purchase price for the Marshalls' MAC stock was calculated as follows:

Total tax liabilities	$15,896,215 ($2,670,273 + $13,225,942)
40% of total taxes	$6,358,486 (premium)
Cash at Rabobank	$19,912,952 ($26,271,438 - 6,358,486)
Credit for prepaid tax	$4,300,000
Purchase price	$24,212,952

The MAC redemption and stock sale were effected by the closing of both the partial redemption agreement and the stock purchase agreement, which were integrated agreements. Under the partial redemption agreement the shareholders of MAC would receive assets worth $6,766,500, constituting all of MAC's assets other than MAC's cash, the future litigation proceeds, and its prepaid income tax, for approximately 18% of MAC shares.

[*18] The stock purchase agreement required MAC to "not [be] engaged in any material business or material business activity" and to have as its "sole assets" $26,271,438 in cash and the remaining US BOR litigation. On or about January 30, 2003, the Marshalls formed MA LLC, an Oregon limited liability company, taxable as a partnership. MA LLC had four equal members: John, Richard, Karen, and Patsy, with John and Richard as the managers. MA LLC was formed to put MAC's land and equipment and the Pearl Gateway Condo into an entity. Once MAC's land, equipment, and other noncash assets were held by MA LLC on March 7, 2003, MAC's only assets were the $26,271,438 in its Rabobank account No. 1345, its estimated tax payments, and the remaining US BOR litigation claim.

The stock purchase agreement required MAC to establish an account at Rabobank and deposit $26,271,438 in cash into this Rabobank account as a condition to closing. On February 18, 2003, Ms. Dill transmitted forms for a new Rabobank account for MAC to Mr. Hornecker, which John executed on February 20, 2003.

At the insistence of Fortrend, MAC opened Rabobank account No. 1345 on February 20, 2003. On March 3, 2003, MAC wired $80,259 and $25,982,847 into its new Rabobank account No. 1345. On March 4, 2003, MAC wired $208,332 into its Rabobank account No. 1345. As of March 4, 2003, the balance in MAC's [*19] Rabobank account No. 1345 was $26,271,438. As of March 4, 2003, all of MAC's cash was on deposit in its new Rabobank account No. 1345. On February 20, 2003, Essex opened Rabobank account No. 1336. On March 6, 2003, Mr. Alderete executed Rabobank account forms for MAC's Rabobank account No. 1345 as the president of MAC.

*7 Rabobank did not require Essex or MAC to submit audited financials because MAC's cash on deposit at Rabobank would be sufficient to pay off Essex's loan. The loan to Essex was short term because MAC had sufficient cash to pay Essex's loan, MAC's Rabobank account No. 1345 was pledged to repay Essex's loan, and Rabobank would have a security interest in MAC's Rabobank account No. 1345. In a Rabobank "Credit Report dated February 7, 2003," Chris Kortlandt, the vice president of Rabobank's Structured Finance Department in 2003, stated that the stock sale was referred to Rabobank by Fortrend and that there would be a

> [p]ledge of the accounts (at Rabobank) of our borrower, Essex Solutions, and its newly acquired subsidiary, Marshall [MAC]. Marshall [MAC] will hold cash balances of $31mm [million] in an account at Rabobank (pledged to us).
>
> At closing, Marshall [MAC] guarantees Essex Solutions obligations under the loan, which guarantee will be secured by Marshall [MAC] cash accounts held

at Rabobank.

[*20] The credit report also stated that: (1) even though the loan was to be provided up to 30 days, "it is expected to be repaid within 2 business days"; (2) "[w]e will receive irrevocable payment instructions to transfer the total cash balance ($31mm) from the * * * [MAC account] to * * * [Essex's account] held at Rabobank, which funds will be used as repayment for our loan"; and (3) "the loan will be cash collateralized."

Rabobank's loan to Essex was low risk for nonrepayment because it was cash collateralized by MAC's cash in Rabobank account No. 1345, MAC guaranteed the loan, and Rabobank had a security interest in MAC's Rabobank account No. 1345 and Essex's Rabobank account No. 1336.

Mr. Alderete, as president of Essex, executed a promissory note in the amount of $30 million payable to UAFC dated as of March 6, 2003 (promissory note). The promissory note was explicit in stating that the advanced funds were to be used to acquire the MAC stock and that Essex's loan would not be funded until Essex and MAC had on deposit in their respective Rabobank accounts the principal amount of the loan plus $1 million. The balances in MAC's Rabobank account No. 1345 and Essex's Rabobank account No. 1336 would at all times exceed the outstanding balance of Essex's loan and the interest and fees due on the loan.

[*21] A control agreement among Essex as the grantor, UAFC, and Rabobank dated as of March 6, 2003, was executed by Mr. Alderete, as president of Essex (Essex control agreement). The Essex control agreement gave UAFC control over all cash, instruments, and financial assets, Essex's Rabobank account No. 1336, and all security entitlements.

A guaranty by MAC, the guarantor, in favor of UAFC dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC (MAC guaranty). Pursuant to the MAC guaranty, MAC unconditionally guaranteed the punctual payment of all of Essex's obligations and liabilities to UAFC and granted UAFC the right to offset MAC's Rabobank account No. 1345 to satisfy Essex's obligations and liabilities. Essex's loan from Rabobank was conditional upon the MAC guaranty. A security and assignment agreement by MAC as the guarantor in favor of UAFC dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC (MAC security agreement). Pursuant to the terms of the MAC security agreement, MAC granted UAFC a first priority security interest in MAC's Rabobank account No. 1345 to secure the obligations of MAC, under the MAC guaranty, to UAFC.

A control agreement among MAC as the grantor, UAFC, and Rabobank dated as of March 6, 2003, was executed by Mr. Alderete as president of MAC [*22] (MAC control agreement). The MAC control agreement gave UAFC control over MAC's Rabobank account No. 1345, all cash, instruments, and financial assets contained, and all security entitlements. Rabobank and UAFC required the MAC guaranty, the MAC security agreement, and the MAC control agreement to be executed before Essex's loan would be funded. The MAC guaranty, the MAC security agreement, and the MAC control agreement became effective simultaneously with the closing of the stock sale.

Transaction

*8 On March 7, 2003, pursuant to the partial redemption agreement, MAC redeemed 180 shares of capital stock from each of the Marshalls in exchange for $1,691,625 worth of MAC's noncash tangible assets, for a total of $6,766,500. MAC's noncash tangible assets consisted of heavy equipment, shop equipment and tools, office electronics, machinery, vehicles, trailers, leases, the 11 acres of land where MAC maintained its office, and MAC's interest in Pearl Condo, LLC. In connection with the partial redemption, MAC conveyed its noncash tangible assets to MA LLC on March 7, 2003, at the direction of the MAC shareholders.

On March 7, 2003, pursuant to the future litigation proceeds agreement entered into by petitioners and Essex, MAC transferred its rights to 80.35% of the Sheep Creek appeal proceeds and 100% of the Stillwater EAJA claim proceeds [*23] with a combined value of $2,544,480 to the Marshalls. The Marshalls purportedly sold their remaining MAC stock to Essex. On the same day, the stock sale closed and, pursuant to the stock purchase agreement, the Marshalls assumed MAC's nontax liabilities, which consisted of the $4,433,866 UBOC liability and the $500,000 Jochim liability.

On March 7, 2003, Essex's account No. 1336 at Rabobank was credited with $30 million, which represented a draw under the loan agreement with UAFC. Immediately before the stock sale, Essex's sole asset was the $30 million in UAFC loan proceeds and its sole liability was the $30 million UAFC loan payable. Pursuant to the stock purchase agreement, Essex wired $24,410,000 from its Rabobank account No. 1336 to MA LLC's USBanCorp Piper Jaffray account No. 5091 at the direction of the Marshalls and wired $200,000 to Schwabe's trust account. Pursuant to the stock purchase agreement, the Marshalls conveyed their outstanding shares of MAC to Essex.

On March 7, 2003, funds of $25 million were transferred from MAC's Rabobank account No. 1345 to Essex's Rabobank account No. 1336. Essex paid MAC a $150,000 guaranty fee. At the end of the day on March 7, 2003, after taking into account MAC's transfer of $25 million from its Rabobank account No. 1345 to Essex's Rabobank account No. 1336 and MAC's receipt of the $150,000 [*24] guaranty fee from Essex, the balance in MAC's Rabobank account No. 1345 was $1,421,438.01. On March 7, 2003, Essex's Rabobank account No. 1336 was debited in the amount of $30 million to repay the $30 million loan due to UAFC. Essex's loan was drawn down and repaid on the same day. Essex paid a $100,000 upfront fee to UAFC.

At the end of the day on March 7, 2003, after taking into account Essex's repayment of its loan, payment of the $150,000 guaranty fee to MAC, and payment of the $100,000 upfront fee to UAFC, the balance in Essex's Rabobank account No. 1336 was $139,600. On March 7, 2003, Schwabe received notification from UAFC that the Essex loan had been repaid and Schwabe returned the $200,000 to Essex on March 7, 2003. On March 13, 2003, MA LLC transferred funds of $10,705,173 from its USBanCorp Piper Jaffray account No. 5091 to Richard and Patsy's joint USBanCorp Piper Jaffray account No. 7198. MA LLC also transferred funds of $10,705,173 from its USBanCorp Piper Jaffray account No. 5091 to John and Karen's joint USBanCorp Piper Jaffray account No. 5089.

Before the MAC transaction, MAC had $40,650,877 in assets and $20,830,081 in liabilities and the net asset value of the MAC stock was $19,820,796. At the time the Marshalls assumed the UBOC liability and the [*25] Jochim liability, MAC's remaining liabilities consisted of Federal and State income tax liabilities totaling $15,896,215 for its FYE March 31, 2003. The Marshalls received $24,410,400 as the purchase price for their MAC stock.

Postclosing Activities

*9 Pursuant to the stock purchase agreement, Essex was required to change the name of MAC. The Marshalls retained the name of MAC because John intended to stay in the construction business. MAC made the following payments on March 10, 2003: $50,000 to Baguette Holdings, LCC; $50,000 to Bittner & Co., LLP; and $37,500 to Joseph Valentino. On March 13, 2003, Essex merged into MAC with MAC surviving and changing its name to First Associated Contractor, Inc.

On April 13, 2003, MAC filed its Form 1120, U.S. Corporation Income Tax Return, for its FYE March 31, 2003. MAC claimed a bad debt deduction of $39,772,396 on the 2003 return to offset its taxable income from the Stillwater litigation award. The bad debt loss deduction claimed by MAC was based upon U.S. Treasury bills. On March 13, 2003, Willow purportedly contributed 140,000 U.S. Treasury bills with a face value of $140,000 and $100,000 cash to MAC in a section 351 transaction. Willow claimed that it had a $53,333,288 tax basis in the U.S. Treasury bills.

[*26] MAC's 2003 return reflected a refund due of $3,825,000. MAC received a refund of $3,825,000 for its FYE March 31, 2003, from the IRS on May 29, 2003. MAC used the $3,825,000 Federal tax refund to make the following payments: $840,000 to Fortrend; $510,000 to Willow; $306,000 to Peachtree; $241,000 to Irgang & Co.; $200,000 to Manatt, Phelps, Phillips; $110,743 to Jeffer, Mangels, Butler & Marmaro; $100,000 to Susan Smith; $30,000 to Oceanus Solutions, LLC; and $7,846 to TC Capital Management, LLC.

MAC administratively dissolved on June 6, 2003, pursuant to Or. Rev. Stat. sec. 63.647, was reinstated on September 12, 2003, and then was administratively dissolved on March 20, 2009. MAC is no longer in existence under Oregon law.

The Marshalls' Protective Disclosure

On October 15, 2004, Richard and Patsy filed their Form 1040 for taxable year 2003, which included Form 8886, Reportable Transaction Disclosure Statement, for the MAC transaction. On October 15, 2004, John and Karen filed their Form 1040 for taxable year 2003, which included Form 8886 for the MAC transaction. The MAC transaction was registered with the IRS as a tax shelter. Richard and Patsy attached Form 8271, Investor Reporting of Tax Shelter Registration Number, for the MAC transaction to their Form 1040 for taxable year 2004.

[*27] Notice of Deficiency to MAC

The IRS disallowed MAC's claimed bad debt deduction of $39,772,396 because MAC could not support or substantiate its basis in the purported bad debt, among other reasons. On February 19, 2009, respondent timely mailed a notice of deficiency to MAC for FYE March 31, 2003, 2004, and 2005. In the notice, the IRS determined a gross valuation misstatement penalty against MAC under section 6662(h), or alternatively a substantial understatement penalty under section 6662(a) and (b)(2), for FYE March 31, 2003.

Neither MAC nor anyone acting on its behalf filed a petition in this Court. On June 24, 2009, the IRS made assessments against MAC for FYE March 31, 2003, for income tax of $15,482,046, accuracy-related penalties of $6,192,818, and interest of $9,592,446.

On October 31, 2009, collection of MAC's liability was assigned to a field revenue officer. Respondent's revenue agent conducted database searches for MAC's assets in Oregon, Nevada, and California, filed notices of Federal tax liens on MAC's assets in Nevada, and issued levies to three banks where MAC maintained accounts.

[*28] Notices of Transferee Liability to Petitioners

*10 On August 26, 2011, after determining that MAC had no assets from which respondent could collect, respondent sent a notice of liability to Richard in which it was determined that he was liable as a transferee for $13,896,825 of the tax liability of MAC for its FYE March 31, 2003, plus interest. On October 26, 2011, respondent sent notices of liability to John, Karen, and Patsy, respectively, in which it was determined that each was liable as a transferee for $13,896,825 of the tax liability of MAC for its FYE March 31, 2003, plus interest. On October 26, 2011, respondent sent a notice of liability to MA LLC, in which it was determined that MA LLC was liable as a transferee and as a transferee of a transferee for $6,776,500 of the tax liability of MAC for its FYE March 31, 2003, plus interest. In response to the notices, Richard and Patsy filed a timely petition on November 28, 2011, MA LLC filed a timely petition on December 15, 2011, and John and Karen filed a timely petition on December 16, 2011.

OPINION

I. Legal Standard

[1]Section 6901(a)(1) is a procedural statute authorizing the assessment of transferee liability in the same manner and subject to the same provisions and limitations as in the case of the tax with respect to which the transferee liability [*29] was incurred. Section 6901(a) does not create or define a substantive liability but merely provides the Commissioner a remedy for enforcing and collecting from the transferee of property the transferor's existing liability. Coca-Cola Bottling Co. v. Commissioner, 334 F.2d 875, 877 (9th Cir. 1964), aff'g 37 T.C. 1006 (1962); Mysse v. Commissioner, 57 T.C. 680, 700-701 (1972).

[2]Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. See Salus Mundi Found. v. Commissioner, 776 F.3d 1010, 1017-1019 (9th Cir. 2014), rev'g and remanding T.C. Memo. 2012-61; Diebold Found., Inc. v. Commissioner, 736 F.3d 172, 183-184 (2d Cir. 2013), vacating and remanding Salus Mundi Found. v. Commissioner, T.C. Memo. 2012-61; Starnes v. Commissioner, 680 F.3d 417, 427 (4th Cir. 2012), aff'g T.C. Memo. 2011-63; Swords Trust v. Commissioner, 142 T.C. 317, 336 (2014).

The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a).

[3][*30] Therefore, petitioners have the burden of proving that MAC is not liable for $21,674,864 of tax and penalty. See Rule 142(a)(1), (d); Welch v. Helvering, 290 U.S. 111, 115 (1933); see also United States v. Williams, 514 U.S. 527, 539 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); L.V. Castle Inv. Grp., Inc. v. Commissioner, 465 F.3d 1243, 1248 (11th Cir. 2006).

We must determine whether respondent has shown that petitioners are liable as transferees.

II. Petitioners' Transferee Status Under Oregon Uniform Fraudulent Transfer Act

*11 [4] We apply Oregon State law to determine whether petitioners are liable, as transferees, for the unpaid tax of MAC since the transaction took place in Oregon. See Commissioner v. Stern, 357 U.S. 39, 45 (1958). Oregon has adopted the Uniform Fraudulent Transfer Act (UFTA), codified at chapter 95 of the Oregon Statutes. See Or. Rev. Stat. secs. 95.200 to 95.310 (2015). The Oregon Uniform Fraudulent Transfer Act (OUFTA) broadly defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes a payment of money, a release, a lease and the creation of a lien or other encumbrance." Id. sec. 95.200(12). Where a debtor transfers property to a transferee and thereby avoids [*31] creditor claims, OUFTA provides creditors with certain remedies against the transferee. See id. sec. 95.260.

[5]Under Oregon common law, the creditor must prove a fraudulent transfer by a preponderance of the evidence under the OUFTA. Norris v. R&T Mfg., LLC, 338 P.3d 150 (Or. Ct. App. 2014).

A. Constructive Fraud

Respondent's arguments under OUFTA are predicated on the assumption that the series of transfers among MAC, Essex, and Fortrend should be collapsed and treated as if MAC had sold its assets and then made liquidating distributions to the shareholders. If the transfers are collapsed accordingly, then MAC will have transferred substantially all of its assets to petitioners and received less than reasonably equivalent value. If the preceding is found, it follows that petitioners will be liable as transferees of MAC's assets under Or. Rev. Stat. sec. 95.240(1) as further explained below. Alternatively, respondent argues that MA LLC is liable as a transferee of the assets transferred in the partial redemption under OUFTA's constructive fraud provisions.

1. Collapsing the Transaction

[6]Respondent contends that the transfers among MAC, Essex, and petitioners should be collapsed and recharacterized under Oregon law as a redemption of the [*32] Marshalls' MAC shares, with the Marshalls receiving a $31,339,897 liquidating distribution in exchange for their shares. Oregon courts have not addressed this type of transaction; however, courts in jurisdictions with fraudulent transfer provisions similar to Oregon's have "collapsed" transactions if the ultimate transferee had constructive knowledge that the debtor's debts would not be paid. See Salus Mundi Found. v. Commissioner, 776 F.3d 1010; Diebold Found., Inc. v. Commissioner, 736 F.3d 172; Starnes v. Commissioner, 680 F.3d 417.

In Salus Mundi Found. the Court of Appeals for the Ninth Circuit addressed the application of New York's fraudulent transfer provisions to a transaction similar to the transaction in these cases. It concluded that if constructive knowledge of the fraudulent scheme could be shown from the conduct of the final transferees, multiple transfers could be collapsed under State law. Salus Mundi Found. v. Commissioner, 776 F.3d at 1020. In Diebold Found., Inc. v. Commissioner, 736 F.3d at 186, the Court of Appeals for the Second Circuit addressed the application of the New York UFTA to the same transaction at issue in Salus Mundi Found. and held that multiparty transactions can be collapsed where the debtor's property is "reconveyed * * * for less than fair consideration" and the ultimate transferee had "constructive knowledge of the entire scheme."

[*33] In Starnes, the Court of Appeals for the Fourth Circuit addressed the application of North Carolina's fraudulent transfer provisions to another transaction similar to the transaction at issue in these cases and ruled that multiple transfers could be collapsed if the ultimate transferee had constructive knowledge that the debtor's tax liabilities would not be paid. If the ultimate transferees "were on inquiry notice * * * and failed to make reasonably diligent inquiry, they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." Starnes v. Commissioner, 680 F.3d at 434.

*12 In Tricarichi v. Commissioner, T.C. Memo. 2015-201, we noted that the Ohio Supreme Court did not have a case addressing this precise issue. We relied on the previously discussed cases when applying Ohio's UFTA because we concluded that the Ohio Supreme Court would find them persuasive as Ohio's UFTA tracks the uniform law almost verbatim and the fraudulent transfer provisions at issue in these cases also mirrored the uniform law or were materially similar to it. Id. at *37-*38. We conclude that the Oregon Supreme Court would also find the previously cited cases persuasive and would follow these decisions if faced with this type of transaction as Oregon's UFTA closely resembles Ohio's UFTA. If petitioners had constructive knowledge that MAC's tax liability would [*34] not be paid, the transfers at issue may be collapsed. Finding that a person had constructive knowledge does not require finding that he had actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. HBE Leasing Corp. v. Frank, 48 F.3d 623, 636 (2d Cir. 1995).

Constructive knowledge also includes "inquiry knowledge." Constructive knowledge may be found where the initial transferee became aware of circumstances that should have led to further inquiry into the circumstances of the transaction, but no inquiry was made. Id. Some cases define constructive knowledge as the knowledge that ordinary diligence would have elicited, while others require more active avoidance of the truth. Diebold Found., Inc. v. Commissioner, 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioners had "constructive knowledge" under either standard.

Our analysis focuses on what John knew because John assumed the responsibility of representing the Marshalls. In determining what the transferees knew, we have to focus on what they were advised and what they themselves appreciated. See id. at 188-189. The Marshalls, Schwabe, and PwC had constructive knowledge of the entire scheme. John knew that Essex was interested [*35] in buying MAC only for its tax liability; that Essex intended to use high-basis low-value assets to offset MAC's income; that Essex intended to obtain a refund of MAC's prepaid taxes, a plan he was leery about; and that Essex was splitting MAC's avoided taxes with the Marshalls.

PwC and Schwabe had a sophisticated understanding of the entire scheme. Notably, before the MAC transaction closed, each of the Marshalls was warned by Schwabe of the risks of transferee liability and John was warned by PwC that the stock sale was similar to a listed transaction and was advised by PwC not to engage in the stock sale. Petitioners knew that the Stillwater litigation award would be considered income to MAC and be subject to corporate income tax for 2003. This knowledge motivated petitioners to enter into a transaction to mitigate this tax liability.

Further, MidCoast and Fortrend promotional material referenced Notice 2001-16, 2001-1 C.B. 730.[5] PwC told John that the proposed stock sale was [*36] similar to a listed transaction.[6] Given this reference by Fortrend and Midcoast and especially PwC's warning to John, the Marshalls and their Schwabe advisers were or should have been on heightened alert for other red flags. That the Marshalls were aware of Notice 2001-16, supra, is evidenced by the protective disclosure attached to their Forms 1040 that referenced Notice 2001-16, supra, and their signatures on their Forms 1040.

5 Notice 2001-16, 2001-1 C.B. 730, indicated that the IRS may challenge transactions in which the assets of a corporation are sold following the purported sale of the corporation's stock to an intermediary and that these and substantially similar transactions are designated "listed transactions" for purposes of sec. 1.6011-4T(b)(2), Temporary Income Tax Regs., 65 Fed. Reg. 11207 (Mar. 2, 2000), and sec. 301.6111-2T, Temporary Proced. & Admin. Regs., 65 Fed. Reg. 11218 (Mar. 2, 2002).

6 John disputes what PwC actually told him. However, it was clear from the record that PwC and John discussed this.

*13 The Marshalls recognized the large tax liability arising from the Stillwater litigation award and entered into a series of transfers to minimize the liability. John and the Marshalls' advisers are analogous to the advisers in Diebold Found., Inc. and Richard, Patsy, and Karen are akin to the shareholders in that case. The Court of Appeals for the Second Circuit in Diebold Found., Inc. found that if the advisers knew or should have known then the transferee is deemed to have had the same knowledge and had a duty to inquire. See Salus Mundi Found. v. Commissioner, 776 F.3d at 1019-1020; Diebold Found., Inc. v. Commissioner, 736 F.3d at 188-190. The Marshalls had a duty to inquire, and they were advised that there was a significant risk of transferee liability. Cf. Slone v. Commissioner, T.C. Memo. 2016-115, at *14-*17 (distinguishable on factual grounds) [*37] ("Petitioners and their advisers had no reason to believe that Fortrend's strategies were other than legitimate tax planning methods."). Accordingly, petitioners are transferees of MAC, as MAC sold its assets and MA LLC received noncash assets and the Marshalls received liquidating distributions in exchange for their shares.

B. Petitioners' Liability as Transferees Under Oregon Law

[7]Or. Rev. Stat. sec. 95.240(1) establishes that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor was insolvent at the time of the transfer or became insolvent as a result of the transfer. Petitioners repeatedly argue that they cannot be found liable as transferees because they acted in good faith. An intent requirement is absent from Or. Rev. Stat. sec. 95.240, and the Or. Rev. Stat. sec. 95.270(1) good faith defense does not apply to Or. Rev. Stat. sec. 95.240. Nor can petitioners claim the good-faith defense to reduce the amount of the liability under Or. Rev. Stat. sec. 95.270(5) as we have found the Marshalls to have had at least constructive knowledge. Further, we find that the three elements of Or. Rev. Stat. sec. 95.240(1) are met and that petitioners are liable as transferees of MAC under Oregon law.

[*38] 1. Claim

[8] [9]"Claim" is defined expansively as a "right to payment." Id. sec. 95.200(3). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." Id. A "creditor" is any person who has a "claim". Id. sec. 95.200(4). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. See Zahra Spiritual Tr. v. United States, 910 F.2d 240, 248 (5th Cir.1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim' " in the UFTA. Stuart v. Commissioner, 144 T.C. 235, 258-259 (2015).

Petitioners do not dispute that there was a claim. MAC received the Stillwater litigation award in May 2002 and additional interest payments in August and October of the same year, generating a Federal tax liability. The transfer of MAC's assets to petitioners occurred on March 7, 2003. Accordingly, respondent had a claim against MAC before the transfer occurred.

[*39] 2. Reasonably Equivalent Value

[10]The second factor of Or. Rev. Stat. sec. 95.240(1) is whether the transferor received reasonably equivalent value in exchange for the transfer, which is a question of fact. See Shockley v. Commissioner, T.C. Memo. 2015-113. Once the transaction is collapsed, the timing of the transfers is irrelevant and we must determine whether MAC's transfers of assets to petitioners were for reasonably equivalent value.

Petitioners received over \$33.7 million[7] in exchange for their stock and the assumption of the UBOC liability and the Jochim liability, worth a total of \$4.9 million. Before the partial redemption and sale of the MAC stock, the net asset value of petitioners' stock was about \$19.8 million[8] and petitioners received approximately \$28.8 million[9] in exchange for their shares. Petitioners received approximately \$9 million in consideration in excess of the value of their MAC [*40] stock. Thus, MAC did not receive reasonably equivalent value in exchange for the proceeds from the sale of its assets.

7 Cash of \$24,410,400, noncash assets of \$6,776,500, and future litigation proceeds rights worth \$2,544,480

8 Assets of \$40.6 million less \$20.8 million in the UBOC and Jochim liabilities and taxes.

9 The total of \$33.7 million received less the liabilities of \$4.9 million assumed.

3. Insolvency

*14 The third factor of Or. Rev. Stat. sec. 95.240(1) is whether the transferor was insolvent or became insolvent as a result of the transfer. A debtor is insolvent under OUFTA "if, at a fair valuation, the sum of * * * [its] debts is greater than all of * * * [its] assets." Id. sec. 95.210(1). Solvency is measured at the time of the transfer. Id. sec. 95.240(1).

Petitioners' argument that MAC was solvent at the time of the partial redemption because it still had over \$26 million cash in its bank account is unpersuasive. The precise timing of the transfers is immaterial since we collapsed the transaction under OUFTA and solvency must be judged as MAC transferred assets to petitioners.

After MAC's transfer of \$25 million to petitioners via Essex, MAC was left with over \$15 million in State and Federal tax liabilities and \$6.8 million in assets, consisting mostly of estimated tax deposits. Thus, MAC became insolvent as a result of the MAC transaction.

[*41] C. Petitioners' Liability for Penalties Under Oregon Law

Petitioners argue that they are not liable for accuracy-related penalties because the penalty was not a "current liability" under OUFTA when the MAC stock was sold to Essex but was incurred by the new owners of MAC after the stock sale. Petitioners reliance on Stanko v. Commissioner, 209 F.3d 1082 (8th Cir. 2000), rev'g T.C. Memo. 1996-530, for the proposition that penalties for negligent or intentional misconduct that occurred months after the transfer are not existing at the time of the transfer is misplaced.

In Tricarichi v. Commissioner, T.C. Memo. 2015-201, we found an argument similar to this unpersuasive. In that case we held that the UFTA's expansive definition of "claim" encompasses this type of penalty regardless of whether the penalty existed at the time of the transfer. Id. at *62. Further, we found the UFTA applies to future and present creditors if the transfer was not for reasonably equivalent value and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due" and the IRS was a future creditor. Id. at *62-*63 (quoting Ohio Rev. Code sec. 1336.04(A)(2)(b)); see Or. Rev. Stat. sec. 95.230(1)(b)(B).

[*42] Oregon's and Ohio's statutes are materially similar. Accordingly, for the reasons we stated in Tricarichi, we find that petitioners are liable under Oregon law for the penalties.

III. Federal Transferee Liability

For purposes of section 6901 the term "transferee" includes, inter alia, donee, heir, legatee, devisee, distributee, and shareholder of a dissolved corporation. See sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. As stated previously, recent authority has treated the inquiry as two separate prongs. See Slone v. Commissioner, 810 F.3d 599 (9th Cir. 2015), vacating and remanding T.C. Memo. 2012-57; Salus Mundi, Found. v. Commissioner, 776 F.3d at 1018-1019. Having found petitioners liable under State law, we must now determine whether they are liable under Federal law.

[11]The Court of Appeals for the Ninth Circuit recently held that a court must consider whether to disregard the form of a transaction by which the transfer occurred when determining transferee status for Federal law purposes. See Slone v. Commissioner, 810 F.3d at 605-606. In performing the inquiry, the court must focus "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." Id. at 606 (quoting Reddam v. Commissioner, 755 F.3d 1051, 1060 (9th Cir. 2014), aff'g T.C. Memo. 2012-106).

***15** [12][*43] The MAC transaction had no economic effects other than the creation of a loss for MAC. The Marshalls recognized the income tax liability from the litigation awards and entered into a series of transfers solely to evade their tax liability. For this reason and the reasons discussed above, we disregard the form of the MAC transaction and find that petitioners are transferees within the meaning of section 6901.

IV. Transferor Liability for Unpaid Tax

In arguing whether MAC actually owed the tax liability, petitioners rely on the form of the MAC transaction's being respected. Petitioners bear the burden of proof on this matter and offer no alternative arguments as to MAC's tax liability. See sec. 6902(a); Rule 142(d). Petitioners point to nothing in the record that shows that respondent incorrectly determined or improperly assessed MAC's tax liability for its FYE March 31, 2003. As the MAC transaction was collapsed and treated as a de facto liquidation to petitioners, we conclude that MAC was liable for the unpaid tax for its FYE March 31, 2003.

V. Collection Efforts Against MAC

Petitioners argue that respondent must show that he exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferees.

[13][*44] We must look to Oregon law to determine whether respondent has an obligation to pursue all reasonable collection efforts against a transferor before proceeding against a transferee. See Hagaman v. Commissioner, 100 T.C. 180, 183-184, (1993); Jefferies v. Commissioner, T.C. Memo. 2010-172; Upchurch v. Commissioner, T.C. Memo. 2010-169. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." Zadorkin v. Commissioner, T.C. Memo. 1985-137, 49 T.C.M. (CCH) 1022, 1028 (1985).

[14]We think respondent did pursue all reasonably necessary collection efforts, and petitioners have not shown that respondent's efforts to collect against MAC were not reasonably exhausted. MAC was left insolvent after the MAC transaction and was administratively dissolved in March 2009. Respondent's revenue agent conducted database searches for MAC's assets in Oregon, Nevada, and California, filed notices of Federal tax lien on MAC's assets in Nevada, and issued levies to three banks where MAC maintained accounts. Nothing in the record states that MAC still exists, but the record instead suggests that MAC was not a viable entity.

If for the sake of argument, we presume that respondent did not take reasonable steps, the OUFTA does not require a creditor to pursue all reasonable [*45] collection efforts against the transferor. See Or. Rev. Stat. secs. 95.200-95.310. Therefore, respondent was not required to exhaust collection efforts against MAC, and petitioners may be held liable.

Accordingly, we conclude that (1) petitioners are liable under Oregon law for the full amount of MAC's 2003 tax deficiency and penalty and (2) the IRS may collect this liability from petitioners as "transferees" pursuant to section 6901.

To reflect the foregoing,

Decisions will be entered under Rule 155.

All Citations

T.C. Memo. 2016-119, 2016 WL 3460226, 111 T.C.M. (CCH) 1579, T.C.M. (RIA) 2016-119, 2016 RIA TC Memo 2016-119

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. A-16-735910-B DEPT NO. XV **PLAINTIFF'S OPPOSITION TO DEFENDANT PRICEWATERHOUSE COOPERS LLP'S MOTION FOR SUMMARY JUDGMENT** JURY TRIAL DEMANDED

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I. INTRODUCTION

Under the guise of a motion for summary judgment, Defendant Pricewaterhouse Coopers LLP ("PwC") asks this Court to reconsider its recent denial of PwC's motion to dismiss on statute-of-limitations grounds. While PwC now concedes that Plaintiff's claims are timely under Nevada law, the rest of its motion is a rerun of arguments that the Court found unpersuasive in November. Citing the same line of cases that it previously cited, and relying upon the same engagement letter that it previously asked the Court to take judicial notice of, PwC advances essentially the same arguments as it did before in asking the Court to apply a New York statute of limitations. The result should be the same – denial of the motion.

As a threshold matter, and as the Nevada Supreme Court has long held, statutes of limitations are procedural rules and therefore the law of the forum – Nevada – applies. Generic choice-of-law provisions, such as the one that PwC points to, which says nothing about statutes of limitation, govern only substantive, not procedural issues like the statute of limitations.

Ignoring this basic point, PwC hopes to reach a different conclusion by looking to the Restatement (Second) of Conflict of Laws (1971). But, as discussed below, PwC looks to the wrong section of that Restatement. The correct section of the Restatement confirms, as has long been the law of Nevada, that statutes of limitations are procedural rules governed by the law of the forum – Nevada. And, in any event, even if the Court were to apply the Restatement section PwC cites, the analysis does not support summary judgment. At a minimum, fact issues regarding the parties' entry into and understanding of the choice-of-law provision preclude summary judgment, as do Nevada's substantial relationship to the parties' dealings and Plaintiffs' claims, not to mention Nevada's public policy not to bar a plaintiff's claims before they are ripe, let alone even discovered. Statute-of-limitations determinations are for the factfinder in such circumstances, and this case should be no exception.

Indeed, even if the Court were to apply the New York statute of limitations, the result would still be denial of PwC's motion. Tolling agreements that the parties entered into, PwC's fraudulent concealment of its actions, and New York's continuous representation doctrine, each mean, at the very least, that there are genuine issues of material fact standing in the way of summary judgment – particularly at this early stage of the case, when discovery is just getting started, and where such discovery can be expected to produce information demonstrating that the statute of limitations should be tolled. Plaintiff's claims should not be barred before he has even had the opportunity to proceed with discovery. The Court held as much when it denied PwC's motion to dismiss, and the present summary judgment motion – brought so quickly on the heels of the motion to dismiss – offers no reason for the Court to hold otherwise now.

II. FACTUAL BACKGROUND

The Court is familiar with the background of this case from prior motions, including PwC's own motion to dismiss, which the Court denied in November. In a nutshell, as set forth in the Complaint, Plaintiff was drawn into a transaction to sell all the shares in his business (Westside Cellular); that transaction was represented to have certain tax benefits; Plaintiff asked PwC to review and advise him regarding the transaction and its represented tax benefits; PwC did so and advised Plaintiff to proceed with the transaction; but PwC's advice was wrong; and as a result Plaintiff now faces tens of millions of dollars in losses, including back taxes and substantial penalties and interest, after the U.S. Tax Court – directly contrary to what PwC advised Plaintiff to expect – in October 2015 found Plaintiff individually liable for Westside's tax obligations.

For purposes of the present motion, PwC does not take issue with these allegations or the merits of the case. *See* Mot. at 2-3 (reciting various allegations from the Complaint). Rather, as a means of rehashing its statute-of-limitations argument, PwC focuses on the choice-of-law provision in an engagement letter between PwC and Plaintiff that does not even govern Plaintiff's tort claims here, which are for gross negligence and grossly negligent misrepresentation. *See id.* According to PwC, Plaintiff (who at the time was in the process of moving from Ohio to Nevada) and PwC "negotiated" the New York choice-of-law provision – which is in a boilerplate fine-print rider to the engagement letter – and Plaintiff "affirmed his understanding and agreement that the choice-of-law clause governed the relationship between the Parties." (*Id.* at 9) As set forth below, these conclusory statements by PwC are unfounded. At a bare minimum, even assuming for the sake of argument that the Court could look to this provision in deciding which statute of limitations applies, there are genuine issues of material fact as to the provision's applicability. As such, summary judgment is inappropriate.

III. ARGUMENT

A. Nevada's Statute of Limitations Applies Here.

1. The Law of the Forum – Nevada – Governs the Statute of Limitations.

PwC again labors to avoid Nevada law, but the Nevada Supreme Court has long held that statutes of limitations are procedural rules and therefore the law of the forum – Nevada – applies. Indeed, the New York choice-of-law clause in the engagement letter between Plaintiff and PwC does not cover procedural rules like the statute of limitations, nor did it exclusively require New York choice of forum.

PwC argues that New York statutes of limitation apply based solely on a substantive choice-of-law provision in boilerplate attached to its engagement letter. PwC contends that the engagement letter's choice-of-law provision governs Plaintiff's tort claims, but PwC's duties to use such skill, prudence and diligence as commonly possessed and exercised by professionals in the fields of income taxes, tax savings transactions and business tax consulting are not specified in the engagement letter and are not dependent on its specific terms. These duties arose because

PwC undertook to provide professional services to Plaintiff. Accordingly, Plaintiff's tort claims are not even governed by the engagement letter or its choice-of-law clause. *See In re Vortex Fishing Sys., Inc.* 277 F.3d 1057, 1069 (9th Cir. 2002) ("if the claims are not governed by the … Agreement, then the court must apply [the forum state's] choice of law rules to determine which statute of limitations applies"). Ignoring this fact, PwC instead cites to an assortment of cases in which courts, not surprisingly, applied substantive contractual choice-of-law clauses to contract claims. That is not this case.

Indeed, Nevada law applies regardless of the choice-of-law provision because, under well-established Nevada law, statutes of limitations are governed by the law of the forum, even where the substance of the dispute is governed by another state's laws:

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

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

Ernest W. Hahn, Inc., 113 Nev. 265, 272, 934 P.2d 229, 233 (1997) ("Statutes of limitation are procedural bars ...").

Moreover, the engagement letter's generic choice-of-law provision states only, in its entirety, that "[t]his Agreement will be governed by the laws of the State of New York." Even under New York law, choice-of-law provisions are not read to include statutes of limitation unless they expressly so provide. *Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410, 416, 927 N.E.2d 1059, 1061 (2010) ("Choice of law provisions typically apply to only substantive issues, and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right. There being no express intention in the agreement that Delaware's statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that limitations period.") (citations omitted). As even New York law provides that choice-of-law provisions do not include statutes of limitation unless they expressly so state, the choice-of-law provision here was not intended to include statutes of limitations, and did not so state. Indeed, the intellectual inconsistency of PwC's position on choice of law is perhaps best highlighted by the fact that PwC argues the Court should apply Nevada (rather than New York) choice-of-law rules even though PwC tethers its entire argument to a New York contractual choice-of-law provision. If New York procedural law applies, that must necessarily include New York choice-of-law principles, which hold that statutes of limitations are procedural matters not included within generic choice-of-law provisions. *See Portfolio Recovery, supra.*

In light of the foregoing law, Judge Denton of this district concluded that Nevada statutes of limitation apply regardless of a contractual choice-of-law clause. (*See* App. Ex. A, Dec. 3, 2013 Order in *Cantor G&W (Nevada) Holdings, L.P. v. Asher*, Case No. A-11-646021, Dist. Ct., Clark Cty. Nev. (writ denied))[1]. Judge Denton held that "[t]he defense that a claim is barred by the statute of limitations is a procedural matter governed by the law of the forum." (*Id.* ¶¶ 9-10.) Judge Denton similarly noted that "even under Delaware law [the law specified in the choice-of-law clause], a choice of law provision will only include the statute of limitations of the chosen jurisdiction if their inclusion is specifically noted." (*Id.* ¶ 11.) The *Cantor* defendants petitioned the Nevada Supreme Court for writ of mandamus solely concerning the choice of law issue. The parties submitted substantial briefing (including citation to the same cases PWC cites here) followed by oral argument. On April 21, 2016, the Nevada Supreme Court let stand Judge Denton's ruling, refusing to direct the district court to "apply Delaware's statute of limitations on contract disputes to a contract containing a choice-of-law favoring Delaware law." (App. Ex. B) Thereafter, the *Cantor* defendants sought rehearing, which the Supreme Court denied (App. Ex. C), and *en banc* reconsideration, which was also denied (App. Ex. D). Judge Denton's decision and the subsequent Nevada Supreme Court proceedings confirm Plaintiff's position that Nevada courts should apply the forum's statute of limitations notwithstanding a generic choice of law clause specifying another state's substantive law.

2. PwC Looks to the Wrong Section of the Restatement.

PwC attempts to avoid this result by ignoring the foregoing authority and instead appealing to a Restatement section – but the attempt is unavailing. PwC notes that Nevada "tends to follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of-law questions involving contracts." (Mot. at 6 (citing *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061, 1063 (Nev. 2014)). But there are at least three problems with PwC's argument. As already noted, (1) Plaintiff's claims are tort claims, not contract claims; and (2) it is also well

[1] Citations to "App. Ex. ___" are to the Appendix of Exhibits in Support of Plaintiff's Opposition to Defendant Pricewaterhouse Coopers LLP's Motion for Summary Judgment. Citations to "Tricarichi Aff. ¶ ___" and "Brooks Aff. ¶ ___" are to the Affidavits of Michael A. Tricarichi and Thomas D. Brooks in Support of Plaintiff's Opposition to Defendant Pricewaterhouse Coopers LLP's Motion for Summary Judgment.

established in Nevada that statutes of limitations are governed by the law of the forum. Furthermore, (3) PwC looks to the wrong section of the Restatement, in any event.

PwC relies on section 187 of the Restatement, which addresses which *substantive law* to apply, but a different provision of the Restatement – section 142 – addresses which *statute of limitations* to apply. Section 142 of the Restatement confirms that the law of the forum – Nevada – governs the statute of limitations here. Section 142 provides: "An action will not be maintained if it is barred by the statute of limitations *of the forum*, including a provision borrowing the statute of limitations of another state." Rest. (2d) §142(1) (emphasis added).[2] Indeed, while comment C to section 142 of the Restatement provides that the validity of a contractual provision specifically *"limiting the time in which an action may be brought under the contract"* is determined by "the law selected by application of the rules of [Restatement] §§ 187-188," the generic substantive choice-of-law provision in the PwC engagement letter is not a provision expressly "limiting the time in which an action may be brought" under the contract. Rest. (2d) §142, Cmt. C (emphasis added). The provision in the PwC engagement letter, in fact, says nothing about the limitations period. Thus, the limitations period of the forum, Nevada, applies to Plaintiff's claims. *See In re Sterba*, 516 B.R. 579, 585 (B.A.P. 9th Cir. 2014) ("[A]s a matter of law, a standard contractual choice of law provision does not cover choice of law questions involving statutes of limitations because the Restatement generally characterizes

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[2] Nevada's borrowing statute does not serve to import the New York statute here because – as the Court will recall from prior motion practice – Plaintiff was a citizen of Nevada at the time his Complaint was filed (and, for that matter, for years beforehand). *See Flowers v. Carville*, 310 F.3d 1118, 1123 (9th Cir. 2002) (to avoid application of Nevada's borrowing statute, plaintiff need only be a citizen of Nevada at the time his original complaint was filed); *Cornett v. Gawker Media, LLC*, 2014 WL 2863093 *5 (D.Nev. 2014) (same); NRS § 11.020 ("When a cause of action has arisen in another state ... and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against the person in this State, *except in favor of a citizen thereof* who has held the cause of action from the time it accrued.") (emphasis added); Tricarichi Affidavit in Support of Plaintiff's Opposition to Defendants Rabobank and Utrecht's Motion to Dismiss (App. Ex. E). The borrowing statute also does not apply because Plaintiff's claims did not "arise in another state," particularly because Plaintiff resided in Nevada when he executed the underlying Fortrend transaction, when PwC gave its bad advice, when Plaintiff was damaged as a result (*i.e.*, when the Tax Court issued its opinion).

statutes of limiations as procedural in nature and hence controlled by the forum state's laws."); *Des Brisay v. Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981) (same; applying forum state's statute of limitations in case involving choice-of-law clause that simply stated, much like the clause at issue here, that "This agreement shall be governed by and interpreted according to the laws of the province of British Columbia").

3. Even Under Restatement § 187, PwC Cannot Show on Summary Judgment that New York's Statute of Limitations Applies.

PwC lists three factors that it says the Court should apply in deciding whether to apply the substantive choice-of-law clause in the PwC engagement letter to the statute of limitations for Mr. Tricarichi's tort claims: (1) whether "Plaintiff and PwC negotiated the choice-of-law provision in good faith;" (2) whether New York "has a significant relationship to the contract;" and (3) whether applying New York's statute of limitations would "contravene any public policy of Nevada." (Mot. at 9-10) Even applying these factors, summary judgment is not appropriate on the statute-of-limitations issue.

PwC baldly asserts that Mr. Tricarichi and PwC "negotiated the choice-of-law provision in good faith" because "[t]he Complaint does not allege otherwise." (Mot. at 9) On summary judgment, however, PwC cannot rely solely on the Complaint's allegations. As reflected in the accompanying affidavit of Mr. Tricarichi, PwC's assertion regarding "negotiation of the choice-of-law provision" is without support. As Mr. Tricarichi states, there were no negotiations or even discussions regarding the choice-of-law clause, which was not even called to Mr. Tricarichi's attention, and Mr. Tricarichi had no understanding that New York statutes of limitations would apply to any claims that he might need to bring against PwC. (Tricarichi Aff. ¶¶ 3-4) Accordingly, Plaintiff did not "affirm[] his understanding and agreement that the choice-of-law clause governed the relationship between the Parties," as PwC suggests (at p. 9). (Tricarichi Aff. ¶ 4) The choice-of-law provision is simply one of various boilerplate clauses in a standard rider attached to the engagement letter that PwC sent Plaintiff. (Ex. 2 to PwC Mot. (rider at 2); Tricarichi Aff. ¶¶ 3-4) The affidavit of PwC's Mr. Stovsky says nothing to the contrary. Indeed, Mr. Stovsky, in his affidavit in support of PwC's instant motion, simply states that, on behalf of PwC, he "sent Mr. Tricarichi an engagement letter and attached [rider]" and that "Mr. Tricarichi returned a copy of the Engagement Agreement with a signature dated April 25, 2003." (Stovsky Aff. ¶ 7 – Ex. 1 to PwC Mot.) No mention of negotiations. Nor are there any drafts of the engagement letter / rider reflecting proposed changes to the choice-of-law clause, since – as again evidenced by Mr. Stovsky's affidavit – no such drafts exist. (Stovsky Aff. ¶ 7; *see also* Tricarichi Aff. ¶ 3) The foregoing shows that there are genuine material fact issues regarding the parties' entry into and understanding of the choice-of-law clause in the PwC rider.

Indeed, in light of PwC's knowledge that Plaintiff was moving to Nevada, PwC's advice in aid of this move, and the fact that PwC's New York office had no involvement in advising Plaintiff – all of which are discussed in more detail immediately below – a reasonable jury could find that PwC's decision to nonetheless include a one-sentence New York choice-of-law clause in the multi-page boilerplate engagement document was in bad faith. At a minimum, there is a genuine issue of material fact as to PwC's motive and *bona fides* in including (indeed, burying) this clause in the document. This further warrants denial of summary judgment.

Regarding New York's "significant relationship" to the contract, PwC points merely to the fact that its principal place of business is in New York. Even assuming this to be the case, though, that fact is hardly "significant" in comparison to the fact that (1) Mr. Tricarichi was moving to Nevada when the engagement agreement was being entered into; (2) PwC knew this; (3) PwC in fact gave Mr. Tricarichi tax advice in connection with both his move from Ohio to Nevada, and the proposed Fortrend transaction; (4) no PwC personnel in New York appear to have had a role in advising Mr. Tricarichi; and (5) PwC advised and continued to advise Mr.

Tricarichi regarding the Fortrend transaction well after he completed his move to Nevada. As Mr. Tricarichi has already set forth in a prior affidavit, he moved from Ohio to Nevada in May 2003, only shortly after signing (on April 25, 2003) the engagement letter sent him by PwC. (Tricarichi Affidavit in Support of Plaintiff's Opposition to Defendants Rabobank and Utrecht's Motion to Dismiss, at ¶¶ 3-4 (App. Ex. E)) Well before signing the document, Plaintiff informed PwC that he was seeking tax advice not only regarding the proposed Fortrend transaction *per se*, but also regarding "change of residence to Nevada." (J. Tricarichi testimony at 970:16 – 971:12, 978:11 – 979:25 (App. Ex. F); App. Ex. G at 2 [Ex. 103-J at 2]; Tricarichi Aff. ¶ 5; Brooks Aff. ¶¶ 4-5) Accordingly, PwC looked at, and advised Plaintiff regarding, his move to Nevada. (Stovsky testimony at 583:13-15, 597:22 – 598:23 (App. Ex. H); App. Ex. G at 17-27 [Ex. 103-J at 17-27]; Tricarichi Aff. ¶ 5; Brooks Aff. ¶¶ 5-6) As also reflected by these exhibits, the PwC personnel advising Plaintiff regarding a move to Nevada were in PwC's Cleveland – not New York – office. Similarly, the PwC personnel advising Plaintiff regarding the proposed Fortrend transaction were in PwC's Cleveland and Washington, D.C. offices – not New York. (Stovsky testimony at 597:20 – 598:23 (App. Ex. H); App. Ex. G at 17-27; Tricarichi Aff. ¶ 5) These personnel reviewed the proposed Fortrend transaction, and advised Plaintiff regarding that transaction – telling Plaintiff to proceed with it – well into August 2003, when Plaintiff was (as PwC knew) a Nevada resident. (Stovsky testimony at 597:20 – 598:23 (App. Ex. H); Tricarichi Aff. ¶ 5) The bare fact that PwC has an office in New York – which had nothing to do with Plaintiff or PwC's advice to Plaintiff – cannot trump Nevada's pervasive connection to the parties' relationship and PwC's actions.

Indeed, PwC is asking the Court to look at only one part of the equation in isolation. Rather than looking merely to one party's principal place of business, "[t]o determine whether a given situs satisfies the substantial relationship test, Nevada considers the following factors …: (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the parties' domicile, residence, nationality, place of incorporation, and place of business.... *A court applies the law of the state having **the more substantial relation*** with the transaction unless public policy concerns outweigh that relation." *IPFS Corp. v. Carrillo*, 2014 WL 3784261 *2 (D.Nev. 2014) (emphasis added) (citing *Sotirakis v. United Serv. Auto. Ass'n*, 787 P.2d 788, 790 (Nev.1990)). Looking at these factors, the place of contracting is just as easily Ohio (where Mr. Tricarichi appears to have signed the engagement letter); there was no "negotiation" of the choice-of-law clause (as discussed above); the place of performance was Nevada, where (as PwC knew) Plaintiff resided when PwC provided its advice to him there; the subject matter of the contract – Mr. Tricarichi's tax liability – resides with him in Nevada; and Plaintiff's domicile was and is in Nevada – which carries at least as much weight as PwC's principal place of business, particularly when one also takes into account that PwC has offices here in Nevada, too. At a minimum, there is a genuine factual dispute regarding application of these factors, which is all that is needed to deny summary judgment.

PwC further asserts that "applying New York law would not contravene *any* public policy of Nevada" (Mot. at 10, emphasis added), but this statement blatantly overlooks, at a minimum, Nevada's policy not to bar claims before they are ripe or even discovered. In *Siragusa v. Brown*, the Nevada Supreme Court rejected the idea that a claim could be barred before it was ripe or discovered, stating, "[P]laintiffs should not be foreclosed from judicial remedies before they know that they have been injured." 114 Nev. 1384, 1392, 971 P.2d 801, 806-07 (1998). In Mr. Tricarichi's case, Plaintiff suffered no injury, and his claims did not accrue, prior to resolution of the Tax Court litigation, where the post-trial opinion finding Plaintiff liable for Westside's taxes etc. did not issue until October 2015. *See, e.g., Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So. 2d 859, 866 (Fla. 2016) (holding, in tax shelter case, that taxpayer plaintiffs' claims accrued "at the time their action in the tax court became final, following expiration of the ninety-day period for appealing the tax court's judgment"). Plaintiff timely filed his Complaint in April 2016. There is substantial Nevada public policy interest in that a Nevada citizen should be able to sue professionals he relied upon in Nevada, in the Nevada courts, in reliance upon Nevada's statute of limitations.

Further emphasizing the emptiness of PwC's arguments, the cases cited by PwC are overwhelmingly cases that <u>do not</u> involve statute of limitations questions. *See, e.g., Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Inv'rs*, 603 P.2d 270 (Nev. 1979) (contract chose Massachusetts law, and court looked to Massachusetts law to determine whether contractual interest rate was usurious); *Progressive Gulf Ins. Co. v. Faehnrich*, 327 P.3d 1061 (Nev. 2014) (insurance policy chose Mississippi law, and court looked to Mississippi law in deciding whether certain policy exclusion applied to car accident that happened in Nevada); *see generally* cases cited at Mot. pp. 9-11.[3] PwC cannot – particularly on summary judgment – deny Plaintiff redress for his recent injury by relying on such a collection of obviously inapposite cases.

The weakness of PwC's position is confirmed by PwC's heavy reliance on *Mardian v. Greenberg Family Trust*, which unremarkably applied Nevada law to a case filed in Nevada, in which the "arguments made by the parties focus[ed] on Nevada law." 359 P.3d 109, 111 (Nev. 2015). Unlike the present case, in which Plaintiff advances tort claims arising out of PwC's gross negligence, *Mardian* dealt with a contract claim seeking the deficiency on a promissory note. *Id.* at 110. Moreover, while PwC hinges its argument on Restatement § 187, *Mardian* contains no discussion of § 187, but instead (as PwC notes) merely relies on *Key Bank of Alaska v. Donnels*, which was another promissory note case that did not involve a statute of limitations

[3] Going further, PwC also exaggerates various of the cases it cites. For example, while PwC describes *Henderson v. Watson*, 2015 WL 2092073 (Nev. 2015) as "applying California choice-of-law provision in employment agreement to Plaintiff's tort-based claims arising from employment agreement" (Mot. at 10), the case in fact simply looked to California law to determine whether an arbitration clause was unconscionable and therefore unenforceable.

question. 787 P.2d 382 (Nev. 1990) (promissory note chose Alaska law, and court looked to Alaska law in determining whether plaintiff could pursue a deficiency action on the note). The federal court and non-Nevada cases PwC cites after *Mardian* (*see* Mot. at 7-8 and n.2) are likewise cases involving contract, not tort, claims. And, in *Shinn v. Baxa Corp.*, contrary to PwC's description of that case, the court actually *denied* summary judgment. 2011 WL 3419239 *2 (D.Nev. 2011) ("As a determination about the applicable statute of limitations is necessary before the court can review the other contractual issues presented by Summerlin, Baxa's motion for summary judgment as to the contract claim must be denied."). The remaining cases are also distinguishable for other reasons. For example: The *Izquierdo* case is further distinguishable because, unlike the PwC choice-of-law provision, the provision in that case specifically stated that Delaware law applied "without regard to conflict-of-law principles" and that "[t]he law of *Delaware, where we and your account are located*, will apply *no matter where you live* or use the account." *Izquierdo v. Easy Loans Corp.*, 2014 WL 2803285 *1 (D.Nev. 2014) (emphasis added); *see also id.* at *4. No such language is present in the PwC clause. Indeed, unlike here, where (as discussed above) Plaintiff is a Nevada resident and that there are fact issues regarding whether PwC included the choice-of-law provision in good faith, in *Izquierdo* there was "no evidence … to show that Plaintiff resided in Nevada" and "no evidence the parties acted in anything other than good faith in selecting Delaware" law. *Id.* at *4. In *DeLeon*, meanwhile, the court found <u>Colorado</u> "ha[d] a substantial relation to the transaction" because "Defendant prepared documents related to the loan application and performed an analysis of whether to approve the loan <u>out of Defendant's Colorado office</u>." *DeLeon v. CIT Small Bus. Lending Corp.*, 2013 WL 1907786 *7 (D.Nev. 2013) (emphasis added). By contrast, as noted above, PwC did no work related to Plaintiff out of its New York office. And in *Zurich Am. Ins. Co. v. Intermodal Maint. Svcs., Inc.*, the opinion does not even recite the choice-of-law provision at issue or discuss the facts underlying the court's opinion in any meaningful detail, so the case is thus of no persuasive value. 2015 WL 1280748 * (D.Nev. 2015).

In considering PwC's arguments, the Court should be mindful of the well-established principle that statute-of-limitations motions should be denied where they raise questions of fact better determined by the jury or trial court after full hearing. *See Millspaugh v. Millspaugh*, 611 P.3d 201, 202 (Nev. 1980) (reversing trial court's dismissal of legal malpractice case as untimely because of fact question); *Siragusa*, 971 P.2d at 806 (holding that "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact") (internal quotation marks omitted); *Oak Grove Investors v. Bell & Gossett Co.*, 668 P.2d 1075, 1079 (Nev. 1983) (placing the burden of demonstrating the absence of a genuine issue of material fact on the party seeking summary judgment on statute of limitations grounds), *disapproved on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000). *See also Trepuk v. Frank*, 44 N.Y.2d 723 (N.Y. 1978) ("Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts."). As discussed both above and below, such questions of fact are present here.

Indeed, PwC's motion is particularly premature in light of the early stage of this case. The Court only completed ruling on motions to dismiss in February, initial disclosures were thus made February 27, and the joint case conference report submitted March 20. Discovery is thus only now getting underway. Accordingly, as reflected in Mr. Tricarichi's affidavit, there are further facts regarding the choice-of-law provision that are currently unavailable to Plaintiff. These include PwC documents and testimony regarding the genesis and intent of the choice-of-law provision in the PwC rider, and admissions from PwC (via testimony, documents or both) that (i) there were no negotiations or discussions with Mr. Tricarichi about the choice-of-law provision, (ii) there were accordingly no drafts reflecting such negotiations or discussions, and (iii) PwC's New York office had no involvement in advising Plaintiff. (Tricarichi Aff. ¶ 6). Since this information is not available to Plaintiff without discovery, the Court should deny PwC's motion, or at a minimum, enter and continue the motion so that Plaintiff may obtain such discovery. *See* NRCP 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.").

In short, even under a Restatement § 187 analysis, there are, at the very least, genuine issues of material fact standing in the way of a finding, on summary judgment at this stage of the case, that New York's statute of limitations applies to Plaintiff's Nevada tort claims.

B. PwC Concedes That Plaintiff's Claims Are Timely Under Nevada Law.

As noted above, Plaintiff had no damages prior to the October 2015 Tax Court opinion imposing liability upon him for Westside's tax deficiency. Because Nev. Rev. Stat. § 11.2075, by its plain terms, only applies to actions "to recover damages," the limitations period could not expire before October 2015. *See also Kipnis, supra*. In other words, Plaintiff's claims are timely even without reference to the discovery rule or tolling. NRS 11.010 states, "Civil actions can only be commenced within the periods prescribed in this chapter, *after the cause of action shall have accrued*, except where a different limitation is prescribed by statute." NRS 11.010 (emphasis added). *See also Dredge Corp. v. Wells Cargo*, 80 Nev. 99 (Nev. 1964) ("The statute of limitations has application to the time within which civil actions may be commenced 'after the cause of action shall have accrued.'"); *Siragusa, supra*. Plaintiff filed his Complaint in April 2016, well within the statute of limitation. Indeed, the Nevada statute tolls the limitations period "for any period during which the accountant or accounting firm conceals the act, error or omission upon which the action is founded" (Nev. Rev. Stat § 11.2075(2)), and Plaintiff expressly alleges such concealment (*e.g.*, Cmplt. ¶¶ 73-74), evidence to date of which is discussed below. In addition, as also discussed below, PwC agreed in a series of tolling agreements to waive any defense based on the expiration of the statute of limitations between January 19, 2011 and May 1, 2016, and Plaintiff filed his Complaint on April 29, 2016. Acknowledging all of this, PwC makes no argument that Plaintiff's suit is untimely under Nevada law, and instead relies solely on New York law.

C. Plaintiff's Claims Are Also Timely Under New York Law.

As discussed above, New York's statute of limitations does not apply here. But even if the Court reaches the New York statute, summary judgment is still inappropriate.

1. Tolling Agreements

To begin with, PwC agreed in a series of tolling agreements to waive any defense based on the expiration of the statute of limitations between January 19, 2011 and May 1, 2016, and Plaintiff filed his Complaint on April 29, 2016. In particular, commencing in October 2012, after the IRS sent Plaintiff a notice of transferee liability in June 2012, Plaintiff and PwC entered into a series of retroactive tolling agreements. Before that time, Plaintiff had no reason to proceed otherwise. Copies of the tolling agreements are provided as App. Ex. I to this Opposition. *See also* Tricarichi Aff. ¶ 7. PwC says not a word about the tolling agreements in its motion.

2. Fraudulent Concealment

Moreover, though the Complaint contains a whole section titled "Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts" (Cmplt. ¶¶ 73-74), PwC makes no attempt to argue that there was no such concealment. PwC's reticence should perhaps come as no surprise, since even the information that Plaintiff has obtained without discovery strongly indicates that PwC concealed the acts, errors and omissions upon which the action is founded, including PwC's previous advocacy of at least one other Midco transaction involving Fortrend and Rabobank (who conspired to defraud Plaintiff). (Cmplt. ¶¶ 38, 73-74, 104 *et seq.*) 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. *Enbridge Energy Co., Inc. v. U.S.*, 553 F.Supp.2d 716, 719 *et seq.* (S.D.Tex. 2008) (App. Ex. J). 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. *Id.* at 720-21. PwC disclosed none of this to Plaintiff. (Tricarichi Aff. ¶ 8) But certainly it would have been material for Plaintiff to know that, rather than being an independent third party reviewing the proposed Fortrend transaction from a neutral perspective, PwC actually had a history of *advocating and promoting* such transactions. 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 later confirmed by the courts to be an illegal tax shelter. *Enbridge, supra* at 723-24, *aff'd*, 354 Fed. App'x 15 (5th Cir. 2009). PwC did not make Plaintiff aware of this, either. (Tricarichi Aff. ¶ 8) The facts that PwC concealed regarding the Bishop transaction came to Plaintiff's attention only after the Tax Court trial. (Tricarichi Aff. ¶ 8).

Even more concerning is the fact, which only recently came to light, that, prior to advising Mr. Tricarichi, PwC actually gave at least one other taxpayer *completely the opposite advice* that it gave Mr. Tricarichi regarding a basically identical intermediary transaction proposed by Fortrend. According to a recently issued Tax Court decision, in March 2003 – before PwC advised Mr. Tricarichi to go ahead with the Fortrend transaction – John Dempsey and Michael Weber of PwC advised another taxpayer, John Marshall, to steer clear of such a transaction:

> After gathering information and conducting an analysis of the stock sale proposed by the Essex letter of intent, Mr. Dempsey became concerned about Fortrend's plan to offset MAC's income with its losses because it was similar to a listed transaction. Mr. Dempsey discussed his concerns about the proposed stock sale with Mr. Weber, who expressed similar concerns. Mr. Weber thought the MAC transaction seemed inconsistent with other transactions in which he had been involved. Mr. Weber was concerned because Fortrend had used transactions like the proposed stock sale in the past to shelter income and avoid taxes. Mr. Weber and Mr. Dempsey contacted PwC's national office to obtain advice.
>
> Dan Mendelson was a national partner in PwC's tax quality and risk management (QRM) group in 2002 and 2003. He assessed transactions that other PwC personnel were uncomfortable with or were concerned could be listed transactions to determine whether PwC could remain involved. PwC's QRM group assessed PwC's compliance with IRS regulations to reduce the risk of noncompliance and penalties' being imposed on PwC and PwC employees, among other things. Mr. Mendelson advised Mr. Dempsey and Mr. Weber that PwC should not consult or advise on the proposed stock sale. **PwC concluded that the stock sale proposed by Essex was similar to a listed transaction and that it could not consult or advise on the proposed stock sale any further.**
>
> When Mr. Weber and Mr. Dempsey spoke with John about their concerns regarding the proposed stock sale, they were "trying to convey absolute concern over the transaction and the chances that it could be challenged by the IRS" to John. **Mr. Dempsey and Mr. Weber** told John before March 7, 2003, that the proposed stock sale was similar to a listed transaction, explained to John what a listed transaction was, and **tried to discourage John from entering into the proposed stock sale**. After **advising John not to do the proposed stock sale**, Mr. Weber thought that John understood the risks, including the risks associated with losing control over MAC. John's response to Mr. Weber's and Mr. Dempsey's warnings about the proposed stock sale was silence. After the MAC transaction closed on March 7, 2003, but before the Marshalls' personal returns were filed in October 2004, Mr. Weber and Mr. Dempsey informed John that the MAC transaction was similar to a listed transaction and would need to be disclosed on petitioners' returns.

Estate of Marshall v. Commissioner of Internal Revenue, T.C. Memo 2016-119 at *2, *4-5 (2016) (emphasis added) (App. Ex. K) PwC never said a word to Mr. Tricarichi about its recent and completely contradictory advice to another taxpayer contemplating an identical Fortrend transaction. (Tricarichi Aff. ¶ 9) Again, Plaintiff was entitled to know then and certainly before litigation with the IRS that PwC advised at least one other taxpayer to *avoid* the very transaction that PwC was advising Plaintiff to go forward with. PwC's failure to make Plaintiff aware of this constitutes fraudulent concealment, which tolls the statute of limitations.

PwC's concealment of its acts, errors and omissions raises issues of fact inappropriate for resolution on a motion for summary judgment. *See, e.g., Szajna v. Rand*, 517 N.Y.S.2d 201, 202 (N.Y.App. Div. 1987) (denying summary judgment because of disputed allegations regarding fraudulent concealment). Indeed, although the Complaint alleges *fraudulent* concealment, Plaintiff need not even actually plead or prove *fraud* in order to qualify for tolling. *See Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. Adv. Op. 23, 277 P.3d 458, 464 (2012) ("concealment" for purposes of tolling statute of limitations for actions against health care providers requires only an intentional act to keep another from learning a fact). As discussed above, it is well-established that efforts to resolve statute-of-limitations issues on motion should be denied where they raise questions of fact to be determined by the jury or trial court after full hearing. *See Trepuk*, 44 N.Y.2d 723 (summary judgment should be denied where it does not conclusively appear that plaintiff had knowledge of facts from which claim could reasonably be inferred); *Millspaugh*, 611 P.3d at 202 (reversing trial court's dismissal of legal malpractice case as untimely because of fact question about when plaintiff should have discovered attorneys' malpractice); *Siragusa*, 971 P.2d at 806 ("[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact," such that "the time of discovery may be decided as a matter of law only where uncontroverted evidence proves [when] the plaintiff discovered or should have discovered the fraudulent conduct"); *Oak Grove Investors*, 668 P.2d at 1079 (placing burden of demonstrating absence of genuine issue of material fact on the party seeking summary judgment on statute of limitations grounds). Plaintiff could not have brought his claims any sooner, particularly in light of PwC's concealment of its wrongdoing.

At a minimum, Plaintiff should be allowed discovery regarding the full extent of PwC's concealment of the acts, errors and omissions that caused Plaintiff's injuries. *See* NRCP 56(f), *supra*. As set forth in the accompanying affidavit of Mr. Tricarichi, there are various facts regarding PwC's apparent concealment that are currently unavailable to Plaintiff. 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 Plaintiff's own transaction; and the reasons why Plaintiff was not made aware of same – not to mention information regarding what PwC knew or reasonably should have known about the transaction (but never disclosed to Plaintiff) and when PwC knew it; and regarding PwC's review of, advice regarding, and involvement in the specific Fortrend transaction that ultimately led to the tax liability and other damages imposed upon Plaintiff, for which Plaintiff seeks recovery here. (Tricarichi Aff. ¶ 10).

3. Continuous Representation Doctrine

Fact issues regarding when PwC's services were complete likewise preclude summary judgment. As the Complaint alleges, PwC agreed to continue to work with Plaintiff after its review of the Fortrend transaction in order to avoid the imposition of any tax penalty. (Cmplt. ¶ 37) Indeed, as the engagement letter itself states, PwC would "be available to assist [Plaintiff] in the event of an audit of any issue for which [it had] provided services under this Agreement." (Eng. Ltr. rider § 5) *See also* Tricarichi Aff. ¶ 11. The parties' agreement for PwC to later assist Plaintiff makes Plaintiff's claims timely by virtue of New York's "continuous representation" doctrine, under which "the statute of limitations begins to run only when the entire course of the representation has ended." *MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 43 F. Supp. 3d 309, 315 (S.D.N.Y. 2014) (fact issues regarding continuous representation precluded dismissal; allegations gave rise "to a reasonable inference that the parties *anticipated* continuous representation") (emphasis added); *see also Stokoe v.*

Marcum & Kliegman LLP, 24 N.Y.S.3d 267, 268 (N.Y. App. Div. 2016) ("Plaintiffs carried their burden of demonstrating evidentiary facts showing that the continuous representation toll applied, based on the 'mutual understanding' set forth in the engagement letters that defendants *could be* called upon in a government investigation to justify their audit findings.") (emphasis added). As reflected by the terms of the engagement letter upon which PwC itself relies to seek summary judgment, this is hardly a case where the parties "did not contemplate that further work would be required." *MF Global*, 43 F.Supp. 3d at 316. To the contrary, the engagement letter contemplated the opposite. This is all that is required to toll the statute of limitations. In fact, consistent with the engagement letter, after receiving notice from the IRS in 2009 that it was looking into the matter, Plaintiff reached out to PwC, further demonstrating that PwC's representation was regarded as continuing. (Tricarichi Aff. ¶ 11) At the very least, there is a fact issue regarding continuing representation, concerning which Plaintiff should be allowed the opportunity to take discovery as part of the overall case.

Accordingly, even if the Court were to apply the New York statute of limitations to Plaintiff's claims, genuine issues of material fact – or at a minimum the need for further discovery – would require either denial or continuance of PwC's motion.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff Michael A. Tricarichi respectfully requests that the Court DENY Defendant Pricewaterhouse Coopers LLP's motion for summary judgment. Alternatively, Plaintiff respectfully requests that the Court order a continuance of the motion so that Plaintiff may obtain discovery on the various matters set forth above.

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. A-16-735910-B DEPT NO. XI **AMENDED COMPLAINT** BUSINESS COURT MATTER JURY TRIAL DEMANDED EXEMPT FROM ARBITRATION

NATURE OF THE CASE[1]

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

[1] In addition to setting forth new allegations and claims in this Amended Complaint, Plaintiff restates the claims of the original Complaint in order to preserve his appellate rights with respect thereto.

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. PwC further breached its obligations to Plaintiff when it subsequently – and in violation of its disclosure duties – failed to inform Mr. Tricarichi regarding the errors PwC made when it advised him to proceed with the transaction at issue here. PwC breached its duty to inform Tricarichi of these errors when the duty first arose – and for years thereafter – notwithstanding multiple opportunities to do so during the parties' ongoing communications about Tricarichi's tax situation. As a result, Plaintiff lost the opportunity to correct those errors, to avoid substantial penalties and interest imposed by the IRS, and to forego costly and ultimately unsuccessful litigation with the IRS in Tax Court – not to mention bring claims against PwC sooner. In addition to thus failing to inform Tricarichi of such errors and related IRS pronouncements, PwC also concealed the fact that it had conflicting interests – and had even given directly conflicting advice – when it came to transactions such as the one it advised Tricarichi to go ahead with.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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

16. 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.

17. 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 Fortend 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.

18. 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.

19. 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.

20. 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

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

22. 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.

23. 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.

24. 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

25. "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.

26. 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.

27. 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

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. Also unbeknownst to Plaintiff, PwC – prior to advising Plaintiff – actually gave at least one other taxpayer *completely the opposite advice* that it gave Plaintiff regarding a basically identical intermediary transaction proposed by Fortrend. In March 2003 – before PwC advised Mr. Tricarichi to go ahead with the Fortrend transaction – PwC advised another taxpayer, John Marshall, to steer clear of such a transaction. *See Estate of Marshall v. Commissioner of Internal Revenue*, T.C. Memo 2016-119 at *2, *4-5 (2016) ("PwC concluded that the stock sale proposed by Essex was similar to a listed transaction and that it could not consult or advise on the proposed stock sale any further.... [PwC] tried to discourage [Marshall] from entering into the proposed stock sale ... advising [him] not to do the proposed stock sale...."). PwC never said a word to Mr. Tricarichi about this contradictory advice to another taxpayer contemplating an identical Fortrend transaction. But Plaintiff was entitled to know then and certainly before litigation with the IRS that PwC advised at least one other taxpayer to *avoid* the very transaction that PwC was advising Plaintiff to proceed with.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

57. 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.

58. 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."

59. 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.

60. 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

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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).

70. 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.

71. 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.

72. 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.

73. 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.

74. 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.

PwC Monitored and Sought to Benefit from Midco Developments

75. Meanwhile, after incorrectly advising Mr. Tricarichi with respect to the Fortrend transaction, PwC continued to monitor developments regarding Midco

transactions – and to try to capitalize on such developments for its own benefit. For example, in October 2003, the month after Tricarichi's transaction with Fortrend closed, internal PwC correspondence shows that PwC had already targeted the IRS's focus on reportable transactions such as Midcos as a chance to "sell a client service opportunity … for a fee." PwC accordingly developed a "Sales Cycle" and marketing materials whereby it would make "targets and clients" aware of the "potential impact" of IRS policies "before they make their buying decision" about whether to seek guidance from PwC. By April 2004 a PwC marketing presentation noted, with respect to Midco and other transactions, that "[t]he IRS is serious about enforcement actions…. The risks are real."

76. While PwC was thus sounding the alarm elsewhere, it took a different tack as to Mr. Tricarichi. In November 2003, two months after the Fortrend transaction closed, PwC's Stovsky and Lohnes reviewed IRS Notice 2003-76, which provided an updated list of listed transactions. Determining the list "contain[ed] no items that would impact" Tricarichi's transaction, they did not advise him to take any action.

77. Subsequently, in January 2006, the IRS "announce[d] a directive emphasizing … that the original shareholders of target corporations" in Midco transactions – such as, potentially, Mr. Tricarichi, the original shareholder of Westside – "must … be thoroughly considered for any tax liability, including … transferee liability" since the intermediary purchasers "will almost certainly be inadequate sources of collection" for the IRS. PwC was aware of this directive, but did not advise Tricarichi of it – although PwC still continued to monitor developments relevant to him.

Commencing in Late 2008, PwC Breached its Duty to Inform Tricarichi of its Prior Errors, Thereby Preventing Tricarichi from Correcting Those Errors and Avoiding Millions of Dollars in Additional Damages

78. In February 2008, when Plaintiff himself was required to respond to a request from the IRS for information in connection with a "transferee liability" issue the IRS was

investigating, PwC likewise responded to a summons from the IRS. PwC did so after first conferring with Plaintiff about the IRS summons and the documents that would be produced in response. PwC was thus aware in early 2008 and going forward that the IRS was looking at Plaintiff and the possibility of transferee liability. As further alleged below, PwC remained in contact and had ongoing communications with Plaintiff in the ensuing years.

79. In light of the recent IRS inquiries, in early March 2008 PwC's Mr. Stovsky again consulted his colleague Mr. Lohnes about a new IRS notice (Notice 2008-34, regarding the "Distressed Asset Trust (DAT) Transaction"). Lohnes told Stovsky not to worry: "I don't think this should apply to your client's fact pattern…."

80. In April 2008, however, a federal district court held that the Bishop transaction – where PwC brought Fortrend to the table in 1999 to facilitate a PwC-promoted Midco deal– was a sham intermediary transaction. As one PwC professional stated to his tax colleagues, "This is not a good situation…. I suspect we will hear more from the losing plaintiffs [*i.e.*, PwC's clients] in the near future." By May 2008 there was also concern within PwC about a Wall Street Journal article linking the sham Bishop transaction to Rabobank – which also financed Fortrend's purchase of Tricarichi's Westside shares in 2003.

81. Then, on December 1, 2008, the IRS issued Notice 2008-111, which clarified Notice 2001-16 regarding Midco tax shelters. Notice 2008-111 is retroactively effective January 19, 2001, the effective date of Notice 2001-16. Notice 2008-111 superseded a prior IRS notice, Notice 2008-20, issued in January 2008, which identified the components of the Midco tax shelter transaction listed and described in Notice 2001-16. (Notice 2008-20 itself and what the IRS said about the notice had already "caus[ed] quite a stir." In particular, there was concern at PwC and elsewhere that the notice was "so broad as to make almost every deal to sell stock of a company (short of a complete liquidation) a potential listed transaction.")

82. Notice 2008-111 retained Notice 2008-20's breakdown of the four components of an intermediary tax shelter transaction and clarified that a transaction with all four of these components is a Midco transaction with respect to a person who engages in the transaction "pursuant to" a "Plan," *i.e.*, "under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-In Gain Assets [component 1] will not pay that tax." "A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan." Notice 2008-111 further provides that any shareholder (X) of the target company (T) in the transaction who controls at least 5 percent of the shares of T, or who is an officer or director of T, is deemed to have "engage[d] in the transaction pursuant to the Plan <u>if any of the following [persons] knows or has reason to know the transaction is structured to effectuate the Plan</u>: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) <u>any advisor of X [*e.g.*, PwC] engaged by that X [*e.g.*, Tricarichi] to advise it with respect to the transaction</u>."

83. Shortly after Notice 2008-111 was issued, Messrs. Stovsky and Lohnes, the primary PwC personnel who advised Tricarichi in connection with the Fortrend transaction, "read through the Notice and agree[d] … that it shouldn't change any of our prior analysis" with respect to Tricarichi. But, as Stovsky and Lohnes knew or had reason to know, Notice 2008-111 – which was retroactively effective to the time period encompassing the Fortrend transaction – indicated that their prior analysis of the transaction was wrong, or at least questionable:

a. As Stovsky testified in Tax Court, PwC concluded when it originally advised Tricarichi that Fortrend's plan "for the write-off of … high basis/low valued property that was to be contributed to Westside … <u>was not Mr. Tricarichi's concern</u>." (Trial Tr. 627:10 – 628:2) *See also* Trial Tr. 699:19 – 701:16 (Lohnes testifying that he "observed that the IRS could challenge certain things that the buyers was planning to do" but concluded that "it would not cause a recharacterization of Mr. Tricarichi's stock sale"); 120:8-20, 173:23 – 174:20, 195:21 – 196:11, 197:24 – 200:1 (Tricarichi testifying that he relied on PwC to advise him regarding the transaction and Fortrend's distressed-asset plan).

b. But, under the newly-issued Notice 2008-111, Fortrend's plan *was* Tricarichi's concern. As Notice 2008-111 indicates, Fortrend's plan was pertinent to the question of whether Fortrend and/or Tricarichi were engaging in the transaction "pursuant to" a "Plan," *i.e.*, "under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-In Gain Assets will not pay that tax." Since PwC had been aware of Fortrend's plan to write off the distressed assets it would contribute to Westside in order to reduce Westside's (*i.e.*, Fortrend's) tax liability post-closing, under recently-issued Notice 2008-111 PwC knew, or at least had reason to know, that the Fortrend transaction was structured to effectuate a Plan as defined in the notice.

c. Since PwC had been Tricarichi's advisor with respect to the Fortrend transaction, Tricarichi could thus now be deemed, under Notice 2008-111, to have engaged in the transaction pursuant to a Plan, and the transaction thus deemed to be a Midco transaction.

d. Accordingly, PwC's conclusion that the Fortrend transaction was not a reportable or listed transaction (*see, e.g.*, Trial Tr. 653:19-25 [Stovsky]) was incorrect or at the very least questionable, as PwC knew or should have known by December 2008.

84. PwC had an affirmative duty to inform Tricarichi of this error, and of the resulting error on Tricarichi's tax return(s) with respect to the Fortrend transaction:

a. Notice 2008-111 itself states: "The Service and the Treasury Department recognize that some taxpayers may have filed tax returns taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action."

b. As PwC has itself noted, Association of International Certified Professional Accountants ("AICPA") Statement on Standards for Tax Services ("SSTS") No. 6 (Knowledge of Error: Return Preparation and Administrative Proceedings) "sets forth the applicable standards for a member who becomes aware of (a) an error in a taxpayer's previously filed tax return [or] (b) an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority…." Under this AICPA provision, "The term error … includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect…. SSTS No. 6 applies whether or not the member prepared or signed the return that contains the error."

c. Given its retroactive effective date of January 19, 2001, Notice 2008-111 is an administrative pronouncement having retroactive effect. As alleged above, PwC knew or had reason to know by December 1, 2008, that Notice 2008-111, and its provisions regarding engaging in a Midco transaction pursuant to a Plan, resulted in there being error(s) on Tricarichi's prior tax return(s).

d. SSTS No. 6 further provides that, "If a member becomes aware of an error in a previously filed return, the member should promptly advise the taxpayer of the error, the potential consequences, and recommend the measures to be taken.... If the member is not engaged to perform tax return preparation, the member is only responsible for informing the taxpayer of the error and recommend[ing] that the taxpayer discuss the error with the taxpayer's tax return preparer."

e. Similarly, Section 10.21 of U.S. Treasury Department Circular No. 230, as summarized by the IRS, requires that: "If you know that a client has not complied with the U.S. revenue laws or has made an error in, or omission from, any return, affidavit, or other document which the client submitted or executed under U.S. revenue laws, you must promptly inform the client of that noncompliance, error, or omission and advise the client regarding the consequences under the Code and regulations of that noncompliance, error, or omission. Depending on the particular facts and circumstances, the consequences of an error or omission could include (among other things) additional tax liability, civil penalties, interest, criminal penalties, and an extension of the statute of limitations.")

85. Notwithstanding the requirements of SSTS No. 6 and Treasury Circular No. 230, however, PwC did not inform Tricarichi of the foregoing developments and resulting error(s) in his taxes. PwC thereby breached its affirmative duty to inform him thereof. PwC's Stovsky and Lohnes expressly considered Notice 2008-111; made an affirmative (and wrong) decision "that it shouldn't change any of our prior analysis" with respect to Tricarichi); and as a result did not even contact Tricarichi – thereby improperly withholding information from Tricarichi regarding Notice 2008-111 and its impact on the tax position Tricarichi had taken with respect to the Fortrend transaction.

86. PwC had numerous opportunities to inform Plaintiff of the foregoing points, but failed to do so in late 2008, early 2009 and thereafter. PwC's Stovsky, between 2008 and 2015, had various conversations with Jim Tricarichi, Plaintiff's brother – who served as a liaison between Plaintiff and PwC – that included discussions of Plaintiff's IRS and Tax Court proceeding. PwC also provided information in connection with Plaintiff's IRS and Tax Court proceedings. And prior to providing deposition and trial testimony in Plaintiff's Tax Court

proceedings, PwC witnesses, including Stovsky, met with Plaintiff's counsel in August 2013, December 2013 and June 2014, with PwC's counsel communicating closely with Plaintiff's counsel during this period in advance of the testimony. During these communications, Tricarichi's counsel informed PwC's counsel that the IRS was focused, among other things, on the distressed debt transactions that Fortrend used to offset Westside's tax liabilities, and that PwC had advised Plaintiff regarding. Indeed, in trying to convince the IRS not to depose Mr. Lohnes, PwC's counsel learned in October 2013 that the IRS considered a key component of its case to be establishing that Tricarichi had actual or constructive notice of Fortrend's plan to write off Westside's tax liability via the distressed debt transactions – the very point addressed by Notice 2008-111, and the very point with respect to which PwC (via AICPA SSTS No. 6 and Treasury Circular 230) had an obligation to tell Tricarichi it had given him bad advice.

87. Nonetheless, at no time, including on none of occasions just indicated, did PwC inform Plaintiff of the errors noted above. But on all of these occasions, as also noted above, PwC was aware that the IRS was looking at Plaintiff and the possibility of transferee liability. On information and belief, PwC concealed the foregoing matters it was obligated to disclose in order to avoid being sued by Tricarichi. As has only recently been learned, and as set forth above, PwC thus breached its duty to inform Plaintiff of its prior errors.

Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts

88. 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.

89. 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; (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; (vi) PwC's concealment of the fact that it advised at least one other taxpayer to *avoid* the very transaction that PwC was advising Plaintiff to proceed with; and (vii) PwC's ongoing failure, starting in late 2008 and continuing thereafter, to advise Plaintiff of PwC's prior erroneous advice regarding the Fortrend transaction.

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

90. As a result of 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.

91. 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.

92. 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.

93. In connection with the investigation, the IRS issued a transferee report in August 2009, to which Tricarichi objected in October 2009. The IRS and Mr. Tricarichi's representatives conferred in the ensuing months in an effort to resolve the matter, including in August, October and December 2010; and February, March and August 2011, with such efforts coming to an end in early 2012. In addition to demonstrating that Tricarichi had no liability or damages at the time he responded to the IRS' document requests in early 2008, these ongoing communications and efforts – during which Tricarichi consistently took, and the IRS considered, the position that he had no transferee liability – further demonstrate that, had PwC then informed Tricarichi of its prior errors, as it had a duty and ample opportunity to do, Tricarichi at that time could have at least minimized any ultimate transferee exposure on his part by reaching agreement with the IRS or otherwise. Instead, PwC withheld information and let Tricarichi proceed at his own peril, and to his ultimate harm.

94. 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.)

95. 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 more than $21.4 million (and counting).

96. The U.S. Court of Appeals for the Ninth Circuit affirmed the Tax Court decision on November 13, 2018. Among other things, the appellate court affirmed the Tax Court's ruling that Tricarichi is liable for nearly $13.9 million in interest that accrued before the IRS sent Tricarichi notice of transferee liability in June 2012.

97. As a further result of Defendants' actions, and in addition to the tax deficiency, penalties and interest for which he has been held liable, Plaintiff has been required to spend a considerable amount of money in fees and expenses in the IRS, Tax Court and appellate proceedings. 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 approximately $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.

98. At a minimum, had PwC in late 2008, early 2009 or thereafter fulfilled its affirmative duty to inform Plaintiff of PwC's prior erroneous advice regarding the Fortrend transaction, and of the resulting errors on Plaintiff's tax returns with respect to that transaction, Plaintiff would have been able to amend his returns, avoid interest and penalties, avoid litigation with the IRS, and thereby avoid related legal fees and expenses; and/or bring claims against

PwC then. But PwC, fearing the resulting exposure to Tricarichi had it come clean, remained silent. PwC's failures thus, in and of themselves, caused Plaintiff millions of dollars in damages, including the nearly $13.9 million in interest that accrued before the IRS sent Plaintiff notice of transferee liability, as the Ninth Circuit court of appeals recently held. By thus lulling Plaintiff, PwC also protected itself from, or at least delayed, any litigation by Plaintiff seeking recovery for PwC's failures.

COUNT I
GROSS NEGLIGENCE AS TO PwC

99. Plaintiff repeats and realleges paragraphs 1 through 98 above as though fully set forth herein.

100. 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.

101. PwC 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.

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

103. 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.

104. 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

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

106. 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.

107. 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.

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

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

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

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

112. 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.

113. 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.

114. 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
NEGLIGENCE AS TO PwC

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

116. The issuance of Notice 2008-111 in December 2008 gave rise to an affirmative duty on the part of PwC to inform Plaintiff that its prior advice regarding the Fortrend transaction had been erroneous, and of the resulting errors on Plaintiff's tax return(s) with respect to the Fortrend transaction.

117. PwC breached that duty by not advising Plaintiff regarding Notice 2008-111 and its impact on the tax position Plaintiff had taken with respect to the Fortrend transaction. PwC breached its duty repeatedly, starting in December 2008 and continuing thereafter, including making no mention of the errors to Plaintiff on the various occasions that the parties communicated regarding Plaintiff's tax situation in the ensuing years. PwC's breach was only recently discovered.

118. In these same communications in late 2008 and the ensuing years, PwC also concealed from Plaintiff that fact that PwC – prior to advising Plaintiff – actually gave at least one other taxpayer (John Marshall) completely the opposite advice that it gave Plaintiff regarding a basically identical intermediary transaction proposed by Fortrend. But Plaintiff was entitled to know then and certainly before litigation with the IRS that PwC advised at least one other taxpayer to avoid the very transaction that PwC advised Plaintiff to proceed with.

119. As a result of PwC's breaches, Plaintiff was not able to amend his tax return(s), avoid interest and penalties, avoid litigation with the IRS, and thereby avoid substantial related legal fees and expenses. As a further result of PwC's breaches, Plaintiff was also prevented from bringing claims against PwC sooner for PwC's failures and/or prior erroneous advice.

120. As a direct and proximate result of the negligence or 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 penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

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

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

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

123. 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.

124. 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.

125. 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.

126. 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.

127. 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.

128. 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
CIVIL CONSPIRACY
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

129. Plaintiff repeats and realleges paragraphs 1 through 128 set forth above as though fully set forth herein.

130. 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.

131. 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).

132. 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.

133. 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.

134. 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 VI
RACKETEERING – VIOLATION OF NRS 207.400(1)(c)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

135. Plaintiff repeats and realleges paragraphs 1 through 134 set forth above as though fully set forth herein.

136. 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.

137. 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).

138. 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 VII
RACKETEERING – VIOLATION OF NRS 207.400(1)(h)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

139. Plaintiff repeats and realleges paragraphs 1 through 138 set forth above as though fully set forth herein.

140. 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.

141. 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).

142. 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 VIII
RACKETEERING – VIOLATION OF NRS 207.400(1)(i)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

143. Plaintiff repeats and realleges paragraphs 1 through 142 set forth above as though fully set forth herein.

144. 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.

145. 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).

146. 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 IX
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

147. Plaintiff repeats and realleges paragraphs 1 through 146 set forth above as though fully set forth herein.

148. 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 10th day of December, 2018.

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR, Defendants.	CASE NO.: A-16-735910-B DEPT. NO.: XI **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO AMENDED COMPLAINT**

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

ANSWER

NATURE OF THE CASE

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. The allegations in paragraph 3 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, 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 denies the remaining allegations in paragraph 3.
4. PwC denies the allegations in paragraph 4.
5. The allegations in paragraph 5 are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, 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. The allegations in paragraph 6 are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff

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states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC is 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. The allegations in paragraph 7 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 7 as to PwC. 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. The allegations in paragraph 8 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 8 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. 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.

9. The allegations in paragraph 9 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 9 as to PwC. To the extent

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the allegations in paragraph 9 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

PARTIES

10. PwC is without information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 10. PwC otherwise denies the allegations contained in paragraph 10.

11. Regarding the allegations contained in paragraph 11:

    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 that 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.

    g. PwC otherwise denies the allegations contained in paragraph 11.

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

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

15. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 15. 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

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.

20. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 20. To the extent a response is required, PwC denies the allegations.

JURISDICTION AND VENUE

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.

24. Paragraph 24 states a legal conclusion to which no response is required.

FACTUAL BACKGROUND

25. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 25. Paragraph 25 states a legal conclusion to which no response is required. To the extent a response is required, PwC denies the allegations.

26. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 26. To the extent a response is required, PwC denies the allegations.

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27. The allegations in paragraph 27 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 27 as to PwC. To the extent the allegations in paragraph 27 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

28. PwC is 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 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 decisions. PwC is otherwise 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.

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 is without information sufficient to form a belief as to the truth of the allegations in paragraph 34. To the extent a response is required, PwC denies the allegations.

35. The allegations in paragraph 35 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original

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claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 35 as to PwC. To the extent the allegations in paragraph 35 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

36. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 36. To the extent a response is required, PwC denies the allegations.

37. The allegations in paragraph 37 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC states that, 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 the Fortrend Transaction. PwC denies the remaining allegations in paragraph 37 as to PwC. PwC is otherwise without information sufficient to form a belief as to the truth of the allegations in paragraph 37. To the extent a response is required, PwC denies the allegations.

38. The allegations in paragraph 38 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits that on or about April 25, 2003, Plaintiff and PwC entered into an Engagement Agreement ("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 38.

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39. The allegations in paragraph 39 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the referenced court proceedings and opinions for the true and correct contents thereof. PwC denies any 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. PwC otherwise denies the allegations in paragraph 39.

40. The allegations in paragraph 40 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the referenced court proceedings and opinions for the true and correct contents thereof. PwC denies any 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. PwC otherwise denies the allegations in paragraph 40.

41. The allegations in paragraph 41 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, 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. PwC otherwise denies the allegations in paragraph 41.

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42. The allegations in paragraph 42 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 42.

43. The allegations in paragraph 43 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, 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 43. To the extent a response is required, PwC denies the allegations.

44. 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 denies the allegations in paragraph 44.

45. The allegations in paragraph 45 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, 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 denies the remaining allegations in paragraph

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45 as to PwC. PwC otherwise is without information sufficient to form a belief as to the truth of the allegations in paragraph 45.

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 46 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 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 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 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 is without information sufficient to form a belief as to the truth of the allegations in paragraph 50. To the extent the allegations in paragraph 50 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

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

52. PwC refers to the relevant court decisions, referenced in paragraph 52, 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. PwC is otherwise 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 is without information sufficient to form a belief as to the truth of the allegations in paragraph 53. To the extent the allegations in paragraph 53 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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. The allegations in paragraph 55 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC admits that Plaintiff retained PwC from April 2003 to August 2003 to provide certain advice regarding the Fortrend Transaction. PwC denies the remaining allegations in paragraph 55.

56. PwC is 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.

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

58. The allegations in paragraph 58 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a 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. PwC denies the remaining allegations in paragraph 58 as to PwC. 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.

59. The allegations in paragraph 59 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 59 as to PwC. To the extent the allegations in paragraph 59 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

60. The allegations in paragraph 60 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 60 as to PwC. To the extent the allegations in paragraph 60 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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61. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 61. 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 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 is without information sufficient to form a belief as to the truth of the allegations in paragraph 64. 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 a response is required, PwC denies the allegations.

66. 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. 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. 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.

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 American Jobs Creation Act of 2004, P.L. 108-357, 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

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legal conclusions made by Plaintiff based on the American Jobs Creation Act of 2004. To the extent the allegations in 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. 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 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.

73. PwC is 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 is 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.

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75. The allegations in paragraph 75 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the documents and any factual inferences or legal conclusions made by Plaintiff based on the documents. PwC otherwise denies the allegations in paragraph 75.

76. The allegations in paragraph 76 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to IRS Notice 2003-76 and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2003-76 or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2003-76 or the documents. PwC otherwise denies the allegations in paragraph 76.

77. The allegations in paragraph 77 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC refers to the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the documents and any factual inferences or legal conclusions made by Plaintiff based on the documents. PwC otherwise denies the allegations in paragraph 77.

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78. PwC admits that it responded to a summons from the IRS in or around February 2008. PwC otherwise denies the allegations in paragraph 78.

79. PwC refers to IRS Notice 2008-34 and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-34 or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-34 or the documents. PwC otherwise denies the allegations in paragraph 79.

80. PwC refers to the referenced court decision and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the court decision or the documents and any factual inferences or legal conclusions made by Plaintiff based on the court decision or the documents. PwC otherwise denies the allegations in paragraph 80.

81. PwC refers to IRS Notices 2008-111, 2001-16, and 2008-20, and the documents from which the paragraph purports to be quoting, for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notices 2008-111, 2001-16, and 2008-20, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notices 2008-111, 2001-16, and 2008-20, or the documents. PwC otherwise denies the allegations in paragraph 81.

82. PwC refers to IRS Notice 2008-111 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111 and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111. PwC otherwise denies the allegations in paragraph 82.

83. PwC refers to IRS Notice 2008-111, the Tax Court transcript, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, the Tax Court transcript, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, the Tax Court transcript, or the documents. PwC admits that the PwC professionals working on the Engagement included

Rich Stovsky, Timothy Lohnes and Don Rocen. PwC otherwise denies the allegations in paragraph 83.

84. PwC refers to IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents. PwC otherwise denies the allegations in paragraph 84.

85. PwC refers to IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, and the documents from which the paragraph purports to be quoting for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, U.S. Treasury Department Circular No. 230, or the documents. PwC otherwise denies the allegations in paragraph 85.

86. PwC refers to IRS Notice 2008-111, SSTS No. 6, and U.S. Treasury Department Circular No. 230 for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of IRS Notice 2008-111, SSTS No. 6, or U.S. Treasury Department Circular No. 230, and any factual inferences or legal conclusions made by Plaintiff based on IRS Notice 2008-111, SSTS No. 6, or U.S. Treasury Department Circular No. 230. PwC admits that certain PwC employees have had contact with Plaintiff or Plaintiff's representatives since 2008. PwC otherwise denies the allegations in paragraph 86.

87. PwC denies the allegations in paragraph 87.

88. The allegations in paragraph 88 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original

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claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 88 as to PwC. To the extent the allegations in paragraph 88 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

89. The allegations in paragraph 89 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 89 as to PwC. To the extent the allegations in paragraph 89 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

90. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 90. To the extent a response is required, PwC denies the allegations.

91. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 91. To the extent a response is required, PwC denies the allegations.

92. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 92. Paragraph 92 also states a legal conclusion to which no response is required. To the extent a response is required, PwC denies the allegations.

93. PwC denies the allegations in paragraph 93 as to PwC. PwC otherwise is without information sufficient to form a belief as to the truth of the allegations in paragraph 93. To the extent a response is required, PwC denies the allegations.

94. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 94. To the extent a response is required, PwC denies the allegations.

95. The allegations in paragraph 95 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 95 as to PwC. PwC refers to

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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.

96. PwC refers to the referenced Ninth Circuit decision for the true and correct contents thereof. PwC denies any paraphrasing, summarizing, or characterization of the Ninth Circuit decision and any factual inferences or legal conclusions made by Plaintiff based on the Ninth Circuit decision. PwC otherwise denies the allegations in paragraph 96.

97. The allegations in paragraph 97 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 97 as to PwC. To the extent the allegations in paragraph 97 are addressed to other defendants, PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

98. PwC denies the allegations in paragraph 98.

COUNT I
GROSS NEGLIGENCE AS TO PwC

99. Paragraph 99 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 98, inclusive, and incorporates those answers herein by this reference.

100. The allegations in paragraph 100 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 100.

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101. The allegations in paragraph 101 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 101.

102. The allegations in paragraph 102 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 102.

103. The allegations in paragraph 103 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 103.

104. The allegations in paragraph 104 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 104.

COUNT II
NEGLIGENT MISREPRESENTATION AS TO PwC

105. Paragraph 105 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 104, inclusive, and incorporates those answers herein by this reference.

106. The allegations in paragraph 106 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary

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Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 106.

107. The allegations in paragraph 107 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 107.

108. The allegations in paragraph 108 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 108.

109. The allegations in paragraph 109 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 109.

110. The allegations in paragraph 110 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 110.

111. The allegations in paragraph 111 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 111.

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112. The allegations in paragraph 112 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 112.

113. The allegations in paragraph 113 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 113.

114. The allegations in paragraph 114 as to PwC are irrelevant because they relate only to claims that were dismissed by the Court's October 22, 2018 Order Granting Summary Judgment. Plaintiff states in footnote 1 of his Amended Complaint that he is restating his original claims for appellate purposes. Accordingly, no response is necessary. To the extent a response is required, PwC denies the allegations in paragraph 114.

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COUNT III
NEGLIGENCE AS TO PwC

115. Paragraph 115 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 114, inclusive, and incorporates those answers herein by this reference.

116. PwC denies the allegations in paragraph 116.

117. PwC denies the allegations in paragraph 117.

118. PwC denies the allegations in paragraph 118.

119. PwC denies the allegations in paragraph 119.

120. PwC denies the allegations in paragraph 120.

121. PwC denies the allegations in paragraph 121.

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

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 to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

124. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 124. Moreover, the allegations in paragraph 124 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

125. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 125. Moreover, the allegations in paragraph 125 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

126. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 126. Moreover, the allegations in paragraph 126 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

127. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 127. Moreover, the allegations in paragraph 127 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

128. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 128. Moreover, the allegations in paragraph 128 are addressed to other

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defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

129. Paragraph 129 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 128, inclusive, and incorporates those answers herein by this reference.

130. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 130. Moreover, the allegations in paragraph 130 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

131. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 131. Moreover, the allegations in paragraph 131 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

132. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 132. Moreover, the allegations in paragraph 132 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

133. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 133. Moreover, the allegations in paragraph 133 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

134. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 134. Moreover, the allegations in paragraph 134 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

135. Paragraph 135 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 134, inclusive, and incorporates those answers herein by this reference.

136. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 136. Moreover, the allegations in paragraph 136 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

137. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 137. Moreover, the allegations in paragraph 137 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

138. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 138. Moreover, the allegations in paragraph 138 are addressed to other defendants and to claims that have been dismissed, 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)(h)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

139. Paragraph 139 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 138, inclusive, and incorporates those answers herein by this reference.

140. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 140. Moreover, the allegations in paragraph 140 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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141. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 141. Moreover, the allegations in paragraph 141 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

142. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 142. Moreover, the allegations in paragraph 142 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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

143. Paragraph 143 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 142, inclusive, and incorporates those answers herein by this reference.

144. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 144. Moreover, the allegations in paragraph 144 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

145. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 145. Moreover, the allegations in paragraph 145 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

146. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 146. Moreover, the allegations in paragraph 146 are addressed to other defendants and to claims that have been dismissed, and PwC states that no response is necessary. To the extent a response is required, PwC denies the allegations.

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COUNT IX
UNJUST ENRICHMENT
AS TO RABOBANK AND UTRECHT

147. Paragraph 147 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 146, inclusive, and incorporates those answers herein by this reference.

148. PwC is without information sufficient to form a belief as to the truth of the allegations in paragraph 148. Moreover, the allegations in paragraph 148 are addressed to other defendants and to claims that have been dismissed, 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.
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.

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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 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, res judicata, and/or law of the case.

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.

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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 above 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 discovery or pre-trial proceedings in this case and hereby reserves its 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.

///

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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: August 12, 2019.

SNELL & WILMER L.L.P.

By: /s/ *Bradley Austin*

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Attorneys for Defendant PricewaterhouseCoopers, LLP

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 August 12, 2019, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S ANSWER TO AMENDED 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 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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Attorneys for Plaintiff

DATED: August 12, 2019

/s/ *Lyndsey Luxford*
An employee of Snell & Wilmer L.L.P.

4839-7201-4751

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6/12/2020 10:27 AM
Steven D. Grierson
CLERK OF THE COURT

SCHTO

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A TRICARICHI,

Plaintiff,

vs

PRICEWATERHOUSE COOPERS, LLP, ET AL,

Defendant(s),

Case No. A 16 735910 B
Dept. No. XI

Date of Hearing: N/A
Time of Hearing: N/A

2nd AMENDED BUSINESS COURT SCHEDULING ORDER and ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL CONFERENCE AND CALENDAR CALL

This 2nd AMENDED SCHEDULING AND TRIAL SETTING ORDER is entered following the filing of the *Stipulation and Order Re: Revised Scheduling Order* on 06/01/2020. This Order may be amended or modified by the Court upon good cause shown.

IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Close of Discovery	**09/28/2020**
Dispositive Motions and Motions in Limine to be filed by ***Omnibus Motions in Limine are not allowed***	**11/13/2020**

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **Five week stack** to begin, **January 4, 2021 at 1:30p.m.**

B. A calendar call will be held on **December 22, 2020 at 9:30a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;

(2) List of depositions;

(3) List of equipment needed for trial, including audiovisual equipment;[1] and

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[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3300 or via E-Mail at CourtHelpDesk@clarkcountycourts.us

(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on **December 10, 2020 at 9:15a.m.**

D. Parties are to appear on **October 5, 2020 at 9:00a.m.** for a Status Check on the matter.

E. The Pre-Trial Memorandum must be filed no later than **December 4, 2020,** with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

F. All motions in limine, **Omnibus Motions in Limine are not allowed**, must be in writing and filed no later than **November 13, 2020. Orders shortening time will not be signed except in extreme emergencies**.

G. No documents may be submitted to the Court under seal based solely upon the existence of a protective order.

Any sealing or redaction of information must be done by motion.

All motions to seal and/or redact and the potentially protected information must be filed at the clerk's office front counter during regular business hours 9 am to 4 pm.

In accordance with, Administrative Order 19-03, the motion to seal must contain the language "Hearing Requested" on the front page of the motion under the Department number.

Pursuant to SRCR Rule 3(5)(b), redaction is preferred and sealing will be permitted only under the most unusual of circumstances.

If a motion to seal and/or redact is filed with the potentially protected information, the proposed redacted version of the document with a slip-sheet for any exhibit entitled "Exhibit ** Confidential Filed Under Seal" must be attached as an Exhibit.

The potentially protected information in unredacted and unsealed form must be filed at the same time and a hearing on the motion to seal set. While the motion to seal is pending, the potentially protected information will not be accessible to the public.

If the motion to seal is noncompliant, the motion to seal may be stricken and the potentially protected information unsealed.

H. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

J. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

K. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, at the final Pre-Trial Conference, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

L. In accordance with EDCR 7.70, counsel shall file and serve by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference voir dire proposed to be conducted pursuant to conducted pursuant to EDCR 2.68.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED this 12th day of June, 2020.

Elizabeth Gonzalez, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of the foregoing 2nd Amended Scheduling Order and Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

/s/ Dan Kutinac
Dan Kutinac, JEA

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11/13/2020 5:06 PM
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR, Defendants.	CASE NO.: A-16-735910-B DEPT. NO.: XI **HEARING REQUESTED** **PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND**

Pursuant to NRCP 56, Defendant PricewaterhouseCoopers LLP files this Motion for Summary Judgment and Motion to Strike Plaintiff Michael A. Tricarichi's Jury Demand.

This motion is based upon the Memorandum of Points and Authorities below, the Affidavit of Katharine A. Roin, Esq. (Ex. 39), the Affidavit of Richard P. Stovsky (Ex. 40), and associated exhibits, the pleadings and papers on file, and any argument that this Court may entertain.

DATED this 13th day of November, 2020.

SNELL & WILMER L.L.P.

By: */s/ Bradley Austin*

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TABLE OF AUTHORITIES

CASES

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STATUTES

RULES

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Michael Tricarichi ("Tricarichi") originally claimed that Defendant PricewaterhouseCoopers LLP ("PwC") was negligent because PwC gave him erroneous tax advice in 2003 relating to the sale of his business. After losing summary judgment on that claim, he came up with a new one: that PwC failed to advise him about IRS Notice 2008-111 when it was issued in December 2008. Tricarichi alleges that PwC should have consulted with him about Notice 2008-111 and told him that the new Notice rendered PwC's 2003 advice deficient. Tricarichi claims that such notice would have prompted him to settle with the IRS and avoid the interest that has accrued on his tax deficiency as well as the attorney's fees and other costs Tricarichi spent litigating against the IRS—a total of approximately $18 million that Tricarichi now seeks as damages from PwC. Tricarichi's claim fails on multiple grounds.

First, Tricarichi cannot show causation as a matter of law. In July 2019, when the Court denied PwC's motion to dismiss Tricarichi's amended complaint, the Court explained that although Tricarichi "properly alleged breach of duty by failing to disclose the new information" whether Tricarichi "on a factual basis … can support that claim is an entirely different issue that I assume I'll see you guys in about six months." Ex. 1, 7/8/19 Hr'g Tr. at 15:10-14. Now that discovery has concluded, it is clear that Tricarichi has not, and cannot, support his claim with admissible evidence. It is undisputed that Tricarichi had actual notice of Notice 2008-111 from other sources. Within a few months of Notice 2008-111's issuance, Tricarichi's various tax lawyers on his legal team (including former and future Chief Counsels of the IRS) informed him about Notice 2008-111 and sent him a detailed analysis of the Notice. Despite this knowledge, Tricarichi never settled his deficiency with the IRS. This reality defeats the necessary element of causation for Tricarichi's claim and entitles PwC to summary judgment.

In addition, Tricarichi cannot establish causation for other reasons. Notice 2008-111 states on its face that it addresses reportability to the IRS, not liability. Even if Tricarichi had reported the Westside transaction to the IRS in December 2008 after Notice 2008-111 was issued, that would not have made any difference because the IRS already was examining the transaction.

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Furthermore, even if Tricarichi had wanted to settle with the IRS, he admits that he did not have the money to do so. Tricarichi testified that the most he had available to settle with the IRS was $5 million, but the undisputed evidence shows the IRS would not agree to settle for anything close to that amount. In fact, the lowest settlement demand the IRS made was approximately $12 million.

Second, the evidence developed in the case has shown that PwC did not have a duty to update Tricarichi about Notice 2008-111 when it was issued in December 2008. The undisputed facts demonstrate that Tricarichi was not a client of PwC's at that time, as its work for Tricarichi concluded in 2003 after the Westside transaction closed. Under the applicable rules for tax accountants and the terms of Tricarichi's Engagement Agreement with PwC, PwC did not have a duty to update Tricarichi about developments in the tax law years later. Even if there was a duty to update Tricarichi, however, such a duty would apply only to a change in the law that led to an error in PwC's prior advice. Notice 2008-111 did not result in such an error. It related to reportability, not liability. And as Tricarichi's distinguished tax lawyers concluded, Notice 2008-111 had multiple objective components for a transaction to be considered a Midco that were not satisfied by the Westside transaction.

Third, Tricarichi's current claim is barred by the statute of limitations. Tricarichi alleges an omission by PwC in December 2008, but Tricarichi did not file this case until 2016, well outside the limitations period. The tolling agreement PwC signed in 2011 cannot save Tricarichi's claim because the plain language of that agreement limits its application to a "claim or defense that Tricarichi may have available to them [sic] arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular." Ex. 2, 2/2/11 Tolling Agreement. Tricarichi's current claim does not arise from the services PwC performed relating to the sale of Westside in 2003, which this Court has already dismissed as time-barred. Instead, Tricarichi's current claim asserts a duty to update him about a new IRS Notice issued five years after PwC's services relating to the Westside transaction had concluded. PwC did not agree to toll the limitations period for such a claim, and it is therefore time-barred.

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Finally, should any portion of this case proceed to trial, the Court should grant PwC partial summary judgment based on a limitation of liability clause in the Engagement Agreement that limits PwC's liability to the amount of professional fees Tricarichi paid to PwC—approximately $48,000. In addition, the Engagement Agreement contains a clear and unequivocal jury trial waiver. The Court should therefore strike Tricarichi's jury demand and proceed with a bench trial with a maximum damages claim of less than $50,000.

II. RELEVANT FACTS AND PROCEDURE

This case arises from a transaction Michael Tricarichi closed more than seventeen years ago. In 2003, Tricarichi's wholly-owned company, Westside Cellular, received approximately $65 million in settlement proceeds from antitrust claims in Ohio. Ex. 3, *Tricarichi v. Comm'r of Internal Revenue*, T.C. Memo. 2015-201 at 3 (2015). Later that year, Tricarichi entered into a deal with Fortrend International LLC to sell his shares of Westside for approximately $34.9 million. *Id.* at 18. At the time of the transaction, Westside had total assets of approximately $40.6 million and a tax liability of approximately $16.9 million. *Id.* Thus, the $34.9 million Tricarichi received from Fortrend for his Westside shares was "$11.2 million more than West Side was worth." *Id.* The Westside transaction closed on September 9, 2003. *Id.* at 23.

A. Tricarichi Engaged PwC to Perform Tax Research and Evaluation Services for the 2003 Westside Transaction

On the advice of his brother Jim, Tricarichi hired PwC to evaluate the tax implications of the proposed sale of Westside Cellular. Ex. 4, 8/3/20 J. Tricarichi Dep. 34:20-24. Tricarichi signed an Engagement Agreement with PwC dated April 10, 2003. Ex. 5, Engagement Agreement. The letter limited the scope of services that PwC would provide to "tax research and evaluation services" in connection with the Westside transaction. *Id.* at Bates 117243. The second sentence of the letter explicitly provided that both the letter and the attached Terms of Engagement to Provide Tax Services constitute the full Agreement between Tricarichi and PwC:

> This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this "Agreement") set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP … and you

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> necessary to ensure that PricewaterhouseCoopers' professional services are performed to achieve mutually agreed upon objectives.

Id..

The Terms of Engagement are three pages appended to the Engagement Agreement. *Id.* at Bates 11748-50. As relevant here, the Terms of Engagement provide a limitation of liability in Section 7.

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT … FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

Id. at 117249. The Terms also provide a clear and unambiguous jury trial waiver in Section 9. *Id.* ("[PwC] and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement."). And the Terms identify New York law as governing in Section 10. *Id.* ("This Agreement will be governed by the laws of the State of New York.").

The final paragraph of the Engagement Agreement advised Tricarichi that "[i]f this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us." *Id.* at 117246. Again, the term "Agreement" had been previously defined to include both the Engagement Agreement and the attached Terms of Engagement. *Id.* at 117244. Tricarichi signed the Engagement Agreement, and his signature appears directly below an indication that the letter included "Enclosure(s): Terms of Engagement to Provide Tax Services." *Id.* at 117247.

PwC evaluated the proposed sale of Westside Cellular and communicated its conclusions to Tricarichi. PwC told Tricarichi that the transaction *more likely than not* would not be reportable to the IRS as an intermediary or Midco transaction under IRS Notice 2001-16, and that Tricarichi *more likely than not* would not be held liable for Westside's taxes under transferee liability. *See* Ex. 6, 4/13/03 Stovsky Memo; Ex. 7, 9/1/20 Stovsky Dep. 126:19-127:7, 131:20-134:4. The "more likely than not" qualifier to PwC's advice is a standard tax industry term that meant that there was a 50.1% chance Tricarichi would prevail, but also a 49.9% chance he would lose. Ex. 7,

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9/1/20 Stovsky Dep. 126:19-127:7. After the fall of 2003, PwC did not perform any additional services for Tricarichi. Ex. 8, PwC Invoices; Ex. 9, 10/1/20 M. Tricarichi Dep. 83:17-24; Ex. 7, 9/1/20 Stovsky Dep. 269:12-16, 272:7-10. PwC did not prepare the tax return for Westside or for Tricarichi. Ex. 7, 9/1/20 Stovsky Dep. 260:13-15.

B. Tricarichi Hired Experienced Tax Counsel and the IRS Ultimately Held Him Liable for Westside's Unpaid Taxes

As part of the 2003 transaction, the Fortrend affiliate that acquired Westside provided a warranty that it would cause Westside to satisfy all of its federal tax obligations arising from receipt of the settlement proceeds. Ex. 3, *Tricarichi*, T.C. Memo. 2015-201 at 7. But Westside never paid any federal taxes. Instead, Westside tried to offset the gain from the settlement proceeds with a bad-debt deduction from a portfolio of defaulted Japanese loans. *Id.* at 10.

The IRS audited Westside's 2003 tax return and disallowed the bad-debt deduction. *Id.* at 11. The IRS determined that Westside owed an additional $15.2 million in taxes for 2003, along with $6 million in penalties. *Id.* Westside was defunct at the time of the IRS's audit. *Id.* Because the IRS could not collect the taxes from Westside, the IRS investigated whether it could collect the unpaid tax from Tricarichi as a transferee. *Id.* at 12.

On January 22, 2008, the IRS sent Tricarichi an Information Document Request ("IDR") seeking documents related to the Westside transaction. Ex. 10, 1/22/08 IDR. The IDR advised Tricarichi that the IRS was examining Westside's 2003 tax return, and that Tricarichi "may be liable as a transferee of West Side … for part or all of the tax liability." *Id.* at Bates 121454. A year later, the IRS sent Tricarichi a draft transferee report advising him that he was being held liable as a transferee for Westside's unpaid 2003 taxes. Ex. 11, 2/3/09 IRS Letter to M. Tricarichi.

Tricarichi hired a team of highly experienced and capable tax lawyers to represent him in negotiations and potential litigation with the IRS. Among the attorneys he hired were Glenn Miller from Bingham McCutcheon; Donald Korb from Sullivan & Cromwell (a former Chief Counsel of the IRS); and Michael Desmond (currently the Chief Counsel of the IRS). Ex. 12, 8/18/20 Miller Dep. 20:5-13; Ex. 13, 8/11/20 Korb Dep. 24:4-25:2; Ex. 14, 8/19/20 Desmond Dep. 16:6-17:24, 44:24-45:2. From 2009 to 2012, Tricarichi and his lawyers had extensive discussions with the IRS

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in an attempt to reach a resolution. Tricarichi's lawyers sent detailed letters and presentations to the IRS arguing that the 2003 Westside transaction was not a reportable intermediary or Midco tax shelter transaction under the relevant IRS Notices, including IRS Notice 2001-16 and IRS Notice 2008-111, which was issued in December 2008 and "clarified" IRS Notice 2001-16. *See, e.g.*, Ex. 15, 4/29/09 Miller Letter to IRS at 6-10; Ex. 16, 10/9/09 Miller Letter to IRS at 8-12; Ex. 17, 6/9/10 Korb Email to M. Tricarichi at Bates 123543; Ex. 18, IRS Notice 2008-111. Tricarichi never asked PwC to participate in the advice relating to or the negotiations with the IRS. PwC provided no services or advice to Tricarichi after the 2003 sale of Westside. Ex. 8, PwC Invoices; Ex. 9, 10/1/20 M. Tricarichi Dep. 83:17-24; Ex. 7, 9/1/20 Stovsky Dep. 269:12-16, 272:7-10.

Tricarichi did not reach a resolution with the IRS, and the IRS sent him a formal notice of liability in June 2012. Ex. 19, 6/25/12 IRS Letter to M. Tricarichi. Tricarichi petitioned the United States Tax Court for review of the IRS's Notice of Liability. Ex. 3, *Tricarichi*, T.C. Memo. 2015-201 at 4. After litigation and a trial in 2014, the Tax Court issued an opinion in October 2015 finding Tricarichi liable as a transferee for Westside's unpaid taxes, penalties, and interest. *Id.* at 27. The Tax Court opinion did not find whether the transaction was reportable under IRS Notice 2001-16 or IRS Notice 2008-111. The IRS issued penalties for under-payment of taxes, not for failure to report the transaction. Ex. 19, 6/25/12 IRS Letter to M. Tricarichi.

The United States Court of Appeals for the Ninth Circuit affirmed the Tax Court's decision in November 2018. *Tricarichi v. Comm'r of Internal Revenue*, 752 F. App'x 455, 456 (9th Cir. 2018), *cert. denied*, 140 S. Ct. 38 (2019).

C. Tricarichi Files Suit Against PwC Based On Its 2003 Advice, and This Court Granted Summary Judgment in Favor of PwC

In April 2016, Tricarichi filed a complaint against PwC in this Court, alleging that PwC's 2003 advice about the Westside transaction was negligent.[1] Compl. ¶¶ 37-40, 81-96.

[1] Tricarichi sued four other defendants in connection with the 2003 transaction—Cooperatieve Rabobank U.A., Utrecht-America Finance Co., Seyfarth Shaw LLP, and Graham R. Taylor. The Court dismissed Tricarichi's claims against the first three, which was affirmed by the Supreme Court. *Tricarichi v. Cooperative Rabobank, U.A.*, 440 P.3d 645, 654-55, 135 Nev. 87, 97-99 (Nev. 2019).

After allowing an initial period of discovery pursuant to NRCP 56(f), the Court granted summary judgment in PwC's favor. Ex. 20, 10/22/18 Summ. J. Order. The Court held that the statute of limitations barred any claims based on PwC's 2003 advice. *Id.* at 2. The Court entered judgment in favor of PwC "regarding any and all claims arising from the services PwC provided Plaintiff in 2003." *Id.* at 3. The Court allowed Tricarichi to file a motion for leave to assert amended claims "arising out of a subsequent retention of PwC in 2008 that may have a different statute of limitations." *Id.*

Tricarichi filed an Amended Complaint in which he asserts a claim for negligence against PwC based on PwC's alleged failure to tell him about IRS Notice 2008-111, which the IRS issued in December 2008, over five years ***after*** PwC's engagement with Tricarichi ended. Am. Compl. ¶¶ 116-117. Tricarichi contends that, if PwC had told him about IRS Notice 2008-111, he would have immediately stopped litigating against the IRS and paid the tax deficiency. *Id.* ¶ 119. Tricarichi seeks as damages from PwC the interest that has accrued on his tax deficiency between the date IRS Notice 2008-111 issued up to and including the Ninth Circuit's decision, as well as the attorney's fees and expenses Tricarichi paid during that time period in his unsuccessful efforts to challenge the IRS's assessment. According to Tricarichi's expert, these alleged damages total $18,117,543, consisting of $14,937,400 in interest and $3,180,143 in legal fees and expenses. Ex. 21, 5/26/20 Greene Expert Report at 16-17; Ex. 22, 9/25/20 Greene Dep. 217:7-16.[2]

III. ARGUMENT

Summary judgment under NRCP 56(a) is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005) (adopting the federal summary judgment standard for the Nevada rules). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party."

[2] In his deposition, Tricarichi's damages expert admitted that he made a calculation error in his report and had overstated the amount of interest by $1,357,319.25. Ex. 22, Greene Dep. 217:7-16.

Id. “The nonmoving party ‘is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.’” *Id.*

In this case, there are no genuine issues of material fact regarding three of the essential elements of Tricarichi’s negligence claim against PwC—duty, breach, and causation. *See Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 439, 135 Nev. 192, 194-95 (Nev. 2019) (identifying elements of professional negligence claim under Nevada law); *Friedman v. Anderson*, 23 A.D.3d 163, 164, 803 N.Y.S.2d 514, 515 (2005) (identifying elements of professional negligence claim under New York law). Although courts generally “are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness are questions of fact … when plaintiff as a matter of law cannot recover, defendant is entitled to a summary judgment.” *Lee v. GNLV Corp.*, 22 P.3d 209, 212, 117 Nev. 291, 295-96 (Nev. 2001). This is such a case. *Id.* at 22 P.3d at 213, 117 Nev. at 297-98.

A. Tricarichi Cannot Prove Causation

Tricarichi must prove a “proximate causal connection between the negligent conduct and resulting injury.” *Boesiger*, 444 P.3d at 439, 135 Nev. at 194-195. “Proximate cause limits liability to foreseeable consequences that are reasonably connected to both the defendant’s misrepresentation or omission and the harm that the misrepresentation or omission created.” *Nelson v. Heer*, 163 P.3d 420, 426, 123 Nev. 217, 225-226 (Nev. 2007).

Tricarichi asserts that PwC’s alleged negligence (not advising him about Notice 2008-111) caused his alleged injury (the $14,937,400 in interest that accrued after Notice 2008-111 was issued and the $3,180,143 in attorney’s fees he spent litigating against the IRS). But no rational trier of fact could find a proximate causal connection between these two elements, for three independent reasons: (1) because Tricarichi’s lawyers informed him of Notice 2008-111 shortly after its issuance, Tricarichi cannot establish that his conduct would have been any different had PwC informed him of the Notice; (2) since Notice 2008-111 relates only to reportability of the transaction and not liability, Tricarichi cannot show that learning of this Notice would have had any effect on his dispute with the IRS, who had been aware of and looking into the transaction for

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several years; and (3) Tricarichi failed to adduce any evidence that he could have settled with the IRS even if PwC had informed him of Notice 2008-111 in 2008.

1. Tricarichi Cannot Factually Support His Claim Because He Knew About Notice 2008-111 From His Tax Lawyers

Tricarichi's most fundamental problem is that he cannot prove causation based on PwC's alleged failure to inform him about Notice 2008-111 because he knew about Notice 2008-111 from his tax lawyers in early 2009. Causation in this case depends on Tricarichi's subjective claim that he would have resolved his tax liability with the IRS if PwC had told him about IRS Notice 2008-111 after it issued in December 2008. No reasonable factfinder could credit this claim because it is undisputed that Tricarichi learned about Notice 2008-111 just a few months later—by April 2009 at the latest—and he did *not* settle with the IRS despite this knowledge. Indeed, Tricarichi was advised about Notice 2008-111 on numerous occasions and in multiple documents by the lawyers he hired to represent him in connection with his dispute with the IRS. Still, Tricarichi never settled.

This Court previously recognized that whether Tricarichi knew about Notice 2008-111 from his tax lawyers was a critical issue that would bear on whether Tricarichi can prove his claim. During a July 9, 2019 hearing, the Court denied PwC's motion to dismiss the amended complaint because the Court found "[t]here [was] a properly alleged breach of duty by failing to disclose the new information"—*i.e.*, Notice 2008-111. Ex. 1, 7/8/19 Hr'g Tr. at 15:10-11. But the Court cautioned that "[w]hether on a factual basis [Tricarichi] can support that claim is an entirely different issue that I assume I'll see you guys in about six months." *Id.* at 15:12-14. The Court added that "if the plaintiff knows of the notice through its own tax professionals," that would be "a factual issue that [PwC] may raise at some point in time." *Id.* at 16:3-6.

Discovery is over, and there is no dispute that Tricarichi had actual notice of Notice 2008-111 from his tax lawyers. Tricarichi learned about Notice 2008-111 on multiple occasions during 2009 from his tax lawyer, Glenn Miller, of Bingham McCutcheon. Tricarichi hired Mr. Miller shortly after the IRS contacted him in connection with potential transferee liability for Westside's unpaid taxes. Ex. 12, 8/18/20 Miller Dep. 17:8-13; Ex. 11, 2/3/09 IRS Letter to

M. Tricarichi. Mr. Miller drafted a detailed response to the IRS's draft transferee report that was sent to the IRS on April 29, 2009. Ex. 15, 4/29/09 Miller Letter to IRS. Mr. Miller's letter devoted five single-spaced pages to IRS Notice 2008-111 and explained why the Westside transaction did not qualify as an intermediary transaction under that notice.[3] *Id.* at 6-10. The letter explained that Notice 2008-111 prescribed four requirements for a transaction to constitute a Midco transaction, and the Westside transaction did not satisfy several of the requirements. *Id.* Mr. Miller provided Tricarichi with a draft of the April 2009 letter to review before it was sent out, Ex. 12, 8/18/20 Miller Dep. 35:24-36:5, and Mr. Miller discussed "the general nature of Midco and notices" with Tricarichi, *id.* at 42:1-6.

The IRS sent Tricarichi a final Transferee Report on August 11, 2009 (Ex. 24, 8/11/09 Transferee Report), and Mr. Miller sent a formal written protest on October 9, 2009. Ex. 16, 10/9/09 Miller Letter to IRS. Like the April 2009 draft protest that Tricarichi reviewed, the October 2009 formal protest contained a detailed discussion of Notice 2008-111 and argued at length that the Westside transaction did not meet the Notice's requirements for a Midco transaction. *Id.* at 8-12. The October 2009 protest contained a "Penalty of Perjury Statement" in which Tricarichi declared under penalty of perjury that he "ha[d] examined this protest, including any accompanying documents, and, to the best of [his] knowledge and belief, the facts presented in this protest are true, correct, and complete." *Id.* at Bates 9453.

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Tricarichi's tax lawyers at Sullivan & Cromwell also educated Tricarichi about Notice 2008-111. Don Korb, a senior statesman in the field of tax law who served as Chief Counsel of the IRS from 2004 to 2008, led the Sullivan & Cromwell team. Ex. 13, 8/11/20 Korb Dep. 17:21-18:5, 18:13-15. Among other materials, Sullivan & Cromwell sent Tricarichi a slide presentation for IRS appeals that discussed Notice 2008-111 in detail and explained why the Westside transaction did not qualify as a Midco under the Notice. Ex. 23, 10/22/10 Corn Email to Desmond & attachments at Bates 122488-122489 & 122513-122520. Tricarichi's counsel later sent an edited version of this presentation to the IRS for use in the settlement conference in October 2010. Ex.

[3] That is consistent with the conclusion PwC reached when it looked at Notice 2008-111 after its issuance. Ex. 25, 12/2/08 Lohnes Email to Stovsky.

26, 10/26/10 Corn Email to Szpalik & attachment. Sullivan & Cromwell also prepared a memo dated October 8, 2009, addressed to Tricarichi and his personal attorney Randy Hart, that addressed Notice 2008-111. Ex. 27, 10/8/09 Korb Memo to M. Tricarichi.

Even though multiple lawyers advised Tricarichi about Notice 2008-111, he never settled his outstanding tax liability with the IRS. Given these undisputed facts, no reasonable factfinder could believe that Tricarichi would have settled with the IRS *if only* PwC had added its voice to the chorus of tax advisers who told Tricarichi about Notice 2008-111. In a related context, courts have held that "a lawyer's negligent actions cannot be the proximate cause of a plaintiff's alleged damages if subsequent counsel had 'a sufficient opportunity to protect the plaintiffs' rights by pursuing any remedies it deemed appropriate on their behalf.'" *Tokio Marine & Nichido Fire Ins. Co. Ltd. v. Calabrese*, No. 07-CV-2514 (JS) (AKT), 2013 WL 752259, at *17 (E.D.N.Y. Feb. 26, 2013) (quoting *Katz v. Herzfeld & Rubin, P.C.*, 853 N.Y.S.2d 104, 106 (N.Y. App. Div. 2008). The same principle applies here; Tricarichi cannot claim that he would have settled with the IRS if PwC had told him about Notice 2008-111 when it is undisputed that numerous distinguished counsel who represented Tricarichi advised him in detail about Notice 2008-111, and he never settled.

In sum, as the Court recognized, Tricarichi's claim boils down to a "failure to disclose." Ex. 1, 7/8/19 Hr'g Tr. at 15:19. Tricarichi simply cannot prevail on that claim when it is undisputed that he learned about the very thing PwC supposedly did not disclose to him—Notice 2008-111—from his tax lawyers shortly after the Notice issued. The Court should grant summary judgment for PwC.

2. Notice 2008-111 Addresses Reportability, Not Liability

Even if PwC had told Tricarichi about IRS Notice 2008-111 (which Tricarichi already knew about), Tricarichi cannot show it would have made any difference because as discussed above, the Notice addresses *reportability*, not *liability*. If a transaction is deemed a Midco transaction under Notice 2008-111, it is considered a "listed transaction[]" and the taxpayer has an obligation to report the transaction to the IRS. Ex. 18, IRS Notice 2008-111 § 6. Notice 2008-111 states on its face that it "does not affect the legal determination of whether a person's

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treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation…." *Id.* § 1. The purpose of the notice is to inform the IRS so that it can make its own assessment on whether the transaction is improper.

Therefore, even if the Westside transaction qualified as a Midco under Notice 2008-111 (which it does not), at most, Notice 2008-111 would have required Tricarichi to report the transaction to the IRS. But reporting the Westside transaction after December 2008 would not have made any difference because the IRS was already actively examining it. The IRS began auditing Westside's 2003 tax returns in 2005. *See* Ex. 28, 9/22/05 IRS Letter to Dick. The IRS interviewed Tricarichi in connection with the audit in 2007. Ex. 29, 11/30/07 Taxpayer Interview Transcript of M. Tricarichi. And the IRS sent Tricarichi an Information Document Request and a notice that it was investigating him for potential transferee liability in January 2008. Ex. 10, 1/22/08 IDR. Additionally, the IRS did not seek, and the Tax Court did not impose, any penalties for failure to report the transaction; the penalties were solely related to the underpayment of taxes. Tricarichi is accordingly not seeking any damages from PwC based on any penalties for failure to report the transaction. Thus, Tricarichi cannot prove that advising him about Notice 2008-111 would have made any difference to his case or how the dispute unfolded with the IRS.

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3. Tricarichi Lacked the Financial Ability to Settle With the IRS

Tricarichi cannot establish causation for yet another reason: he did not have the ability to settle with the IRS in 2008 according to his own testimony. Even if the factfinder somehow were to accept that PwC advising Tricarichi about Notice 2008-111 would have led him to *want* to settle with the IRS (when learning about the Notice from his other tax lawyers did not have that effect), Tricarichi cannot prove that he had the *ability* to do so.

Tricarichi testified that he had "around $5 million" available to settle with the IRS in 2008. Ex. 9, 10/1/20 M. Tricarichi Dep. 284:22-285:1; *see also id.* at 285:6-8 ("Q. [Y]ou would have needed a $5 million number from the IRS to settle? A. Somewhere in that neighborhood, yeah."). However, the lowest settlement offer the IRS ever made to Tricarichi was in August 2011 when the IRS offered to settle his outstanding tax liability for approximately $12.4 million. Ex. 30, 8/29/11 Szpalik Email to Korb; Ex. 13, 8/11/20 Korb Dep. 126:2-7. Thus, there was a gap of more than $7 million between the lowest IRS settlement offer and the amount of money Tricarichi had available to settle. Moreover, the IRS's $12.4 million offer was made at a time when liability was still contested, and it represented a significant discount from what the IRS alleged Tricarichi owed in back taxes, interest, and penalties. *See* Ex. 30, 8/29/11 Szpalik Email to Korb (showing total proposed transferee liability of $34.6 million as of August 26, 2011). No reasonable factfinder could believe that Tricarichi would have received a dramatically better offer from the IRS—a reduction of 55% to 60% below the IRS's lowest offer—after he *conceded liability*.

Tricarichi's "[d]amages 'cannot be based solely upon possibilities and speculative testimony.'" *Franchise Tax Bd. of Cal. v. Hyatt*, 335 P.3d 125, 156, 130 Nev. 662, 708-09 (Nev. 2014), *vacated on other grounds*, 136 S. Ct. 1277 (2016) (citation and quotation marks omitted). Rather, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact [of damages] may be presumed." *Id.* In *Hyatt*, the plaintiff sought damages for the collapse of his licensing business in Japan based on the Franchise Tax Board sending letters to two Japanese companies asking about licensing payments. *Id.* The Nevada Supreme Court affirmed summary judgment of no damages because the plaintiff failed to prove that "hypothetical steps" necessary for his damages "actually occurred." *Id.* He did not prove, for example, that the businesses that received the letters, "contacted the Japanese government," or that the Japanese government "in turn contacted other businesses regarding the investigation." *Id.* 335 P.3d at 156-57, 130 Nev. at 708-10. Similarly, here, Tricarichi has not provided any proof of necessary steps for his damages claim against PwC. Most importantly, Tricarichi has not proven that he could have settled his tax liability with the IRS if he had wanted to do so. Thus Tricarichi's claim that he would have saved the interest and attorney's fees he accrued after December 2008 is based on nothing more than "possibilities and speculative testimony." *Id.* 335 P.3d at 156, 130 Nev. at 708-09; *see also Filbin v. Fitzgerald*, 211 Cal. App. 4th 154, 171 (Cal. Ct. App. 2012) (granting summary judgment on malpractice claim against lawyer where plaintiff "introduced no evidence that a greater settlement could have been negotiated"). The Court should grant summary judgment for PwC.

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B. PwC Is Not Liable for Not Updating Tricarichi in 2008

Tricarichi also cannot establish that PwC had a duty to advise him about IRS Notice 2008-111 when the IRS issued it in December 2008. The existence of a duty is, of course, an essential element of Tricarichi's negligence claim. *Boesiger*, 444 P.3d at 439, 135 Nev. at 194-95. "The question of whether a 'duty' to act exists is a question of law solely to be determined by the court." *Lee*, 22 P.3d at 212, 117 Nev. at 295-96 (Nev. 2001).

1. There Is No Duty to Update a Former Client

PwC did not have a duty to advise Tricarichi about IRS Notice 2008-111 in December 2008 because Tricarichi was not a PwC client at that time. In fact, Tricarichi had not been a PwC client since 2003, when PwC completed its work for Tricarichi in connection with the Westside transaction. The Court denied PwC's motion to dismiss, ruling that Tricarichi had "properly alleged breach of duty by failing to disclose the new information. Whether on a factual basis you can support that claim is an entirely different issue…" Ex. 1, 7/8/19 Hr'g Tr. at 15:10-13. The undisputed facts demonstrate that under the applicable standards for accountants, PwC did not have or breach any duty to Tricarichi in 2008 or after.

Under the relevant authorities, PwC has no duty to advise a former client about changes in the law. The American Institute of Certified Public Accountants ("AICPA") has issued Statements on Standards for Tax Services ("SSTS") that spell out the obligations of tax professionals like PwC in certain circumstances. The relevant provisions are SSTS No. 6 and No. 8.

SSTS No. 8 makes clear that "[a] member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement." Ex. 33, SSTS No. 8, ¶ 4 at Bates 28436. The Explanation to SSTS No. 8 makes clear that a subsequent agreement for services is the touchstone for a duty to communicate changes in the law: "[a]lthough such developments as legislative or administrative changes or future judicial interpretations may affect the advice previously provided, a member cannot be expected to communicate subsequent developments that affect such advice unless the member undertakes this obligation by specific agreement with the taxpayer." *Id.* ¶ 9 at Bates 28437.[4]

Tricarichi has cited SSTS No. 6, but that provision does not alter the rule that an accountant has no duty to update a former client. SSTS No. 6 refers to obligations that exist for accountants who are not involved in tax preparation who become aware of "an error in a previously filed return" "[w]hile performing services for a taxpayer." *Id.* No. 6, ¶¶ 5, 9 at Bates 28431-32. PwC expert, Kip Dellinger, who served on the AICPA Task Force that revised the SSTS standards, explained that the reference in SSTS No. 6 to "performing services for a taxpayer" is designed to "ensure that a CPA did not have an indefinite obligation to inform a former client of errors in their returns, let alone provide such advice where a potential error might occur as a result of a retroactive administrative pronouncement of a tax authority." Ex. 31, 6/25/20 Dellinger Rebuttal Expert Report at 3.

Tricarichi's expert, Craig Greene, confirmed no such duty exists for former clients:

> Q: Well, let me -- if you have a tax practitioner who keeps abreast of new developments in the law and, as a result of those new developments, learns of an error in something that was done for a former client years before and is no longer performing any services for that taxpayer or client, is there a requirement to notify this former client about the error?
>
> A: I don't believe so.

Ex. 22, 9/25/20 Greene Dep. 193:16-24.

Here, PwC was not "assisting [Tricarichi] in implementing procedures or plans associated with the advice provided" or "performing services" for Tricarichi when Notice 2008-111 came

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[4] The rule is the same for lawyers. In Formal Opinion 481, the American Bar Association's Standing Committee on Ethics and Professional Responsibility concluded that a lawyer has no obligation under the Model Rules of Professional Conduct to alert a former client about a material error that the lawyer discovers *after* her representation of the client has ended. *See* Ex. 32, 4/17/18 ABA Formal Opinion 481 at 2 ("If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error."). Although the ABA recognized that a lawyer might *choose* to inform a former client about an error for "[g]ood business and risk management reasons" or for "other individual reasons," those are "personal decisions for lawyers rather than obligations imposed under the Model Rules." *Id.*

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out in December 2008, five years after the Westside transaction closed. Ex. 33, SSTS No. 8, ¶ 4 at Bates 28436. Tricarichi hired PwC in 2003 to "perform tax research and evaluation services" related to Tricarichi's sale of Westside Cellular. Ex. 5, Engagement Agreement at Bates 117243; *see also* Ex. 4, 8/3/20 J. Tricarichi Dep. 68:19-25 (PwC was engaged to evaluate "state and local tax issue[s], and then reviewing the deal from a standpoint that it was legitimate"); Ex. 7, 9/1/20 Stovsky Dep. 63:12-15 (PwC was "engaged to evaluate the tax implications of the Westside transaction"). That engagement ended in 2003 after the Westside transaction closed.

PwC did not send Tricarichi any invoices for any work after 2003. *See* Ex. 8, PwC Invoices; Ex. 9, 10/1/20 M. Tricarichi Dep. 80:21-82:8 (no recollection of receiving any invoices from PwC after 2003); Ex. 34, 10/9/20 Meighan 30(b)(6) Dep. 70:18-71:18 ("We rendered our advice, in my view, in 2003 on the sale of the stock, we then billed the client for that advice, and that completed the engagement."); Ex. 35, 10/1/20 Harris Dep. 73:7-74:13 (explaining that Tricarichi's engagement with PwC ended in 2003 because it was a "discrete assignment that had been completed where there was no future service being performed and nothing more to do with respect to the transaction"). And Tricarichi did not reach out to PwC or request any services or analysis from PwC after the transaction closed in 2003. Ex. 9, 10/1/20 M. Tricarichi Dep. 83:17-24; Ex. 7, 9/1/20 Stovsky Dep. 269:12-16, 272:7-10.

PwC also did not "undertake[] [an] obligation by specific agreement" to update Tricarichi about subsequent developments in tax law. Ex. 33, SSTS No. 8, ¶ 4 at Bates 28436. To the contrary, the Engagement Agreement specifically disclaimed any obligation on the part of PwC to update or revise its advice based on subsequent changes in the tax laws. Section 3 of the Terms of Engagement—which are part of the Engagement Agreement between Tricarichi and PwC, *see infra* at III.D.1.—provides as follows:

> **3. Responsibilities of PricewaterhouseCoopers**
> We will perform our services on the basis of the information you have provided and in consideration of the applicable federal, foreign, state or local tax laws, regulations and associated interpretations relative to the appropriate jurisdiction as of the date the services are provided. Tax laws and regulations are subject to change at any time, and such changes may be retroactive in effect and may be applicable to advice given or other services rendered before their effective dates. ***We do not assume responsibility for***

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such changes occurring after the date we have completed our services.

Ex. 5, Engagement Agreement at Bates 117248 (emphasis added). Because Tricarichi contractually agreed that PwC did not have any responsibility for changes in tax laws or regulations that occurred after PwC completed its services in 2003, he cannot attempt to impose such a duty by way of his negligence claim. *Cf. United Rentals Hwy. Techs., Inc. v. Wells Cargo, Inc.*, 289 P.3d 221, 226, 128 Nev. 666, 672-73 (Nev. 2012) (duties addressed by contract are "enforced in accordance with the terms of the contracting parties' agreement") (citation and quotation marks omitted).

2. The Issuance of Notice 2008-111 Did Not Create an "Error in a Previously Filed Return"

Even if the Court concludes there was a duty for PwC to update Tricarichi years after he ceased being a client, that duty would apply only if the change in the law resulted in an "error in a previously filed return." Ex. 33, SSTS No. 6, § 3 at Bates 28430. No reasonable factfinder could find that the issuance of Notice 2008-111 in December 2008 resulted in an error in the tax return that Tricarichi previously filed.

IRS Notice 2008-111 "clarifie[d] Notice 2001-16" with respect to the nature of the transaction that would require reporting it to the IRS. Ex. 18, IRS Notice 2008-111 § 1. Importantly, IRS Notice 2008-111 explicitly states that it "does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation…." *Id.* As PwC tax expert Ken Harris explained, the result is that "even if Notice 2008-111 was thought to properly apply to Plaintiff's transaction, which neither PwC nor any of Plaintiff's many subsequent tax advisors concluded, the Notice did not imply that PwC's advice on transferee liability was any less correct than prior to the issuance of the Notice." Ex. 36, 5/23/20 Harris Expert Report at 45. Because a revised rule on reportability of a transaction did not alert PwC to any "error" on the tax return, there could not be any duty requiring PwC to update Tricarichi under SSTS No. 6.

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3. IRS Notice 2008-111 Did Not Render PwC's Prior Advice on Reportability Erroneous

Even if the "error" were viewed to include not reporting the transaction to the IRS, Notice 2008-111 did not make the prior advice erroneous. To the contrary, Notice 2008-111 clarified Notice 2001-16 to *limit* the situations in which the transaction had to be reported by creating "more objective components." Ex. 18, IRS Notice 2008-111 § 1. In particular, Notice 2008-111 contained four objective components "indicative of an Intermediary Transaction set forth in section 3." *Id.* A transaction "must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16." *Id.* § 3.

There is no dispute that the Westside transaction did not have three of the four objective components identified in Notice 2008-111, based on what three different tax attorneys for Tricarichi wrote to the IRS and the Tax Court. The transaction did not meet the first component because Westside did not "own[] assets the sale of which would result in taxable gain ([] Built-in-Gain Assets)." *Id.* § 3.1. The transaction did not meet the third component because "at least 65 percent (by value) of [Westside's] Built-in Gain Assets" were not sold "within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date." *Id.* § 3.3. And the transaction did not meet the fourth component because "[a]t least half of [Westside's] Built-in Tax that would otherwise result from the disposition of the Sold [Westside] Assets" was not "purportedly offset or avoided or not paid." *Id.* § 3.4. The only component from Notice 2008-111 that the Westside transaction satisfied was component two because "[a]t least 80 percent of the [Westside] stock (by vote or value) [was] disposed of by [Westside's] shareholder(s) … in one or more related transactions within a 12 month period." *Id.* § 3.2.

All of Tricarichi's tax lawyers took the view that the Westside transaction did not qualify as a Midco because it did not meet the objective components required by Notice 2008-111. Tricarichi's lawyers from Sullivan & Cromwell sent the IRS a PowerPoint presentation that explained why the Westside transaction did not satisfy three of the four components of Notice 2008-111. *See* Ex. 26, 10/26/10 Corn Email to Szpalik & attachment at Bates 911-912; *see also*

Ex. 23, 10/22/10 Corn Email to Desmond & attachments at Bates 122513-122520. Sullivan & Cromwell included the following chart showing its analysis:

Notice 2008-111 Requirements	Applicable?
T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale.	**NO.** West Side did not own any relevant built-in gain assets
At least 80% of T's stock is sold within a 12 month period.	Yes
Within a 12 month period before or after the stock sale, at least 65% of T's built-in gain assets are sold.	**NO.** West Side did not own any relevant built-in gain assets
At least half of the tax resulting from T's built-in gain assets is offset or avoided.	**NO.** West Side did not own any relevant built-in gain assets

Ex. 26, 10/26/10 Corn Email to Szpalik & attachment at Bates 920. Another one of Tricarichi's lawyers, Glenn Miller, sent the IRS a formal protest arguing at length that the Westside transaction did not qualify as an intermediary transaction under Notice 2008-111 because it did not meet the four required components. Ex. 16, 10/9/09 Miller Letter to IRS at 8-12. And yet another one of Tricarichi's lawyers, Michael Desmond, filed a motion *in limine* in the Tax Court arguing "it is undisputed that three of the four objective components that a transaction 'must' have to fit the definition of a reportable 'Midco' transaction (or be substantially similar to that transaction) are missing." Ex. 37, 5/19/14 Motion *in Limine* ¶ 8.

Thus, the issuance of Notice 2008-111 did not render PwC's prior 2003 advice that the Westside transaction was not reportable as an intermediary transaction erroneous. The day after the IRS issued Notice 2008-111, one of the PwC partners who worked on the Westside transaction, Tim Lohnes, emailed another partner who had worked on the transaction, Rich Stovsky, and told him: "I read through the Notice and agree with your assessment that it shouldn't change any of our prior analysis." Ex. 25, 12/2/08 Lohnes Email to Stovsky. The PwC partners reached the same conclusion as all of Tricarichi's tax lawyers—*i.e.*, that the Westside transaction was not an intermediary transaction under Notice 2008-111 because it did not satisfy several of the required objective components. Therefore, even if PwC had a duty to update Tricarichi about an "error" in its prior advice on reportability (which it did not), Notice 2008-111 did not create such an error and therefore did not trigger any duty to update Tricarichi.

C. Tricarichi's Current Claim Is Time Barred

PwC is also entitled to summary judgment on Tricarichi's negligence claim because it is time-barred. The alleged omission about which Tricarichi complains—PwC's failure to advise him about Notice 2008-111—took place in December 2008 when the IRS issued the Notice. But Tricarichi did not file suit against PwC until April 2016, and he did not file an amended complaint alleging his current claim based on Notice 2008-111 until April 2019. Tricarichi's claim falls well outside of any of the potentially applicable statutes of limitation.

As the parties have briefed to the Court before, there are two potentially applicable statutes of limitation: Nevada and New York. *See* 6/14/18 PwC Renewed Mot. for Summ. J. Under Nevada law, the statute of limitations is two years from discovery or four years from the alleged malpractice, whichever is shorter. NRS § 11.2075(1). Under New York law—the governing law identified in the Engagement Agreement—the statute of limitations is three years from the alleged malpractice. *See Ackerman v. Price Waterhouse*, 644 N.E.2d 1009, 1011 (N.Y. 1994) (citing New York Civil Practice Law and Rules § 214). No matter which limitations period the Court applies, Tricarichi's current claim based on not updating him in December 2008 is untimely. *See* at, 10/22/18 Summ. J. Order at 2 ("The Court holds that regardless of whether New York's or Nevada's statute of limitations applies, Plaintiff's claims are time-barred.").

Tricarichi cannot claim the benefit of the tolling agreement he and PwC signed in February 2011 because it does not apply to Tricarichi's current claim. The tolling agreement provides in relevant part:

> [A]ny statutes of limitations that would expire during the period from January 19, 2011 through October 31, 2012,[5] 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.

[5] The parties extended the tolling agreement periodically up through the filing of this lawsuit.

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Ex. 2, 2/2/11 Tolling Agreement (emphasis added).

By its plain terms, the tolling agreement applies only to claims "arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular." Tricarichi's current claim does not arise from the services PwC provided in 2003, but rather from an alleged independent duty to update Tricarichi about a new IRS Notice that was issued in December 2008—five years after Tricarichi's engagement of PwC concluded. As explained above, the services PwC performed relating to the sale of Westside Cellular ended in 2003 after the deal closed. Tricarichi's complaint about the work PwC did in 2003 or the advice PwC ultimately gave in 2003 was the subject of Tricarichi's original claim against PwC, but the Court granted summary judgment "in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003." Ex. 20, 10/22/18 Summ. J. Order at 3.

Thus, the Court's summary judgment order entered judgment in favor of PwC on all claims covered by the tolling agreement. PwC agreed to tolling for any claims "arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular," and the Court granted summary judgment for PwC "regarding any and all claims arising from the services PwC provided Plaintiff in 2003." Because all of PwC's services "relating to the sale of West Side Cellular" were "provided … in 2003," the tolling agreement and the summary judgment order are coextensive. Summary judgment is appropriate because Tricarichi's 2008 claim is time-barred.

D. Alternatively, Based on PwC's Engagement Agreement With Tricarichi, the Court Should Grant Partial Summary Judgment and Strike the Jury Demand

For the reasons set forth above, the Court should grant PwC summary judgment on the entirety of Tricarichi's claim. If the Court does not grant summary judgment, then as an alternative, the Court should enforce two provisions in Tricarichi's Engagement Agreement with PwC that will impact how the trial in his matter proceeds. Specifically, the Court should enforce the limitation of liability in the Engagement Agreement and enter partial summary judgment for PwC to the extent Tricarichi's damages claim exceeds the amount of professional fees he paid PwC—approximately $48,000. And the Court should also enforce the jury trial waiver, strike Tricarichi's jury demand, and try this case as a bench trial.

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1. The Terms of Engagement Are Part of the Contract Between PwC and Tricarichi

The Engagement Agreement between Tricarichi and PwC dated April 10, 2003 includes a three-page Terms of Engagement to Provide Tax Services attached to the letter. Ex. 5, Engagement Agreement. The second sentence of the Engagement Agreement explicitly defines the "Agreement" to comprise both the letter and its terms. *Id.* at Bates 117243 ("This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this 'Agreement') set forth an understanding of the nature and scope of the services to be performed ….") "Under Nevada law, where reference in a contract to the terms of a collateral document indicates an intention to incorporate those terms generally, such reference can become a part of the contract." *Living Ecology, Inc. v. Bosch Packaging Tech., Inc.*, No. 2:18-CV-1647 JCM (NJK), 2019 WL 7597039, *3 (D. Nev. Dec. 9, 2019) (citing *Lincoln Welding Works, Inc. v. Ramirez*, 647 P.2d 381, 383 (Nev. 1982)); *see also Movado Grp., Inc. v. Mozaffarian*, 92 A.D.3d 431, 432, 938 N.Y.S.2d 27, 28 (2012) (finding that plaintiff was bound by terms and conditions when the "credit agreement, which identified the terms and conditions as those contained on each invoice, was sufficient to put defendants on notice that there was an additional document of legal import to the contract they were executing").[6] "[I]f the terms of a collateral document are made a part of the contract, those terms 'will control with the same force as though incorporated in the very contract itself.'" *Living Ecology*, 2019 WL 7597039, *3.

Here, there is no doubt that the Engagement Agreement "indicates an intention to incorporate" the Terms of Engagement into the contract between PwC and Tricarichi because the Agreement is defined to include the Terms. Notwithstanding his signature on the Engagement Agreement, during his October 1, 2020 deposition, Tricarichi claimed—for the first time in this litigation—that he did not actually receive a copy of the Terms of Engagement with the Engagement Agreement. Ex. 9, 10/1/20 M. Tricarichi Dep. 46:17-47:10, 71:18-23. This new assertion is contrary to representations Tricarichi has made throughout this case.

[6] The Engagement Agreement includes a New York choice of law provision. Ex. 5, Engagement Agreement at Bates 117249.

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Tricarichi's complaint referenced his Engagement Agreement with PwC and invoked a provision that was contained in the Terms of Engagement. *Compare* 4/26/16 Compl. ¶ 37 ("The PwC Engagement Letter further noted that it would work with Plaintiff to avoid the imposing of any tax penalty.") *with* Ex. 5, Engagement Agreement at Bates 117248 ("We will also discuss with Client possible courses of action related to the Client's tax return to avoid the imposition of any penalty (e.g., disclosure)."). Tricarichi also submitted an affidavit in connection with a motion for summary judgment PwC filed in 2017 in which he acknowledged that his Engagement Agreement with PwC consisted of both the letter and the terms. Ex. 38, 4/7/17 Tricarichi Aff. ¶ 3. Tricarichi stated that "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." *Id.* Exhibit 2 to PwC's motion contained the full letter and the attached Terms of Engagement. Ex. 5, Engagement Agreement (which is also Ex. 2 to 3/6/17 PwC MSJ). Tricarichi further said in his affidavit that "[t]here were no ***other*** drafts of the engagement letter, ***or of the rider to the letter***, exchanged with me." Ex. 38, 4/7/17 Tricarichi Aff. ¶ 3 (emphasis added). Saying that there were no "other" drafts of the letter or the rider (*i.e.*, the Terms) conclusively establishes that Tricarichi *did* receive at least one draft of the letter and the rider. Tricarichi's brief in opposition to PwC's 2017 summary judgment motion confirmed that the Terms were "attached to the engagement letter that PwC sent" him. 4/10/17 Tricarichi Opp. to PwC MSJ at 8-9 ("The choice-of-law provision is simply one of various boilerplate clauses in a standard rider attached to the engagement letter that PwC sent Plaintiff."). And Tricarichi had the full Engagement Agreement—including the Terms of Engagement—in his possession and produced it to PwC during discovery. *See* Ex 5.

Because Tricarichi's current assertion that he did not receive the Terms of Engagement is directly contrary to representations he has made in the case, including in a sworn affidavit, the Court can and should disregard it. It is well recognized that courts can "ignore" an affidavit that "constitute[s] a 'sham' produced for the sole purpose of falsely circumventing summary judgment." *Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, No. 77124-COA, 2019 WL 7410795, *6 (Nev. Ct. App. Dec. 31, 2019). "In such situations, the court

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can find an affidavit to be a sham if it contains assertions that directly contradict other assertions previously made by that same witness during discovery and the contradiction cannot otherwise be legitimately reconciled as anything but manufactured." *Id.* Here, the fact that Tricarichi made his statement in a deposition rather than an affidavit is of no moment. *See Wood v. Safeway*, 121 P.3d 1026, 1031 (Nev. 2005) (summary judgment requires considering all factual material including "pleadings, depositions, … and affidavits"). The point is that he made an assertion (that he did not receive the Terms of Engagement) that "directly contradict[s] other assertions previously made by [Tricarichi] during discovery" for the "sole purpose of falsely circumventing summary judgment." *Pickett*, 2019 WL 7410795, at *6.

Even if the Court does not disregard Tricarichi's current assertion that he did not receive a copy of the Terms of Engagement, that claim does not affect the enforceability of the Terms because they are still part of the Engagement Agreement as a matter of law. Tricarichi does not dispute that he received the Engagement Agreement from PwC, Ex. 5, Engagement Agreement; Ex. 9, 10/1/20 M. Tricarichi Dep. 47:21-48:9, and the letter references the Terms twice, the first time in bold. The second sentence of the letter defines the "Agreement" between Tricarichi and PwC to consist of the "engagement letter and the **attached Terms of Engagement to Provide Tax Services**." Ex. 5, Engagement Agreement at Bates 117247. And the signature page identifies the "Terms of Engagement to Provide Tax Services" as an "Enclosure(s)." *Id.* Not only did Tricarichi receive the letter that referenced the Terms, he made edits or notations on each of the pages that referenced the Terms. Tricarichi tried to cross out an unrelated sentence on the first page that identified the Terms as part of the Agreement, and he signed and dated the signature page directly below the reference to the Terms being an enclosure. *Id.* at 117244, 117247.

Numerous courts have held that in these circumstances, where a contract that a party signs clearly and unambiguously refers to terms and conditions, those terms and conditions are considered part of the contract as a matter of law even if one party later claims that he did not actually receive a physical copy of them. For example, in *Living Ecology*, the court enforced a one-year limitation provision contained in terms and conditions referenced in a purchase invoice even though "the parties dispute[d] whether the 2014 terms and conditions were physically

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attached to the proforma invoice.” 2019 WL 7597039, *3. The court held that the dispute about whether the terms and conditions were physically attached did “not alter the enforceability of those terms and conditions” because, “[b]ased on the clear and unambiguous language of the proforma invoice, [the purchaser] had notice that the 2014 terms and conditions were part of the contract.” *Id.* The language in the invoice referencing the terms and conditions “must have called [the purchaser’s] attention to a collateral document to be incorporated in the contract. [The purchaser] then assented to those terms, and all other terms set forth in the 2014 terms and conditions, regardless of whether it actually read them.” *Id.*

The court employed the same reasoning and reached the same result in *Madison Who’s Who of Executives & Professionals Throughout the World, Inc. v. SecureNet Payment Sys., LLC*, No. 10-CV-364 (ILG), 2010 WL 2091691 (E.D.N.Y. May 25, 2010). There, the court enforced contract terms related to payment for services contained in terms and conditions attached to a contract even though one of the parties “allege[d] that it never received a copy of the Terms & Conditions.” *Id.* at *3. The court found it “apparent that the Terms & Conditions were incorporated by reference into the Merchant Agreement” because there were “two references to the Terms & Conditions in the signed pages” of the contract. *Id.* The court held that the party “cannot avoid the natural consequences of its signature on the Merchant Agreement affirming that it had received the Terms & Conditions and agreeing to adhere to it.” *Id.* at *4. “If Madison agreed to abide by this document without first securing a copy of it for review or even contacting SecureNet for any information then such an omission of due diligence was negligence and will not relieve Madison of its obligations under the agreement.” *Id.*; *see also, e.g.*, *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 998-99 (N.D. Cal. 2012) (holding that arbitration clause in terms and conditions referenced in rental car agreement was enforceable even though customer claimed he did not receive a copy of the terms and conditions because “the terms of an incorporated document must only have been easily available to him; they need not have actually been provided”); *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc.*, No. C-11-0052 EMC, 2011 WL 1086035, *4 (N.D. Cal. Mar. 24, 2011) (enforcing arbitration clause contained in General Terms and

Conditions that were explicitly referenced in purchase agreement and were not attached but were available upon request).

The reasoning of *Living Ecology*, *Madison*, and the other cases cited above applies with equal force here. There were "two references to the Terms [of Engagement] in the signed pages" of Tricarichi's Engagement Agreement with PwC, including one in bold. *Madison*, 2010 WL 2091691, at *3. Tricarichi knew from the Engagement Agreement that the Terms were part of the "Agreement" between him and PwC. Ex. 5, Engagement Agreement at Bates 117243. Tricarichi testified that he did not ask for a copy of the Terms when he saw them referenced in the Engagement Agreement, nor did he ask where any enclosures were as referenced on the signature page. Ex. 9, 10/1/20 M. Tricarichi Dep. 71:24-72:12. "If [Tricarichi] agreed to abide by this document without first securing a copy of it for review or even contacting [PwC] for any information then such an omission of due diligence was negligence and will not relieve [Tricarichi] of [his] obligations under the agreement." *Madison*, 2010 WL 1091691, at *4.

2. The Court Should Enforce the Limitation of Liability to Which Tricarichi Agreed

One of the key provisions in the Terms of Engagement is a limitation of liability for PwC. Ex. 5, Engagement Agreement at Bates 117249. Tricarichi agreed that,

> IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL [PWC] BE LIABLE TO THE CLIENT … FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES.

Id. The last section of the Terms refers to provisions "that are intended by their nature to survive termination of this Agreement and remain in full force" including the "limitation of liability" provision.[7] Tricarichi paid PwC $48,552 in professional fees for PwC's work in relation to the Westside transaction. Ex. 8, PwC Invoices; Ex. 9, 10/1/20 M. Tricarichi Dep. 80:4-20 (acknowledging he paid the PwC invoices). PwC cannot be liable for more than that amount to Tricarichi.

[7] It also lists the "resolution of differences" section, which includes the jury waiver.

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The limitation of liability is enforceable against Tricarichi. The Terms specify that New York law governs Tricarichi's Engagement Agreement with PwC, Ex. 5, Engagement Agreement at Bates 117249, and under New York law, "parties are free to enter into contracts that absolve a party from its own negligence or that limit liability to a nominal sum." *Abacus Fed. Savings Bank v. ADT Sec. Servs., Inc.*, 967 N.E.2d 666, 669 (N.Y. 2012); *see also Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1370 (N.Y. 1992) (holding an "exculpatory clause is … enforceable against claims of ordinary negligence"). Exculpatory clauses are also "generally valid" under Nevada law. *Contreras v. Am. Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1229 (D. Nev. 2015) (citing *Agricultural Aviation Eng. Co. v. Bd. of Clark Cty. Comm'rs*, 794 P.2d 710, 712 (Nev. 1990)); *see also Miller v. A & R Joint Venture*, 636 P.2d 277, 278, 97 Nev. 580, 581-82 (Nev. 1981) ("An exculpatory provision such as the one in this case is generally regarded as a valid exercise of the freedom of contract.").

The limitation of liability in the Engagement Agreement applies squarely to Tricarichi's current claim against PwC. The clause applies broadly "WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE." Ex. 5, Engagement Agreement at Bates 117249. Consistent with New York law, the limitation of liability clause does not apply where "IT HAS BEEN FINALLY DETERMINED THAT [PWC] WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY." *Id.*; *see Sommer*, 593 N.E.2d at 1370-71 (New York public policy prohibits exculpation for "grossly negligent conduct"). That carve-out does not apply here. Tricarichi has not even pled gross negligence against PwC for his current claim. Tricarichi's current claim based on PwC's alleged failure to advise him about Notice 2008-111 is set forth in Count III of Tricarichi's Amended Complaint. Am. Compl. ¶¶ 115-121. That count is for ordinary negligence. By contrast, Count I against PwC based on PwC's 2003 advice was for gross negligence, but the Court has entered summary judgment for PwC on that claim. *Id.* ¶¶ 99-104; Ex. 20, 10/22/18 Summ. J. Order.

Even if Tricarichi had pled gross negligence, no reasonable factfinder could conclude that PwC was grossly negligent or acted willfully or fraudulently. The bar for gross negligence is very high. "Gross negligence is substantially and appreciably higher in magnitude and more culpable

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than ordinary negligence." *Hart v. Kline*, 116 P.2d 672, 674, 61 Nev. 96 (Nev. 1941) (citation omitted). "Gross negligence is equivalent to the failure to exercise even a slight degree of care." *Id.*; *see also Colnaghi, U.S.A., Ltd. v. Jewelers Protection Servs., Ltd.*, 611 N.E.2d 282, 284 (N.Y. 1993) ("'[G]ross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing.") (citation omitted). No reasonable factfinder could conclude that PwC was grossly negligent when it did not advise Tricarichi about Notice 2008-111. The undisputed evidence shows that PwC personnel reviewed Notice 2008-111 shortly after it was issued and concluded that it did not change PwC's prior analysis of the Westside transaction. Ex. 25, 12/2/08 Lohnes Email to Stovsky. Notably, this was the same conclusion that *all* of Tricarichi's tax lawyers reached.[8] PwC cannot have been *grossly* negligent for reaching the same conclusion that all of Tricarichi's lawyers reached regarding Notice 2008-111 (none of whom Tricarichi has sued for malpractice). For the same reasons, there is zero evidence that PwC acted willfully or fraudulently in not advising Tricarichi about Notice 2008-111.

Because the limitation of liability in PwC's Engagement Agreement with Tricarichi is enforceable, and because Tricarichi cannot prove gross negligence, the Court should grant summary judgment in favor of PwC on Tricarichi's claim to the extent it seeks damages greater than the amount of fees he paid PwC—$48,552. *See Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 589-91, 108 Nev. 105, 105-110 (Nev. 1992) (affirming grant of partial summary judgment on amount of claim in excess of enforceable liability limitation).

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[8] As explained above, *supra* at III.A.1., Tricarichi's tax lawyers advised Tricarichi and argued to the IRS that the Westside transaction did not qualify as a Midco tax shelter under Notice 2008-111 because it was missing three of the four components required by the Notice. This was the view of both Don Korb (a former IRS Chief Counsel) and Michael Desmond (current IRS Chief Counsel). And Glenn Miller testified that it was reasonable to believe that Notice 2008-111 did not apply by its plain terms to the Westside transaction. Ex. 12, 8/18/20 Miller Dep. 42:17-20 ("I believe that it was a reasonable argument that the transaction at issue here was distinguishable from the specific Midco transactions laid out in the notices….").

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3. The Court Should Enforce the Jury Trial Waiver to Which Tricarichi Agreed

The Terms of Engagement includes a jury trial waiver.[9] Ex. 5, Engagement Agreement at Bates 117249 ("[PwC] and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement."). "Contractual jury trial waivers are valid and enforceable in Nevada." *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 40 P.3d 405, 408, 118 Nev. 92, 96-97 (Nev. 2002); *see also Uribe v. Merchants Bank of N.Y.*, 227 A.D.2d 141, 141 (N.Y. App. Div. 1996) ("Jury waiver provisions are valid and enforceable as a general matter."). The Nevada Supreme Court has held that "[c]ontractual jury trial waivers are enforceable when they are entered into knowingly, voluntarily and intentionally." *Lowe*, 40 P.3d at 410, 118 Nev. at 99-100. The Supreme Court has further held, "in accordance with Nevada's public policy favoring the enforceability of contracts," that "contractual jury trial waivers are presumptively valid unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally." *Id.*

Tricarichi cannot carry his burden of proving that the jury trial waiver in his Engagement Agreement with PwC was not entered into knowingly, voluntarily, and intentionally. The Supreme Court identified four non-exclusive factors for courts to consider "in determining whether a contractual waiver of the right to jury trial was entered into knowingly and voluntarily" "(1) the parties' negotiations concerning the waiver provision, if any, (2) the conspicuousness of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement." *Id.* 40 P.3d at 410-11, 111 Nev. at 99-101 (quoting *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994)). Although there were not explicit negotiations concerning the jury trial waiver provision, the provision was conspicuous and written in plain English. The provision appears on the second page of the Terms under the bold heading "**9. Resolution of Differences**," and it states in crystal clear language that "PwC and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement." Ex. 5, Engagement Agreement at Bates 117249. PwC

[9] On several occasions this year, including the October 6, 2020 Status Conference, PwC alerted the Court that it planned to raise the jury waiver issue once discovery had closed.

and Tricarichi had equal bargaining power. Tricarichi was a sophisticated businessman who had just won an antitrust settlement worth more than $65 million, and he could have chosen any of a number of firms to evaluate his proposed transaction. Finally, Tricarichi was represented by counsel when he signed the Engagement Agreement, and he undoubtedly had the opportunity to review the agreement with his counsel. Ex. 9, 10/1/20 M. Tricarichi Dep. 74:11-14 ("may have" run the Engagement Agreement by attorney Randy Hart); *see Lowe*, 40 P.3d at 411 & n.36, 118 Nev. at 101-02 (jury trial waiver valid where contracting parties were "sophisticated and experienced businesspeople" who were "represented by counsel"); *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, No. 57784, 2012 WL 642746, at *2 (Nev. Feb. 27, 2012) (jury trial waiver valid where contracting party was "a sophisticated businessman" and "was represented by counsel").

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

Because Tricarichi cannot prove that the jury trial waiver was not entered into knowingly, intentionally, and voluntarily, the Court should strike Tricarichi's jury demand and try this case as a bench trial. *Lowe*, 40 P.3d at 413, 118 Nev. at 104 (issuing writ of mandamus instructing district court to strike jury demand based on contractual waiver).

IV. CONCLUSION

For these reasons, PwC respectfully requests that the Court grant summary judgment to PwC or alternatively grant partial summary judgment and strike Tricarichi's jury demand.

DATED this 13th day of November, 2020.

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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 November 13, 2020, I caused to be served a true and correct copy of the foregoing **PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE PLAINTIFF MICHAEL A. TRICARICHI'S JURY DEMAND** 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.

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☐ **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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DATED this 13th day of November, 2020.

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, vs. PRICEWATERHOUSECOOPERS LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR, Defendants.	CASE NO.: A-16-735910-B DEPT. NO.: XI **APPENDIX OF EXHIBITS IN SUPPORT OF PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND** **VOLUME 1 OF 4**

Exhibit No.	Description	Bates
1	Hearing Transcript on Defendant PwC's Motion to Dismiss Amended Complaint, dated July 8, 2019	001 – 019
2	February 2, 2011 Tolling Agreement between PwC and Michael Tricarichi	020 – 031
3	T.C. Memo. 2015-201, Michael A. Tricarichi v. Commissioner of Internal Revenue, No. 23630-12, dated October 14, 2015	032 – 059
4	Excerpts of the deposition of James Tricarichi, taken August 3, 2020	060 – 070
5	Engagement Agreement, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0117243 – 117250	071 – 078
6	Richard P. Stovsky Memo to Westside Cellular, Inc./Michael Tricarichi files/Cleveland BP Tower regarding potential transaction, dated April 13, 2003, produced in this action by PwC with Bates-stamp PwC-049330 – 49334	079 – 083
7	Excerpts of the deposition of Richard P. Stovsky, taken September 1, 2020	084 – 111
8	PwC's Invoices to Michael A. Tricarichi, dated May 20, 2003, June 27, 2003, July 31, 2003, August 27, 2003, September 29, 2003, and October 29, 2003, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0007532 – 7537	112 – 117
9	Excerpts of the deposition of Michael A. Tricarichi, taken October 1, 2020	118 – 144
10	IRS Letter to Michael A. Tricarichi ("IDR"), dated January 22, 2008, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0121454 – 121458	145 – 149
11	IRS Letter to Michael A. Tricarichi, dated February 3, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0067021 – 67070	150 – 199
12	Excerpts of the deposition of Glenn Miller, taken August 18, 2020	200 – 217
13	Excerpts of the deposition of Donald L. Korb, taken August 11, 2020	218 – 234
14	Excerpts of the deposition of Michael Desmond, taken August 19, 2020	235 – 247
15	Glenn S. Miller Letter to IRS, dated April 29, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093731 – 93752	248 – 261
16	Glenn S. Miller Letter to IRS, dated October 9, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0009424 – 9557	262 – 395
17	Don Korb Email to Michael Tricarichi, et al., dated June 9, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0123530 – 123589	396 – 455
18	IRS Notice 2008-111, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0026636 – 26644	456 – 464
19	IRS Letter to Michael Tricarichi, dated June 25, 2012, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0027037 – 27046	465 – 474

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Exhibit No.	Description	Bates
20	Order Granting Summary Judgment, dated October 22, 2018	475 – 478
21	Expert Report of Craig L. Greene, CPA/CFF, CFE, MAFF, dated May 26, 2020	479 – 499
22	Excerpts of the deposition of Craig L. Greene, taken September 25, 2020	500 – 510
23	Richard Corn Email to Michael Desmond, et al., dated October 22, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0122486 – 122561	511 – 586
24	IRS Transferee Report to Michael Tricarichi, dated August 11, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093619 – 93643	587 – 598
25	Timothy Lohnes Email to Richard P. Stovsky regarding Notice 2002-111, dated December 2, 2008 produced in this action by PwC with Bates-stamp PwC-001371 – 1382	599 – 610
26	Richard Corn Email to Peter Szpalik, et al., dated October 26, 2010, Bates-stamp ADMIN_TRI00910 – 930	611 – 618
27	Donald L. Korb, et al. Memo to Michael Tricarichi, et al., dated October 8, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0135479 – 135488	619 – 628
28	IRS Letter to Randall G. Dick, dated September 22, 2005, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0008109 – 8129	620 – 649
29	Taxpayer Interview Transcript of Michael Tricarichi, taken November 30, 2007, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0073774 – 73876	650 – 752
30	Peter Szpalik Email to Donald L. Korb, dated August 29, 2011, Bates-stamp ADMIN_TRI01034 – 1035	753 – 754
31	Rebuttal Report of Arthur J. “Kip” Dellinger, dated June 25, 2020	755 – 759
32	ABA Formal Opinion 481, dated April 17, 2018	760 – 768
33	Statements on Standards for Tax Services, dated August, 2000, Nos. 1-8, produced in this action by PwC with Bates-stamp PwC-028404 – 28439	769 – 804
34	Excerpts of the 30(b)(6) deposition of Brian Meighan, taken October 9, 2020	805 – 814
35	Excerpts of the deposition of Kenneth Harris, taken October 1, 2020	815 – 823
36	Expert Report of Kenneth L. Harris, dated May 23, 2020	824 – 877
37	Cross-Motion *In Limine* to Exclude From Trial Any Evidence or Arument [sic] That the Stock Purchase Transaction at Issue Is an “Intermediary Transaction Tax Shelter” Within the Meaning of IRS Notice 2001-16 and IRS Notice 2008-20, dated May 19, 2014, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0077953 – 77959	878 – 884
38	Affidavit of Michael A. Tricarichi in Support of Plaintiff’s Opposition to Defendant PricewaterhouseCoopers LLP’s Motion for Summary Judgment, dated April 7, 2017	885 – 889

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Exhibit No.	Description	Bates
39	Affidavit of Katharine A. Roin in Support of Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand, dated November 13, 2020	890 – 894
40	Affidavit of Richard P. Stovsky in Support of Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand, dated November 11, 2020	895 – 897

DATED this 13th day of November, 2020.

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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 November 13, 2020, I caused to be served a true and correct copy of the foregoing **APPENDIX OF EXHIBITS IN SUPPORT OF PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE JURY DEMAND (VOLUME 1 OF 4)** upon the following by the method indicated:

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DATED this 13th day of November, 2020.

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Exhibit 1

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MICHAEL TRICARICHI Plaintiff vs. PRICEWATERHOUSECOOPERS LLP. et al. Defendant	CASE NO. A-16-735910-B DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON DEFENDANT PWC'S
MOTION TO DISMISS AMENDED COMPLAINT

MONDAY, JULY 8, 2019

APPEARANCES:

FOR THE PLAINTIFF: SCOTT F. HESSELL, ESQ.

FOR THE DEFENDANTS: PATRICK G. BYRNE, ESQ.
PETER B. MORRISON, ESQ.
ZACHARY FAIGEN, ESQ.

COURT RECORDER: TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, MONDAY, JULY 8, 2019, 9:11 A.M.

(Court was called to order)

THE COURT: Tricarichi versus PriceWaterhouseCooper.

You know, I had flashbacks reading this.

Mr. Byrne, we've talked about you a lot in the last 12 days in an evidentiary hearing I'm in.

MR. BYRNE: I am afraid to even ask, Your Honor.

Good morning, Your Honor. Pat Byrne on behalf of PriceWaterhouseCoopers. With me is, from Skadden Arps, Peter Morrison and Zach Faigen.

THE COURT: Good morning, gentlemen.

Okay. It's your motion, I gather.

MR. BYRNE: Yes, Your Honor. A bit like Bill Murray in "Groundhog Day."

THE COURT: Yes.

MR. BYRNE: The Court is familiar with the issues in this motion. You granted summary judgment with similar motions. We briefed it again on the motion to amend, and then we're here now a third time on the motion to dismiss. And actually we had briefed it before that, before the Court was reassigned.

THE COURT: Before another judge.

MR. BYRNE: Yes.

THE COURT: And it went on appeal.

MR. BYRNE: Yes.

THE COURT: And then got some decisions from the appellate courts.

MR. BYRNE: The plaintiff's old claim is that PriceWaterhouse gave negligent tax advice in 2003. The new claim is that in December of 2008 PriceWaterhouse failed to tell plaintiff about the old negligence in 2003.

THE COURT: And the new IRS rule.

MR. BYRNE: The problem, Your Honor, is this Court found that 10 months earlier plaintiff was on notice of the negligent advice, in February of 2008.

THE COURT: But don't you think you've still got to disclose it?

MR. BYRNE: Well, Your Honor --

THE COURT: And assume that's true and some day there's a question of fact that gets resolved. But don't you think you've got to disclose? I know if you were a lawyer in your office and you had given transactional advice to somebody and something really big happened that screwed up the transaction, you'd probably reach out to your client and say, hey, guys --

MR. BYRNE: Your Honor, your question poses two -- there's two elements to your question, first off do you think there's this duty to tell the client. Okay. Let's accept that as true, because I want to I want to get to -- I don't agree with it, and I'll tell you why. But let me tell you why it doesn't matter. It's December of 2008, and I now have this new duty. Now, at this time the plaintiff is represented by his own tax professionals, because they're dealing with the fact that the IRS has got them in the cross-hairs. So they've got their own tax advisors that are not reaching out to PriceWaterhouse. In 2008 if in fact there's a new duty, they're on notice.

THE COURT: Not a new duty, an existing duty.

MR. BYRNE: Okay. But let's just call it a new --

THE COURT: A new event.

MR. BYRNE: Right. At this time, Your Honor, it's -- they're already on notice 10 months earlier. So the fact that has to be disclosed, in other words, what's the omitted fact, it's not that I have this duty. That's not material. The material fact that has to be disclosed is that, hey, we made a mistake in 2003. That's the fact that has to be disclosed. They're already on notice of it, Your Honor. So if in fact this triggers a new claim, it starts immediately at that time, because they're on notice. Remember, the statute says it starts at the date they knew or should have known of the omission. And it uses the word "omission," Your Honor. So what's the material fact that was omitted? It's not that I now have this legal duty or continuing legal duty, it's that I made this mistake. Well, guess what, Your Honor. If we start at that date, December, we go to December of 2010, it's still stale, because it didn't toll until January. The effective date wasn't until January.

So, Your Honor, even if you accept there's this continuing duty or a new duty, the claim is still stale. And that's the fundamental problem. And the same thing with the causation, Your Honor. But let's go to the duty, okay. Now, so you've got the problem of even if there's a duty it doesn't matter, still stale. But is there a duty? If I was the law firm, for example, would I disclose it? Well, you know, that's an interesting question. It's certainly here. But it does -- Your Honor, it does assume that there's a duty. Well, what are they basing the argument that there's a duty, that there are these -- well, first off, we know it's not because I still represent them.

THE COURT: There are industry standards that apply in tax preparation.

MR. BYRNE: Fair enough. But it is 2008. I haven't represented them since 2003. They say it's been a long time until they were our client. They've been a former client now for five-plus years. Now, am I going to go back and revisit old advice? Well, based on the fact that these professional codes that they cite suggest that I should do so, the problem, Your Honor, we know professional codes don't create a duty. Now, are they relevant to the standard of care? Yes, assuming you get a tax professional, an expert, to get up and say --

provide that testimony. Then they become relevant to the standard of care, but they don't trigger the duty. And the Nevada law is clear on that with respect to the legal -- in fact, it's set forth in the legal professional code that they don't create a separate cause of action and duty.

Now, are they relevant once a duty is created? Yes. But that puts the cart before the horse. We have to still establish the duty. So, Your Honor, would a law firm go back to a client that's a former client five years later if it believes -- now, Your Honor, all of this is recognizing that the issue was still -- there was still an issue as to whether there was an obligation on the transferee liability. That was still an issue. And the plaintiff is now represented by professionals who are obviously aware of the same 2008 notice, and they're looking at this issue and they're making their own decisions. The idea that somehow if I circle back -- and, by the way, my client knows the plaintiff is being represented by new professionals, because my client's getting the subpoena at the same time and they're communicating as to what should be produced. They're not communicating about, hey, we want to hire you so that you can defend your prior work product. They're not doing that. They're saying, hey, let's communicate about what needs to be produced, we're in the cross-hairs. They're making their own independent determination with tax professionals. The idea that as a lawyer if they've got new lawyers and they're looking at it that I would go back and say, hey, my prior tax advice would be wrong, I doubt I would do that, Your Honor. And I don't think I would have a legal duty to do that.

So, to answer the Court's question, we don't believe there was a duty. But even if there was, you still go back to what triggers the statute. And what triggers the statute, it's very clear under the statute, is it is the time they knew or should have known of the omission. What's the omission? It's not the duty, it's not this new duty or continuing duty, it's this material fact that we may have made a mistake that they already know.

THE COURT: And the IRS has a given a retroactive ruling.

MR. BYRNE: Well, you know the IRS -- the IRS doesn't view it as retroactive. It's just basically clarifying what we think you should have understood from the initial --

THE COURT: Yeah. You should give always known.

MR. BYRNE: You should have always known.

THE COURT: Yeah.

MR. BYRNE: Your Honor, the advice that PriceWaterhouse gave, again -- because this all came out in discovery. They didn't give them a clean bill of health. They said more likely than not. They gave them a 50 percent call, coin flip. That's what they gave them on their tax advice. So let's not assume that they said, oh, go forward, there's no risk. The tax opinion -- and this is in the tax opinion that's published -- was very clear on this point, that PriceWaterhouse warned of the risks and the plaintiff knew of the risks. So we are engaging in some revisionism here when we look back at this and we see somehow they gave them this clean bill of health, proceed without risk. So, again, Your Honor, we don't think there is a -- there's a statute of limitations problem. There's also a causation problem, Your Honor. And this is material, but it's related. But if they knew in 2008 that the tax advice -- we were on notice because of the IDR that that tax advice was negligent. But how can we fail to disclose something they already know? You can't have it an omission claim when you already know the omitted facts. And we cite the cases in our briefs for that, Your Honor.

And then, of course, you also have, like I mentioned, that there's no duty. I believe that I've focused on the issue that the Court really focused on, and I'm more than willing to go through the other arguments that they raised.

THE COURT: No. The briefing was really good.

MR. BYRNE: Okay.

THE COURT: It just made me have [inaudible] like "Groundhog Day."

MR. BYRNE: Do I have any time rebuttal? I don't know if I do. But I'll reserve it.

THE COURT: A little.

MR. BYRNE: Thank you, Your Honor.

THE COURT: Uh-huh.

MR. HESSELL: Good morning, Your Honor. Scott Hessell for Mr. Tricarichi. I do appreciate that this has a lot of the elements of when we were before you last. And pursuant to the briefing on the motion to dismiss we made the arguments that in 2008 even if he was on notice that the IRS was investigating in 2006, might he still have a claim because there was continuing contact and communication between PWC and Mr. Tricarichi in 2008, in 2009, and even continuing through the underlying Tax Court litigation, during which time PWC said nothing of the internal communications, only a little bit of which we've learned about, because there has been no discovery -- merits-based discovery in this case. But those internal communications in 2008 in response to the new IRS notice 2008-111 acknowledge that PWC has a duty to continue to advise its clients if it learns that its prior advice is incorrect. And, as you've already alluded to, there are AICPA standards and IRS regulatory standards that require accountants when they learn that a client's prior tax advice -- or tax returns are incorrect to consult with that client about the appropriate corrective measures.

In 2008 Mr. Tricarichi is not faced with the decision about whether to enter the transaction any longer. The decision that he's now facing is is the transaction defensible, should he litigate with the IRS over the transaction, or should he simply pay the taxes and be done with the matter.

THE COURT: Or try to cut a deal with the IRS.

MR. HESSELL: Believe me, I have a bunch of these Midco cases, a lot of clients tried to cut deals, the IRS -- and this is outside the record -- was not that interested in offering deals.

But the point is that the amended complaint starts with the assumed fact that you prior found, which is that the IRS is investigating the transactions. And the question in 2008 is what should he do about it. And the facts that PWC had at its disposal at the time are not just what it knew in terms of its conflict of interest, in terms of the fact that it knew that the Midco Fortran was entering into an illegal transaction in order to avoid paying taxes, but they also concerned the fact that in 2008, in April of 2008 another transaction which PWC advised a client to enter into was rejected by the Tax Court. And they internally said, oh, geez, we might now get sued by that client.

Another month later --

THE COURT: It was the Bishop transaction?

MR. HESSELL: You got it.

THE COURT: Okay.

MR. HESSELL: And another month later they are internally evaluating should we go back to Mr. Tricarichi and advise him about these new notices that come out. And they decide, oh, these notices don't apply. Those facts suggest that they knew that they had a duty. The question is they came to the wrong conclusion. And that is an issue of fact for a later proceeding. We are here on a motion to dismiss. The question is only whether we've pled sufficient facts to avoid a legal dismissal. The question of duty, as you suggest, but I think he suggested, is really a matter for an expert to opine upon. We've put before you and allege that they did have a duty. They take issue with that. And that's a matter for another day.

The only issue really that is possible of being resolved on a motion to dismiss is the question of the statute of limitations. And there I think you hit the nail on the head already, which is in 2008 there was a seminal event that changed the dynamic of this transaction. That event did not happen until December of 2008, and we say that their duty to go back to their client and weather that new notice and tell them the transaction may fail and may not be worth litigating and, by the way, we have internal analysis that suggests that these transactions are illegal re-arose. Whatever happened in

2003, whatever the facts were in 2003 about their bad advice, that's not what the amended complaint is about. That's why we amended the complaint That's why we sought leave to do so, which is that we argue that in 2008 going forward PWC, who was then in communication with the client -- it's not as if all contacts had stopped, it's not as if there was no ongoing means of communicating with either the client or his lawyers about what he should do going forward, they just say he didn't specifically engage them. But they were in contact with him, and they basically acted as if everything was fine.

The ultimate determination of whether they knew things about the transaction either in 2008 or before which they were obligated to tell him is a matter for another day. As to whether or not he knew or should have known he had a claim, that's why the amended complaint starts with the facts as of 2008. We accept the Court's ruling that as a result of the 2006 letter from the IRS he new the transaction was under examination. The issue now is what to do about it. And we say they were obligated to disclose the facts that they knew, all of the facts that they knew about the transaction so they make an informed decision about it.

The damages even are unique as compared to what they were in the original complaint. The question now is what damages would he have avoided if he had not litigated with the IRS, if he had paid and avoided the interest, going forward interest, legal costs, and possibly other fees. That's what the issue is to be presented, and that's why we think we've done enough to at least survive a motion to dismiss. They clearly know or on notice of the basis for our claims at this juncture, the Supreme Court -- the Nevada Supreme Court has pretty well settled on the issue being an issue of fact from here, that most complaints, so long as they're not legally defective on their face, on a 12(b)(5) motion, those motions should be denied unless it appears beyond all doubt that the claims are not capable of being sustained.

So we'd ask that you allow us the opportunity to proceed with discovery. My client obviously has been substantially damaged by it, and it's just he's entitled to have that day that in court and give his testimony. Their witnesses should have to give their testimony on the issues, and we should go from there.

THE COURT: Thank you.

MR. HESSELL: Thank you, Your Honor.

THE COURT: Mr. Byrne, anything else?

MR. BYRNE: Yeah. Quickly, Your Honor.

Plaintiffs are -- again they're not addressing the question. They're moving the target, but they don't want to address the question. The question is what is the omitted -- this is an omission claim. So what is the material omitted fact that in fact, you know, the knowledge of would trigger the statute? It's that PriceWaterhouse may have committed negligence in its tax advice in 2003. This Court found in its order the plaintiff knew that in February 21 of 2008. So the clock starts either when the plaintiff has knowledge of the omission, it's clear. But even if you want to bump it up all the way to the time they say this new duty was created, it still doesn't save the day. Or if you want to bump it to when the alleged new act of negligence took place, not telling them in 2008, December 2008, the claim is still stale. They don't address that issue. The omission is the negligent tax advice. That's what should have been told. This Court has found they knew or should have known all the way back in February of 2008. So they can't resurrect this claim.

And the idea that PriceWaterhouse may have had some communications, they are on record with the declaration from the plaintiff saying the engagement ended in 2003. That was in connection with determining what documents that PriceWaterhouse held that may have been the plaintiff's documents had to be produced. It had nothing to do with providing advice, confirming what the prior advice was. There was none of those communications. And if that evidence existed, you would have seen it, because they would be in control of it.

This case is time barred. There's no causation, and there's no duty. Any one of those bases would justify dismissal of this complaint. And so we can go forward, but we'll be right back here again, because the operative fact that is what is the omission is undisputed as a matter of law. It's law of the case. They knew the material fact in February of 2008. That's the prior Court's order, and it was the correct order, because the caselaw that deals with information document requests, they were in the cross-hairs, they knew it.

Your Honor, unless you have any other questions --

THE COURT: Thank you.

The motion is denied. There is a properly alleged breach of duty by failing to disclose the new information. Whether on a factual basis you can support that claim is an entirely different issue that I assume I'll see you guys in about six months. So the motion's denied.

MR. BYRNE: Your Honor, just, again, for clarification, are you rejecting the idea that the omission -- because this is an omission claim -- is the failure to disclose --

THE COURT: This is a failure to disclose.

MR. BYRNE: The duty, or the --

THE COURT: The failure -- this is a failure to disclose the new information from the IRS that impacts the prior tax advice that was given.

MR. BYRNE: And so if in fact the evidence shows the plaintiff already knows of that notice --

THE COURT: Well, the plaintiff knows there's a problem.

MR. BYRNE: But if the plaintiff knows of the notice through its own tax professionals, then it would be --

THE COURT: That's a factual issue that you may raise at some point in time.

MR. BYRNE: Okay. So if the evidence does show that, then he would know the omitted fact.

THE COURT: That's a factual right now on whether did they allege a proper claim for breach of duty to disclose.

MR. BYRNE: Fair enough, Your Honor.

THE COURT: Okay. When are you going to answer, Mr. Byrne? Mr. Byrne, how long before you answer? Two weeks?

MR. BYRNE: Yeah. We'll answer within a week. Can you give us 10 days, Your Honor?

THE COURT: Well, the reason I'm asking is Dan's going to set a Rule 16. I want to make sure the pleadings are fully joined before he does that.

MR. BYRNE: Your Honor, the only tricky part is the amended complaint does include all the prior allegations and claims that were dismissed. So we do need now to address it. Can you give us at least -- can we have three weeks to provide an answer?

THE COURT: You can.

MR. BYRNE: Huh?

THE COURT: You can. And you may enter into a stipulation with the plaintiff related to the other claims that have previously been dismissed by me so that we don't have to deal with that later.

MR. BYRNE: Does the Court want to set the conference now? Is that what we're looking --

THE COURT: No. Dan's going to want to set it the moment I leave this room. He's going to say, did you tell them when they're going to answer; and then I'm going to say, no, Dan. And he's going to say, well, I'll it for six weeks or five weeks or whatever.

MR. BYRNE: Can we confer with plaintiff's counsel, then circle back to the Court to get the date set?

THE COURT: So I'm going to set a status check in two weeks on my chambers calendar to find out what you're doing.

MR. BYRNE: Right. And that's in chambers, Your Honor?

THE COURT: You don't need to come on Friday at 3:00 a.m.

MR. BYRNE: Perfect. We'll let you know before then.

THE COURT: Thank you. 'Bye.

THE CLERK: July 26th.

THE PROCEEDINGS CONCLUDED AT 9:31 A.M.

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE M. HOYT, TRANSCRIBER

7/9/19

DATE

DiAntonio, Stefani

Subject: FW: ASAP DISTRO FW: Courtesy Notification for Case: A-16-735910-B; Michael Tricarichi, Plaintiff(s) vs.PricewaterhouseCoopers LLP, Defendant(s); Envelope Number: 4564051

Importance: High

Courtesy Notification

Envelope Number: 4564051
Case Number: A-16-735910-B
Case Style: Michael Tricarichi, Plaintiff(s)vs.PricewaterhouseCoopers LLP, Defendant(s)

This is a courtesy notification for the filing listed. Please click the link below to retrieve the submitted document.

Filing Details	
Case Number	A-16-735910-B
Case Style	Michael Tricarichi, Plaintiff(s)vs.PricewaterhouseCoopers LLP, Defendant(s)
Date/Time Submitted	7/9/2019 2:32 PM PST
Filing Type	EFile
Filing Description	Transcript of Proceedings: Hearing on Defendant PWC's Motion to Dismiss Amended Complaint
Activity Requested	Transcript of Proceedings - TRANS (CIV)
Filed By	Jill Hawkins
Filing Attorney	

Document Details	
Lead Document	1907061.pdf
Lead Document Page Count	18
File Stamped Copy	View Stamped Document
This link is active for 45 days.	

Exhibit 2

pwc

February 2, 2011

Revised as of January 24, 2012 per comments below. Mgt. Enloe

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, West Side Cellular, Inc., 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 West Side Cellular, Inc., 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 ~~January 31, 2012~~ October 31, 2012 *, 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.

MME * 10/31/12

This letter agreement shall expire at 11:59 P.M. on ~~January 31, 2012~~ October 31, 2012 MME 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. 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.

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

pwc

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,

Margaret M. Enloe Mgt. M. Enloe as of 1/24/12 for amendments

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

Agreed:

West Side Cellular, Inc., Michael Tricarichi and Barbara Tricarichi

Date: 2/3/11 1/24/12

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

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

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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

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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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.

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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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

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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T: (646) 471 1126, F: (813) 282 6298, richard.j.demarco@us.pwc.com

pwc

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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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

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

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pwc

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.

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.

Exhibit 3

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

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

No. 23630–12.
|
Oct. 14, 2015.

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

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

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

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

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

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

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

6 taxpayer had transferee liability for penalties; and

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

Decision for IRS.

West Headnotes (29)

1 Internal Revenue
Transferees in general
Internal Revenue
Persons Liable
Statute permitting the IRS Commissioner to proceed against a transferee of property to assess and collect federal income tax, penalties, and interest owed by a transferor does not impose substantive liability on the transferee, but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. 26 U.S.C.A. § 6901.

Cases that cite this headnote

2 Internal Revenue
Income and Excess Profits Taxes
State law determines the transferee's substantive liability when the IRS Commissioner seeks to proceed against a transferee to assess and collect federal income tax, penalties, and interest owed by a transferor, thus placing the Commissioner in the same position as that of ordinary creditors under state law. 26 U.S.C.A. § 6901(a).

1 Cases that cite this headnote

3 Internal Revenue
Income and Excess Profits Taxes
Internal Revenue
Transferees in general
Once a transferor's own tax liability is established, the Commissioner may assess that liability against a transferee only if two distinct requirements are met: first, the transferee must be subject to liability under applicable state law, which includes state equity principles, and second, under principles of federal tax law, that person must be a "transferee" within the meaning of the statute governing such assessments. 26 U.S.C.A. § 6901.

Cases that cite this headnote

[4] **Internal Revenue**
Transferees in general
Internal Revenue
Persons Liable

When the IRS Commissioner seeks to proceed against a transferee to assess and collect federal income tax, penalties, and interest owed by a transferor, the transferee has the burden of proving that the transferor is not liable for the amounts the IRS assessed against it. 26 U.S.C.A. § 6902(a); Tax Court Rule 142(a)(1), (d), 26 U.S.C.A. foll. § 7453.

Cases that cite this headnote

[5] **Internal Revenue**
Transferees in general
Internal Revenue
Persons Liable

Burden remained with individual taxpayer with respect to corporation's tax liability, and this burden did not shift to IRS Commissioner, on Commissioner's attempt to collect corporation's federal income tax, penalties, and interest owed from taxpayer, as transferee of corporate assets, where taxpayer introduced no "credible evidence" concerning $42,480,622 bad debt deduction that generated corporation's deficiency. 26 U.S.C.A. §§ 6902(a), 7491(a)(1, 2); Tax Court Rule 142(a)(1), (d), 26 U.S.C.A. foll. § 7453.

Cases that cite this headnote

[6] **Internal Revenue**
Evidence

No portion of $1,651,752 in corporation's disallowed legal and professional fees deductions constituted deductible business expenses, absent any evidence to establish that any of these fees were incurred in connection with some transaction other than tax-avoidance transfer of assets to individual taxpayer. 26 U.S.C.A. § 162.

Cases that cite this headnote

[7] **Internal Revenue**
Amount deductible

Corporation's claimed $42,480,622 bad debt loss deduction was based on preposterous assertion that two loans had tax basis of $43,323,069, and thus IRS appropriately denied this deduction, where loans were subset of larger portfolio of loans that had tax basis of approximately $137,000.

Cases that cite this headnote

[8] **Federal Courts**
Highest court
Federal Courts
Inferior courts

In deciding matters of state law, the Tax Court is generally guided by the decisions of the state's highest court, or, if there is no relevant precedent from the state's highest court but there is relevant precedent from an intermediate appellate court, the Tax Court must follow the state intermediate appellate court decision unless the Tax Court finds convincing evidence that the state's supreme court likely would not follow it.

1 Cases that cite this headnote

[9] **Federal Courts**
Anticipating or predicting state decision

When the Tax Court decides matters of state law, only where no state court has decided the point in issue may the Tax Court make an educated guess as to how that state's supreme court would rule.

1 Cases that cite this headnote

[10] **Fraudulent Conveyances**
Construction in general

Ohio's version of Uniform Fraudulent Transfer Act (OUFTA) is a remedial statute that should be liberally construed to protect creditors. R.C. § 1336.01, et seq.

Cases that cite this headnote

[11] **Fraudulent Conveyances**
Insolvency element of fraud

Fraudulent Conveyances
Intent to Defraud Pre-Existing Creditors

Fraudulent Conveyances
Inadequacy or insufficiency of consideration

Actual intent of the transferor or the transferee need not be shown under the provision of Ohio's version of the Uniform Fraudulent Transfers Act (OUFTA) stating that a transfer made by a debtor is fraudulent as to the creditor if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor was insolvent at that time or became insolvent as a result of the transfer. R.C. § 1336.05(A).

Cases that cite this headnote

[12] **Fraudulent Conveyances**
Retention of property sufficient to pay debts

Fraudulent Conveyances
Intent to Defraud Pre-Existing Creditors

Fraudulent Conveyances
Inadequacy or insufficiency of consideration

Neither the actual intent of the transferor nor the actual knowledge of the transferee need be shown under the provision of Ohio's version of the Uniform Fraudulent Transfers Act (OUFTA) stating that a debtor's transfer is fraudulent as to a creditor if the debtor made the transfer without receiving a reasonably equivalent value in exchange and either the debtor was engaged in a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or the debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. R.C. § 1336.04(A).

Cases that cite this headnote

[13] **Fraudulent Conveyances**
Elements of Fraud as to Creditors

If the stated conditions of any constructive fraud provision of Ohio's version of the Uniform Fraudulent Transfers Act (OUFTA) are met, the transfer is fraudulent as a matter of law. R.C. §§ 1336.04(A)(1, 2), 1336.05(A, B).

Cases that cite this headnote

[14] **Corporations and Business Organizations**
Transfer to or for the benefit of directors, officers, or shareholders

Internal Revenue
Transferees in general

Internal Revenue
Persons Liable

Two purported loans that were used to finance purchase of corporate stock from individual taxpayer were shams under Ohio law, and thus taxpayer was transferee of corporation, under Ohio law, as required for IRS Commissioner to collect corporation's federal income tax, penalties, and interest owed from taxpayer, where loans were extended and repaid same business day, literally moments after receipt of alleged loan proceeds, loans did not bear interest by their own terms, and loans were fully collateralized by cash corporation's account. 26 U.S.C.A. §§ 6901, 6902(a); R.C. § 1336.01(L).

Cases that cite this headnote

[15] **Corporations and Business Organizations**
Transfer to or for the benefit of directors, officers, or shareholders

Internal Revenue
Transferees in general

Internal Revenue
Persons Liable

Under Ohio's version of Uniform Fraudulent Transfers Act (OUFTA), individual taxpayer was direct transferee of corporation's assets under IRS's "de facto liquidation" theory, thus supporting IRS Commissioner's effort to collect corporation's federal income tax, penalties, and interest owed from taxpayer; taxpayer had constructive knowledge of tax-avoidance scheme, at least on basis of inquiry knowledge stemming from economics of transaction at issue, multiple steps of transaction could thus be collapsed, and, in substance, collapsing these steps yielded partial or complete liquidation of corporation from which taxpayer received $35.2 million liquidating distribution in exchange for his stock. 26 U.S.C.A. §§ 6901, 6902(a); R.C. § 1336.01 et seq.

Cases that cite this headnote

[16] **Fraudulent Conveyances**
What constitutes constructive notice

Under Ohio's version of the Uniform Fraudulent Transfers Act (OUFTA), finding that a person had constructive knowledge does not require that he have actual knowledge of the minute details of the transaction; it is sufficient if, under the totality of the surrounding circumstances, he should have known about the transaction. R.C. § 1336.01, et seq.

1 Cases that cite this headnote

[17] **Fraudulent Conveyances**
What constitutes constructive notice

Under Ohio's version of the Uniform Fraudulent Transfers Act (OUFTA), inquiry knowledge, which is a form of constructive knowledge, exists where the transferee was aware of circumstances that should have led him to inquire further into the circumstances of the transaction, but he failed to make such inquiry. R.C. § 1336.01, et seq.

Cases that cite this headnote

[18] **Corporations and Business Organizations**
Transfer to or for the benefit of directors, officers, or shareholders

Internal Revenue
Transferees in general

Internal Revenue
Persons Liable

IRS's claim to collect corporation's federal income tax, penalties, and interest owed from individual taxpayer arose before corporation's transfer of assets to taxpayer, thus weighing in favor of finding transfer to be fraudulent under Ohio's version of Uniform Fraudulent Transfer Act (OUFTA). 26 U.S.C.A. §§ 6901, 6902(a); R.C. §§ 1336.01(c, D), 1336.05(A).

Cases that cite this headnote

[19] **Fraudulent Conveyances**
Consideration

Under Ohio's version of the Uniform Fraudulent Transfer Act (OUFTA), it is a question of fact whether the debtor received reasonably equivalent value, as one element in finding transaction to be fraudulent. R.C. § 1336.05(A).

Cases that cite this headnote

[20] **Corporations and Business Organizations**
Transfer to or for the benefit of directors, officers, or shareholders

Internal Revenue
Transferees in general

Internal Revenue
Persons Liable

Corporation did not receive reasonably equivalent value in transaction in which it transferred $35.2 million to individual taxpayer in exchange for his shares, thus weighing in favor of finding transfer to be fraudulent under Ohio's version of Uniform Fraudulent Transfer Act (OUFTA), as required for IRS to collect corporation's federal income tax, penalties, and interest owed from taxpayer, where value of taxpayer's stock was only $23.7 million, and only other thing corporation received in transaction was worthless promise by shell company that it would "cause" corporation to pay its tax liabilities in full. 26 U.S.C.A. §§ 6901, 6902(a); R.C. § 1336.05(A).

1 Cases that cite this headnote

[21] **Corporations and Business Organizations**
Transfer to or for the benefit of directors, officers, or shareholders

Internal Revenue
Transferees in general

Internal Revenue
Persons Liable

Corporation was rendered insolvent by transaction at issue, thus weighing in favor of finding fraudulent corporation's transfer of assets to individual taxpayer, under Ohio's version of Uniform Fraudulent Transfer Act (OUFTA), as required for IRS to collect corporation's federal income tax, penalties, and interest owed from taxpayer, where, following transfer of $35.2 million to taxpayer, corporation was left with tax liabilities of $16.9 million and assets of $5.1 million in account that would soon be emptied by payments to tax shelter promoters. 26 U.S.C.A. §§ 6901, 6902(a); R.C. §§ 1336.02, 1336.05(A).

Cases that cite this headnote

[22] **Internal Revenue**
Persons Liable

Even if IRS's claim against corporation's assets for income tax penalties were not "in existence" on date corporation transferred assets to individual taxpayer, taxpayer had transferee liability to IRS under Ohio's version of Uniform Fraudulent Transfer Act (OUFTA) in IRS's capacity as "future creditor" with respect to those penalties. 26 U.S.C.A. §§ 6901, 6902(a); R.C. §§ 1336.01(C), 1336.04(A)(2).

Cases that cite this headnote

[23] **Fraudulent Conveyances**
Intent of grantor in general

Ohio's version of the Uniform Fraudulent Transfer Act (OUFTA) does not require proof that a transfer is made to defraud specific creditors, nor does it require proof that the debts in question were in contemplation at the time the assets were conveyed. R.C. § 1336.01(C).

Cases that cite this headnote

[24] **Fraudulent Conveyances**
Pre-Existing Creditors

Fraudulent Conveyances
Subsequent Creditors

Under Ohio's version of the Uniform Fraudulent Transfer Act (OUFTA), a transfer may be held fraudulent as to future as well as present creditors. R.C. § 1336.04(A)(2)(b).

Cases that cite this headnote

[25] **Internal Revenue**
Transferees in general

Internal Revenue
Persons Liable

Individual taxpayer was direct recipient of corporation's cash, and thus he was transferee of corporation within meaning of statute permitting IRS Commissioner to proceed against transferee to assess and collect federal income tax, penalties, and interest owed by transferor, where transaction at issue, by which third party purportedly purchased taxpayer's corporate stock, relied on sham transactions, had no economic substance, had no bona fide business purpose, and was entered into solely to evade corporation's federal and Ohio tax liabilities. 26 U.S.C.A. § 6901; 26 C.F.R. § 301.6901–1(b).

Cases that cite this headnote

[26] **Internal Revenue**
Transferees in general

Internal Revenue
Persons Liable

Under the statute permitting the IRS Commissioner to proceed against a transferee to assess and collect federal income tax, penalties, and interest owed by a transferor, where the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor. 26 U.S.C.A. § 6901.

Cases that cite this headnote

[27] **Internal Revenue**
Transferees in general
Internal Revenue
Persons Liable

IRS acted reasonably in declining to take further, useless steps against corporation to collect corporation's assess and collect federal income tax, penalties, and interest owed by corporation, and instead seeking to collect from individual taxpayer as transferee of corporation's assets, where, during its examination of corporation, IRS searched for any existing corporate assets upon which to levy but found none, any cash corporation had was quickly dissipated by payments to tax shelter promoters affiliates, and corporation's parent was immune from IRS collection efforts. 26 U.S.C.A. § 6901.

Cases that cite this headnote

[28] **Internal Revenue**
Transferees in general
Internal Revenue
Persons Liable

Even if loan was not sham and lender could be thought of as transferee of corporation, collection efforts against lender would almost certainly have been futile, and thus IRS acted reasonably in declining to take further steps against lender to collect corporation's assess and collect federal income tax, penalties, and interest owed by corporation, where lender was shadowy entity that appeared and quickly disappeared, and there was no evidence as to what assets lender had or where they were. 26 U.S.C.A. § 6901.

Cases that cite this headnote

[29] **Internal Revenue**
Transferees in general
Internal Revenue
Persons Liable

Under the statute permitting the IRS Commissioner to proceed against a transferee to assess and collect federal income tax, penalties, and interest owed by a transferor, a transferee is severally liable for the unpaid tax of the transferor to the extent of the assets received and other stockholders or transferees need not be joined. 26 U.S.C.A. § 6901.

Cases that cite this headnote

Attorneys and Law Firms

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

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

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, Judge:

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

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

Although Midco transactions took various forms, they shared several key features, well summarized by the Court of Appeals for the Second Circuit in *Diebold Found. Inc. v. Commissioner,* 736 F.3d 172, 175–176 (2d Cir.2013), *vacating and remanding* T.C. Memo.2010–238. These transactions were chiefly promoted to shareholders of closely held C corporations that had large built-in gains. These shareholders, while happy about the gains, were typically unhappy about the tax consequences. They faced the prospect of paying two levels of income tax on these gains: the usual corporate-level tax, followed by a shareholder-level tax when the gains were distributed to them as dividends or liquidating distributions. And this problem could not be avoided by selling the shares. Any rational buyer would normally insist on a discount to the purchase price equal to the built-in tax liability that he would be acquiring.

Promoters of Midco transactions offered a purported solution to this problem. An "intermediary company" affiliated with the promoter—typically, a shell company, often organized offshore—would buy the shares of the target company. The target's cash would transit through the "intermediary company" to the selling shareholders. After acquiring the target's embedded tax liability, the "intermediary [*4] company" would plan to engage in a tax-motivated transaction that would offset the target's realized gains and eliminate the corporate-level tax. The promoter and the target's shareholders would agree to split the dollar value of the corporate tax thus avoided. The promoter would keep as its fee a negotiated percentage of the avoided corporate tax. The target's shareholders would keep the balance of the avoided corporate tax as a premium above the target's true net asset value (i.e., assets net of accrued tax liability).

***2** In due course the IRS would audit the Midco, disallow the fictional losses, and assess the corporate-level tax. But "[i]n many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek payment from other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid." *Id.* at 176.

In a nutshell, that is what happened here. Petitioner engaged in a Midco transaction with a Fortrend shell company; the shell company merged into West Side and engaged in a sham transaction to eliminate West Side's corporate tax; the IRS disallowed those fictional losses and assessed the corporate-level tax against West Side; but West Side, as was planned all along, is judgment proof. The IRS accordingly seeks to collect West Side's tax from petitioner as the transferee of [*5] West Side's cash. We hold that petitioner is liable for West Side's tax under the Ohio Uniform Fraudulent Transfer Act and that the IRS may collect West Side's tax liabilities in full from petitioner under section 6901(a)(1)[2] as a direct or indirect transferee of West Side. We accordingly rule for respondent on all issues.

FINDINGS OF FACT

The parties filed stipulations of facts with accompanying exhibits that are incorporated by this reference. At the time the Midco transactions were executed, petitioner resided in Ohio. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

Petitioner graduated from Case Western Reserve University and embarked on a career in the cellular telephone (cell phone) business. He incorporated West Side in 1988 as a C corporation. Petitioner was the president and sole shareholder of West Side, and he and his wife, Barbara Tricarichi, served as its directors.

Although petitioner had no formal tax training, he displayed familiarity with tax concepts. At trial he spoke easily about C corporations and S corporations, corporate tax rates, and other tax matters. He explained that he organized West [*6] Side as a C corporation because he thought it might ultimately have more shareholders than an S corporation would be permitted to have.

In 1991 petitioner approached Verizon and other major cellular service providers with a proposal that West Side would become a reseller of cell phone services.

From 1991 through 2003 West Side engaged in various telecommunications activities in Ohio, including the resale of cell phone services. West Side had a retail presence in Ohio, customer and vendor relationships, goodwill, know-how, a workforce in place, trade names, and other tangible and intangible assets. At its peak West Side had about 15,000 subscribers throughout Ohio.

Beginning in 1991, West Side purchased network access from the major cellular service providers in order to serve its customers. Petitioner soon came to believe that certain of these providers were discriminating against West Side. In 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP (Hahn Loeser), to file a complaint with the Public Utilities Commission of Ohio (PUCO) against certain of these providers, alleging anticompetitive trade practices. The PUCO lawsuit was a "bet the company" matter for petitioner, and he took a hands-on role in the lengthy litigation that ensued. Hahn Loeser lawyers described him as a constant presence at the firm throughout this period.

***3** [*7] The PUCO ruled in West Side's favor on the liability issue and the Ohio Supreme Court affirmed that decision. In early 2003 West Side returned to the Court of Common Pleas to commence the damages phase of the litigation. Not long thereafter a settlement was reached, pursuant to which West Side ultimately received, during April and May 2003, total settlement proceeds of $65,050,141. In exchange West Side was required to terminate its business as a retail provider of cell phone service and to end all service to its customers as of June 10, 2003.

Petitioner's "Tax Problem"

Anticipating a large settlement, petitioner began to regret his decision, 15 years earlier, to organize West Side as a C corporation. He asked Jeffrey Folkman, a Hahn Loeser tax partner, to investigate how to "maximize whatever after-tax proceeds were available" from the anticipated settlement. Petitioner's goal was to "pay less tax than what the straight up, you know, 35% or whatever the corporate tax rate was" and avoid the two-level tax on the settlement proceeds.

Mr. Folkman had experience with MidCoast and thought it might help solve petitioner's problem. He arranged a meeting on February 19, 2003, with petitioner and MidCoast representatives. In preparation for this meeting, Hahn Loeser attorneys devoted five days of research and discussion to the "sham transaction" doctrine, "reportable transactions," and Notice 2001–16. Their billing records [*8] describe Notice 2001–16 as addressing (among other things) a transaction involving a "shareholder who wants to sell stock of a target" and "an intermediary corporation." At the February 19 meeting, MidCoast's representatives explained to petitioner that it was in the "debt collection business" and that, as part of its business model, it purchased companies that "had large tax obligations."

Shortly after the meeting with MidCoast, petitioner's brother, James Tricarichi (James), introduced him to Fortrend. On February 24, 2003, petitioner received a letter from Fortrend; he subsequently had several conference calls and at least one face-to-face meeting with Fortrend representatives. Petitioner understood that Fortrend and MidCoast were both involved with "distressed debt receivables" and had basically the same business model. Fortrend told petitioner that it would purchase his West Side stock and would offset the taxable gain with losses, thereby eliminating West Side's corporate income tax liability.

MidCoast and Fortrend each expressed interest in acquiring petitioner's West Side stock, and each made an offer proposing essentially the same transactional structure. An intermediary company would borrow money to purchase the stock. The cash held by West Side would be used immediately to repay the loan. The cash petitioner received from the intermediary company would substantially exceed West Side's net asset value. The intermediary company would receive a [*9] fee equal to a negotiated percentage of West Side's tax liabilities. And after the sale closed, the intermediary company, after merging into West Side, would use bad debt deductions to eliminate those tax liabilities.

***4** Because petitioner regarded MidCoast and Fortrend as competitors, he began negotiating with both in the hope of stirring up a bidding war. James arranged further conference calls with both companies. Rather than compete, MidCoast secretly agreed with Fortrend to step away from the transaction in exchange for a fee of $1,180,000 (ultimately paid by West Side on September 14, 2003). MidCoast's final offer was adjusted to make it seem unattractive, and petitioner therefore chose to pursue discussions with Fortrend in order to "maximize" his profits.

Bringing in PricewaterhouseCoopers

James recommended that petitioner retain PricewaterhouseCoopers (PwC) to advise him about the proposed stock sale. Acting as a conduit between petitioner and PwC, James sent a letter dated April 8, 2003, to PwC partner Richard Stovsky. This letter requested advice concerning a stock sale to MidCoast or Fortrend and a fallback strategy to mitigate petitioner's tax liability if the stock sale did not occur. PwC sent petitioner a draft engagement letter on April 10, 2003.

By this time petitioner had had extensive discussions with Mr. Folkman about Notice 2001–16, and the risk that the contemplated stock sale would give [*10] rise to a "reportable transaction." Upon receipt of PwC's draft engagement letter, petitioner reacted negatively to the following sentence: "You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed." Petitioner struck this sentence from the engagement letter, initialed the change, and sent the draft back to PwC. [3]

Petitioner testified that he struck this sentence from the draft engagement letter because he wanted to ensure that PwC would thoroughly investigate all relevant issues. The Court did not find this testimony credible. Mr. Stovsky's draft engagement letter stated that PwC would investigate the relevant issues; the sentence about "reportable transactions" was included as a matter of PwC's due diligence to ensure that the client disclosed all relevant facts to it. The Court finds that petitioner struck this sentence from the draft engagement letter because he wanted to keep the paper trail free, to the maximum extent possible, of any references to "reportable transactions."

Working with tax professionals from several PwC offices, Mr. Stovsky prepared an internal memorandum addressing the proposed sale of West Side stock to Fortrend or MidCoast. This memorandum was revised multiple times as the negotiations [*11] evolved, and various drafts were discussed with petitioner and his advisers. The first draft of the memorandum, dated April 13, 2003, stated the following assumptions about the proposed transaction:

- [Buyer will] borrow $36,000,000 and purchase 100% of the Westside shares outstanding from * * * [petitioner]. * * *

- [Buyer will] contribute to Westside * * * high basis/low fair market value property (the assumption is that these are delinquent receivables).

***5** • Westside is now in the business of purchasing "distressed/charged-off" credit card debt * * * at pennies on the dollar and collecting on this debt.

- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purchases is apparently difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [the buyer] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock).

- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by * * * [the buyer]. The deduction offsets the taxable income created within Westside upon the receipt of the $65,000,000 from the legal verdict.

- Westside, now a charged off debt business, utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected.

- The suggested result, from a federal tax perspective, is as follows:

[*12]• [Petitioner] recognizes long-term capital gain upon the sale of his shares in Westside * * *.

- Westside offsets the taxable income from the legal verdict with the write off of high basis property.

The memorandum notes that petitioner planned to move from Ohio to a State without an income tax so that there would be no State tax on his gains.

PwC understood that Notice 2001–16 applied to Midco transactions described therein and to "substantially similar" transactions. Marginal notes on

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the memorandum also suggest PwC's understanding that the term “substantially similar” was to be broadly construed. But PwC concluded that “a position can be taken” that the stock sale would not be a reportable transaction. This was because “[a] typical ‘Midco’ transaction [has] 3 parties (this transaction only has 2), and a typical ‘Midco’ transaction results in an asset basis step up and the associated amortization deductions going forward (this transaction does not have these characteristics).”

The memorandum concluded that the proposed transaction was not without risk. It noted a particularly high level of risk in the “high basis/low value” debt receivable strategy that the buyer proposed to eliminate West Side's tax liabilities. PwC characterized this as a “very aggressive tax-motivated” strategy and indicated that the IRS would likely challenge the deductibility of the bad debt loss expected [*13] to be reported by West Side after the stock sale. Pointedly absent from the memorandum is any indication that PwC believed this strategy was “more likely than not” to be successful. Regardless, the memorandum suggested that “this is not * * * [petitioner's] concern” since the result would be a corporate tax liability and not petitioner's liability. The memorandum noted that PwC had provided no formal written advice to petitioner but had discussed its conclusions orally with him.

Formation of LXV

***6** Petitioner's representatives communicated with Fortrend after meeting with PwC. During these conversations Fortrend made clear that it did not want to acquire West Side's accounts receivable or any of its other operating assets. Rather, Fortrend wanted all operating assets stripped out of West Side before the closing so that West Side would be left with nothing but cash and tax liabilities.

In order to meet Fortrend's requirements, petitioner and three West Side employees formed LXV Group, LLC (LXV), an Ohio limited liability company, on May 2, 2003, to acquire West Side's operating assets. Each contributed $25,000 for his respective 25% interest in LXV. As mandated by the PUCO settlement agreement, West Side had to discontinue providing cell phone service to its customers by June 10, 2003. On June 11, 2003, LXV purchased all of West [*14] Side's operating assets, namely, its goodwill and its “revenue producing wireless customer base, accounts receivable, Trade names, Trade marks, chattels, fixtures, software and equipment” used in the operation of West Side's business.

The purchase price that LXV paid for these assets was $100,044. That amount was substantially less than the sum of West Side's net physical assets and accounts receivable ($74,564 + $166,940 = $241,504) as stated on West Side's balance sheet. [4] The parties to this transaction thus appear to have attached a value of zero to West Side's wireless customer base, trade marks, and trade names. Mr. Stovsky voiced concern that if fair market value were not paid for these assets, petitioner might face risk because of “the transferee liability issue.” Despite this warning, petitioner did not obtain a valuation of the assets thus transferred.

Petitioner testified that his motivation for this sale was to “continue to service West Side's customers.” The Court did not find this testimony credible. The parties' placement of zero value on West Side's intangible assets, including its wireless customer base, trade name, and trade marks, belies any intention to serve those customers in the future. Indeed, it is not clear how LXV could continue to [*15] serve West Side's cell phone customers because West Side's principals, who were also LXV's principals, were barred after June 10, 2003, from conducting any form of cell phone business. The Court finds as a fact that petitioner arranged the sale of West Side's operating assets to LXV in order to comply with Fortrend's requirement that West Side have nothing left in it except tax liabilities and cash.

Negotiation of the Stock Purchase Agreement

The parties adopted as their working assumption that West Side's accrued tax liability resulting from the $65 million PUCO settlement would not be paid. Since West Side at closing was to have only cash and tax liabilities, and since cash has a readily ascertainable value, the major item for negotiation was how to carve up the corporate tax liability thus avoided. The parties referred to this exercise as determining the “Fortrend premium.” Petitioner actively participated in the negotiation of this point. Neither Hahn Loeser nor PwC participated in the negotiation of the stock purchase price or the “Fortrend premium.”

***7** The trial record sheds little light on the early stages of the negotiations, when MidCoast was still involved.

During later stages of the negotiations, the dollar amount of the "Fortrend premium" varied, but each iteration of the agreement contained the same formulaic calculation. Fortrend would pay petitioner the amount of cash remaining in West Side at the closing, less 31.875% of West [*16] Side's total Federal and State tax liability for 2003. In other words, the "Fortrend premium" equaled 31.875% of West Side's accrued 2003 tax liability. This left petitioner with a premium, above and beyond West Side's closing net asset value, equal to 68.125% of its accrued 2003 tax liability.

At two points in his testimony, petitioner stated that he did not understand the "Fortrend premium" to have any correlation to West Side's tax liabilities. The Court did not find this testimony credible. Petitioner testified that he participated in negotiating Fortrend's fee, and numerous spreadsheets prepared by his brother explicitly state that Fortrend's fee was to equal 31.875% of West Side's accrued tax liabilities for 2003. Confronted with this evidence, petitioner became visibly uncomfortable. The Court finds as a fact that petitioner knew at all times that the "Fortrend premium" would be computed as a negotiated percentage of West Side's 2003 corporate tax liability.

In preparation for the stock sale, Millennium Recovery Fund, LLC (Millennium), a Fortrend affiliate incorporated in the Cayman Islands, created Nob Hill, Inc. (Nob Hill), a shell company also incorporated in the Cayman Islands. Nob Hill was to be the "intermediary company" that would purchase the West Side stock. John McNabola was the sole officer of Millennium and Nob Hill.

[*17] The Hahn Loeser lawyers negotiated with Fortrend the technical details of the stock purchase agreement. Nob Hill provided covenants aimed at mitigating the risk that the transaction would be characterized as a "liquidation" of West Side. Nob Hill represented that West Side would remain in existence for at least five years after the closing, would "at all times be engaged in an active trade or business," and would "maintain a net worth of no less than $1 million" during this five-year period. (None of these representations was substantially honored.)

Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side] attributable to income earned during the [2003] tax year." The agreement did not specify how Nob Hill would "cause" West Side to satisfy its 2003 tax liabilities or explain the strategy it would use to offset West Side's gain from the $65 million PUCO settlement. Nob Hill agreed to indemnify petitioner in the event of liability arising from breach of its representation to "satisfy fully" West Side's 2003 tax liability. Petitioner's expert, Wayne Purcell, admitted that "there can be problems" enforcing warranties and covenants against offshore entities like Nob Hill that have no assets in the United States.

***8** [*18] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Instead, the parties negotiated a statement that Nob Hill "has no intention" of causing West Side to engage in a listed transaction.

Petitioner Accepts Fortrend's Offer

A letter of intent dated July 22, 2003, set forth the terms on which Nob Hill proposed to acquire petitioner's stock. It stated a tentative purchase price of $34.9 million, subject to fine-tuning based on West Side's final cash position. The letter indicated that West Side would deposit $50,000 in escrow to cover fees should the transaction fail to close.

After the transfer of West Side's operating assets to LXV, West Side's balance sheet reflected total assets of $40,577,151, including $39,949,373 in cash, a $577,778 loan receivable from petitioner, and the $50,000 receivable from the escrow agent. West Side's aggregate 2003 tax liabilities were estimated to be $16,853,379. West Side's net asset value as of late July—that is, its assets minus its accrued tax liability—was thus $23,723,772. Nob Hill offered to pay petitioner $34.9 million for his stock-$11.2 million more than West Side was worth—in exchange [*19] for a fee (the "Fortrend premium") comfortably in excess of $5 million. Petitioner decided to accept this offer.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with making sure he gets paid. Mr. Purcell agreed, however, that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Hahn Loeser's bankruptcy lawyers advised that petitioner needed to assure himself that Nob Hill and

Fortrend would live up to their postclosing obligations. And Mr. Purcell agreed that "due diligence did require * * * [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liability. Petitioner was evasive when asked how he expected Fortrend to pull off this feat; he testified as to his belief that Fortrend "had some sort of tax reduction process" that would somehow "use bad debt to reduce tax liability." PwC specifically declined to provide assurance that Fortrend's bad debt strategy was "more likely than not" to succeed.

[*20] *Preparation for the Closing*

The stock purchase transaction was carefully structured to ensure that For-trend and its affiliates made no real outlay of cash. Fortrend planned to borrow the entire $34.9 million tentative purchase price: $5 million from Moffatt International (Moffatt), a Fortrend affiliate, and $29.9 million from Coöperatieve Centrale Raiffeisen–Boerenleenbank, B.A. (Rabobank), a Dutch bank.[5] West Side's cash would be used to repay these loans immediately, so that the nominal lenders bore no risk.

***9** The financing process began on August 13, 2003, when Fortrend mailed Chris Kortlandt of Rabobank, requesting a $29.9 million short-term loan. Two weeks later, Mr. Kortlandt requested internal approval of this loan, with Nob Hill as the nominal borrower. Mr. Kortlandt understood that West Side would be required to have cash in excess of $29.9 million on deposit with Rabobank when the stock purchase closed. He therefore considered the risk of nonpayment of the loan [*21] to be essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on collateral: R–1 (cash)." Rabobank uses the R–1 risk rating to denote a loan that is fully cash collateralized.

On August 21, 2003, petitioner received instructions to open at Rabobank an account for West Side with account number ending in 1577, to which West Side's cash would eventually be transferred. To receive the cash proceeds from the stock sale, petitioner opened an individual Rabobank account with account number ending in 1595. To shuttle cash at the closing, Nob Hill opened a Rabobank account with account number ending in 1568.

In connection with the Rabobank financing, Mr. McNabola planned to execute two sets of documents at the closing. He would sign the first set on behalf of Nob Hill as its president. He would sign the second set on behalf of West Side as its postclosing president-to-be.

The Nob Hill documents to be executed by Mr. McNabola included a promissory note for $29.9 million, a security agreement, and a pledge agreement. Pursuant to the security agreement, Nob Hill granted Rabobank a first priority security interest in West Side's Rabobank account to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, Nob Hill granted Rabobank a first [*22] priority security interest in the West Side stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation.

The West Side documents to be executed by Mr. McNabola included security and guaranty agreements in favor of Rabobank and a "control agreement." West Side unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and the security agreement granted Rabobank a first priority security interest in the West Side Rabobank account. The "control agreement" gave Rabobank control over West Side's account—including all "cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto"—to ensure that West Side did not default on its commitments.

As petitioner's UCC expert, Barkley Clark, correctly noted, Mr. McNabola as Nob Hill's president could not grant Rabobank a perfected security interest in West Side's assets until Nob Hill acquired West Side's stock. And Mr. McNabola as West Side's president could not grant Rabobank a perfected security interest in West Side's assets until he became West Side's president. At the closing, however, all of these documents were to become effective simultaneously with the funding of the Rabobank loan, the payment of the stock purchase price, and the resignation of West Side's former officers and directors. These agreements effectively gave Rabobank a "springing lien" on West Side's cash at the moment it [*23] funded the loan. For all practical purposes, therefore, the

Rabobank loan was fully collateralized with the cash in West Side's Rabobank account, consistently with the R–1 risk rating that Rabobank assigned to that loan.

The Closing

***10** The closing was scheduled for September 9, 2003. The final stock purchase price was to be $34,621,594 in cash plus a $577,778 check payable to petitioner to zero out his shareholder loan. On September 8, Fortrend deposited the $5 million "loan proceeds" from Moffatt into Nob Hill's Rabobank account. Also on September 8, petitioner deposited West Side's $39,949,373 ending cash balance into West Side's Rabobank account. The funds in these accounts earned overnight interest of $135 and $1,076, respectively.

On September 9, 2003, the following events occurred. Nob Hill's Rabobank account was credited with the $29.9 million Rabobank loan proceeds and $35 million in cash from West Side's Rabobank account. From this account, Nob Hill transferred $34,621,594 into petitioner's Rabobank account; transferred $29.9 million to repay the Rabobank loan (which bore no interest); transferred $5 million to repay the Moffatt loan (which bore no interest); transferred $150,000 to cover Rabobank's fees; and transferred $150,000 to West Side's Rabobank account. Petitioner immediately withdrew the entire balance of his Rabobank account and [*24] deposited it into a personal account at Pershing Bank. When the dust settled at the end of the day, petitioner's Rabobank account had a balance of zero; petitioner's Pershing Bank account had a balance of $34,621,594; West Side's Rabobank account had a balance of $5,100,450; and Nob Hill's Rabobank account had a balance of $78,541.

The next day, Nob Hill merged into West Side with West Side surviving. The $5,100,450 remaining in West Side's Rabobank account and the $78,541 remaining in Nob Hill's Rabobank account were later transferred into a West Side account at the Business Bank of California. West Side eventually transferred $4,766,000 out of that account to Fortrend affiliates and various promoters, including MidCoast, which on September 14, 2003, received the promised $1,180,000 for stepping away from the transaction. By late 2004, West Side's bank accounts had been drained of funds and were closed.

The Bad Debt Strategy

The background of Fortrend's strategy for eliminating West Side's 2003 tax liability begins in 2001. On March 7, 2001, United Finance Co. Ltd. (United Finance) purportedly contributed a portfolio of charged-off Japanese debt (Japanese debt portfolio) to Millennium in exchange for Millennium class B shares. (Millennium eventually became Nob Hill's, and then West Side's, parent.) The Japanese [*25] debt portfolio was valued at $137,109. Two days later, United Finance sold the Millennium class B shares it had just acquired to Barka Limited, another Cayman Islands entity, for $137,000. Although Millennium had acquired the Japanese debt portfolio with property worth only $137,000, it claimed that its tax basis in that Portfolio was $314,704,037 as of June 30, 2003.

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

***11** There is no evidence that West Side conducted meaningful business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Although Nob Hill had represented that West Side would "maintain a net worth of no less than $1 million" during the five-year period following the closing, West Side did not do so. The following table shows West Side's asset balances as reported to the IRS:

[*26] ***Tax year***	***Asset balance as of 12/31***
2003	$1,829,395
2004	313,300

2005	1,171,609
2006	942,589
2007	–0–

Petitioner offered no evidence to show that the actual value of West Side's assets corresponded to these reported amounts. Given Fortrend's track record, we do not take these reported amounts at face value.

West Side's Tax Returns and IRS Audit

West Side's Form 1120 for 2003 described it as incorporated in the Cayman Islands, doing business in Ireland, and having its address in Las Vegas, Nevada. It described its parent, Millennium, as incorporated in the Cayman Islands and doing business in Ireland. West Side reported for 2003 total income of $66,116,708 and total deductions of $67,840,521. The deductions included salaries and wages of $8,315,605, other deductions of $16,542,448, and bad debt losses of $42,480,622.

On January 9, 2006, West Side filed Form 1120X, Amended U.S. Corporation Income Tax Return, for 2003. Apart from correcting minor errors and listing a new address in Reno, Nevada, the amended return did not differ materially from the original. Both returns were prepared using the accrual method of accounting.

[*27] The IRS examined West Side's 2003 return. During the examination, the IRS was unable to find any assets or current sources of income for West Side; a March 28, 2008, memorandum details the steps the IRS took in search thereof. At the conclusion of the audit, the IRS disallowed the $42,480,622 bad debt deduction and $1,651,752 of the deduction claimed for legal and professional fees, on the ground that these fees were incurred in connection with a transaction entered into solely for tax avoidance.

West Side's authorized representative executed successive Forms 872, Consent to Extend the Time to Assess Tax, that extended to December 31, 2009, the time for assessing West Side's 2003 tax liability. On February 25, 2009, the IRS mailed a timely notice of deficiency to West Side determining a deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively. West Side did not petition this Court and, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of deficiency, plus accrued interest. On April 5, 2011, West Side's corporate charter was canceled by the Ohio secretary of state.

Notice of Transferee Liability

***12** Petitioner and Barbara Tricarichi jointly filed Form 1040, U.S. Individual Income Tax Return, for 2003 showing a Nevada address. This return reported a[*28] tax liability of $5,303,886, resulting chiefly from gain on the sale of petitioner's West Side stock. On Schedule D, Capital Gains and Losses, petitioner reported the proceeds from this sale as $35,199,357, reflecting both the cash he received and the $577,778 check, resulting in a long-term capital gain of $35,170,793.

The IRS did not audit petitioner's Form 1040, but it did open a transferee-liability examination concerning West Side's 2003 tax liabilities. Upon completion of that examination, the IRS sent petitioner a Letter 902–T, Notice of Liability. This notice of liability was timely mailed to petitioner on June 25, 2012.[6] The notice determined that petitioner is liable as transferee for the following liabilities of West Side:

[*29]***Deficiency*** i	***Penalty sec. 6662(a), (d)***	***Penalty sec. 6662(h)***
$15,186,570	$61,851	$5,950,926

Petitioner timely petitioned this Court for review of the notice of liability.[7]

OPINION

I. *Legal Standard and Burden of Proof*

Petitioner resided in Nevada when he filed his petition. The parties have stipulated that any appeal of this case will lie to the U.S. Court of Appeals for the Ninth Circuit. *See* sec. 7482(b)(1)(A); *Golsen v. Commissioner,* 54 T.C. 742, 757, 1970 WL 2191 (1970), *aff'd,* 445 F.2d 985 (10th Cir.1971). That Court has held that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." *Popov v. Commissioner,* 246 F.3d 1190, 1195 (9th Cir.2001) (quoting *Unger v. Commissioner,* 936 F.2d [*30] 1316, 1320 (D.C.Cir.1991), *aff'g* T.C. Memo.1990–15), *aff'g in part, rev'g in part and remanding* T.C. Memo.1998–374.

Under section 6901, the Commissioner may proceed against a transferee of property to assess and collect Federal income tax, penalties, and interest owed by a transferor. Respondent contends that petitioner, as transferee, is liable for the unpaid 2003 Federal tax liabilities of West Side. Petitioner contends that Nob Hill purchased his stock moments before it received West Side's cash; that Rabobank and Moffat were the source of the cash used to purchase his stock; and that he thus received no "transfer" from West Side that could make him liable as its "transferee."

[1] **[2]** Section 6901 does not impose substantive liability on the transferee but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. *Commissioner v. Stern,* 357 U.S. 39, 42, 78 S.Ct. 1047, 2 L.Ed.2d 1126 (1958). To take advantage of this procedure, the Commissioner must establish an independent basis under applicable State law for holding the transferee liable for the transferor's debts. Sec. 6901(a); *Commissioner v. Stern,* 357 U.S. at 45; *Hagaman v. Commissioner,* 100 T.C. 180, 183, 1993 WL 69243 (1993). State law thus determines the transferee's substantive liability. *Ginsberg v. Commissioner,* 305 F.2d 664, 667 (2d Cir.1962), *aff'g* 35 T.C. 1148, 1961 WL 1326 (1961). In this respect, section 6901 places the Commissioner [*31] in "precisely the same position as that of ordinary creditors under state law." *Starnes v. Commissioner,* 680 F.3d 417, 429 (4th Cir.2012), *aff'g* T.C. Memo.2011–63. The parties agree that the State law applicable here is that of Ohio, where petitioner resided, West Side did business, and the principal transactions occurred. *See Commissioner v. Stern,* 357 U.S. at 45; *Estate of Miller v. Commissioner,* 42 T.C. 593, 598, 1964 WL 1217 (1964).

***13** **[3]** Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. *See Diebold Found., Inc.,* 736 F.3d at 183–184; *Starnes,* 680 F.3d at 427; *Swords Trust v. Commissioner,* 142 T.C. 317, 336, 2014 WL 2218977 (2014).

[4] The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a). Under normal burden-of-proof rules, therefore, petitioner has the burden of proving that West Side is not liable for the $21,199,347 of tax and penalties that the IRS assessed against it for 2003. Rule 142(a)(1), (d); *Welch v. Helvering,* 290[*32] U.S. 111, 115 (1933); *see United States v. Williams,* 514 U.S. 527, 539, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); *L.V. Castle Inv. Grp., Inc. v. Commissioner,* 465 F.3d 1243, 1248 (11th Cir.2006).

[5] The burden of proof on factual issues may be shifted to the Commissioner if the taxpayer introduces "credible evidence" with respect thereto and satisfies other requirements. Sec. 7491(a)(1) and (2). Petitioner asked that we shift to respondent the burden of proof with respect to West Side's 2003 tax liability. We decline this request. Petitioner introduced no "credible evidence" concerning the $42,480,622 bad debt deduction that generated West Side's 2003 deficiency. In any event, it does not matter who bears the burden of proof because the preponderance of the evidence favors respondent's position as to all material facts. [8]

II. *West Side's 2003 Federal Tax Liability*

In the notice of deficiency to West Side, the IRS disallowed a deduction of $1,651,752 for legal and professional fees and a deduction of $42,480,622 for bad [*33] debts. The notice also determined an accuracy-related penalty of $61,851 and a penalty of $5,950,926 for a "gross valuation misstatement" under section 6662(h).

[6] The deduction for legal and professional fees was disallowed on the ground that these fees were incurred in connection with a tax-avoidance transaction. We conclude below that the transaction by which Nob Hill acquired petitioner's West Side stock was indeed entered into for the sole purpose of tax avoidance. Petitioner provided no evidence to establish that any of the disallowed professional fees were incurred in connection with some other, legitimate, transaction. Petitioner has thus failed to carry his burden of proving that any portion of these fees constituted deductible business expenses of West Side under section 162. *See Agro Sci. Co. v. Commissioner,* 934 F.2d 573, 576 (5th Cir.1991), *aff'g* T.C. Memo.1989–687; *Simon v. Commissioner,* 830 F.2d 499, 500–501 (3d Cir.1987), *aff'g* T.C. Memo.1986–156; *Cullifer v. Commissioner,* T.C. Memo.2014–208, at *45.

***14** **[7]** West Side's claimed $42,480,622 bad debt loss was based on the assertion that the two Aoyama loans had a tax basis of $43,323,069. That assertion is preposterous because those loans were a subset of a larger portfolio of loans that had [*34] a tax basis of approximately $137,000. Petitioner introduced no credible evidence to substantiate the basis claimed. [9]

Petitioner does not seriously dispute West Side's liability for the $61,851 accuracy-related penalty. [10] For returns filed on or before August 17, 2006, a "gross valuation misstatement" exists where the basis claimed equals or exceeds 400% of the correct amount. Sec. 6662(h)(2); sec. 1.6662–5(e)(2), Income Tax Regs. Claiming a tax basis of $43,323,069 for the Aoyama loans, which had an actual basis of substantially less than $137,000, is unquestionably a "gross valuation misstatement." Apart from challenging the deficiency on which the penalty is based, petitioner introduced no evidence to show that respondent's [*35] calculation of a section 6662(h) penalty of $5,950,926 was incorrect. Petitioner has thus failed to prove that respondent erred in determining against West Side for 2003 a tax deficiency of $15,186,570 and penalties of $61,851 and $5,950,926 under section 6662(a) and (h), respectively.

III. *Petitioner's Liability as Transferee of West Side*

Section 6901 permits the Commissioner to assess tax liability against a person who is "the transferee of assets of a taxpayer who owes income tax." *Salus Mundi Found. v. Commissioner,* 776 F.3d 1010, 1017 (9th Cir.2014), *rev'g and remanding* T.C. Memo.2012–61. To impose that liability on a transferee, a court must first determine whether "the party [is] substantively liable for the transferor's unpaid taxes under state law," and next determine whether that party is a "transferee" within the meaning of section 6901. *Slone v. Commissioner,* ––– F.3d ––––, 2015 WL 5061315, at *2 (9th Cir. Aug.28, 2015) *vacating and remanding* T.C. Memo.2012–57; *see Commissioner v. Stern,* 357 U.S. at 44–45. The two prongs of this inquiry are independent of one another. *See Feldman v. Commissioner,* 779 F.3d 448, 458 (7th Cir.2015), *aff'g* T.C. Memo.2011–297; *Salus Mundi Found.,* 776 F.3d at 1012; *Diebold Found., Inc.,* 736 F.3d at 185; *Frank Sawyer Trust of May 1992 v. Commissioner,* 712 F.3d 597, 605 (1st Cir.2013), *aff'g* T.C. Memo.2011–298; *Starnes,* 680 F.3d at 429.

[*36] A. *Petitioner's Substantive Liability Under Ohio Law*

[8] **[9]** In deciding matters of State law, we are generally guided by the decisions of the State's highest court. If there is no relevant precedent from the State's highest court, but there is relevant precedent from an intermediate appellate court, "the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." *Ryman v. Sears, Roebuck & Co.,* 505 F.3d 993, 994 (9th Cir.2007); *see Commissioner v. Estate of Bosch,* 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (Federal court should apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); *Swords Trust,* 142 T.C. at 342; *Estate of Young v. Commissioner,* 110 T.C. 297, 300, 302, 1998 WL 235975 (1998). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." *Flintkote Co. v. Dravo Corp.,* 678 F.2d 942, 945 (11th Cir.1982) (quoting *Benante v. Allstate Ins. Co.,* 477 F.2d 553, 554 (5th Cir.1973)).

***15** In 1990 Ohio enacted the Uniform Fraudulent Transfer Act of 1984 (UFTA) as chapter 1336 of its Commercial Transactions Code. *See* Ohio Rev.Code secs. 1336.01 to 1336.12 (hereafter OUFTA; all references to the OUFTA are to the version in effect during 2003). Forty-three States and the District of Columbia [*37] have adopted the UFTA in whole or in part. The version of the UFTA that Ohio adopted corresponds almost verbatim to the uniform law.

When interpreting Ohio statutes derived from uniform or model laws, the Ohio Supreme Court has regularly

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consulted opinions from sister State courts interpreting parallel provisions of their own statutes. *See Stein v. Brown,* 18 Ohio St.3d 305, 480 N.E.2d 1121 (Ohio 1985) (discussing other States' treatment of the Uniform Fraudulent Conveyance Act (UFCA), the UFTA's predecessor); *Ohio Ins. Guar. Ass'n v. Simpson,* 1 Ohio App.3d 112, 439 N.E.2d 1257 (Ohio Ct.App.1981) (noting relevance of opinions from courts of other States when interpreting model or uniform laws).[11] Federal Courts of Appeals for five different Circuits, examining Midco transactions similar to that here, have recently issued opinions interpreting state laws that substantially incorporate the UFTA or its predecessor. *See supra* p. 2 and note 1. We believe that the Ohio Supreme Court would give proper regard to these decisions, and to the State court precedents on which they are based, when interpreting parallel provisions of the OUFTA.

[10] [*38] The Ohio Supreme Court has emphasized that the OUFTA is a remedial statute that should be liberally construed to protect creditors. *See Wagner v. Galipo,* 50 Ohio St.3d 194, 553 N.E.2d 610, 613 (Ohio 1990); *Locafrance United States Corp. v. Interstate Distrib. Servs., Inc.,* 6 Ohio St.3d 198, 451 N.E.2d 1222, 1225 (Ohio 1983) (interpreting the OUFTA's predecessor). The OUFTA defines "transfer" very broadly to include "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset." OUFTA sec. 1336.01(L). Respondent argues that petitioner is a liable as a "transferee" of West Side's cash under four distinct sections of the Ohio statute. *See id.* secs. 1336.04(A)(1) and (2), 1336.05(A) and (B). The first of these is an actual fraud provision; the latter three are constructive fraud provisions.

OUFTA section 1336.04(A)(1), the actual fraud provision, applies in the case of any creditor regardless of whether his "claim * * * arose before or after the transfer was made." A transfer is fraudulent under this provision if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." The statute sets forth 11 nonexclusive "badges of fraud" that may give rise to an inference of actual fraudulent intent. *See id.* sec. 1336.04(B).

[11] Two of the constructive fraud provisions apply in the case of a creditor "whose claim arose before the transfer was made." *Id.* secs. 1336.05(A) and (B). [*39] Section 1336.05(A), the provision most relevant here, provides that "[a] transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor "was insolvent at that time or * * * became insolvent as a result of the transfer." This provision applies regardless of a transferor's or transferee's actual intent. *See Sease v. John Smith Grain Co.,* 17 Ohio App.3d 223, 479 N.E.2d 284, 287 (Ohio Ct.App.1984) (holding that with respect to the OUFTA's predecessor, "[n]either the intent of the debtor nor the knowledge of the transferee need be proven"); *Nelson v. Walnut Inv. Partners, L.P.,* 2011 U.S. Dist. LEXIS 75534 (S.D.Ohio 2011) (same).

***16** **[12]** **[13]** The third constructive fraud provision applies whether the creditor's claim arose "before or after the transfer was made." OUFTA sec. 1336.04(A). "A transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer "without receiving a reasonably equivalent value in exchange" and either: (1) "[t]he debtor was engaged * * * [in a] transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (2) "[t]he debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." *Ibid.* This provision likewise applies regardless of the debtor's [*40] intent or transferee's actual knowledge. If the stated conditions of any constructive fraud provision are met, "the transfer is fraudulent as a matter of law." *See Sease,* 479 N.E.2d at 288.

1. *Petitioner's Status Under Ohio Law as a "Transferee"*

Under all four OUFTA provisions, a "transfer" of some kind must have been made from West Side as tax debtor to petitioner as transferee. This issue is the focus of the parties' dispute and its resolution affects analysis of the other OUFTA tests. We may thus conveniently discuss it first.

Petitioner insists that he was not literally a transferee of West Side's cash. According to petitioner, the cash he got came from Nob Hill, and the sources of that cash were the "loans" from Rabobank and Moffat. Nob Hill supposedly did not get West Side's cash, which it used to repay those "loans," until later that same day. For this reason, petitioner contends that he received no West Side assets that could subject him to liability as a fraudulent transferee under Ohio law.

Respondent contends that Ohio law would treat petitioner in substance as the transferee of West Side's cash. We agree with respondent for at least two reasons, each of which constitutes an alternative ground for sustaining his position. First, the "loans" from Rabobank and Moffat were shams, and West Side was the true source of the cash petitioner received. Second, the stock sale transaction would be [*41] recharacterized under Ohio law as a de facto liquidation of West Side, with petitioner receiving in exchange for his stock a $35.2 million liquidating distribution. [12]

a. *Sham Loans*

[14] In order to "finance" the purchase of West Side's stock from petitioner, Nob Hill "borrowed" $29.9 million from Rabobank and $5 million from Moffatt, a Fortrend affiliate. Ohio courts have consistently allowed finders of fact, in appropriate circumstances, to disregard transactions as shams. *See, e.g., Rowe v. Standard Drug Co.,* [*42] 132 Ohio St. 629, 9 N.E.2d 609, 613 (Ohio 1937) ("Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship."); *Selanders v. Selanders,* 2009 WL 1365226, at *11 (Ohio Ct.App.2009) (affirming the trial court's decision and agreeing that "the entire transaction was quite possibly nothing more than a sham"); *Galley v. Galley,* 1994 WL 191431, at *5 (Ohio Ct.App.1994) ("When that reason for the transfer of property * * * is disregarded as a sham, the * * * [finder of fact] could well conclude that the transfer was a fraudulent transfer[.]"); *Phillips v. Phillips,* 1994 WL 179950 (Ohio Ct.App.1994). We believe that an Ohio court would disregard as shams the "loans" purportedly extended by Rabobank and Moffat.

***17** The Rabobank "loan" should be disregarded as a sham for at least three reasons. First, this "loan" was extended and repaid the same business day, literally moments after Nob Hill received the alleged loan proceeds. The essence of a loan is an extension of credit. It is obvious that the parties to this transaction did not desire to receive from Rabobank, and that Nob Hill did not in fact receive, a true extension of credit.

[*43] Second, the "loan" by its terms did not bear interest. Instead, Rabobank received a "fee" of $150,000. This fee cannot represent interest: Since the "loan" was outstanding for less than a day, this fee would translate to annual interest of $54,750,000, almost twice the magnitude of the "loan." What Rabobank received was not interest on a loan but a fee for facilitating a tax shelter transaction. Rabobank was presumably able to charge such an outlandish fee because (1) from its vantage point, it was incurring reputational or business risks by accommodating a questionable transaction and (2) from petitioner's vantage point, the fee was being paid by the U.S. Treasury and not by him.

Third, the Rabobank "loan" was fully collateralized by the cash in West Side's Rabobank account. Nob Hill's credit application described the risk rating on this loan as "N/A, or based on collateral." ("N/A" presumably means "not applicable.") Rabobank gave the loan an R–1 risk rating, which denotes a loan that is fully cash collateralized. The documents executed at the closing gave Rabobank control over West Side's Rabobank account and a "springing lien" on West Side's cash the moment it funded the loan. Cash is fungible, and the consideration used to pay petitioner for his stock came in substance from West Side.

For essentially the same reasons, the $5 million "loan" extended by Moffat must also be disregarded as a sham. Like the Rabobank loan, it bore no interest; [*44] instead, Fortrend received a $5 million fee for assembling the entire tax shelter package. This "loan" did not represent a true extension of credit. It was simply an overnight shuffling of funds between two Fortrend entities designed to facilitate a tax-avoidance transaction.

We conclude that an Ohio court would apply the sham transaction doctrine to these loans, and we find that both loans were in fact shams. The totality of the circumstances shows that the nominal lenders provided these funds, not as bona fide extenders of credit, but simply as accommodation parties recruited by Fortrend to conceal the true nature of what was happening. What actually happened is that Rabobank electronically transferred cash from West Side's Rabobank account through Nob Hill's Rabobank account into petitioner's Rabobank account; the "loans" were utterly unnecessary and had no purpose except obfuscation. Since both loans were shams, Rabobank's transfer of funds from West Side's account into petitioner's account constituted a "direct or indirect * * * method of disposing of or parting with an asset." *See* OUFTA sec. 1336.01(L). Petitioner was thus was a "transferee" of West Side under Ohio law.

b. *De Facto Liquidation of West Side*

***18** **[15]** Respondent alternatively contends that the transfers among West Side, Nob Hill, and petitioner should be collapsed and recharacterized under Ohio law as a[*45] partial or complete liquidation of West Side, with petitioner receiving in exchange for his shares a $35.2 million liquidating distribution ($34.6 million of cash plus a check for $577,778). Although the Ohio courts have not addressed this precise scenario, judicial interpretations of fraudulent transfer provisions similar to Ohio's establish that such transactions may be "collapsed" if the ultimate transferee had constructive knowledge that the debtor's debts would not be paid.

The Court of Appeals for the Ninth Circuit recently addressed the application of New York's fraudulent transfer provisions to a Midco transaction resembling that here. It concluded that multiple transfers could be collapsed under State law if the conduct of the ultimate transferees "show[ed] that they had constructive knowledge of the fraudulent scheme." *Salus Mundi Found.,* 776 F.3d at 1020. Addressing the application of New York law to that same Midco transaction in *Diebold Found., Inc.,* the Court of Appeals for the Second Circuit held that multiparty transactions can be collapsed where the debtor's property is "reconveyed * * * for less than fair consideration" and the ultimate transferee had "constructive knowledge of the entire scheme." 736 F.3d at 186.

The Court of Appeals for the Fourth Circuit, addressing the application of North Carolina's UFTA provisions to another Midco transaction, similarly ruled that multiple transfers can be collapsed if the ultimate transferee has constructive [*46] knowledge that the debtor's tax liabilities will not be paid. If the ultimate transferees are on "inquiry notice" and fail to conduct a sufficiently diligent investigation, "they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." *Starnes,* 680 F.3d at 434.

The Ohio courts have regularly consulted and followed the decisions of sister courts when interpreting the provisions of model laws, including the OUFTA's predecessor. *See supra* pp. 36–37 and note 11. The North Carolina UFTA provisions governing constructive fraud are substantially identical to Ohio's, and New York's fraudulent transfer provisions are similar in material respects. We conclude that the Ohio Supreme Court, if confronted with this question, would find persuasive and would follow these three Federal decisions and the state court precedents on which they are based. The transfers at issue here may thus be collapsed under the OUFTA if petitioner had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid. [13]

[16] [*47] Petitioner argues that he was not aware of Fortrend's "plan as a whole" to avoid West Side's income taxes. If this is true, it is irrelevant. Finding that a person had constructive knowledge does not require that he have actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. *HBE Leasing Corp. v. Frank,* 48 F.3d 623, 636 (2d Cir.1995).

***19** **[17]** Constructive knowledge also includes "inquiry knowledge." "Inquiry knowledge" exists where the transferee was "aware of circumstances that should have led * * * [him] to inquire further into the circumstances of the transaction, but * * * [he] failed to make such inquiry." *HBE Leasing Corp.,* 48 F.3d at 636. Some cases define constructive knowledge as the knowledge that ordinary diligence would have elicited, while other cases require more active avoidance of the truth. *Diebold Found., Inc.,* 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioner had "constructive knowledge" under either standard.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with ensuring that he [*48] gets paid. But he agreed that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Specifically, echoing the contemporaneous advice of Hahn Loeser's bankruptcy lawyers, Mr. Purcell testified that "due diligence did require [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into For-trend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liabilities. Petitioner and his advisers were clearly suspicious about Fortrend's scheme. But instead of digging deeper, they engaged in willful blindness and actively avoided learning the truth.

Petitioner and his advisers knew that the transaction Fortrend was proposing was likely a "reportable" or "listed transaction." Before meeting with Fortrend, Hahn Loeser lawyers spent several days researching Notice 2001–16, "reportable transactions," "sham transactions," and transactions involving "an intermediary corporation." PwC insisted on including in its engagement letter a requirement that petitioner advise it if he determined "that any matter covered by this Agreement is a reportable transaction." Petitioner attempted to strike this sentence from the engagement letter, evidencing his active avoidance of learning the truth.

[*49] PwC advised petitioner orally that "a position can be taken" that the proposed stock sale would not be a reportable transaction. In tax-speak, this translates to a low level of confidence on PwC's part. [14] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Any reasonably diligent person would infer from this refusal that a "listed transaction" was very likely what Fortrend, a tax shelter promoter, had in mind.

Though alerted by these warning signs, petitioner and his advisers failed to conduct a diligent inquiry into the "high basis/low value" debt strategy that Fortrend proposed for eliminating West Side's tax liabilities. PwC had advised that this appeared to be "a very aggressive tax-motivated strategy" that was "subject to IRS challenge." PwC specifically declined to give "more likely than not" assurance on this point. Petitioner turned his back on this red flag. He testified that [*50] Fortrend's tax-elimination strategy was of no concern to him because "that was their business."

***20** Mr. Purcell testified that petitioner could not have sought an opinion from PwC concerning Fortrend's bad debt strategy because, as of the closing date, Fortrend had put no specific high-basis/low-value plan on the table. The Court did not find this testimony persuasive. If ordinary diligence required petitioner and his advisers to investigate Fortrend's plan, as Mr. Purcell admitted, ordinary diligence required them to dig more deeply into what Fortrend's bad-debt strategy was. Fortrend obviously had to know, as of September 9, 2003, how it envisioned eliminating a $16.9 million corporate tax liability in fewer than 12 weeks. Reasonable diligence required petitioner and his advisers to insist that Fortrend explain its debt reduction strategy in sufficient detail to enable PwC to evaluate it.

Numerous other features of Fortrend's proposal raised red flags that demanded further inquiry. Fortrend offered to pay petitioner $11.2 million more than the net book value of West Side—representing a premium of 47%—while insisting that West Side's assets be reduced to cash. Petitioner was a sophisticated entrepreneur who had built a company and knew how to value a business. It should have provoked tremendous skepticism to discover that Fortrend was [*51] willing to pay a 47% premium to acquire cash, which by definition cannot be worth more than its face value.

The business purpose alleged for the transaction, moreover, made absolutely no sense. Petitioner and his advisers were told that Fortrend intended to put West Side into the "distressed debt" business. "[T]he business purpose for the acquisition," according to PwC's memo, was "based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purposes is apparently difficult."

This explanation demanded further inquiry from any reasonably diligent person. In order to purchase West Side's stock, Fortrend needed to have cash or be able to borrow cash. If Fortrend had cash or could easily borrow cash, why would it want to acquire West Side in order to get cash? Moreover, as PwC noted in a parenthetical, "most of the $40,000,000 cash in Westside will be distributed out of Westside and used by * * * [Fortrend] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock." Since there was going to be precious little cash left in West Side after the deal closed, the "business purpose" alleged for the transaction did not pass the straight-face test.

The icing on the cake was the manner in which the purchase price was determined. Numerous spreadsheets prepared by petitioner's brother explicitly [*52] state that the purchase price would equal West Side's closing cash balance plus 68.125% of its accrued tax liabilities. A sophisticated businessman like petitioner should have been curious as to why the purchase price for his company was being computed as a percentage of its tax liabilities, and why this was the only number that Fortrend seemed to care about. In effect, Fortrend was offering to assume a $16.9 million tax liability in exchange for a $5 million fee. Because the economics of the deal made it obvious that Fortrend was not going to pay West Side's tax liabilities, this fact alone put petitioner on "inquiry knowledge." [15]

***21** Petitioner testified that he had no contemporaneous understanding that the "Fortrend premium" was correlated to West Side's accrued tax liabilities. The Court did not find this testimony credible. Petitioner actively participated in negotiating [*53] Fortrend's fee. When confronted with his brother's spreadsheets that invariably compute Fortrend's fee as 31.875% of West Side's tax liabilities, petitioner became visibly uncomfortable. Petitioner's evasive testimony is further evidence that he had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West Side's tax liability.

To conclude that the totality of these circumstances did not give rise to constructive knowledge on petitioner's part "would do away with the distinction between actual and constructive knowledge." *Diebold Found., Inc.,* 736 F.3d at 189. And to relieve petitioner and his advisers of the duty to inquire, when the surrounding circumstances cried out for such inquiry, "would be to bless the willful blindness the constructive knowledge test was designed to root out." *Ibid.* We find as a fact that petitioner had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities. The various steps of the Midco transaction may thus be "collapsed" in determining whether petitioner was a "transferee" of West Side under Ohio law. [16]

[*54] The remaining question is whether these steps, once collapsed, yield a de facto "liquidation" of West Side from which petitioner received a $35.2 million liquidating distribution. Petitioner appears to believe that, for this to occur, there must have been a *complete* liquidation of West Side. We do not see the logic of this position: under state corporate law, as well as under Federal tax law, a corporation can be the subject of either a partial or a complete liquidation. [17] In either event, petitioner received a $35.2 million liquidating distribution upon surrendering his stock. We fail to see how it matters which kind of liquidation it was.

In any event, we find as a fact that West Side was in substance completely liquidated. There is no evidence that West Side conducted any bona fide business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed [*55] "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Those loans were not operational assets of a business; they were simply tools for implementing a sham tax-avoidance scheme. In reality, West Side was nothing but a shell company immediately after the Midco deal closed.

At the insistence of petitioner's lawyers, West Side was kept in formal existence for several years. It filed tax returns; it cut checks to Fortrend affiliates; and it maintained a nominal cash balance. But keeping West Side in notional existence was simply a charade designed to create a defense to the precise argument the IRS is advancing here, an argument that petitioner and his attorneys knew the IRS would advance if this Midco transaction came to its attention. Such lawyerly stratagems cannot hide the fact that West Side had been liquidated in substance. It continued as a Potemkin village intended to deceive the IRS, just as the original was designed to fool Catherine the Great.

***22** In sum, we find that petitioner had constructive knowledge of Fortrend's tax-avoidance scheme; that the multiple steps of the Midco transaction must be collapsed; and that collapsing these steps yields a partial or complete liquidation of West Side from which petitioner received in exchange for his stock a $35.2 million liquidating distribution. *See Salus Mundi Found.,* 776 F.3d at 1019–1020[*56] (following the Second Circuit's analysis to the same effect in *Diebold Found., Inc.*). Under the OUFTA, petitioner is thus a direct transferee of West Side's assets under respondent's "de facto liquidation" theory as well as under the "sham loan" theory discussed previously. [18]

2. *Petitioner's Liability Under Ohio Law as a "Transferee"*

OUFTA section 1336.05(A) provides that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor became insolvent as a result of the transfer. We find that all three of these elements are satisfied here. Petitioner is thus liable as a transferee of West Side under Ohio law.

a. *When the IRS Claim Arose*

[18] During April and May 2003, West Side received proceeds of $65 million from the PUCO settlement. This yielded a large gain that generated a tax liability of approximately $16.9 million. West Side thus had an accrued tax liability of [*57] approximately $16.9 million before September 9, 2003, the day the Midco deal closed.

The OUFTA defines the term "claim" expansively to mean "a right to payment." *Id.* sec. 1336.01(C). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Ibid.* A "creditor" is any person who has a "claim." *Id.* sec. 1336.01(D). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. *See Zahra Spiritual Tr. v. United States,* 910 F.2d 240, 248 (5th Cir.1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim' " in the UFTA. *Stuart v. Commissioner,* 144 T.C. ——, ——, (slip op. at 15) (Apr. 1, 2015).

Petitioner does not seriously dispute that the IRS had a "claim" against West Side before the stock sale. Rather, he argues that the IRS had no claim against *Nob Hill* when his stock was purchased because West Side had not yet transferred its cash into Nob Hill's Rabobank account. The precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various [*58] transactions must be collapsed for purposes of determining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, it is irrelevant in what order the subsidiary transfers are thought to have occurred.

***23** West Side's Federal tax liability had accrued by late May 2003. The IRS had a claim against West Side at that time. The transfer of West Side's assets to petitioner occurred on September 9, 2003. Respondent's claim thus "arose before the transfer was made." OUFTA sec. 1336.05(A).

b. "*Reasonably Equivalent Value*"

[19] OUFTA section 1336.05(A) imposes, as a second condition of liability, that the debtor not have received "a reasonably equivalent value in exchange for the transfer." Whether the debtor received "reasonably equivalent value" is a question of fact. *See Shockley v. Commissioner,* T.C. Memo.2015–113, at *50.

[20] On September 9, 2003, West Side consisted of nothing but cash and tax liabilities. The value of petitioner's stock thus equaled West Side's net asset value, which was about $23.7 million (cash equivalents of $40.6 million minus accrued tax liabilities of $16.9 million). West Side transferred $35.2 million to petitioner in exchange for his shares. Since his shares were worth only $23.7 million, West [*59] Side did not receive "a reasonably equivalent value in exchange for the transfer." OUFTA sec. 1336.05(A).

The only other thing West Side got at the closing was a representation from Nob Hill that it would "cause" West Side to pay its 2003 tax liabilities in full. As we have found previously, this representation was not worth the paper it was printed on. Nob Hill was a shell company, incorporated offshore, with no assets in the United States (or anywhere else). Nob Hill's parent, Millennium, was also a Cayman Islands company with no assets in the United States. Both were affiliates of a tax shelter promoter. The value of Nob Hill's promise was zero.

c. *West Side's Insolvency*

[21] OUFTA section 1336.05(A) imposes, as a third condition of liability, that the debtor making the transfer "was insolvent at that time or * * * became insolvent as a result of the transfer." Petitioner asserts that West Side was solvent when he received Nob Hill's cash because, at that moment, West Side had not yet transferred its cash to Nob Hill. Thus, West Side supposedly had assets in excess of its tax liabilities when the transfer to petitioner occurred.

As with petitioner's argument about when the IRS claim arose, the precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various transactions must be collapsed for purposes of determining [*60] the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, West Side's solvency must be judged on that basis.

Under OUFTA sections 1336.02 and .05, solvency is measured at the time of the transfer. A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. *Id.* sec. 1336.02(A)(1). Following the transfer of $35.2 million to petitioner, West Side was left with tax liabilities of $16.9 million and assets of $5.1 million (consisting of a Rabobank account soon to be emptied by payments to tax shelter promoters). West Side thus "became insolvent as a result of the transfer." *Id.* sec. 1336.05(A).

***24** In sum, we find that the IRS claim arose before West Side's assets were transferred to petitioner; that West Side made this transfer without having received "a reasonably equivalent value in exchange"; and that this transfer caused West Side to become insolvent. Petitioner is thus liable for West Side's tax debts under OUFTA section 1336.05(A). [19]

[*61] 3. *Petitioner's Liability Under Ohio Law For Penalties*

[22] Even if he can be held liable for West Side's unpaid tax, petitioner contends that the penalties assessed against West Side cannot be collected from him as its "transferee" under Ohio law. According to petitioner, "the distressed debt transaction giving rise to those penalties was not entered into until after petitioner sold his stock and petitioner had nothing whatsoever to do with that transaction." In support of this proposition he relies on *Stanko v. Commissioner,* 209 F.3d 1082 (8th Cir.2000), *rev'g* T.C. Memo.1996–530.

In *Stanko,* the Eighth Circuit interpreted Nebraska law in effect before 1989, when Nebraska adopted the UFTA. *See id.* at 1084 n. 1. The Court reasoned that "penalties for negligent or intentional misconduct by the transferor that occurred many months after the transfer * * * are not * * * existing at the time of the transfer." *Id.* at 1088. The Eighth Circuit concluded that "[a] creditor whose debt did not exist at the date of the * * * [transfer] cannot have the conveyance [*62] declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time." *Id.* at 1087 (quoting *U.S. Nat'l Bank of Omaha v. Rupe,* 207 Neb. 131, 296 N.W.2d 474, 476 (Neb.1980)).

[23] We find the *Stanko* case to have no application here. The instant case is governed by Ohio law, and the governing Ohio law differs from the pre-UFTA Nebraska statute that the Eighth Circuit was construing. The OUFTA defines "claim" expansively to include any "right to payment" even if it is "unliquidated" and "unmatured." OUFTA sec. 1336.01(C). The IRS may thus have a "claim" for the penalties whether or not they are thought to have been "existing at the time of the transfer." *Stanko,* 209 F.3d at 1088. The OUFTA, moreover, does not require proof that the transfer was made to defraud specific creditors; nor does it require proof that the debts in question "were in contemplation at the time" the assets were conveyed. *Id.* at 1087.

[24] Finally, the OUFTA provides that a transfer may be held fraudulent as to future as well as present creditors. Liability as to future creditors exists if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became [*63] due." OUFTA sec. 1336.04(A)(2)(b). Thus, even if respondent's claim for the penalties were regarded as not being "in existence" on the date of the transfer, petitioner would have transferee liability to the IRS under

OUFTA section 1336.04(A)(2) in its capacity as a "future creditor" with respect to those penalties. *See supra* pp. 60–61 and note 19.

***25** For these reasons, we conclude that petitioner is liable under Ohio law as a transferee both with respect to West Side's unpaid tax deficiency and with respect to the penalties properly assessed against it. We have reached the same conclusion concerning transferee liability for penalties under the fraudulent transfer laws of other States. *See, e.g., Kreps v. Commissioner,* 42 T.C. 660, 670, 1964 WL 1376 (1964) (New York law), *aff'd,* 351 F.2d 1 (2d Cir.1965); *Cullifer,* T.C. Memo.2014–208, at *30, *74 (Texas law); *Feldman v. Commissioner,* T.C. Memo.2011–297, 102 T.C.M. (CCH) 613, 623 (Wisconsin law). [20]

[*64] B. *Petitioner's Status as a "Transferee" Under Federal Law*

Whether a person is a "transferee" within the meaning of section 6901 is "undisputedly [a question] of federal law." *Starnes,* 680 F.3d at 427; *see Slone,* ––– F.3d ––––, 2015 WL 5061315; *Feldman,* 779 F.3d at 458. "Transferee" is an expansive term that includes a "donee, heir, legatee, devisee, and distributee." Sec. 6901(h). The term also includes "the shareholder of a dissolved corporation," "the successor of a corporation," and "the assignee * * * of an insolvent person." Sec. 301.6901–1(b), Proced. & Admin. Regs.

In determining "transferee" status for Federal law purposes, the Ninth Circuit has recently held that a court must consider whether to disregard the form of the transaction by which the transfer occurred. *See Slone,* ––– F.3d at ––––, 2015 WL 5061315, at *5. "[F]or purposes of transferee liability under § 6901," the Ninth Circuit ruled, relevant precedent requires that the court "look through the form of a transaction to consider its substance." *Id.* at ––––, 2015 WL 5061315, at *4. Analyzing a transaction similar to that here, the Ninth Circuit explained in *Slone:*

> [W]hen the Commissioner claims a taxpayer was "the shareholder of a dissolved corporation" for purposes of 26 C.F.R. § 301.6901–1(b), but the taxpayer did not receive a liquidating distribution if the form of the transaction is respected, a court must consider the relevant subjective and objective factors to determine whether the formal transaction "had any practical economic effects other than the creation of income tax losses."

[*65] *Id.* at ––––, 2015 WL 5061315, at *5 (quoting *Reddam v. Commissioner,* 755 F.3d 1051, 1060 (9th Cir.2014), *aff'g* T.C. Memo.2012–106). [21]

In performing this "substance over form" inquiry, the Ninth Circuit does not engage in a rigid two-step analysis. Rather, it focuses "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." *Id.* (quoting *Reddam,* 755 F.3d at 1060). Following a commonsense review of the transaction, if the court concludes that the transaction lacks a nontax business purpose, has no economic substance, and was entered into solely to generate illegitimate tax benefits, the Commissioner may disregard the form the parties have selected and tax the transaction on the basis of its underlying economic substance. *Id.* at ––––, 2015 WL 5061315, at *5–*6.

***26 [25]** For the reasons discussed previously, we find that the transaction by which Nob Hill "purchased" petitioner's West Side stock relied on sham transactions, had no economic substance, had no bona fide business purpose, and was entered into solely to evade West Side's Federal and Ohio tax liabilities. *See supra* p. 40[*66] and note 11 and pp. 41–55. We therefore disregard the form of the transaction and find that petitioner in substance was a direct recipient of West Side's cash, i.e., as a "distributee," "the shareholder of a dissolved corporation," or "the assignee * * * of an insolvent person." Sec. 6901(h); sec. 301.6901–1(b), Proced. & Admin. Regs. In any of those capacities, he was a "transferee" of West Side within the meaning of section 6901.

IV. *Respondent's Collection Efforts*

[26] In certain circumstances the IRS may be required to show that it exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferee. *See Sharp v. Commissioner,* 35 T.C. 1168, 1175, 1961 WL 1287 (1961); *Shockley v. Commissioner,* T.C. Memo.2015–113, at *54; *Kardash v. Commissioner,* T.C. Memo.2015–51, at *22–*24; *Zadorkin v. Commissioner,* T.C. Memo.1985–137, 49 T.C.M. (CCH) 1022, 1028 (1985). The reasonableness of the IRS' collection efforts against the tax debtor must be assessed in the light of the facts of the particular case. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." *Zadorkin,* 49 T.C.M. (CCH) at 1028.

[27] In 2008, during the course of its examination of West Side, the IRS searched for any existing West Side assets upon which to levy. Unsurprisingly, it [*67] found none. In 2008, as in late September 2003, West Side had no meaningful assets. What little cash it had post closing was quickly dissipated by payments to Fortrend, MidCoast, and their tax shelter promoter affiliates. Millennium, West Side's postclosing parent, was likewise immune from IRS collection efforts because it was a Cayman Islands company with no assets in the United States. We find that the IRS acted completely reasonably in declining to take further, useless, steps to collect this liability from West Side.

Petitioner also argues that the IRS failed to make collection efforts against Moffatt, whose $5 million "loan" was allegedly repaid with some of West Side's cash. We have already determined that the Moffatt loan was a sham. In substance, West Side's cash went directly to petitioner, and the Moffatt "loan" was simply an overnight shuffling of funds between two Fortrend affiliates. Under these circumstances, it is not certain that Moffatt was a transferee of West Side.

[28] Even if Moffatt were thought to be a transferee of West Side, collection efforts against it would almost certainly have been futile. As far as the trial revealed, Moffatt was a shadowy entity that appeared and quickly disappeared. There is no evidence in the record about what assets Moffatt had or where they were. It is a fair assumption that Fortrend established this affiliate, like Nob Hill, [*68] Millennium, and its other affiliates, in a manner that effectively immunized them from the reach of U.S. tax authorities.

***27** **[29]** In any event, the IRS is not required to pursue collection efforts against Transferee A before seeking to collect from Transferee B. "Transferee liability is several" under section 6901. *Alexander v. Commissioner,* 61 T.C. 278, 295, 1973 WL 2542 (1973); *Cullifer v. Commissioner,* T.C. Memo.2014–208, at *74 (same). "It is well settled that a transferee is severally liable for the unpaid tax of the transferor to the extent of the assets received and other stockholders or transferees need not be joined." *Estate of Harrison v. Commissioner,* 16 T.C. 727, 731, 1951 WL 126 (1951) (citing *Phillips v. Commissioner,* 283 U.S. 589, 51 S.Ct. 608, 75 L.Ed. 1289 (1931) (construing predecessor statute)). "In the event that one transferee is called upon to pay more than his pro rata share of the tax, he is left to his rights of contribution from the other transferees." *Id.* Petitioner is free to pursue against Moffat any right of contribution he may have.

We accordingly conclude (1) that petitioner is liable under Ohio law for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith and (2) that the IRS may collect this aggregate liability from petitioner as a "transferee" under section 6901. *See* OUFTA sec. 1336.08(B); *Shussel v. Werfel,* 758 F.3d 82 (1st Cir.2014) (discussing the calculation of [*69] prejudgment interest on transferee liability), *aff'g in part, rev'g in part and remanding* T.C. Memo.2013–32. To reflect the foregoing,

Decision will be entered under Rule 155.

1 For Fortrend, see *Slone v. Commissioner,* T.C. Memo.2012–57, *vacated and remanded,* — F.3d ——, 2015 WL 5061315 (9th Cir. Aug.28, 2015); *Salus Mundi Found. v. Commissioner,* T.C. Memo.2012–61, *rev'd and remanded,* 776 F.3d 1010 (9th Cir.2014); *Frank Sawyer Trust of May 1992 v. Commissioner,* T.C. Memo.2011–298, *rev'd and remanded,* 712 F.3d 597 (1st Cir.2013); *Diebold v. Commissioner,* T.C. Memo.2010–238, *vacated and remanded sub nom. Diebold Found., Inc. v. Commissioner,* 736 F.3d 172 (2d Cir.2013). For MidCoast, see *Stuart v. Commissioner,* 144 T.C. ——, (Apr. 1, 2015); *Cullifer v. Commissioner,* T.C. Memo.2014–208; *Hawk v. Commissioner,* T.C. Memo.2012–259; *Feldman v. Commissioner,* T.C. Memo.2011–297, *aff'd,* 779 F.3d 448 (7th Cir.2015); *Starnes v. Commissioner,* T.C. Memo.2011–63, *aff'd,* 680 F.3d 417 (4th Cir.2012); *Griffin v. Commissioner,* T.C. Memo.2011–61. Samyak Veera, a principal of MidCoast, has been indicted for his role in promoting these arrangements. *United States v. Veera,* No. 12–444 (E.D.Pa. Oct. 1, 2013) (superseding indictment alleging Veera's involvement in MidCoast schemes to evade taxes by using fraudulent losses to eliminate target's gains).

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

3 Petitioner's effort to strike this language from the engagement letter was ultimately unsuccessful. Mr.

Stovsky insisted on retaining this language and, after further negotiations, petitioner acquiesced.

4 West Side's balance sheet at the relevant time listed $302,357 in assets (less $227,793 in accumulated depreciation) and accounts receivable of $50,936 and $116,004. The assets consisted of computers, software, furniture/fixtures, office equipment, shop equipment, and leasehold improvements. LXV did not assume any of the liabilities reflected on West Side's balance sheet.

5 The $29.9 million loan was provided through a Rabobank subsidiary, Utrecht–America Finance Co. For simplicity, we will refer to these entities collectively as Rabobank. Rabobank frequently partnered with Fortrend in executing Midco deals. It has been involved in numerous transactions previously considered by this Court. *See, e.g., Salus Mundi Found.,* T.C. Memo.2012–61; *Slone,* T.C. Memo.2012–57; *Frank Sawyer Trust of May 1992,* T .C. Memo.2011–298; *Diebold,* T.C. Memo.2010–238; *LR Dev. Co. LLC v. Commissioner,* T.C. Memo.2010–203.

6 In his petition, petitioner challenged the timeliness of the notice of liability. The Commissioner generally must assess transferee liability within one year after expiration of the period of limitations on the transferor, but the applicable period of limitations may be extended by agreement. *See* sec. 6901(c) and (d). Petitioner executed successive Forms 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, extending to June 30, 2012, the time for assessing transferee liability against him, and the notice of liability was timely issued on June 25, 2012. Petitioner abandoned in his posttrial briefs any challenge to the timeliness of the notice of liability, and that argument is thus deemed conceded.

7 In addition to the amounts listed in the notice of liability, petitioner proposed as a finding of fact (to which respondent did not object) that respondent determined “assessed interest” of $8,475,655 as well as “accrued interest and penalties” of $12,362,425. In their posttrial briefs the parties have not addressed the proper computation of interest or the existence of penalties other than those determined by respondent under section 6662(a), (d), and (h). We will accordingly enter decision in this case under Rule 155.

8 Whether the burden has shifted matters only in the case of an evidentiary tie. *See Polack v. Commissioner,* 366 F.3d 608, 613 (8th Cir.2004), *aff'g* T.C. Memo.2002–145. In this case, we discerned no evidentiary tie on any material issue of fact. *See Payne v. Commissioner,* T.C. Memo.2003–90, 85 T.C.M. (CCH) 1073, 1077 (2003).

9 Petitioner argues that a memorandum solicited by Millennium from the Seyfarth Shaw law firm was sufficient to substantiate the bad-debt deduction. We give no weight to that memorandum. It was based on assumed facts provided by Mr. McNabola; those assumed facts are contradicted by the record evidence in this case; and the memorandum explicitly states that no one but Millennium can rely upon it. Seyfarth Shaw gained notoriety for issuing bogus tax-shelter opinions, and this document seems par for the course. *See, e.g., Kenna Trading, LLC v. Commissioner,* 143 T.C. 322, 2014 WL 5471973 (2014), *aff'd,* 728 F.3d 676 (7th Cir.2013); *Superior Trading, LLC v. Commissioner,* 137 T.C. 70, 2011 WL 3875649 (2011); *Rogers v. Commissioner,* T.C. Memo.2014–141; *Rogers v. Commissioner,* T.C. Memo.2011–277, *aff'd,* 728 F.3d 673 (7th Cir.2013); *Sterling Trading, LLC v. United States,* 553 F.Supp.2d 1152 (C.D.Cal.2008).

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

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

12 Respondent advances the “economic substance” and “substance over form” doctrines as additional theories to support his position, contending that the Ohio courts would disregard the form of the Midco transaction because it was not a true multiparty transaction, had no business purpose, and was engineered for the sole purpose of avoiding West Side's Federal and Ohio tax liabilities. The

Ohio courts have recognized and employed both doctrines. *See, e.g., First Banc Grp., Inc. v. Lindley,* 68 Ohio St.2d 81, 428 N.E.2d 427, 428 (Ohio 1981) (affirming decision of Ohio Board of Tax Appeals and agreeing that "[t]o hold otherwise would allow form to control over substance"); *Bloomingdale v. Stein,* 42 Ohio St. 168 (Ohio 1884) (concluding in fraudulent transfer case that equity "look[s] through the form to the substance of the transaction"); *Macior v. Limbach,* 86 Ohio App.3d 204, 620 N.E.2d 227, 229 (Ohio Ct.App.1993) (citing *Humana, Inc. v. Commissioner,* 881 F.2d 247, 255 (6th Cir .1989), *aff'g in part, rev'g in part* 88 T.C. 197, 1987 WL 49269 (1987)) (employing Federal "economic substance" doctrine). The "business purpose" petitioner now alleges for the Midco transaction—to generate greater after-tax profit for West Side's sole shareholder—is not cognizable under these two doctrines because it is simply a corollary of the tax-avoidance scheme. And the facts we find to support respondent's position on the "sham loan" and "de facto liquidation" theories also show that the Midco transaction lacked economic substance. In view of our disposition, however, we need not address these alternative theories as an independent justification for respondent's submission that petitioner is liable as a transferee under Ohio law.

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

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

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

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

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

18 Respondent advances the alternative contention that Nob Hill was a direct transferee of West Side and that petitioner has transferee-of-transferee liability as a subsequent transferee of Nob Hill. *See* sec. 6901(c)(2); *Frank Sawyer Trust of May 1992 v. Commissioner,* T.C. Memo.2014–59 (finding transferee-of-transferee liability). Because we find that petitioner is liable as a

direct transferee of West Side, we need not consider respondent's alternative position.

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

20 In *Frank Sawyer Trust of May 1992 v. Commissioner,* T.C. Memo. 2014128, at *10–*11, this Court cited *Stanko,* 209 F.3d. at 1088, in holding that a transferee was not liable for accuracy-related penalties assessed against the transferors. The facts of the instant case, which must be evaluated under Ohio law, differ substantially from those of *Frank Sawyer Trust,* which involved Massachusetts law. The First Circuit accepted our "factual finding that the Trust lacked knowledge—actual or constructive—of the new shareholders' tax avoidance intentions." *Frank Sawyer Trust of May 1992,* 712 F.3d at 599. Here, we have found that petitioner had at least constructive knowledge that West Side's tax liabilities would not be satisfied.

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

All Citations

T.C. Memo. 2015-201, 2015 WL 5973214, 110 T.C.M. (CCH) 370, T.C.M. (RIA) 2015-201, 2015 RIA TC Memo 2015-201

End of Document

Exhibit 4

DISTRICT COURT

CLARK COUNTY, NEVADA

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MICHAEL A.	:	
TRICARICHI,	:	
Plaintiff,	:	Case No.
v.	:	A-16-735910-B
PRICEWATERHOUSE	:	DEPT NO. XI
COOPERS, LLP,	:	
COÖPERATIEVE RABOBANK	:	
U.A., UTRECHT-AMERICA	:	
FINANCE CO., SEYFARTH	:	
SHAW LLP AND GRAHAM	:	
R. TAYLOR,	:	
Defendants.	:	

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Deposition of JAMES TRICARICHI

Monday, August 3, 2020

1:08 p.m. CST

Job No.: 312050

Pages: 1 - 111

Reported By: Cynthia J. Conforti

Deposition of JAMES TRICARICHI, held remotely.

Pursuant to agreement, before Cynthia J. Conforti, CSR, CRR and Notary Public in and for the County of Cook.

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF MICHAEL TRICARICHI:

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303.592.3100

ALSO PRESENT:

DONALD LANE, Planet Depos Technician
JOHN BORTOLINI, planet Depos Videographer
MICHAEL TRICARICHI

INDEX

DEPOSITION EXHIBITS

still married to Barbara Tricarichi?
A I don't know.
(Simultaneous speaking.)
BY MR. TAYLOR:
Q I'm sorry. What did you say?
A I thought they were going through a divorce.
(Simultaneous speaking.)
BY MR. TAYLOR:
Q Do you know if the divorce is final?
A No, I do not.
Q Let me ask you quickly about Carla Tricarichi. Where does she live?
A Cleveland Heights, Ohio.
Q And you said she's your cousin?
A Yes.
Q All right. I want to talk with you now, Mr. Tricarichi, about the 2003 deal we've discussed a little bit in a little more detail.
First, let me ask you, before the 2003 deal, what was your involvement, if any, with Westside Cellular?
A Before the deal?
Q Yes.
A I had an office there when I started my

13:40:15 13:40:17 13:40:19 13:40:21 13:40:21 13:40:22 13:40:24 13:40:27 13:40:29 13:40:29 13:40:30 13:40:34 13:40:36 13:40:38 13:40:45 13:40:47 13:40:48 13:40:54 13:40:58 13:41:00 13:41:05 13:41:08 13:41:10 13:41:12 13:41:18

own company.
Q Did you do any work for Westside Cellular before the 2003 deal?
A A little.
Q What kind of work did you do for the company?
A Accounting work, when they asked me to help them do something.
Q And was that on a regular basis that you would do accounting work or more irregular?
A No, IPCO, not on a regular basis.
Q When you would do accounting work for Westside Cellular, would you receive compensation?
A Sometimes.
Q What was your role in the 2003 deal where Westside Cellular was sold?
A I am the one, that through another party, got Fortrend involved. And other than that, I just facilitated information.
Q So besides getting Fortrend involved and facilitating information, did you have any other role in the 2003 deal?
A Yeah, I recommended that he -- that he engage PwC to help him with the transaction.
Q Anything else that you did in relation to

13:41:21
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13:42:27
13:42:29
13:42:33
13:42:37
13:42:39
13:42:42
13:42:45
13:42:56

the 2003 deal? 13:42:58
    A No. 13:42:59
    Q Let me ask you about some of those. 13:43:05
       You mentioned that you arranged the introduction to Fortrend International, right? 13:43:07 13:43:09
    A To another party, yes. 13:43:20
    Q All right. We are going to look at an exhibit now. 13:43:22 13:43:22
       MR. TAYLOR: I'm going to mark PwC's Deposition Exhibit Number 6. 13:43:25 13:43:27
       Don, if you're there, could you please put that on the screen? 13:43:28 13:43:31
       MR. HESSELL: So I don't need to get them out? Are you going to show them on the screen? 13:43:33 13:43:36
       MR. TAYLOR: Let's just talk briefly about how to do them. I think most of these exhibits are pretty short, and we can probably be okay looking at them on a screen. There are a few that are longer. 13:43:36 13:43:38 13:43:41 13:43:43 13:43:46
       But, Mr. Tricarichi, if you would like to look at a hard copy of any of the exhibits, then just let me know, you know, and you can go get the hard copy from the envelopes. But if you're okay looking at the exhibits on the screen, it might be easier to just start out like that, because I 13:43:47 13:43:49 13:43:51 13:43:54 13:43:58 13:44:00

audit clients to you?

A No, no. They -- PwC under the Big 4 or 6, whatever the hell it was at that time -- now there's only four obviously -- they were the only one with a middle market practice. So they -- they did work for a lot of companies that weren't very sophisticated a lot of times.

So if they needed to be audited because they're about to be sold or what have you and they were not GAAP compliant, they were unauditable, if you will, he'd call me in and we'd go in and fix it, you know, make them GAAP compliant. They weren't always audit-related clients. I guess I was trying to articulate.

Q No, that make sense. Thank you for the explanation.

For the six years that PwC was doing work for The Kilgore Companies, while you were there, did you have confidence in the work that PwC did?

A Yes.

Q And did you have confidence in the work that Rich Stovsky did for The Kilgore Companies?

A Yes.

Q When it came to the 2003 deal, did you consider using any other accounting firm besides

PwC to look at the tax issues involved with the transaction? 14:42:00 14:42:03

A I don't believe I did, no. 14:42:04

Q Do you know if Mike Tricarichi considered using any other accounting firm? 14:42:10 14:42:12

A I can't recall. I know he couldn't use my brother's because my brother is independent, that kind of stuff, but I don't know if there's any other. I don't -- I don't recall. 14:42:14 14:42:20 14:42:23 14:42:25

Q And your brother was at KPMG at the time? 14:42:26

A Yes. 14:42:29

Q So KP -- KPMG was not an option because of independence issues? 14:42:30 14:42:37

A Yes, I believe so. 14:42:37

Q So you recommended PwC to Michael Tricarichi to look at the tax issues involved in the 2003 deal, right? 14:42:45 14:42:47 14:42:49

A I did. 14:42:51

Q What specifically was PwC engaged to do in connection with the 2003 deal? 14:42:53 14:42:59

A There was two parts: One for his state and local tax issue, and then reviewing the deal from a standpoint that it was legitimate, or, you know what I mean by that, making sure it was Kosher, I guess, is the best way to put. 14:43:05 14:43:08 14:43:10 14:43:18 14:43:27

Q Kosher in what sense? 14:43:31
A I don't know, that it was okay to do. 14:43:33
Q Besides looking at the state and local tax issues and reviewing whether the deal was okay to do, was PwC hired to do anything else? 14:43:35 14:43:37 14:43:41
MR. HESSELL: Objection, foundation. 14:43:45
You can answer if you know. 14:43:48
THE WITNESS: I don't know. 14:43:49
MR. TAYLOR: If we could put PwC Exhibit 7 up, please. 14:43:53 14:43:57
(Exhibit 7 is introduced for the record.) 14:43:59
MR. TAYLOR: Putting on the screen PwC Deposition Exhibit 7, which is an April 8, 2003, e-mail from you, Jim Tricarichi, to Rich Stovsky of PwC, produced with the Bates label TRICAR-NV0030607. 14:44:24 14:44:26 14:44:30 14:44:38 14:44:50
BY MR. TAYLOR: 14:44:50
Q Do you see that? 14:44:50
A I do. 14:44:51
Q Did you send this e-mail to Rich Stovsky? 14:44:52
A Yes. 14:45:00
Q In the e-mail you state that: 14:45:01
The tax issues we need to have you help us with. 14:45:02 14:45:05
And then you say that you'll call him 14:45:05

CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

I, CYNTHIA J. CONFORTI, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; that reading and signing was not requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 14th day of August, 2020.

My commission expires: 10/30/23

Cynthia J. Conforti

Exhibit 5

PRICEWATERHOUSECOOPERS

PricewaterhouseCoopers LLP
BP Tower, 27th Floor
200 Public Square
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

Mr. Michael A. Tricarichi
Westside Cellular, Inc.
23632 Mercantile Drive
Beachwood, OH 44122

April 10, 2003

Dear Mr. Tricarichi:

We appreciate the opportunity to provide tax services to you and Westside Cellular, Inc. (collectively "you"). This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this "Agreement") set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP ("PricewaterhouseCoopers," "we" or "us") and you necessary to ensure that PricewaterhouseCoopers' professional services are performed to achieve mutually agreed upon objectives.

Summary of Services

You have requested that PricewaterhouseCoopers perform tax research and evaluation services.

Timing of Engagement

We will be prepared to begin immediately.

Tax Return Disclosure and Tax Advisor Listing Requirements

Treasury regulations section 1.6011-4 require that taxpayers disclose to the IRS their participation in certain "reportable transactions." You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed under section 1.6011-4. Similar Treasury regulations issued under Internal Revenue

EXHIBIT
PwC Dep Ex. No.
13
A-16-735910-B
071

PRICEWATERHOUSECOOPERS

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MT

PER DISCUSSION W/ M. TRICARICHI:

1. HE UNDERSTANDS AND AGREES THAT THIS IS REQUIRED

2. FEES: PWC AGREES TO BILL MONTHLY SO THAT TRICARICHI CAN BE UP-TO-DATE ON FEES INCURRED. HE UNDERSTANDS THE FEES MAY EXCEED $20,000.

— DISCUSSED W/ RON PADGETT

PRICEWATERHOUSECOOPERS

Code section 6112 require that we maintain lists of certain client engagements where we are material advisors to clients that have participated in either a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter. Therefore, if we determine, after consultation with you, that you have participated in either a reportable transaction or one required to be registered under Internal Revenue Code section 6111, we will place your name and other required information on a list. Sometime in the future the IRS may request our lists of reportable or section 6011 transactions, and we may be compelled to provide the IRS with the contents of our lists, including your name. We will advise you if we are ultimately required to provide your name to the IRS in connection with any matter covered by this agreement.

Fees

The fee for services relative to this project as described in the "Summary of Services" section of this Agreement will be based on our standard hourly rates. We will also bill you for our reasonable out-of-pocket expenses and our internal charges for certain support activities. Our internal charges include certain flat-rate amounts that reflect an allocation of estimated costs, including those associated with airline ticketing and general office services, such as computer usage, telephone charges, facsimile transmissions, postage and photocopying. We leverage our size to achieve cost savings for our clients in all areas of expense, including those covered by these internal charges and use this system of allocation to minimize total costs.

Payment of our invoices is due on presentation and expected to be received within 20 days of the invoice date.

We reserve the right to charge interest on any past due balances at a rate of 1% per month or part thereof.

TOTAL COST OF SERVICES IS NOT TO EXCEED $20,000 WITHOUT PRIOR WRITTEN AUTHORIZATION

* * * * *

We look forward to working with you and your staff during the completion of this important project. If this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us. Please sign and retain the original for your files. If you have any questions or comments regarding the terms of this Agreement, please do not hesitate to call Mr. Richard P. Stovsky at 216-875-3111.

PRICEWATERHOUSECOOPERS

Yours very truly,

Pricewaterhousecoopers LLP

Enclosure(s): Terms of Engagement to Provide Tax Services

Accepted: Michael A. Tricarichi and Westside Cellular, Inc.

By: _______________ Date: 4/25/03

1. Entire Agreement
These Terms of Engagement to Provide Tax Services and the engagement letter to which they are attached (collectively, the "Agreement") constitute the entire agreement between the client to whom such engagement letter is addressed and any other legal entities referred to therein ("Client" or "you") and PricewaterhouseCoopers LLP, a Delaware limited liability partnership ("PricewaterhouseCoopers," "we" or "us"), regarding the services described in the engagement letter.

2. Responsibilities of the Client
In circumstances where the Client is a business entity, the Client agrees to identify those individuals authorized to request services from PricewaterhouseCoopers under the terms of this Agreement. Individuals authorized to request services agree to identify the purpose of the services, and identify for whom the services are to be performed (e.g., the corporation, an employee, a director) at the time the services are requested.

A fundamental term of this Agreement is that the Client will provide us with all information relevant to the services to be performed and to provide us with any reasonable assistance as may be required to properly perform the engagement. The Client agrees to bring to our attention any matters that may reasonably be expected to require further consideration to determine the proper treatment of any relevant item. The Client also agrees to bring to our attention any changes in the information as originally presented as soon as such information becomes available. Client consents to the use, by PricewaterhouseCoopers staff visiting or working from the Client site, of the Client's resources, including, but not limited to network, Internet and extranet access, for the purpose of accessing similar PricewaterhouseCoopers resources. Client acknowledges that it retains all management responsibilities related to judgments and decisions regarding the Client's financial, tax or business matters.

Unless otherwise indicated, any tax returns, reports, letters, written opinions, memoranda, etc. delivered to the Client as part of the tax services ("Deliverables") are solely for the Client and are not intended to nor may they be relied upon by any other party ("Third Party").

3. Responsibilities of PricewaterhouseCoopers
We will perform our services on the basis of the information you have provided and in consideration of the applicable federal, foreign, state or local tax laws, regulations and associated interpretations relative to the appropriate jurisdiction as of the date the services are provided. Tax laws and regulations are subject to change at any time, and such changes may be retroactive in effect and may be applicable to advice given or other services rendered before their effective dates. We do not assume responsibility for such changes occurring after the date we have completed our services.

Some of the matters on which we may be asked to advise the Client may have implications to other persons or entities. However, we have no responsibility to these persons or entities unless we are specifically engaged to address these issues to such persons or entities, and we agree to do so in writing.

Tax jurisdictions may impose penalties for certain failures. Relative to the services provided under the terms of this Agreement, we will discuss with Client any tax positions of which we are aware that we believe may subject the Client to penalties. We will also discuss with Client possible courses of action related to the Client's tax return to avoid the imposition of any penalty (e.g., disclosure). We will use our judgment in resolving questions where the tax law may be unclear, or where there are conflicts between taxing authorities' interpretations of the law and other supportable positions, and discuss them with you. We are not responsible for any penalties imposed for positions that have been discussed with Client where we recommended a course of action to avoid penalties and the Client elected not to pursue such course.

PricewaterhouseCoopers is not responsible for any penalties assessed against the Client as the result of the Client's failure to provide us with all the relevant information relative to the issue under consultation. Furthermore, the Client agrees to reimburse PricewaterhouseCoopers for any penalties imposed on PricewaterhouseCoopers, its partners or staff, as the result of the Client's failure to provide such information.

4. Electronic Communications
In performing services under this Agreement, PricewaterhouseCoopers and/or Client may wish to communicate electronically either via facsimile, electronic mail or similar methods (collectively, "E-mail"). However, the electronic transmission of information cannot be guaranteed to be secure or error free and such information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete or otherwise be adversely affected or unsafe to use. Unless you notify us otherwise, we shall regard your acceptance of this Agreement as including your consent to use E-mail. All risks related to your business and connected with the use of E-mail are borne by you and are not our responsibility.

Both parties will carry out procedures to protect the integrity of data. In particular, it is the recipient's responsibility to carry out a virus check on any attachments before launching or otherwise using any documents, whether received by E-mail or on disk or otherwise.

5. Engagement Limitations
The services performed under this Agreement will not constitute an examination or review in accordance with generally accepted auditing or attestation standards. Except as may be specified in this Agreement, we will not audit or otherwise verify the information supplied to us, from whatever source, in connection with this engagement.

In performing services under this Agreement, we may occasionally discuss financial accounting matters with Client. The services performed under this Agreement, including any such discussions, are not intended to and do not include an engagement or other undertaking to perform an engagement to issue an opinion on the application of financial accounting matters as contemplated under Statement on Auditing Standards (SAS) No. 97. We have no responsibility for such matters unless we are specifically engaged to address these issues pursuant to a specific written engagement agreement.

As you are aware, tax returns and other filings are subject to examination by taxing authorities. We will be available to assist the Client in the event of an audit of any issue for which we have provided services under this Agreement. However, unless otherwise indicated, our fees for these additional services are not included in our fee for the services covered by this Agreement.

We will not be prevented or restricted by anything in this Agreement from providing services for other clients.

In the course of our engagement, certain communications between Client and PricewaterhouseCoopers may be subject to a confidentiality privilege. Client recognizes that we may be required to disclose such communications to federal, state and international regulatory bodies; a court in criminal or other civil litigation; or to other Third Parties, including Client's independent auditors, as part of our professional responsibilities. In the event that we receive a request from a Third Party (including a subpoena, summons or discovery demand in litigation) calling for the production of information, we will promptly notify you. We agree to cooperate with Client in any effort to assert any privilege with respect to such information, provided Client agrees to hold PricewaterhouseCoopers harmless from and be responsible for any costs and expenses resulting from such assertion.

6. **Disassociation or Termination of Engagement**

Either party may terminate this Agreement upon written notice to the other party. In the event of termination, Client will be responsible for fees earned and expenses incurred through the date termination notice is received.

7. **Limitation of Liability**

All services will be rendered by and under the supervision of qualified staff in accordance with the AICPA's Statements on Standards for Tax Services and the terms and conditions set forth in this Agreement. PricewaterhouseCoopers makes no other representation or warranty regarding either the services to be provided or any Deliverables; in particular, and without limitation of the foregoing, any express or implied warranties of fitness for a particular purpose, merchantability, warranties arising by custom or usage in the profession, and warranties arising by operation of law are expressly disclaimed.

IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT PRICEWATERHOUSECOOPERS WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL PRICEWATERHOUSECOOPERS BE LIABLE TO THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD PARTY, WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES. IN NO EVENT SHALL PRICEWATERHOUSECOOPERS BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, PUNITIVE, LOST PROFITS OR SIMILAR DAMAGES, EVEN IF WE HAVE BEEN APPRISED OF THE POSSIBILITY THEREOF.

8. **Indemnification**

Client agrees to indemnify and hold harmless PricewaterhouseCoopers and its personnel from any and all Third-Party claims, liabilities, costs, and expenses, including reasonable attorneys fees, arising from or relating to the services under this Agreement, except to the extent finally determined to have resulted from the gross negligence, willful misconduct or fraudulent behavior of PricewaterhouseCoopers relating to such services.

9. **Resolution of Differences**

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

10. **Other Provisions**

Notwithstanding any terms or conditions in this Agreement to the contrary, no conditions of confidentiality within the meaning of IRC §6111(d) or US Treasury regulations §1.6011-4 are intended, and Client (and each employee, representative, or other agent of Client) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of any transaction and all materials of any kind (including opinions or other tax analysis) that are provided to the Client relating to such tax treatment and tax structure. The foregoing sentence is effective as of the commencement of any discussions we may have had with Client regarding any transaction related to any services covered by this Agreement.

Neither party shall be liable to the other for any delay or failure to perform any of the services or obligations set forth in this Agreement due to causes beyond its reasonable control. All terms and conditions of this Agreement that are intended by their nature to survive termination of this Agreement shall survive termination and remain in full force, including but not limited to the terms and conditions concerning payments, warranties, limitations of liability, indemnities, and resolution of differences. If any provision of this Agreement, including the Limitation of Liability clause, is determined to be invalid under any applicable law, such provision will be applied to the maximum extent permitted by applicable law, and shall automatically be deemed amended in a manner consistent with its objectives to the extent necessary to conform to any limitations required under applicable law.

This Agreement will be governed by the laws of the State of New York.

California law requires that we include the following notice in all engagement letters with California entities or individuals:

Engagement Letter Addendum
Notice Pursuant to California Business & Professions Code, Section 5079(a)(5)

PricewaterhouseCoopers LLP is owned by professionals who hold CPA licenses as well as by professionals who are not licensed CPAs. Depending on the nature of the services we provide, non-CPA owners may be involved in providing services to you now or in the future. If you have any questions about this matter, please do not hesitate to ask.

Exhibit 6

PRICEWATERHOUSECOOPERS

Redacted

• Red comments are from Telecon on 8/14/03 w/ LOHNER FOLEMAN TRICARICHI TUPE STOVSKY

pencil comments are from earlier mtg @ PwC w/ Scott (others by phone) + Mike Tricarichi + Wisenberg

Redacted

Memo

To: / Location: Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower

From: / Location: Richard P. Stovsky

Date: April 13, 2003 < updated > Redacted

Subject: Potential transaction Redacted

NOTE: ALL CONCLUSIONS DISCUSSED WITH TRICARICHI, AND JIM TRICARICHI, WERE CLEARLY QUALIFIED AS "MORE LIKELY THAN NOT". FURTHER, NO WRITTEN ANSWERS WERE PROVIDED TO TRICARICHI.

Redacted

Redacted

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict (SETTLEMENT?) in the amount of $65,000,000. Westside is contemplating the following transaction ~~with Newco~~: Redacted

Post facto sale company

Redacted

- New shareholders borrow approximately $36,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of $40,000,000 of cash ($65,000,000 of cash from the legal verdict less bonus payments to employees of $13,000,000 and attorney's fees of $12,000,000), small accounts receivable, and minor furniture/fixtures/compute equipment (see attached).
- New shareholders contribute to Westside, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Westside is now in the business of purchasing "distressed/charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt

Exhibit #
Stovsky 28
09/01/2020 - MP
exhibitsticker.com

PRICEWATERHOUSECOOPERS

Redacted

- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the $40,000,000 cash in Westside will be distributed out of Westside and used by the new shareholders of Westside to pay back the cash borrowed to purchase Tricarichi's Westside stock)

Redacted

Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by the new shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the $65,000,000 cash from the legal verdict. As stated above, the new shareholders of Westside receive from Westside cash to pay the loan from the bank used to purchase Tricarichi's shares in Westside

Redacted

Redacted

- Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

Redacted

- The suggested result, from a federal tax perspective, is as follows:

all L-T per Tricarichi

Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside (THE ASSUMPTION IS THAT ALL OF TRICARICHI'S STOCK HAS BEEN HELD FOR THE REQUISITE LONG-TERM HOLDING PERIOD)

Westside offsets the taxable income from the legal verdict with the write off of high basis property

Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

Redacted

1. Will the transaction be respected for federal income tax purposes? TIM~~E~~ LOHNES, WNTS PARTNER, WAS INTEGRALLY INVOLVED IN THE ANALYSIS OF THIS TRANSACTION FROM MIKE TRICARICHI'S PERSPECTIVE. AFTER CONSULTING WITH OTHER MEMBERS OF WNTS, AND RESEARCHING THE TRANSACTION, LOHNES CONCLUDED THAT THE RISK TO TRICARICHI WAS THE IRS' RECHARACTERIZATION OF A PORTION OF THE PROCEEDS RECEIVED FROM THE PURCHASER AS FOLLOWS:

Redacted

PRICEWATERHOUSECOOPERS

Per Folkman - "there is some risk" Redacted

AMOUNT RECEIVED BY TRICARICHI:	$36,000,000

AMOUNT THAT TRICARICHI WOULD HAVE RECEIVED HAD HE NOT SOLD THE STOCK, BUT INSTEAD LIQUIDATED WESTSIDE:

WESTSIDE GROSS INCOME:	$65,000,000
LESS ATTORNEY'S FEES & BONUSES:	($25,000,000)
TAXABLE INCOME:	$40,000,000
CORPORATE FEDERAL TAX RATE:	34%
FEDERAL TAX:	$13,600,000
AMOUNT AVAILABLE FOR LIQ. DIST.:	$26,400,000
COMPARE WITH ACTUAL PROCEEDS	$34,000,000
AMOUNT RECHARACT. AS ORD. INC.	$ 7,600,000

Redacted

Redacted

Redacted

Redacted

John: Even if this happens still better than not doing deal. This was again discussed

is also that there is not guarantee. Jim Tricarichi understands this.

LOHNES AND STOVSKY POINTED OUT TO TRICHARICHI THAT ONE ALTERNATIVE WOULD BE TO FILE THE 1040 WITH THIS ORDINARY INCOME ELEMENT, THEN IMMEDIATELY FILE A CLAIM FOR REFUND. HOWEVER, TRICARICHI INDICATED THAT HE WOULD NOT BE INCLINED TO DO SO, AND THAT THE STOCK SALE AGREEMENT WOULD PROBABLY PROHIBIT HIM FROM DOING SO. IN ADDITION, LOHNES CONCLUDED THAT ANY 269 ISSUES WOULD BE THE PURCHASER'S PROBLEM, NOT TRICARICHI'S. LOHNES ALSO STATED Redacted THAT THE DEDUCTION THE CORPORATION WAS TAKING FOR THE WRITE OFF OF THE HIGH BASIS/LOW VALUE PROPERTY CONTRIBUTED TO WESTSIDE (TO OFFSET THE TAXABLE INCOME IN WESTSIDE RELATIVE TO THE LEGAL VERDICT) WAS SUBJECT TO IRS CHALLENGE (THE IRS COULD PUSH THE DEDUCTION TO THE TIME PERIOD WHEN IT WAS IN THE HANDS OF THE CONTRIBUTING SHAREHOLDER). FURTHER, THE CHARACTER OF THAT LOSS VS. THE CHARACTER OF THE TAXABLE INCOME FROM THE LEGAL VERDICT MAY NOT MATCH. HOWEVER, THIS IS NOT TRICARICHI'S CONCERN AS THE RESULT WOULD BE A CORPORATE TAX LIABILITY, NOT A SELLING SHAREHOLDER LIABILITY (AND, PER THE DISCUSSION BELOW, TRICARICHI HAS NOT SUCCESSOR/TRANSFEREE LIABILITY FOR WESTSIDE TAXES).

Redacted

All liab. remains in corp.

If 269 is asserted -

It was said apply to acquirer & low property - it would be corp. level

Redacted

Folkman - only time a S/H is responsible for corp level tax is if taken out of corp. thus making

(3)

Redacted

PRICEWATERHOUSECOOPERS

Redacted

Redacted

2. Will the transaction be a reportable transaction? LOHNES CONCLUDED THAT A POSITION CAN BE TAKEN THAT THIS IS NOT A REPORTABLE TRANSACTION. TYPICAL "MIDCO" TRANSACTIONS HAVE 3 PARTIES (THIS TRANSACTION HAS ONLY 2), AND TYPICAL MIDCO TRANSACTIONS RESULT IN AN ASSET BASIS STEP UP AND THE ASSOCIATED AMORTIZATION DEDUCTIONS GOING FORWARD (THIS TRANSACTION DOES NOT HAVE THESE CHARACTERISTICS).

Redacted

Redacted

Redacted

3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the $65,000,000 legal verdict (less the deductions for attorneys fees and bonuses) (assuming Westside does not have cash sufficient to cover the tax liability)? PER LOHNES AND DON ROCEN (OF WNTS), TRICARICHI SHOULD HAVE NO SUCCESSOR/TRANSFEREE LIABILITY FOR ANY CORPORATE LEVEL TAX AS HE TOOK NOTHING OUT OF WESTSIDE. AT THE TIME TRICARICHI SOLD WESTSIDE, IT WAS A SOLVENT CORPORATION. TRICARICHI WAS NOT THE TRANSFEREE OF ANY WESTSIDE ASSET. **ROCEN TO PROVIDE NOTES MESSAGE.**

Redacted

Redacted

Redacted

4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision) **CALCULATION NEEDED. NOTE THAT SECTION 341 MAY BE REPEALED BY THE NEW TAX LAW. FURTHER, PER JIM BANKS, THE $65,000,000 TAXABLE INCOME WAS RECOGNIZED (EVEN THOUGH IT WILL ULTIMATELY BE OFFSET WITH DEDUCTIONS SO THAT NO TAX WILL BE INCURRED).**

5. Westside is planning to pay significant bonuses (total of $13,000,000) to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive $2,500,000 (regular compensation $81,000), employee B will receive $2,000,000 (regular compensation $80,000), employee C will receive $1,500,000 (regular compensation $76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the $65,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible? PER JIM CONNOR OF WNTS, THESE BONUSES WILL BE DEDUCTIBLE SINCE THEY ARE PAID FOR COMPENSATORY REASONS.

Redacted

6. Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004? SEE THE STATE TAX MEMO WRITTEN BY DAVID COOK AND RAY TURK OF SALT.

Redacted

PRICEWATERHOUSECOOPERS

7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes? PER PARAGRAPH 3 ABOVE, TRICARICHI SHOULD BE SUBJECT TO NO CORPORATE LEVEL TAX.

Redacted

8. OPEN ITEMS: Section 341 analysis; Section 384 analysis; Section 453 and 453A analysis and conversation with attorney to ensure the appropriate language is in place in the agreements (note, escrow and Stock Sale) to ensure installment sale treatment for federal tax purposes; representations in Stock Sale agreement re: Tricarichi has no liability for any corporate level taxes;

Note - No installment sale will be used - Sale taxed (to be non-Ohio sourced) per Roy Tesh.

Exhibit 7

DISTRICT COURT

CLARK COUNTY, NEVADA

- - - - - - - - - - - - - - x

MICHAEL A. :

TRICARICHI, :

Plaintiff, : Case No.

v. : A-16-735-910-B

PRICEWATERHOUSECOOPERS : Department No. XI

LLP, COOPERATIVE :

RABOBANK U.A., :

UTRECHT-AMERICA :

FINANCE CO., SEYFARTH :

SHAW LLP, AND :

GRAHAM R. TAYLOR, :

Defendants. :

- - - - - - - - - - - - - - x

Remote Deposition of RICHARD STOVSKY

Tuesday, September 1, 2020

8:28 a.m.

Job No.: 318097

Pages: 1 - 289

Reported By: Michelle M. Yohler, CSR, RMR, CRR

The videorecorded deposition of RICHARD STOVSKY, held remotely via Zoom, pursuant to notice, before Michelle M. Yohler, CSR, RMR, CRR, in and for the County of Will, Illinois.

R E M O T E A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF MICHAEL TRICARICHI:
MR. SCOTT HESSELL
MR. BLAKE SERCYE
SPERLING & SLATER
55 West Monroe Street, Suite 3200
Chicago, Illinois 60603
312.641.3200

ON BEHALF OF THE DEFENDANTS PRICEWATERHOUSECOOPERS, LLP:
MR. CHRISTOPHER D. LANDGRAFF
MR. DANIEL TAYLOR
BARTLIT BECK LLP
54 West Hubbard Street
Chicago, Illinois 60654
312.494.4400

ALSO PRESENT:
Mr. Geoffrey Ezgar, PwC General Counsel
Mr. Michael Tricarichi, Plaintiff
Mr. Michael Pietanza, Technician
Mr. Jeremy Dineen, Videographer

E X A M I N A T I O N S

E X H I B I T S

(Continued)

Q Was this a document that was available to you as far as you know? 09:44:16 09:44:20
A This and other similar documents, I -- you asked if I could recall this one specifically. I -- it's familiar, but I can't recall specifically. 09:44:21 09:44:24 09:44:27 09:44:29
Q All right. So whether you remember this exact format, you were generally familiar with this type of document at PwC in 2003 identifying subject matter experts in particular reportable transactions, correct? 09:44:30 09:44:32 09:44:36 09:44:43 09:44:46
A As well as other areas. 09:44:47
Q Right. And do you see at the top of PX 2 it says that "If you have a client issue regarding a listed or other reportable transaction, you should contact the appropriate subject matter expert," abbreviated "SME," right? 09:44:49 09:44:54 09:44:57 09:45:00 09:45:04
A That's -- that's what it states, correct. 09:45:08
Q It also says that "Noncompliance with the final disclosure and list maintenance regulations carry significant risk to the firm and our clients," correct? 09:45:11 09:45:16 09:45:20 09:45:23
A Correct. That's what it says. 09:45:24
Q And you did have a client issue regarding a listed or other reportable transaction in the 09:45:26 09:45:44

context of the Westside transaction, correct? 09:45:47
A We were looking into and analyzing, evaluating, the Westside transaction. 09:45:50 09:45:55
Q Right. You were about -- one of the things that you were engaged by Mr. Tricarichi to do was to look at and evaluate whether it was a listed or reportable transaction under Notice 2001-16, correct? 09:45:57 09:45:59 09:46:00 09:46:06 09:46:10
A Well, we were engaged to provide research and evaluation services, and then we determined that that was one of the areas to look into. 09:46:14 09:46:17 09:46:19
Q Right. So PwC was generally engaged to evaluate the tax implications of the Westside transaction, right? 09:46:29 09:46:31 09:46:34
A To assess, yes. 09:46:37
Q And then after you started to assess the Westside transaction, you identified that one of the issues that PwC needed to evaluate was whether it was a listed or reportable transaction under Notice 2001-16, correct? 09:46:39 09:46:44 09:46:49 09:46:53 09:46:58
A Correct. 09:47:00
Q Mr. Tricarichi didn't tell you which tax issues you needed to assess or evaluate, correct? 09:47:00 09:47:08
A Correct. 09:47:13
Q I'm going to show you a document that I've 09:47:14

marked as PX 40. It should be in your binder. 09:47:32
THE TECHNICIAN: Would you like me to pull 09:47:38
it up on the screen? 09:47:39
THE WITNESS: I have it here. 09:47:42
MR. HESSELL: Then no. 09:47:43
BY THE WITNESS: 09:47:45
A It's Tab 40, right? 09:47:45
BY MR. HESSELL: 09:47:47
Q Yeah, Tab 40, which the court reporter or 09:47:47
technician will mark as PX 40. 09:47:51
(WHEREUPON, Plaintiff's Exhibit No. 40 was 09:47:55
presented to the witness.) 09:47:56
BY MR. HESSELL: 09:47:56
Q Do you have it there? 09:47:56
A Hold on. 09:47:56
Q Take your time. 09:47:58
A Yes, I have it. 09:48:13
Q PX 40 appears to be the bills that PwC 09:48:15
sent Mr. Tricarichi regarding the Westside 09:48:19
transaction, correct? 09:48:22
A Yes. 09:48:22
Q And were you the person at PwC who was 09:48:22
responsible for actually sending these invoices to 09:48:27
Mr. Tricarichi? 09:48:30
A You mean physically mailing -- 09:48:36

Mr. Lohnes do. 11:26:38
    Q Yeah. 11:26:38
    A And I don't know what Mr. Lohnes did. 11:26:39
    Q Are you aware of any steps Mr. Lohnes took in the context of the Westside transaction in particular to inquire from either Fortrend or Mr. Tricarichi's lawyers how Fortrend planned to minimize the tax obligations of Westside following closing? 11:26:41 11:26:59 11:27:01 11:27:04 11:27:08 11:27:13
    A I think we had conversations with the lawyers, with Jeff Folkman. I don't remember specific discussions around what you just asked. 11:27:14 11:27:18 11:27:21
    Q Are you aware of anybody at PwC proposing to Mr. Tricarichi or his lawyers that somebody needed to further investigate the manner in which Fortrend planned to avoid the tax obligations of Westside following the closing of the transaction? 11:27:29 11:27:32 11:27:37 11:27:41 11:27:45
        MR. LANDGRAFF: Object to form. 11:27:48
BY THE WITNESS: 11:27:49
    A I'm not -- I'm not aware, no. We -- we represented -- we weren't privy to the buyer's actions post-closing. 11:27:49 11:27:52 11:27:55
BY MR. HESSELL: 11:27:57
    Q Well, you were privy to them, that's why you set forth these facts, right? 11:27:58 11:28:00

A To the extent we set them forth, we were privy, but we weren't privy to any of the details post-closing. We were consulting on the transaction itself. 11:28:02 11:28:04 11:28:08 11:28:10
Q But you did understand that how Westside planned to deal with the corporate tax liabilities post-closing could create additional exposure for your client, Mr. Tricarichi, right? 11:28:11 11:28:15 11:28:18 11:28:22
A We were aware of the facts as we knew them and -- and that played into the -- to the more-likely-than-not conclusion that we -- that we reached. 11:28:26 11:28:35 11:28:43 11:28:46
So there was risk in the transaction and -- and so we were aware of -- and that's one of the factors that -- that led to our conclusion. 11:28:46 11:28:54 11:28:58
Q By the way, on PX -- which do you have open right now? Because it doesn't really -- 11:29:01 11:29:07
A 4. 11:29:09
Q Okay. On PX 4 where it says, "Note: All conclusions," do you see -- 11:29:10 11:29:15
A Yes. 11:29:17
Q Was -- was that language you came up with? 11:29:17
A Yes. 11:29:28
Q So what was your understanding in 2003 on the difference between a more-likely-than-not 11:29:29 11:29:31

opinion and other levels of -- of tax opinions that were available? 11:29:35 11:29:38

A I believe I had a good understanding of the levels of confidence that can be concluded, and in this case, more likely than not meaning at least more than 50 percent was the conclusion we came to. 11:29:40 11:29:50 11:29:56 11:30:03 11:30:07

Q When you say "we came to," who decided that the level of opinion that you had reached -- you, PwC, had reached was -- was more likely than not as opposed to some higher standard? 11:30:09 11:30:14 11:30:19 11:30:22

A I can't recall specifically. I think it was a collective determination. 11:30:26 11:30:31

Q Well, when did you add -- when in time did you add this note to PX 4? 11:30:34 11:30:37

A Yeah, I don't know. 11:30:41

Q You can't say any period of time between April 13th and closing when you added this note to PX 4, the note about the level of the opinion? 11:30:47 11:30:49 11:30:54

A I can't recall any specific point in time when I wrote any of the notes or typed any of the language in the -- in the memo. 11:30:57 11:30:59 11:31:02

Q So I take it then you can't say as you sit here today when the note regarding the -- the more-likely-than-not level of the opinion was 11:31:04 11:31:07 11:31:12

added to PX 4? 11:31:14
A No, as I sit here today, you know, 17 years later, no, I can't tell you that with any -- with specificity. 11:31:16 11:31:20 11:31:23
Q Why did you note that no written answers were provided to Tricarichi? 11:31:25 11:31:28
A Just stating a fact. 11:31:31
Q I know, but why was that important to add to the memo? 11:31:34 11:31:37
A So that the file can stand on its -- on its own. So if somebody was looking at it, they wouldn't be looking for another document. 11:31:39 11:31:42 11:31:45
Q Can you say whether any of the notes that you've added -- that you added to PX 4 for sure happened -- sorry. Strike that. 11:31:47 11:31:49 11:31:53
Were all of the conclusions in the memo discussed with both Mike Tricarichi and Jim Tricarichi? 11:32:25 11:32:29 11:32:32
A I can't say with certainty. We often, as we do in most transactions, dealt with Jeff Folkman as well as Jim Tricarichi. And I know we communicated with them quite a bit. 11:32:32 11:32:44 11:32:49 11:32:53
We communicated with Mike as well, but I can't say that every conclusion was discussed specifically with -- with Mr. Tricarichi. 11:32:57 11:32:59 11:33:00

were -- that PwC was comfortable with? 11:34:21
    A I can't specifically recall discussions, but that's -- that was the -- the matter in which we provided services and decisions. 11:34:23 11:34:30 11:34:39
    Q So are you saying that you would have made a collective decision but you don't have a specific recollection of any conversation where that decision was reached? 11:34:46 11:34:47 11:34:49 11:34:52
    A It wouldn't be one conversation. It would be conversations throughout the entire process. 11:34:55 11:34:58
    Q Why was it important to determine the level of PwC's opinion, meaning what level opinion? 11:35:02 11:35:04 11:35:11
    A Because PwC wants to -- wanted to communicate the level of confidence we had in the advice provided. 11:35:11 11:35:15 11:35:23
    Q But as you sit here today, I think your testimony is you don't recall a conversation with Mr. Tricarichi -- Mike Tricarichi or Jim Tricarichi where you did so communicate that level of -- or what the levels of your confidence were? 11:35:24 11:35:29 11:35:32 11:35:36 11:35:38
        MR. LANDGRAFF: Object to form. 11:35:43
BY THE WITNESS: 11:35:45
    A Yeah, as I sit here today, I don't recall specifically. But my notes indicate that we did 11:35:45 11:35:47

have those conversations. 11:35:50
BY MR. HESSELL: 11:35:52
Q But you don't know when you added that note, right? 11:35:52 11:35:55
A Yeah, I don't -- I can't recall specifically when I added that note. 11:35:55 11:35:59
Q And can you say with certainty as you sit here -- or strike that. 11:36:01 11:36:03
I take it you can't say with certainty as you're sitting here today that with respect to each of the conclusions that PwC reached about the federal tax implications that you used the verbiage "more likely than not" with Mr. Tricarichi or Jim Tricarichi -- Mike Tricarichi or Jim Tricarichi? 11:36:05 11:36:08 11:36:10 11:36:13 11:36:17 11:36:21 11:36:25
MR. LANDGRAFF: Object to the form. 11:36:28
BY THE WITNESS: 11:36:29
A Can you repeat that. 11:36:29
BY MR. HESSELL: 11:36:30
Q I take it you can't say with certainty as you're sitting here today that with respect to PwC's conclusions on the federal tax implications, that you used the verbiage "more likely than not" with Mike Tricarichi, correct? 11:36:31 11:36:34 11:36:37 11:36:41 11:36:47
MR. LANDGRAFF: Object to the form. 11:36:50

BY THE WITNESS: 11:36:51

A Well, that's why I -- I wrote it down. 11:36:51

BY MR. HESSELL: 11:36:54

Q That's not what I asked you. 11:36:54

A Well, then ask again. 11:36:58

MR. LANDGRAFF: Asked and answered. 11:37:00

BY MR. HESSELL: 11:37:02

Q My question is that, I take it as you're sitting here today, you can't say with certainty that with respect to PwC's conclusions on each of the conclusions on the federal tax implications, that you actually used the verbiage "more likely than not" with Mike Tricarichi, correct? 11:37:02 11:37:05 11:37:09 11:37:13 11:37:16 11:37:19

MR. LANDGRAFF: Object to the form. 11:37:23

BY THE WITNESS: 11:37:26

A Are you asking whether I can recall a specific dialogue? 11:37:26 11:37:28

BY MR. HESSELL: 11:37:34

Q I'm asking whether you can say under oath that you actually used that verbiage "more likely than not" when you -- when you communicated each of the conclusions that PwC reached on the federal tax implications of the transaction? 11:37:35 11:37:39 11:37:47 11:37:49 11:37:51

MR. LANDGRAFF: Object to the form. 11:37:55

BY THE WITNESS: 11:37:56
A As I sit here today, I can't recall that I had dinner those days, but I'm -- I -- because I can't recall it specifically, but I'm pretty sure I did have dinner those days. 11:37:57 11:38:06 11:38:11 11:38:13
The -- the reason I document and wrote things down is so I would have memorialized those conversations. 11:38:14 11:38:17 11:38:24
BY MR. HESSELL: 11:38:26
Q I understand why you documented things, and we've already gone over that. And my question was to clarify that, as you're sitting here today, you don't recall that you actually used that language when you communicated federal tax implication conclusions of the Westside transaction to Mr. Tricarichi, right? 11:38:33 11:38:35 11:38:37 11:38:42 11:38:45 11:38:50 11:38:53
MR. LANDGRAFF: Object to the form. Asked and answered. 11:38:55 11:38:58
BY THE WITNESS: 11:38:58
A I don't specifically recall a conversation. 11:38:58 11:39:03
BY MR. HESSELL: 11:39:04
Q And as to what you have written down here, did you explain to Mr. Tricarichi what the significance of more likely than not was as to 11:39:04 11:39:13 11:39:14

PwC's federal tax conclusions about the Westside transactions? 11:39:18 11:39:33

A I don't recall specific discussions, but more -- more likely than not is self-explanatory. 11:39:33 11:39:38

Q So I take it that you don't recall explaining to Mr. Tricarichi as to what you have written down in PX 4 what the meaning of more likely than not would be to a nonCPA, nonlawyer client, correct? 11:39:44 11:39:51 11:39:57 11:40:02 11:40:08

A Correct. I don't have -- as I sit here today, I don't have a specific recollection of that. 11:40:10 11:40:14 11:40:15

Q At the time in 2003, did you have an understanding of what the business purpose was for Fortrend in entering into this transaction? 11:40:21 11:41:02 11:41:07

A Well, the -- you know, there was a seller who wanted to sell stock. Which is typical, sellers always want to sell stock for tax and non-tax reasons. There was a buyer who wanted to buy stock. Presumably there was -- there was cash in the company and that was the attribute that they wanted. And so that was the -- the business purpose. 11:41:11 11:41:18 11:41:23 11:41:26 11:41:29 11:41:36 11:41:38 11:41:50

Q But they had to borrow -- Fortrend had to borrow $35 million in order to purchase the stock 11:41:50 11:41:55

of Westside, correct? 11:41:59
A I don't recall specifically, but I believe 11:42:00
that's the case. 11:42:03
Q And the purchase price was roughly 11:42:04
$35 million, right? And you knew that Fortrend -- 11:42:07
prior to closing on this transaction, Fortrend was 11:42:16
going to have to borrow $35 million from Rabobank 11:42:19
in order to pay for the stock of Westside, right? 11:42:23
A Yes. You know, I wasn't privy to their 11:42:30
transaction, but they wanted that -- that 11:42:33
attribute of the asset so they must have needed it 11:42:37
for some reason. 11:42:40
Q So are you telling me that prior to 11:42:41
closing on the transaction, PwC did not in any way 11:42:44
investigate what possible business reason Fortrend 11:42:55
could have for wanting to borrow 35 million to buy 11:43:00
a bank account with 40 million plus tax 11:43:04
liabilities? 11:43:08
A We didn't investigate that. It wasn't our 11:43:10
role to investigate that. 11:43:14
Q Did PwC ever recommend to Mr. Tricarichi 11:43:16
or any of his representatives that somebody should 11:43:19
investigate what possible business purpose there 11:43:22
was for Fortrend to pay $35 million in order to 11:43:27
buy a company who had $40 million in the bank but 11:43:33

Q I want to go back to the first time you learned about potential -- about the transaction involving the potential sale of -- of Mike Tricarichi's stock in Westside. 15:41:39 15:41:41 15:41:44 15:41:51
How did you come to learn about that potential transaction? 15:41:53 15:41:57
A Jim Tricarichi reached out to me. 15:41:58
Q What did Jim Tricarichi ask you to do? 15:42:04
A He asked us to -- I believe there was an email, but he asked us to look at the transactions -- or tax consequences of the transactions. I'd have to look at the email specifically to... 15:42:08 15:42:13 15:42:18 15:42:24 15:42:26
Q Were you asked by Jim Tricarichi or anyone associated with Westside to find a buyer for Mr. Tricarichi's stock in Westside? 15:42:28 15:42:31 15:42:37
A No. No, the parties were, you know, brought in by others. 15:42:39 15:42:47
Q Were -- were you or PwC asked to perform due diligence relating to the transaction? 15:42:49 15:42:53
A No. 15:42:56
Q Is there a group at PwC who is available to be retained to perform due diligence? 15:43:02 15:43:05
A Yes. 15:43:07
Q Is that -- is that part of the National 15:43:07

Tax practice or part of your group? 15:43:13
MR. HESSELL: Objection -- 15:43:13
BY THE WITNESS: 15:43:13
A No, it's -- 15:43:15
MR. HESSELL: -- leading. 15:43:17
You can answer. 15:43:21
BY THE WITNESS: 15:43:22
A That group is a part of our -- there's a due diligence practice. At the time I don't know where it sat. I think it sat in -- in the assurance practice. 15:43:22 15:43:34 15:43:36 15:43:38
BY MR. LANDGRAFF: 15:43:45
Q Were you asked to prepare Mr. Tricarichi's tax returns? 15:43:45 15:43:48
A I don't believe so, no. 15:43:48
Q Did Mr. Tricarichi or any of his representatives on his team ask you whether PwC had a relationship with Fortrend? 15:43:49 15:43:55 15:43:59
A I don't believe so, no. 15:44:03
Q Do you have any understanding as to how Fortrend came to be involved in the transaction? 15:44:04 15:44:09
A I think I have a note that says they were brought in either by Jeff Folkman or another -- another lawyer in town who was somehow connected to the -- the transaction, but I never -- never 15:44:13 15:44:18 15:44:24 15:44:30

heard his name after that. 15:44:36
MR. LANDGRAFF: So I'm going to ask Mike to put up exhibit -- PwC Deposition Exhibit 9 onto the screen. 15:44:38 15:44:42 15:44:47
(WHEREUPON, the document was presented to the witness.) 15:44:47 15:44:58
MR. LANDGRAFF: And if you would, Mike, scroll through it and then come back to the first page, please. 15:44:58 15:45:00 15:45:03
BY MR. LANDGRAFF: 15:45:05
Q Mr. Stovsky, I'm just going to ask you to look at Exhibit 9 while Mike scrolls through it, and then I'm going to ask you to identify it. 15:45:06 15:45:08 15:45:11
Having scrolled through that PwC Deposition Exhibit 9, could you identify what that is, Mr. Stovsky? 15:46:29 15:46:32 15:46:34
A Yes, that's our -- our engagement letter for the engagement with Mr. Tricarichi and Westside Cellular. When I say "our," PwC's. 15:46:35 15:46:39 15:46:42
Q And in the second line on the first page of PwC Deposition Exhibit 9, it says, "This engagement letter and the" -- and it says in bold -- "attached terms of engagement to provide tax services (collectively this agreement) set forth an understanding of the nature and scope of 15:46:49 15:46:52 15:46:59 15:47:02 15:47:06 15:47:10

ultimately come to a different conclusion than the one -- than the opinion expressed by the tax professional? 15:55:30 15:55:34 15:55:39

MR. HESSELL: Objection, foundation. 15:55:44

BY THE WITNESS: 15:55:48

A Well, mathematically I guess it's 49.99 percent. If that's what you're asking for. 15:55:49 15:55:52

BY MR. LANDGRAFF: 15:55:57

Q That is. Did you -- did you ever get feedback from a client where the client said, "I don't understand what more likely than not means"? 15:55:57 15:56:00 15:56:05

MR. HESSELL: Objection, leading. 15:56:14

BY THE WITNESS: 15:56:17

A I can't recall a client asking me that. 15:56:18

BY MR. LANDGRAFF: 15:56:23

Q I want you to go back now to Exhibit 40 that you reviewed earlier in the day with Mr. Hessell. 15:56:29 15:56:33 15:56:37

Do you have that in front of you? 15:56:49

A Yes. 15:56:50

Q So now we're back to Plaintiff's Exhibit 40. And you testified that these are the compiled invoices that you sent for the work that PwC performed on the -- on the Westside stock sale; is that correct? 15:56:53 15:56:55 15:56:57 15:57:00 15:57:06

A Yes. 15:57:07
Q And what's the date of the latest invoice in Exhibit 40? 15:57:07 15:57:13
A October 29, 2003. 15:57:15
Q And what time period is -- is covered by that invoice? 15:57:19 15:57:27
A Through September 30th, 2003. 15:57:34
Q Are you aware of any other -- are you aware of any later invoices sent to Mr. Tricarichi? 15:57:36 15:57:40 15:57:43
A No. 15:57:44
Q Was PwC engaged to perform any work for Mike Tricarichi after this time period in 2003? 15:57:45 15:57:51
MR. HESSELL: Objection, form. 15:57:56
BY THE WITNESS: 15:57:59
A No, not that I'm aware of. 15:57:59
BY MR. LANDGRAFF: 15:58:01
Q If you would turn to Plaintiff's Exhibit 1. 15:58:02 15:58:14
A Yes. 15:58:14
Q Plaintiff's Exhibit 1 is the email you testified about earlier from you to Jim Tricarichi on November 15th, 2003, enclosing some billing detail and requesting payment. 15:58:15 15:58:17 15:58:21 15:58:29
Do you see that? 15:58:31

A Yes. 15:58:32
Q Why were you sending this information in 15:58:32
this request to Jim Tricarichi? 15:58:40
A He must have requested it. 15:58:41
Q And did Mike Tricarichi or -- or his 15:58:43
representatives pay PwC for all the work that was 15:58:50
performed? 15:58:53
A Yes. 15:58:53
Q Do you -- do you know of any communication 15:58:54
after November 15th, 2003, between you and 15:58:59
Mr. Tricarichi or any of Mr. Tricarichi's 15:59:06
representatives about invoices for work performed 15:59:08
by PwC? 15:59:10
A After this date? 15:59:16
Q Correct. 15:59:18
A Not that I'm aware of. 15:59:18
Q Okay. I want to switch gears now and talk 15:59:20
about the summons that you received in 2008. You 15:59:26
testified about that -- 15:59:30
A Yes. 15:59:33
Q -- in the last session. 15:59:33
Before you received that summons, had you 15:59:36
heard anything from Mike Tricarichi about the sale 15:59:44
of the Westside transaction -- sale of the 15:59:48
Westside stock? So between 2003 and -- you know, 15:59:52

September 2003 and early 2008, had you heard anything from Mike Tricarichi or any of his representatives. 15:59:56 16:00:00 16:00:03
MR. HESSELL: Objection. 16:00:06
THE WITNESS: I'm sorry? 16:00:09
MR. HESSELL: I just objected. Go ahead. 16:00:10
THE WITNESS: Oh, okay. 16:00:11
BY THE WITNESS: 16:00:12
A Just before I received the summons, Jim Tricarichi had called me and told me that the IRS was examining or -- or auditing, whatever, just before that. 16:00:15 16:00:21 16:00:26 16:00:37
BY MR. LANDGRAFF: 16:00:38
Q So between the closing of the Westside stock sale and when Jim Tricarichi communicated you -- communicated with you just before you received the IRS summons in early 2008, had you heard anything from Mike Tricarichi or his representatives about the Westside stock sale? 16:00:38 16:00:43 16:00:47 16:00:49 16:00:52 16:00:55
A Not that I can recall, no. 16:00:58
Q And you told -- you testified in questioning -- in response to questioning by Mr. Hessell that you invited Mike Tricarichi and -- and Randy Hart to review the materials that you were going to provide to the IRS in response 16:01:00 16:01:03 16:01:07 16:01:11 16:01:15

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to the summons; is that right? 16:01:18
A That's right. 16:01:20
Q At that point, did Mike Tricarichi ask you or anyone at PwC to take another look at the Westside stock sale transaction? 16:01:22 16:01:25 16:01:31
A Not that I can recall, no. 16:01:35
Q Did Mike Tricarichi or any of his representatives attempt to re-engage PwC to perform any services for him? 16:01:36 16:01:39 16:01:42
A No. 16:01:44
Q Did Mike Tricarichi or any of his representatives in 2008 ask you or PwC to reassess your earlier advice? 16:01:44 16:01:48 16:01:56
A Not that I can recall. 16:01:57
Q Did Mike Tricarichi or any of his -- any of his representatives ask PwC for any professional services at all? 16:01:58 16:02:04 16:02:06
MR. HESSELL: Objection to form. 16:02:19
BY THE WITNESS: 16:02:21
A Not that I can recall. 16:02:21
BY MR. LANDGRAFF: 16:02:23
Q Did Mike Tricarichi or any of his representatives ask you or PwC to keep him up to date on changes in the tax laws? 16:02:23 16:02:26 16:02:29
A No. 16:02:31

Q I want you to turn to Exhibit -- Plaintiff's Exhibit 14 that you reviewed earlier with Mr. Hessell. This is the February 22nd letter -- February 22nd, 2008 letter from you to Ms. McCaskill at the IRS. 16:02:32 16:02:40 16:02:41 16:02:50 16:02:55

A Yes. 16:02:58

Q And in the middle of the letter you see the statement -- your statement that -- actually, it's the second and third sentence. You say, "Please note that PricewaterhouseCoopers, LLP, (PwC) was engaged by Michael Tricarichi and Westside Cellular, Inc., solely to perform state, local, and federal tax research and evaluation services related to the sale of Mr. Tricarichi's stock in Westside Cellular, Inc. PwC provided no services to Mr. Tricarichi or Westside Cellular, Inc. after this engagement." 16:02:58 16:03:07 16:03:19 16:03:21 16:03:25 16:03:29 16:03:31 16:03:34 16:03:37 16:03:40 16:03:44

What -- what did you mean by that? 16:03:47

A Just what it said. 16:03:49

Q Can you explain -- what -- what did you mean by the fact -- or by your statement that PwC provided no services to Mr. Tricarichi or Westside Cellular after the engagement. 16:03:53 16:03:55 16:03:59 16:04:03

MR. HESSELL: Objection, form. 16:04:09

C E R T I F I C A T E   O F   R E P O R T E R

I, MICHELLE M. YOHLER, a Certified Shorthand Reporter within and for the County of Cook, State of Illinois, do hereby certify:

That previous to the commencement of the examination of the witness, the witness was duly sworn to testify the whole truth concerning the matters herein;

That the foregoing deposition transcript was reported stenographically by me, was thereafter reduced to typewriting under my personal direction and constitutes a true record of the testimony given and the proceedings had;

That the said deposition was taken remotely before me at the time and place specified;

That I am not a relative or employee or attorney or counsel, nor a relative or employee of such attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action.

IN WITNESS WHEREOF, I do hereunto set my hand and affix my seal of office at Chicago, Illinois, this 14th day of September, 2020.

Michelle M. Yohler

____

Michelle M. Yohler, CSR, RMR, CRR
Certified Shorthand Reporter
CSR No.: 84-4531

Exhibit 8