No

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSE COOPERS LLP,

Petitioner,

Electronically Filed Jan 25 2021 10:32 a.m. 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 III

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Affidavit of Michael A. Tri- carichi in Support of Plain- tiff's Opposition to Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment	04/10/2017	Ι	APP0072- APP0076
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Appendix of Exhibits in Support of PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand, Volume 1 of 4	11/13/2020	II-III	APP0307- APP0540
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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

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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 $Attorneys\ for\ Petitioner$

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 III by the method indicated:

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

Honorable Elizabeth Gonzalez Regional Justice Center 200 Lewis Ave. Las Vegas, Nevada 89101

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

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/s/Maricris Williams

An Employee of Snell & Wilmer L.L.P.

4816-4909-6920.1

PRICEWATERHOUSE COOPERS @

RPS . 1 (1) 1/-

May 20, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 Invoice Number 4187-019547-0

INVOICE FOR SERVICES
PricewaterhouseCoopers LLP
P.O. Box 75647
Chicago, IL 60675-5647

For tax services rendered through April 30, 2003.

Progress billing for tax services rendered pursuant to Engagement Letter.

(Payment Due Within 30 Days).

Total Invoice

\$6,766.00

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 May 20, 2003 Invoice Number Invoice Amount

4187-019547-0 \$6,766.00

EXHIBIT PwC Dep Ex. No. **28**A-16-735910-B

EXHIBIT 51-J

PWC-WS 1214

TRICAR-NV0007532

PRICEWATERHOUSE COOPERS @

June 27, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122

Invoice Number 4187-020218-5

INVOICE FOR SERVICES
PricewaterhouseCoopers LLP
P.O. Box 75647 Chicago, IL 60675-5647

For tax services rendered through May 31, 2003.

Progress billing for tax services rendered pursuant to Engagement letter.

(Payment Due Within 30 Days).

Total Invoice

\$12,884.00

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122

June 27, 2003 Invoice Number 4187-020218-5 Invoice Amount \$12,884.00

PWC-WS 1215

113 TRICAR-NV0007533

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July 31, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 Invoice Number 4187-020640-0

INVOICE FOR SERVICES
PricewaterhouseCoopers LLP
P.O. Box 75647
Chicago, IL 60675-5647

For tax services rendered through June 30, 2003:

Progress billing for tax services rendered pursuant to Engagement letter.

(Payment Due Within 30 Days).

Total Invoice

\$4,000.00

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 July 31, 2003 Invoice Number Invoice Amount

4187-020640-0 \$4,000.00

PRICEWATERHOUSE COPERS @

Naclar 8-27-03

August 27, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 Invoice Number 4187-020919-8

INVOICE FOR SERVICES PricewaterhouseCoopers LLP P.O. Box 75647 Chicago, IL 60675-5647

For tax services rendered through July 31, 2003:

Progress billing for tax services rendered pursuant to Engagement letter.

(Payment Due Within 30 Days).

Total Invoice

\$3,892.00

\$3,892.00 ========

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 August 27, 2003 Invoice Number Invoice Amount

4187-020919-8 \$3,892.00



September 29, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 Invoice Number 4187-021375-2

INVOICE FOR SERVICES PricewaterhouseCoopers LLP P.O. Box 75647 Chicago, IL 60675-5647

For tax services rendered through August 31, 2003:

Progress billing for tax services rendered pursuant to Engagement letter.

(Payment Due Within 30 Days).

Total Invoice

\$18,811.00

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122

September 29, 2003 Invoice Number 4187-021375-2 Invoice Amount \$18,811.00

PRICEWATERHOUSE COOPERS @

October 29, 2003

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 Invoice Number 4187-021796-9

PricewaterhouseCoopers LLP P.O. Box 75647 Chicago, IL 60675-5647

For tax services rendered through September 30, 2003:

Progress billing for tax services rendered pursuant to Engagement letter and 2003 estimated payment calculation.

(Payment Due Within 30 Days).

Total Invoice

\$2,199.00

Contact: Richard P Stovsky (216) 875-3111 Engagement No. 659487-9158-00

Mr. Michael A. Tricarichi Westside Cellular, Inc. 23632 Mercantile Drive Beachwood, OH 44122 October 29, 2003 Invoice Number 4187-021796-9 Invoice Amount \$2,199.00

Exhibit 9

1	DISTRICT COURT
2	CLARK COUNTY, NEVADA
3	x
4	MICHAEL A. TRICARICHI, :
5	Plaintiffs, :
6	v. : Civil Action No.
7	PRICEWATERHOUSECOOPERS : A-16-735-910-B
8	LLP, COOPERATIVE : Department No. XI
9	RABOBANK U.A., :
10	UTRECHT-AMERICA FINANCE :
11	CO., SEYFARTH SHAW LLP, :
12	and GRAHAM R. TAYLOR, :
13	Defendants. :
14	x
15	
16	REMOTE DEPOSITION of MICHAEL A. TRICARICHI
17	Thursday, October 1, 2020
18	9:01 a.m.
19	
20	
21	
22	
23	Job No.: 323672
24	Pages: 1 - 339
25	Reported By: Michelle M. Yohler, CSR, RMR, CRR

1	Deposition of MICHAEL A. TRICARICHI, held
2	remotely pursuant to notice before Michelle M.
3	Yohler, CSR, RMR, CRR, a certified shorthand
4	reporter in and for the County of Will, State of
5	Illinois.
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1	
1	APPEARANCES
2	ON BEHALF OF THE PLAINTIFF:
3	MR. SCOTT HESSELL
4	MR. BLAKE SERCYE
5	SPERLING & SLATER
6	55 West Monroe Street, Suite 3200
7	Chicago, Illinois 60603
8	312.641.3200
9	shessell@sperling-law.com
10	bsercye@sperling-law.com
11	
12	ON BEHALF OF THE DEFENDANTS:
13	MR. CHRISTOPHER D. LANDGRAFF
14	BARTLIT BECK LLP
15	54 West Hubbard Street
16	Chicago, Illinois 60654
17	312.494.4400
18	chris.landgraff@bartlikbeck.com
19	
20	
21	ALSO PRESENT:
22	Mr. Dan Lohaus, Videographer
23	Mr. Lawrence Wallace, Technician.
24	
25	

Transcript of Michael A. Tricarichi Conducted on October 1, 2020

> PLANET DEPOS 888.433.3767 | WWW.PLANETDEPOS.COM

1	can't identify a single piece of paper that you	09:47:22
2	authored recounting your claimed conversation with	09:47:25
3	Rich Stovsky about the deal; is that correct?	09:47:29
4	A The answer to my question is to your	09:47:30
5	question is what I said. I don't think there's a	09:47:32
6	single piece of paper either way.	09:47:35
7	Q You mentioned your brother Jim. Jim	09:47:41
8	was Jim was your withdrawn.	09:47:45
9	Jim was the main contact with PwC for	09:47:49
10	regarding your side of the Westside sale; is that	09:47:54
11	fair?	09:47:57
12	A Yes.	09:47:57
13	Q And did Jim have your blessing to be the	09:48:01
14	conduit between you and PwC?	09:48:06
15	A He was the conduit between me and Rich	09:48:10
16	Stovsky.	09:48:12
17	Q And Rich Stovsky is who you communicated	09:48:12
18	with at PwC, right?	09:48:14
19	A Yes.	09:48:15
20	Q Did Jim Tricarichi have your blessing to	09:48:17
21	be the conduit between you and and Rich Stovsky	09:48:24
22	relating to the Westside sale?	09:48:28
23	A Yes, he was the conduit between me and	09:48:30
24	between Westside and Rich Stovsky.	09:48:34
25	Q And you trusted him with that role?	09:48:35
		1

1	A Yeah.	09:48:40
2	Q If you would turn it's probably in the	09:48:45
3	first binder to Exhibit 9.	09:48:53
4	MR. LANDGRAFF: And I'll ask that	09:48:58
5	Exhibit 9 be marked as PwC Exhibit 9.	09:49:00
6	MR. HESSELL: This one has already been	09:49:03
7	marked, right?	09:49:05
8	MR. LANDGRAFF: I believe so, Scott.	09:49:06
9	That's right.	09:49:09
10	(WHEREUPON, a certain document was marked	09:49:09
11	PwC Deposition Exhibit No. 9, for identification.)	09:49:09
12	BY THE WITNESS:	09:49:09
13	A I got it.	09:49:10
14	BY MR. LANDGRAFF:	09:49:10
15	Q Do you have that in front of you, sir?	09:49:11
16	A I do.	09:49:12
17	Q Did you receive Exhibit 9?	09:49:13
18	A No.	09:49:17
19	Q What did you did you what didn't	09:49:23
20	what part of Exhibit 9 did you not receive?	09:49:29
21	A I did not receive the page that's marked	09:49:30
22	PwC-02 002486.	09:49:39
23	Q Any other part of Exhibit 9 that you did	09:49:45
24	not receive?	09:49:47
25	A Yes.	09:49:48
		1

1	Q And can you tell us what other pages you	09:49:52
2	did you claim you did not receive?	09:49:55
3	A I don't I resent your using the words	09:50:00
4	"you claim" and wish you wouldn't do that.	09:50:03
5	PwC-002489 through 2491.	09:50:11
6	Q So it's your testimony that you did not	09:50:25
7	receive the terms and conditions that are part of	09:50:27
8	Exhibit 9; is that correct?	09:50:31
9	A It's my testimony that I didn't receive	09:50:32
10	the pages that I just outlined.	09:50:35
11	Q Now so you did receive and Exhibit 9	09:50:38
12	has two copies of the first page because there's	09:50:48
13	a there's a page that doesn't have any marking	09:50:51
14	on it on Exhibit 9.	09:50:53
15	But the the second page of Exhibit 9 is	09:50:54
16	a is the first page of a letter to you from	09:50:57
17	PwC. And that ends in the Bates number 485; is	09:51:00
18	that correct?	09:51:09
19	A The second page? Yeah, 485, that's the	09:51:09
20	second page. That has my strikeout on it.	09:51:12
21	Q Okay. So you received you received the	09:51:14
22	page ending in 485; is that fair?	09:51:16
23	A No, I made the page ending in 485. I	09:51:19
24	received the page ending in 484.	09:51:22
25	Q Okay. So you received 484 and you	09:51:24
		l .

1	marked your marking is shown on 485?	09:51:27
2	A Correct.	09:51:31
3	Q And then we'll talk about 486, but then	09:51:31
4	you received or your marking shows up on	09:51:34
5	Page 487; is that correct?	09:51:39
6	A That's correct.	09:51:41
7	Q And and then your signature appears on	09:51:41
8	the Page 488; is that correct?	09:51:45
9	A That's correct.	09:51:49
10	Q Okay. So let's go back to Page 485 of	09:51:49
11	Exhibit 9 that you said contains your strikeout.	09:52:00
12	A Yeah.	09:52:03
13	Q So on Page 485 of Exhibit 9, you it's	09:52:04
14	your strikeout, you crossed out the statement on	09:52:13
15	the on this page saying, quote, "You agree to	09:52:15
16	advise us if you determine that any other matter	09:52:18
17	covered by this agreement is a reportable	09:52:22
18	transaction that is required to be disclosed under	09:52:24
19	Section 1.6011-4."	09:52:28
20	Is that correct?	09:52:34
21	A That's correct.	09:52:35
22	Q Why did you strike that out?	09:52:35
23	A Because I didn't want Pricewaterhouse to	09:52:38
24	have an out.	09:52:43
25	Q What do you mean by that?	09:52:43
		I

1	A Well, look at what you're doing now.	09:52:44
2	You're trying to get out of standing behind advice	09:52:50
3	that you gave. So I looked at this and said, oh,	09:52:54
4	that's a possible out for PwC. They could always	09:52:58
5	say that we should have advised them that this was	09:53:03
6	a reportable transaction.	09:53:06
7	The point of the matter was I had no idea	09:53:09
8	what a what a reportable transaction was.	09:53:12
9	That's one of the reasons why PwC was hired. So I	09:53:16
10	can't understand why there would be a paragraph in	09:53:21
11	their retention agreement that would ask me to	09:53:25
12	make the determination that there was a reportable	09:53:27
13	transaction.	09:53:29
14	That's why we hired PwC. That's one of	09:53:30
15	the things that PwC was charged with doing was	09:53:33
16	determining whether this was a reportable	09:53:37
17	transaction or not.	09:53:41
18	So to me that was a clear conflict in the	09:53:42
19	retention letter. And I don't like conflicts in	09:53:45
20	retention letters.	09:53:49
21	Q Hahn Loeser had told you the transaction	09:53:52
22	was not a reportable transaction, right?	09:53:54
23	A Yeah.	09:53:57
24	Q Did and who told you that from	09:53:57
25	Hahn Loeser?	09:54:03

1	Services?	10:22:12
2	A Yeah.	10:22:12
3	Q So if you'd flip to Page 489, the Bates	10:22:12
4	number ending in 489 of Exhibit 9.	10:22:18
5	A 489? Yeah, I got it.	10:22:26
6	Q And the top of the page, it's it's a	10:22:29
7	little there's like a hole punch that knocks	10:22:30
8	out a little bit out, but do you see the title	10:22:34
9	at the top of that page?	10:22:36
10	A Yeah.	10:22:38
11	Q "Terms of Engagement to Provide Tax	10:22:38
12	Services"?	10:22:40
13	A Yeah.	10:22:41
14	MR. HESSELL: Objection.	10:22:41
15	BY MR. LANDGRAFF:	10:22:42
16	Q So the the title on Page 489 matches	10:22:42
17	the bold language on Page 485 that you edited,	10:22:45
18	correct?	10:22:50
19	A It matches the page that I edited, yeah,	10:22:51
20	the language on the page, sure.	10:22:54
21	Q And your signature appears on Page 488 of	10:22:56
22	Exhibit 9; is that right?	10:23:06
23	A That's right.	10:23:10
24	Q And so does Pricewaterhouse's signature,	10:23:12
25	right?	10:23:16

Transcript of Michael A. Tricarichi Conducted on October 1, 2020

\neg	1
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-	1

1	A Well	10:23:16
2	MR. HESSELL: Objection, foundation.	10:23:16
3	BY THE WITNESS:	10:23:18
4	A I've never seen something signed by a	10:23:18
5	corporation, so, yeah, that's what it says, but I	10:23:22
6	don't believe that to be a valid contractual	10:23:25
7	signature.	10:23:28
8	BY MR. LANDGRAFF:	10:23:29
9	Q The only other thing other than the	10:23:29
10	signatures on Page 488 of Exhibit 9 that you	10:23:33
11	signed says "Enclosure(s): Terms of Engagement to	10:23:37
12	Provide Tax Services."	10:23:42
13	Do you see that?	10:23:44
14	A I do.	10:23:45
15	MR. HESSELL: Objection to the form of the	10:23:46
16	question.	10:23:47
17	BY MR. LANDGRAFF:	10:23:47
18	Q Now, it's your claim that you did not get	10:23:47
19	a version of the engagement agreement with the	10:23:50
20	Terms of Engagement to Provide Tax Services,	10:23:55
21	right?	10:23:58
22	A I have never seen this document before	10:23:58
23	these depositions.	10:24:00
24	Q If, as you claim, you didn't get a copy of	10:24:01
25	the Terms of Engagement to Provide Tax Services,	10:24:06

1	did you ask where they were when you saw them on	10:24:09
2	Page 1 of Exhibit 9?	10:24:12
3	A I don't believe so, no.	10:24:14
4	Q If, as you claim, you didn't get a copy of	10:24:15
5	the terms of engagement to provide tax services,	10:24:20
6	did you ask where the enclosure was that's	10:24:23
7	referred to right above your signature?	10:24:25
8	A Well, there's an "S" on the end of	10:24:27
9	"enclosure," so where's the other one?	10:24:32
10	Q Did you ask where any enclosures were?	10:24:34
11	A No, I don't believe that I did. I assumed	10:24:36
12	that this was the agreement.	10:24:38
13	Q And	10:24:39
14	A I've never let me put it this way:	10:24:43
15	I've done plenty of of of engagement	10:24:46
16	letters. This would be if if I saw this	10:24:49
17	document attached to the engagement letter, this	10:24:50
18	would have been the first one of its kind because	10:24:53
19	I've never gotten an engagement letter that had a	10:24:55
20	separate attached sheet that wasn't part of the	10:24:58
21	of the engagement letter itself that didn't have a	10:25:02
22	signature line or initial line or something for me	10:25:07
23	to acknowledge that I received it.	10:25:09
24	And if I had received this particular	10:25:10
25	document, I would have made changes to it.	10:25:14
		i

		1
1	Q What would you have made changes to?	10:25:17
2	A I would have struck number seven,	10:25:19
3	"Limitations of Liability" because that would	10:25:24
4	defeat me that would defeat my purpose of	10:25:29
5	hiring you in the first place.	10:25:32
6	And I would have struck the part about	10:25:33
7	New York law.	10:25:39
8	Q Anything else you would have struck?	10:25:42
9	MR. HESSELL: Objection	10:25:45
10	BY THE WITNESS:	10:25:46
11	A No.	10:25:47
12	MR. HESSELL: speculation.	10:25:48
13	BY THE WITNESS:	10:25:51
14	A I don't know.	10:25:51
15	BY MR. LANDGRAFF:	10:25:51
16	Q Why would the limitation of liability	10:25:52
17	defeat your purpose of hiring PwC? Was your	10:25:54
18	purpose to sue them?	10:25:58
19	A You want me to answer that? No, my	10:25:59
20	purpose was to get tax advice on a \$40 million	10:26:05
21	deal.	10:26:09
22	Q And why would a limitation of liability	10:26:12
23	defeat the purpose of hiring PwC?	10:26:14
24	A Because I'm not going to be limited in	10:26:18
25	if your advice goes bad, I'm not going to be	10:26:22
		1

1	limited to what I paid you for your advice.	10:26:26
2	I'm going to want I'm going to	10:26:29
3	if if there's punitives, I'm going to want	10:26:31
4	punitives. If there's penalties, I'm going to	10:26:34
5	want penalties.	10:26:37
6	I would never have signed that. Ever.	10:26:38
7	Q Did you ask anyone to review the	10:26:44
8	engagement agreement between you and PwC to give	10:26:46
9	you feedback?	10:26:49
10	A No.	10:26:50
11	Q Did you run it by Randy Hart?	10:26:52
12	A I may have.	10:26:55
13	Q Well, which is it, did you	10:26:58
14	A I don't know. I don't recall.	10:27:00
15	Q Okay. You don't do you have any	10:27:03
16	recollection of asking anyone to review the	10:27:04
17	engagement agreement between you and PwC?	10:27:07
18	A I may have. I don't recall.	10:27:09
19	Q Do you recall asking your brother, Jim	10:27:12
20	Tricarichi, to look at the engagement agreement?	10:27:14
21	A Oh, I'm sure Jim looked at the engagement	10:27:17
22	agreement.	10:27:20
23	Q Why	10:27:20
24	A I'm not sure, but I'm assuming that he	10:27:21
25	did.	10:27:23
		1

1	Q Why do you assume he did?	10:27:23
2	A Because Stovsky and him were the ones that	10:27:25
3	were communicating.	10:27:27
4	Q You Jim Tricarichi didn't sign the	10:27:28
5	letter, right?	10:27:30
6	A No, I signed it. I didn't say I didn't	10:27:32
7	review it. You asked me if I had anyone else	10:27:35
8	review it.	10:27:37
9	And you asked me specifically about Randy	10:27:38
10	Hart, and I said I didn't recall. Now you're	10:27:41
11	asking me about Jim, and I'm saying it's more	10:27:43
12	likely than not that Jim reviewed this letter but	10:27:45
13	I can't say for certain.	10:27:48
14	Q And why is it more likely than not that	10:27:51
15	Jim reviewed the letter?	10:27:53
16	A Because Jim was involved in the	10:27:53
17	transaction.	10:27:55
18	Q Did you ask Mr. Folkman to review the	10:28:00
19	letter?	10:28:03
20	A I don't have any recollection of that.	10:28:04
21	Q Did you ask Carla Tricarichi to review the	10:28:09
22	letter?	10:28:11
23	A I don't have any recollection of that	10:28:11
24	either.	10:28:15
25	Q Page 1 of Exhibit 9 or the you could	10:28:15

1	MR. LANDGRAFF: Hold on one second.	10:32:03
2	I'm asking this be marked as PwC	10:32:03
3	Exhibit 28.	10:32:05
4	(WHEREUPON, a certain document was marked	10:32:05
5	PwC Deposition Exhibit No. 28, for	10:32:05
6	identification.)	10:32:12
7	BY THE WITNESS:	10:32:12
8	A I see it.	10:32:12
9	BY MR. LANDGRAFF:	10:32:12
10	Q And it is it is more than one page,	10:32:13
11	Mr. Tricarichi. If you want to flip through	10:32:15
12	Exhibit 28, I'm just going to ask you some	10:32:17
13	high-level questions. They're the invoices you	10:32:20
14	received from PwC.	10:32:22
15	THE TECHNICIAN: You now have control,	10:32:24
16	sir.	10:32:26
17	THE WITNESS: How do I flip through it?	10:32:27
18	MR. HESSELL: Go to the top where there's	10:32:31
19	that arrow. You see where it says 1 through 6?	10:32:33
20	And then there's a	10:32:36
21	THE WITNESS: I'm looking, looking,	10:32:37
22	looking. Wait.	
23	MR. HESSELL: There's a down arrow.	
24	THE WITNESS: I don't see that. On the	
25	top oh, okay. Got it.	

1	BY THE WITNESS:	
2	A Got it.	
3	BY MR. LANDGRAFF:	
4	Q So do you recognize Exhibit 28 as a	10:33:01
5	compilation of the invoices that PwC sent to you	10:33:03
6	for work on the Westside sale project that is	10:33:06
7	discussed in the engagement letter?	10:33:10
8	A That's what it appears to be.	10:33:14
9	Q And if you look at the each page is a	10:33:15
10	different time period for which PwC was billing	10:33:21
11	you; is that fair?	10:33:23
12	A That's fair.	10:33:24
13	Q And the final page, if you flip to that	10:33:28
14	page, the sixth page of Exhibit 28, is a bill for	10:33:30
15	September 2003 work that appears to have been sent	10:33:39
16	to you on October 29th; is that right?	10:33:42
17	A That's what it says.	10:33:46
18	Q And you paid these invoices, right?	10:33:48
19	A Like I said, you acknowledged that I paid	10:33:51
20	for them, yeah.	10:33:57
21	Q Did you receive any invoices from PwC in	10:33:58
22	2004?	10:34:02
23	A I don't recall.	10:34:03
24	Q Did you receive any invoices from PwC in	10:34:05
25	2005?	10:34:08
		1

1	A I don't recall that either.	10:34:09
2	Q Did you receive invoices from PwC any time	10:34:13
3	after this invoice that you received sometime in	10:34:19
4	October of 2003?	10:34:23
5	A I don't recall.	10:34:24
6	Q Do you think it's possible you received	10:34:26
7	invoices from PwC after 2003?	10:34:33
8	A It's possible. I wasn't paying the	10:34:35
9	invoices.	10:34:40
10	Q You did did you ever pay PwC after	10:34:40
11	2003?	10:34:42
12	A I don't recall.	10:34:43
13	Q What do you mean you weren't paying the	10:34:47
14	invoices?	10:34:49
15	A I wasn't the person who paid the invoices.	10:34:49
16	Q Who was the person who paid the invoices?	10:34:52
17	A Well, it would have been Jimmy, or it	10:34:53
18	would have been my it could have been Scott	10:34:59
19	Ginsburg, or it could have been Nemic, my	10:35:01
20	accounting person.	10:35:11
21	Q Did Scott Ginsburg or	10:35:12
22	A Steve Nemic.	10:35:13
23	Q I'm sorry. Go ahead.	10:35:14
24	A Steve Nemic.	10:35:16
25	Q Did Scott Ginsburg or Steve Nemic work for	10:35:18

1	you after the sale of the Westside stock?	10:35:22
2	A Scott Ginsburg did.	10:35:25
3	Q Did	10:35:27
4	A He didn't work for me, he worked with me.	10:35:28
5	Q Did he ever tell you we received an	10:35:30
6	invoice from PwC in 2004 or 2005 or after the	10:35:32
7	Westside sale?	10:35:36
8	A I have no recollection either way.	10:35:37
9	Q Now, you you did not have an ongoing	10:35:39
10	relationship with PwC after the sale of the	10:35:43
11	Westside stock in September 2003, correct?	10:35:46
12	MR. HESSELL: Objection to the form of the	10:35:50
13	question.	10:35:52
14	BY THE WITNESS:	10:35:52
15	A Define ongoing relationship.	10:35:52
16	BY MR. LANDGRAFF:	10:35:54
17	Q If you'd turn to Exhibit 309.	10:35:54
18	MR. HESSELL: Is that in the other binder?	10:36:10
19	MR. LANDGRAFF: He's already looked at it,	10:36:12
20	but, yes. It should be in the second binder.	10:36:14
21	BY THE WITNESS:	10:36:17
22	A 309. What is that?	10:36:17
23	BY MR. LANDGRAFF:	10:36:19
24	Q It's your trial testimony.	10:36:20
25	A Okay. Go ahead.	10:36:23

1	Q Exhibit 309, Page 164	10:36:24
2	A Wait a minute. Wait a minute. Wait a	10:36:28
3	minute. Is that in this book or the other book?	10:36:30
4	MR. HESSELL: The other the second	10:36:32
5	binder, volume two.	10:36:33
6	THE WITNESS: Oh, I'm in the wrong book.	10:36:36
7	I'm sorry.	10:36:40
8	MR. LANDGRAFF: And, Lawrence, you can	10:36:42
9	take the	10:36:45
10	THE WITNESS: My bad.	10:36:45
11	MR. LANDGRAFF: down.	10:36:46
12	BY THE WITNESS:	10:36:46
13	A 309. Got it.	10:36:48
14	BY MR. LANDGRAFF:	10:36:49
15	Q Exhibit 309, Page 164.	10:36:50
16	A Got it.	10:37:12
17	Q Line 14, "QUESTION: And have you had any	10:37:13
18	ongoing relationship with PricewaterhouseCoopers	10:37:16
19	after the sale of your stock?	10:37:20
20	"ANSWER: I don't think so."	10:37:22
21	Were you asked that question and did you	10:37:23
22	give that answer?	10:37:25
23	A Yeah, I said the same thing I just said,	10:37:27
24	"I don't think so."	10:37:31
25	Q Now, you know	10:37:31
		1

1	A (Unintelligible.)	10:37:32
2	Q You knew PwC received a summons from the	10:37:32
3	IRS in 2008 relating to PwC's work on the Westside	10:37:37
4	sale, right?	10:37:44
5	A I don't know that I I I don't know	10:37:45
6	that I knew that in 2008. I knew that at some	10:37:50
7	point before the trial, but I can't tell you when.	10:37:53
8	Q Do you do you recall PwC inviting you	10:37:56
9	and your counsel to review or look at documents	10:38:00
10	that PwC was planning on sending the IRS in	10:38:03
11	response to a summons that PwC had received?	10:38:11
12	A I think I think there was some	10:38:13
13	coordination between Hahn Loeser and PwC at that	10:38:15
14	time. But I can't tell you for sure what year	10:38:21
15	that was or when that was.	10:38:25
16	Q Did was there any coordination with you	10:38:32
17	personally in reviewing the materials that PwC was	10:38:34
18	intending to send to the IRS?	10:38:36
19	A I may have. I don't have a specific	10:38:38
20	recollection of that.	10:38:41
21	Q Do you recall going to PwC's office to	10:38:41
22	review materials that PwC had said it's going to	10:38:46
23	send to the IRS in response to a summons that PwC	10:38:48
24	had received?	10:38:51
25	A Where would that office have been?	10:38:55
		l

1	BY MR. LANDGRAFF:	15:39:51
2	Q Exhibit 153 is an email from Mr. Korb to	15:39:51
3	you from September 1st, 2011.	15:39:56
4	Do you see that, sir?	15:39:59
5	A That's what it says.	15:40:04
6	Q And the subject is, "Just got off the	15:40:05
7	phone with the IRS appeals officer," right?	15:40:07
8	A Yeah.	15:40:09
9	Q And Mr. Korb tells you, "I I told him	15:40:10
10	that you were ready to go to court and that there	15:40:15
11	was nothing that could be done at appeals except	15:40:18
12	settling for the cost of litigation. He said fine	15:40:21
13	and will now send the case back to exam for exam	15:40:23
14	to prepare the statutory notice of deficiency, the	15:40:26
15	90-day letter."	15:40:30
16	And then Mr. Korb says, "I did get the	15:40:31
17	impression from a couple of things he said during	15:40:33
18	our conversation that he might move his offer down	15:40:35
19	but was clear that it would not get in the range	15:40:38
20	you need at the present time."	15:40:41
21	Do you see that?	15:40:45
22	A That's what it says.	15:40:46
23	Q Do you know do you recall what the	15:40:46
24	range that you needed in this time frame,	15:40:49
25	November pardon me, September 2011?	15:40:55
		I

1	A I think it was \$5 million, between 1.5 and	15:41:04
2	\$5 million. That was the range. I've said that	15:41:10
3	about five times already now, too.	15:41:12
4	Q And after you decided to go to trial, were	15:41:15
5	you told that the IRS would not settle for less	15:41:21
6	than what was offered in the in this	15:41:23
7	administrative appeals process?	15:41:26
8	A I don't know. I recollect they made	15:41:30
9	another offer right before trial that was also in	15:41:32
10	the either 12 or \$14 million range. I was not	15:41:35
11	told that, no.	15:41:37
12	Q Would you turn to Exhibit 166.	15:41:38
13	MR. HESSELL: Chris, before you do, could	15:41:56
14	we take a restroom break?	15:41:59
15	MR. LANDGRAFF: Sure thing.	15:42:01
16	THE VIDEOGRAPHER: We are now going off	15:42:02
17	the record. The time is 3:41 p.m.	15:42:04
18	(WHEREUPON, a recess was had.)	15:53:40
19	THE VIDEOGRAPHER: We are now going back	15:53:40
20	on the record. The time is 3:54 p.m.	15:54:51
21	BY MR. LANDGRAFF:	15:54:51
22	Q In 2008, do you recall how much you would	15:54:58
23	have been able to pay to settle your liability	15:55:01
24	with the IRS?	15:55:05
25	A Probably around \$5 million. It would	15:55:08

1	depend when exactly in 2008.	15:55:12
2	Q So when you say if you had if PwC had	15:55:14
3	told you of what you claim is their knowledge of	15:55:18
4	Fortrend's plan to reduce Fortrend's tax liability	15:55:21
5	and you would have settled with the IRS if PwC had	15:55:25
6	told you that, you would have needed a \$5 million	15:55:29
7	number from the IRS to settle?	15:55:34
8	A Somewhere in that neighborhood, yeah.	15:55:36
9	Q Now, before we broke, I asked you if after	15:55:38
10	you decided to go to trial, you were were you	15:55:42
11	told that the IRS would not settle for less than	15:55:46
12	what was offered in the administrative appeals	15:55:49
13	process. And I think you said you didn't know or	15:55:50
14	you didn't remember. Is that correct?	15:55:55
15	A Yeah, that's what I said.	15:55:56
16	Q And if you look at would you turn now	15:55:57
17	to Exhibit 166.	15:56:00
18	(WHEREUPON, a certain document was marked	15:56:02
19	PwC Deposition Exhibit No. 166, for	15:56:02
20	identification.)	15:56:03
21	BY THE WITNESS:	15:56:03
22	A Yep. I'm on it.	15:56:03
23	BY MR. LANDGRAFF:	15:56:04
24	Q And 166 is an email to you from Michael	15:56:08
25	Desmond from August 13th, 2013.	15:56:14
		I

1	Do you see that?	15:56:19
2	A Yep.	15:56:21
3	Q And Mr. Desmond is is part of the	15:56:21
4	email he's talking to you about the IRS's trial	15:56:32
5	team; is that correct?	15:56:37
6	A Yep, that's correct. That's what it says.	15:56:39
7	Q And in the second paragraph of	15:56:43
8	Exhibit 166, the last sentence, Mr. Desmond tells	15:56:47
9	you, "The IRS has given no indication of a	15:56:50
10	willingness to discuss settlement on terms other	15:56:53
11	than what was offered in the administrative	15:56:56
12	appeals process, basically a 15 percent discount	15:56:59
13	on the total amount the IRS is looking to	15:57:02
14	collect."	15:57:05
15	Do you see that?	15:57:06
16	A That's what it says.	15:57:07
17	Q Did you receive the email that's	15:57:08
18	Exhibit 166?	15:57:13
19	A I assume I did. I'm not 100 percent sure,	15:57:14
20	but I assume I did.	15:57:19
21	Q You eventually added the McGuireWoods firm	15:57:20
22	to your legal team, right?	15:57:25
23	A Well, we added and subtracted.	15:57:27
24	Q Did you eventually hire McGuireWoods to	15:57:31
25	help try the tax court case?	15:57:34
		I

1	CERTIFICATE OF REPORTER
2	
3	I, MICHELLE M. YOHLER, a Certified
4	Shorthand Reporter within and for the County of
5	Cook, State of Illinois, do hereby certify:
6	That previous to the commencement of the
7	examination of the witness, the witness was duly
8	sworn to testify the whole truth concerning the
9	matters herein;
10	That the foregoing deposition transcript
11	was reported stenographically by me, was
12	thereafter reduced to typewriting under my
13	personal direction and constitutes a true record
14	of the testimony given and the proceedings had;
15	That the said deposition was taken
16	remotely before me at the time and place
17	specified;
18	That I am not a relative or employee or
19	attorney or counsel, nor a relative or employee of
20	such attorney or counsel for any of the parties
21	hereto, nor interested directly or indirectly in
22	the outcome of this action.
23	
24	
25	

1	IN WITNESS WHEREOF, I do hereunto set my
2	hand and affix my seal of office at Chicago,
3	Illinois, this 8th day of October, 2020.
4	
5	
6	
7	
8	Michelle M. Yohren
9	Michelle M. Yohlek, CSR, RMR, CRR
10	Certified Shorthand Reporter
11	CSR No.: 84-4531
12	
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Exhibit 10

INTERNAL REVENUE SERVICE

Department of the Treasury

Michael A. Tricarichi 341 Arbour Garden Las Vegas, Nevada 89148 Person to Contact:
Denise McCaskill
Employee Number:
75-11917
Telephone Number:
(817)232-6383
Refer Reply To:
MC: 4296NFTW
Date:
January 22, 2008

Dear Mr. Tricarichi,

The Internal Revenue Service is in the process of examining the tax return filed by West Side Cellular, Inc. (EIN: 34-1685059) (hereinafter "West Side") for the tax year ended December 31, 2003. In the event that we determine that West Side has an outstanding tax liability, you may be liable as a transferee of West Side under I.R.C. § 6901 for part or all of the tax liability.

We have begun an examination to determine whether West Side is liable as a transferee and, if so, the degree of its liability. Please find enclosed Form 4564, Information Document Request, to begin this process. This form requests information that will help us make the above determinations. Please mail the information requested by February 7, 2008 to the following address:

Internal Revenue Service 5450 Stratum Drive, Ste 150 Fort Worth, Texas 76137 Attn: Denise McCaskill MS: 4296NFTW

You may have someone represent you during any part of this transferee liability examination. If you would like someone to represent the Trust, please mail a completed Form 2848, Power of Attorney and Declaration of Representative, to the above address. Please find enclosed a partially completed Form 2848 for your convenience.

We encourage you to read the Declaration of Taxpayer Rights found in the enclosed Publication 3498, The Examination Process. This publication also discusses general rules and procedures we follow in examinations.

Also enclosed with this letter is a notice to you regarding the possibility of our contacting third parties in the course of this examination

Thank you for your cooperation. If you have any questions regarding any of the above matters, please contact me at (817)232-6383.

Sincerely,

Genile My Cabill

Denise McCaskill Revenue Agent

Enclosures: Publication 3498 Form 2848 Form 4564 Letter 3164-E(DO)

> EXHIBIT PwC Dep Ex. No.

104

A-16-735910-B

Internal Revenue Service

Department of the Treasury

Michael A. Tricarichi 341 Arbour Garden Las Vegas, Nevada 89148 Letter Number: 3164 E(DO)
Letter Date: O1-22-O8
Social Security Number or Employer Identification Number:
268-56-5446
For Assistance You May Call Us At:
817-232-6383
Person to Contact:
Denise McCaskili, Revenue Agent Employes Identification Number:
75-11917

Dear Mr. Tricarichi:

We are in the process of examining a return you have filed with us to determine your correct federal tax liability. Generally, our practice is to deal directly with a taxpayer or a taxpayer's duly authorized representative. However, we sometimes talk with other persons, for example when we need information that the taxpayer has been unable to provide, or to verify information we have received.

We are writing to tell you that we may contact other persons. If we do contact other persons we will generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. Our need to contact other persons may continue as long as we are examining any open tax year.

If you have any questions regarding this letter or wish to request a list of contacts, please do not hesitate to contact the employee listed above. However, you are not required to respond to this letter.

Sincerely,

Denise McCaskill Revenue Agent

General Milestall

Letter 3164 E (DO) (01-2000) Catalog Number: 73229R

Form 4564 (Rev. June 1988)	Department of the Treasury - Information Docu	Request Number		
To: (Name of Taxpayer and Company Division or Branch) Michael Tricarichi 341 Arbour Garden Las Vegas, NV 89148		Subject: Ti	ransferee Liability	
		SAIN Number	Submitted to:	
	sted documents to requester identified below	Dates of Previo	us Requests	

Description of Documents Requested
Please provide the following records:

- A list of the assets, including cash and notes, transferred to you by West Side Cellular from 1/1/2003 to 12/31/2003. On this list, please indicate the fair market value of the assets you received and whether you made any transfers to West Side Cellular as consideration for the assets you received.
- 2. All documents that evidence the transfers identified in your answer to item 1 above, including but not limited to bank statements and wire transfer records. Note: This should include, but not limited to, copies of the bank statements showing receipt of cash on September 9, 2003 into the following accounts:
 - a. Tricarichi Escrow account #21595 at Rabobank
 - b. Michael Tricarichi account #310091918 at Pershing
- 3. Any other documents you wish to provide in regards to the potential transferee liability matter.

nformation d	lue by		At next appointment	Mail in X
T	N	Name and Title of Requester Denise McCaskill, RA	Employee ID Number 75-11917	Date January 22, 2008
Form:		Office Location 5450 Stratum Drive, Ste 150 Fort Worth, Texas 76137		Telephone Numbers Voice 817-232-6383 Fax 817-232-6527

Form 2848

Power of Attorney

OMB No. 1545-0150

Depart	Rev. March 2004) expertment of the Treasury tennal Revenue Service Type or print. > See the separate instructions.						100	For IHS Use Received by: Name	0.0000
	Power of Attorney						T	elephone	
	Caution: Fo	orm 2848 will not be honored for any				fore the IR		unction	
1		mation. Taxpayer(s) must sign and	date t	his form or			-	Date /	_/_
laxp	ayer name(s) an	d address		i i	Social security r	number(s)	numbe	yer Identific r	ation
		4							
					Daytime telephon ()	e number	Plan nu	umber (if ap	plicable
herel	by appoint(s) the	following representative(s) as atto-	rney(s)	-in-fact:					
2	Danmanntathu	(a) court sine and data this form a		0 Dant #					
	e and address	e(s) must sign and date this form o	n page						
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to re	present the taxr	payer(s) before the Internal Revenue	Servi				e No. L	_ rax No.	<u> </u>
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3	Tax matters								
	Type of Tax (Inc or Civil Penalty	ome, Employment, Excise, etc.) (see the instructions for line 3)			orm Number 941, 720, etc.)	(see		or Period(s) uctions for	
	eree liability unde ide Cellular, Inc. (r I.R.C. § 6901 for the tax liability of 34-1685059:)	Wes	t Side Celful	ar's Form 1120		Decembe	r 31, 2003	
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Name of representative to receive refund check(s)

For Privacy Act and Paperwork Reduction Notice, see page 4 of the instructions.

Form 2848 (Rev. 3-2004)

Cat. No. 11980J

Form	2848 (Rev. 3-2004)				Page
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		1			Form 2848 (Rev. 3-2004)

Exhibit 11

INTERNAL REVENUE SERVICE

Department of the Treasury

Michael A. Tricarichi 341 Arbour Garden Las Vegas, Nevada 89148 Person to Contact:
Denise McCaskill
Employee Number:
75-11917
Telephone Number:
(817)232-6383
Refer Reply To:
MC: 4296NFTW

Date:

February 3, 2009

Dear Mr. Tricarichi,

We have determined that the tax return filed by West Side Cellular, Inc. for the tax year ended December 31, 2003 has an outstanding tax liability and that you are liable as a transferee of West Side under I.R.C. § 6901.

I am enclosing a draft copy of the transferee report for your review. This report is currently being reviewed by our Counsel. Upon approval by Counsel, I will mail you a final transferee report.

I am also enclosing Pub 4539 and Pub 3498 to explain your options in regards to our findings. You can agree or disagree with our report. If you disagree, you can elect to go to Appeals or to follow the Fast Track Mediation process. Both of these options are explained in the attached publications.

It is not necessary for you to formerly respond to this letter. This is just a draft report for you to begin reviewing and considering. If you have any questions regarding this report or you disagree with the facts of the report, please let me know as soon as possible. Once I receive the approval from Counsel and complete the Final transferee report, I will contact you to find out whether you plan to agree or disagree. If you disagree, I will ask you which closing option you prefer.

Thank you for your cooperation. If you have any questions regarding any of the above matters, please contact me at (817)232-6383.

Sincerely,

Denise McCaskill Revenue Agent

Senor My Cashell

Enclosures: Draft transferee report Pub 4539' Pub 3498

Cc: Jeffrey Folkman, POA Randy Hart, POA

EXHIBIT PwC Dep Ex. No. **71**

FEB - 6 2009

Transferee Report **SUBJECT TO REVIEW BY COUNSEL**

Transferee of the Assets: Michael Tricarichi

268-56-5446

Of 341 Arbour Garden

Las Vegas, Nevada 89148

Transferor: West Side Cellular, Inc.

34-1685059

Of 1155 W. Fourth St. #225-18

Reno, Nevada 89503

Return Form: 1120

Year: Taxable year ended 12/31/2003

ISSUE

Whether Michael Tricarichi is a transferee of the assets of West Side Cellular, Inc., and as such is liable for the unpaid income tax deficiencies of West Side Cellular, Inc. for its taxable year ended 12/31/2003.

FACTS

Introduction

In September 2003 the shareholder of West Side Cellular, Inc. ("Michael Tricarichi") engaged in a transaction that is substantially similar to the Intermediary Transactions tax shelter described in Notice 2001-16. At the time of the tax shelter transaction West Side Cellular, Inc. ("West Side") had a significant taxable gain resulting from the settlement of a lawsuit. The income tax on the gain would be due on 12/31/2003, at the end of West Side's taxable year.

West Side Cellular was the owner and operator of a revenue producing wireless subscriber base operating as a Verizon Wireless reseller. As part of the legal settlement, West Side Cellular had to terminate its business relationship with Verizon. As a result, the shareholder intended to sell the customer base to another Verizon Wireless reseller and then get out of the cellular business completely. The shareholder ended up selling West Side's stock to a tax shelter promoter at a price substantially higher than the amount he would have received from a liquidation of Westside. The promoter that acquired West Side arranged for tax shelter losses to be used by West Side to offset the taxable gain, with the result that no tax on the gain was ever paid.

The description of the tax shelter transaction in this report is based on records received from Michael Tricarichi, West Side, as well as from other participants in the transaction in response to third party summonses. The description that follows is a summary of the transaction that occurred. For detailed analysis of the facts surrounding the settlement agreement, sale of the business assets to a related entity, stock sale to the tax shelter promoter and the subsequent section 351 transfer, see Form 4665.

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Intermediary Transactions Tax Shelter

In an Intermediary Transaction tax shelter a specially created entity (the "Intermediary") acquires a target corporation from the original shareholders. The Intermediary is created and controlled by a shelter promoter. The target corporation's assets have either already been entirely sold or their sale is completely prearranged. This sale of assets causes the target corporation to incur taxable gain. The Intermediary acquires the target stock and then provides a shelter to target to offset the gain from the sale of the assets (or other significant taxable gain trapped in corporation). [In West Side's case the taxable gain to be sheltered is from the receipt of settlement proceeds.]

The original shareholders wish to maximize their yield from the sale of the assets (or other significant gain) and limit their exposure to any corporate liability. Ordinarily, the original shareholders would cause the target corporation to pay the corporate level tax on the gain from the asset sale (or other significant gain) and then liquidate the corporation by paying the remainder to themselves. Another option is for the original shareholders to acquire a shelter for the target corporation and then liquidate the target. This is risky however as the original shareholders would be transferees of the target corporation and liable for the corporate level taxes should the corporation be audited.

An Intermediary transaction provides the original shareholder with another option. Instead of liquidating the corporation, the original shareholders purportedly sell their target stock to the promoter at a premium price. The original shareholder agrees to this because it not only increases the shareholder's yield but, if it is a legitimate stock sale, would protect the original shareholder from any transferee liability for debts, including tax liabilities, of the target corporation. The promoter is only able to offer a premium price, however, because it will not be paying the target corporation tax liabilities.

The Intermediary Transactions tax shelter was designated as a listed transaction in Notice 2001-16, 2001-1 C.B. 730, which was released on 1/18/2001.

Tax Shelter Promoter - Fortrend

Fortrend began as a group of professionals who decided to implement financial strategies rather than continue to act as advisors. Since its inception, Fortrend has worked closely with owners and shareholders in merger and acquisition transactions to maximize values for their clients. As stated in a Fortrend brochure, "Clients of Fortrend have benefited from our ability to structure transactions that minimize shareholder and corporate liabilities resulting from the sale of the corporation or its assets. Fortrend is prepared to finance the acquisition of the selling corporation, manage the negotiations, oversee the preparation of documents, and close the transaction." Fortrend's two founding principals are Fred Forster and Jeffrey Furman. They are described as having over 30 years of combined experience managing "leading-edge transaction structuring".

From 1996 to 2003, Fortrend was active in the promotion and implementation of abusive tax shelters similar to those described in Notice 2001-16, Intermediary Transaction. In all, Fortrend promoted in excess of 120 transactions, ranging in size from \$5 million to \$1.5 billion. Fred Forster and Jeffrey Furman directed the tax shelter transactions of Fortrend, with the assistance of Fortrend employees and with services provided by accountants, attorneys and others. Fortrend worked closely with Rabobank Nederland in New York to secure financing for the purchase of the target stock in many of the transactions.

Following the acquisition of a target corporation, Fortrend used various tax shelter techniques to avoid the payment of corporate taxes by the target corporation. A Fortrend-controlled entity would own the target after the stock sale and would generally transfer an inflated high-basis asset, such as stock, US Treasury Bills, distressed debt, etc. to the target corporation in a section 351 transfer. By the end of the taxable year, this inflated basis asset would then be sold to another Fortrend related entity or the debt would be deemed worthless and a loss was created.

West Side Cellular, Inc.

West Side was incorporated on March 13, 1988 by Carla Tricarichi. One hundred shares of stock were issued to her son, Michael Tricarichi (WC 00040). Michael served as 100% shareholder and President of West Side from the date of its incorporation until the time the stock was sold.

On October 18, 1993, West Side Cellular (doing business as Cellnet) filed a complaint with Public Utilities Commission of Ohio (PUCO), against wholesale cellular service providers, including Ameritech. The complaint asserted that Ameritech discriminated against Cellnet. (Rabo-F-5430) On January 18, 2001, PUCO ruled in agreement with Cellnet's assertions and held that Ameritech unlawfully discriminated against Cellnet. (Rabo-F-5430) Ameritech submitted an Appeal in 2002. On December 30, 2002, the Supreme Court of Ohio affirmed the decision of PUCO and ruled in favor of West Side.

In April, 2003 two Settlement Agreements were entered into between West Side and the Defendants. Pursuant to the Settlement Agreements, West Side would receive settlement proceeds totaling \$64,250,000 and all business relationships with Verizon would terminate effective June 10, 2003. From the settlement proceeds, Westside would pay employees \$13,000,000 and attorney's fees of \$12,000,000, leaving cash in Westside of approximately \$40,000,000.

As of June 10, 2003, West Side would no longer be able to provide Verizon cellular service to its customers. The shareholder intended to transfer/sell its customer base to another Verizon reseller so that the customers would be able to continue their wireless service. The shareholder would then completely get out of the cellular business.

Contact with Fortrend

As it began to look like West Side would prevail in it's lawsuit, Hahn, Loeser & Parks (HLP), the law firm for West Side, began doing extensive research on income tax issues regarding the taxation of settlement proceeds and, ultimately on the tax shelter transaction. (HL 1856 – HL 1861) For example,

- On 9/18/2002, "JB Sims met with attorney DC Carlson regarding tax matters; researched
 and analyzed tax law on settlement and judgment awards; research timing of S-election
 and liquidation rules";
- On 2/8/2003, "JB Sims researched and analyzed law relating to reportable transactions, Sham transactions and substance over form; consider potential structuring options";
- On 2/10/2003, "JB Sims, JM Folkman, DC Carlson met regarding tax structuring of
 entities for potential settlement; researched and analyzed law relating to tax-free spin-offs
 and collapsible corporations; reviewed certain listed transactions; reviewed substance
 over form issues and the Sham Transaction Doctrine";
- On 2/11/2003, "JB Sims reviewed and analyzed Notice 2001-16 relating to transaction involving a shareholder who wants to sell stock of a target, an intermediary corporation, and a buyer who wants to buy the assets of the corporation; telephone call to V. Papallo, Technical Advisor, regarding the same";
- On 2/12/2003, "JB Sims researched and analyzed issues relating to listed transactions";

On 2/19/2003, "JB Sims, JM Folkman, RJ Hart met with Cellnet personnel and MidCoast
personnel regarding tax structuring issues relating to the resolution of the Cellnet
lawsuits; JB Sims researched and analyzed issues relating to Notice 2001-16 and the
applicability of those provisions on the resolution of the pending lawsuits."

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In February, 2003, HLP introduced Michael Tricarichi to MidCoast. MidCoast was another intermediary tax shelter promoter that occasionally worked on deals with Fortrend. Jim Tricarichi (Michael's brother) introduced him to Fortrend. Both companies expressed an interest in acquiring the stock of West Side and were actually competing against one another for the deal. Ultimately, Michael Tricarichi chose to sale his stock in West Side to Fortrend because, according to Michael Tricarichi's testimony, Fortrend offered a higher price.

Sale of Business Assets to LXV, Group

Once it became apparent that the stock sale transaction was a viable solution for Michael Tricarichi, it was determined that the business assets (other than cash) needed to get out of West Side. The primary business asset (other than cash) was the customer base.

Michael Tricarichi intended to sell the West Side customer base to another Verizon reseller for an income stream. A percentage of the income generated from the customer base would be paid back to West Side (or the Seller) for a period of 2 or 3 years. According to Michael Tricarichi, the customer base needed to be "parked" in another entity so it could collect the income stream.

On May 1, 2003, Michael Tricarichi filed Articles of Organization for LXV Group with the State of Ohio. This corporation was formed to receive and then sell the customer base to a third-party.

On June 11, 2003 an Asset Purchase Agreement ("APA") between West Side and LXV Group was executed by Michael Tricarichi, as President of West Side; Scott Ginsburg as Treasurer of LXV Group; Lawrence Dubin as Vice President of LXV Group; and, Patrick Scaravilli, as Secretary of LXV Group. It is noted that Scott Ginsburg, Lawrence Dubin and Patrick Scaravilli held the same officer positions with West Side.

Pursuant to the APA, LXV Group acquired all of the wireless business assets of West Side, . including the revenue producing wireless customer base, accounts receivables, Trade names, Trade marks, chattels, fixtures and equipment located on its business premises for an amount of \$100,044. This Agreement specifically excluded any cash or cash equivalents in the possession of West Side.

Letter of Intent with Fortrend

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On or around July 22, 2003, Nob Hill Holdings (a Fortrend created entity) sent a letter of intent to Michael Tricarichi (Seller) regarding the principal terms to which Fortrend would acquire 100% of the stock of West Side. The Stock Purchase Price shall be \$34,900,000. The Stock Purchase Price shall be adjusted upward or downward, as the case may be, by the amount by which the "Available Cash" differs from the amount of cash held by the Company at the time of closing, on a dollar for dollar basis; and downward by amount of any undisclosed liability of the Company, which is not contained in this Letter of Intent as of the closing date on a dollar for dollar basis. The Company's assets shall consist of cash held by the Company, after all liabilities (other than local, state and federal income tax liabilities for the current fiscal year) have been paid or otherwise provided for, in the sum of \$40,000,000 (such amount, "Available Cash"). The Company will have no liabilities other than the liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003; provided that, in the event that such liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003 are greater than the \$40,000,000 amount previously

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*

disclosed to representatives of Purchaser prior to the execution of this Letter of Intent, the Stock Purchase Price shall be adjusted downward proportionately but no such adjustment to the Stock Purchase Price shall be made if such liabilities associated with the Company's ordinary income and capital gains for the fiscal year ending December 31, 2003 are lower than previously disclosed to representative of Purchaser. (HL 281) In addition, West Side was to simultaneously deposit \$50,000 with Fortrend's attorney's escrow account. Seller had to agree to compensate Purchaser for all reasonable professional costs up to \$50,000 if the transaction failed to close based on factors within Seller's control. Purchaser also agreed to reimburse Seller for all reasonable professional costs up to \$50,000 if the transaction failed to close based upon factors within Purchaser's control. The letter of intent was signed by Tim Conn, as Manager of Nob Hill Holdings.

Stock Purchase

West Side Cellular ceased business operations and sold all of its business assets on or about June 11, 2003. Nob Hill Holdings acquired the stock in West Side for a final price of \$35,199,371 on or about September 9, 2003. At the time Nob Hill acquired the stock, West Side had converted all of its assets to cash and paid off all outstanding liabilities. Other than a Notes Receivable from the shareholder in the amount of \$577,777, the only asset remaining in the corporation was cash in the amount of \$39,999,373 (this amount includes the \$50,000 previously deposited into escrow).

Fortrend via Nob Hill received cash of \$40,577,150 (\$39,999,373 plus a check in the amount of \$577,777 for repayment of the shareholder loan. Fortrend only paid \$35,199,371 (\$34,621,594 cash plus check of \$577,777) for the West Side Cellular stock. Fortrend exchanged cash for cash. The difference in cash paid and cash received of \$5,377,779 was the profit retained by Fortrend for participating in the transaction.

Concerns about this transaction being considered a listed transaction were noted throughout the Stock Purchase Agreement: (WC 00069)

- Section 3.2(y): During the period commencing on January 1, 2003, and continuing through the period ending immediately prior to the Closing Date, Company has not directly or indirectly participated in any Listed Transaction ...
- Section 4.1(1): Neither Buyer nor its affiliates has registered the transactions contemplated by this Agreement under Section 6111 of the Code. Neither Buyer nor any of its Affiliates has been advised by their respective professional advisors that the transactions contemplated by this Agreement (separately or in combination) must be registered under Section 6111 of the Code or constitute direct or indirect participation by them in a Listed Transaction
- Section 4.1(n): The Buyer has no intention to cause Company to, directly or indirectly, engage in or be a party to any Listed Transaction, Confidential Transaction ...Loss Transaction, ...or Transaction with a Brief Asset Holding Period.
- Section 5.2(b): Buyer shall maintain the existence of Company for a period of at least five years following Closing and, during such time, Company shall, at all times, be engaged in an active trade or business. Buyer shall maintain a net worth of no less than \$1,000,000 during such time period.

Financing for the Intermediary Transaction

Rabobank was the lender and key participant in the circular money flow that was utilized to acquire West Side. On August 13, 2003, Fortrend sent a letter to Chris Kortlandt at Rabobank setting forth the basis information concerning the acquisition of West Side (also known as "CellNet") by Fortrend's client Nob Hill Holdings. "Nob Hill will purchase 100% of the stock of CellNet from its sole shareholder, Michael Tricarichi pursuant to a stock purchase transaction. The stock purchase is scheduled to close on August 27, 2003. (Rabo-F-5525) Nob Hill will purchase 100% of the stock of CellNet for a purchase price of approximately \$34.9M... Nob Hill is seeking a short-term loan of \$29.9M from Rabobank. Nob Hill has cash in the amount of \$5M, which it will deposit in a new account with Rabobank prior to closing. On the date that Nob Hill purchases CellNet, the only assets of CellNet will be cash in the amount of \$40M realized from the settlement of litigation and certain accounts receivable from cell phone customers. There will be no liabilities at closing. Immediately prior to the stock purchase, the Seller will transfer all of CellNet's cash assets to a new account at Rabobank. Nob Hill will have opened an account at Rabobank and deposited its \$5M; the loan funds will be transferred into that account. On the closing date, Rabobank, on behalf of Nob Hill, will transfer \$34.9M to the Seller, and Seller will relinquish control of CellNet's bank account to Nob Hill. Immediately thereafter, Nob Hill will satisfy the loan and fees to Rabobank. The shareholder of Nob Hill was listed as Millennium Recovery Fund. John McNabola was listed as the Director and President of Millennium Recovery Fund as well. Charles Klink was listed as Counsel for Nob Hill." (Rabo-F-5526)

On August 21, 2003, an email was sent to shareholder's counsel, "West Side Cellular needs to open a bank account at Rabobank. Alice Dill in our SF office sent the account opening forms directly to Michael in Las Vegas yesterday with instructions to forward the completed forms directly to Rabobank in New York. As we discussed, the company money needs to be transferred into this account at least one day prior to closing. The account will be under your sole control until we buy the Company." "Michael needs to open a second account at Rabobank, in his capacity as selling shareholder, for purposes of receiving the stock purchase price. This account will always be under his control. As we explained, it is easier and quicker to transfer the money we are paying you for the company to another account in the same bank. If the stock purchase funds are wired to an outside bank, we play the "waiting game" for Fed wire numbers. Having the shareholder account at Rabobank avoids this problem, as the funds are transferred and confirmed right away." (HL 2519)

On or around August 29, 2003, Rabobank approved an up to 30 day \$29.9mm secured loan to Nob Hill to complete the Stock Purchase Agreement between Nob Hill and the shareholder of West Side Cellular. The following are excerpts from the credit application:

- The purpose of the request was "to allow Nob Hill to purchase 100% of the stock of CellNet, the target company, for approximately \$34.9mm. After the acquisition CellNet will be re-engineered to enter into the business of investing in, collecting and re-investing in distressed receivables, including certain cellular phone receivables currently held by 'CellNet'. (Rabo-F-5528)
- Pledge of the Rabobank account of our borrower, Nob Hill, and West Side Cellular, Inc., with cash balances in excess of the USD 38 mm (held at Rabobank in New York) to transfer those balances from West Side Cellular to Nob Hill (which funds will be used to pay-off our loan). At all times the loan amount will be covered by cash in the pledged account, and the irrevocable payment instructions. The total amount will be more than sufficient to cover our loan, interest and fees. (Rabo-F-5531)

- This transaction was referred to us by Fortrend International LLC. The Fortrend group is an investment banking firm specializing in structuring economic transactions to solve specific corporate and estate or accounting issues. Fortrend and its affiliates have acted as principal or investment banker in numerous transactions, ranging from \$10MM to in excess of \$1 billion in assets. We have entered into various acquisition financing transactions with Fortrend over the past five years, all of which have been concluded satisfactorily. Rabobank has been offered the opportunity to assist in the acquisition financing of a transaction for Fortrend. Rabobank has been offered the opportunity to assist in the completion of a stock purchase transaction for Nob Hill. Rabobank's role will be that of a lending bank to acquirers. (Rabo-F-5528)
- The only assets of CellNet are cash in excess of \$38mm, resulting from a settlement of litigation, and certain accounts receivable from cell phone customers. At closing there will be no liabilities outstanding." (Rabo-F-5530)
- Under the Repayment section, "Although the loan will be provided for up to 30 days, it is
 expected to be repaid in approximately a week." The upfront fee is \$125,000. (Rabo-F5530)
- Nob Hill Holdings is a Delaware company formed in November 2001 but has not been used by Fortrend International until now. The company will be used for the purpose of completing this transaction. The principals of Fortrend are highly regarded and well known to Shearman & Sterling, a law firm that has represented Rabobank in numerous financings. Our experience with Fortrend has been highly satisfactory, with the dozens of transactions we have concluded to date. (Rabo-F-5532)
- The loan was classified as an "R-1", due to the fact that the loan will be cash collateralized at all times or covered by an irrevocable payment instruction. (Rabo-F-5532)

To begin the money flow, the ending cash balance of \$39,949,373 [\$50,000 had previously been deposited in escrow] in West Side's account #31v001900 at Pershing Bank was transferred to the new West Side account #21577 at Rabobank and invested in an overnight time deposit, where it earned interest of \$1,076.41. Upon receipt of the cash wire by Rabobank (needed to secure the loan), loan proceeds of \$29,900,000 were credited to the Rabobank Nob Hill Holdings account #21568. A \$5,000,000 short-term loan was also credited to this account from Moffat International, another Fortrend-controlled entity. From the Nob Hill account, \$34,621,594 (cash portion of the purchase price of West Side Cellular's stock) was transferred to the Tricarichi Escrow account #21595 at Rabobank and then to the Michael Tricarichi account #310091918 at Pershing Bank. Upon receipt of the money by Tricarichi, the funds in the Rabobank West Side account #21577 were transferred to the Rabobank Nob Hill Holdings account #21568. Upon transfer of the funds to the Nob Hill account #21568, the \$29,900,000 loan was repaid; and, \$150,000 loan fee was paid. There was no interest paid on the loan as the loan was repaid the same day the proceeds were credited. All of these money transfers occurred over a two-day period, beginning on September 8, 2003 and ending on September 9, 2003. See Exhibit A for cash flow spreadsheet.

It is noted that Fortrend would not have been able to purchase the stock in West Side Cellular without the loan from Rabobank. The loan from Rabobank was conditioned upon the money from West Side Cellular being on deposit at Rabobank prior to the issuance of the loan (security for the loan). The money from West Side Cellular was then used to repay the loan. This circular flow of money was a diversion to the substance of the transaction, that Fortrend used the money from West Side Cellular to buy the stock in West Side Cellular. Neither Fortrend nor Rabobank was ever at risk.

Post-Closing Events

After acquiring the stock, Nob Hill Holdings merged with and into West Side with West Side being the surviving corporation. Millennium Recovery Fund (a partner with Fortrend), now in control of West Side, had access to inflated, high-basis Japanese debt that was transferred to West Side after the merger was completed. The transfer was made pursuant to section 351 on or about November 6, 2003. By year-end, this debt was determined worthless and was written off as a bad debt deduction in the amount of \$42,480,622. No other information is available to support the amount of basis claimed on the Notes or on how the Notes were determined to be worthless.

The bad debt deduction was used to offset the taxable income resulting from the lawsuit settlement proceeds. The West Side corporate income tax return for the period 2003 was examined and an adjustment was made to disallow the basis in the Japanese debt and the resulting bad debt deduction. In addition, an adjustment was made to disallow the legal fees paid in connection with the tax shelter transaction in the amount of \$2,633,387. The proposed adjustments resulted in a tax deficiency of \$15,186,569 and penalties in the amount of \$6,012,777. The case was forwarded to Appeals.

Benefit to Shareholder for doing the transaction with Fortrend

*Net Taxable Income (includes litigation proceeds)	W/O Fortrend 40,635,945	W/ Fortrend 40,635,945	Net Savings
*Federal Tax (35%)	14,222,581	N/A	78.5
*State Tax (first 50,00051%)	255		- 13
*State Tax (over 50,000 - 8.50%)	3,449,805		Acres 1
*Local Tax	597,321		4
*State & local tax reduction	-1,416,584		
Estimated Corporate Taxes Due	16,853,378	0	
Net After-Tax Cash for S/H per Liquidation	23,782,567		5.E +
Ending Cash Balance (includes N/R from s/h)		40,577,150	-14
Less Fortrend premium		5,377,779	* **. *
Net pay-out to S/H per transaction with Fortrend		35,199,371	
Benefit to S/H		: ::::::::::::::::::::::::::::::::::::	11,416,804

^{*} based on document WC 00104

It was evident throughout the negotiation process that the shareholder engaged in the stock sale transaction with Fortrend solely to avoid corporate tax and was aware that the tax would not be paid.

- In an email attachment from Jim Tricarichi to Price Waterhouse Coopers (PWC) on April
 9, 2003, a question was posed that if the stock is not sold and West Side continued to
 operate, "what can be done to mitigate the tax liability?" (PWC-WS 884)
- In a detailed memo prepared by Richard Stovsky of PWC on April 13, 2003, a
 computation was prepared (similar to the one above) comparing the amount to be
 received by Tricarichi from the stock sale vs. the amount that would have been received
 as liquidating distribution if the corporate stock was not sold and the tax was paid on the
 settlement proceeds. (PWC-WS 602)

- In this same memo, there was discussion about if the transaction would be a reportable
 transaction. PWC concluded that a position could be taken that this is not a reportable
 transaction because a typical "Midco" transaction has 3 parties where as this transaction
 only has 2; and, typical Midco transactions result in an asset basis step with associated
 amortization deductions going forward, which this transaction does not have.
- In this same memo, there was discussion about whether Tricarichi would have any liability for the federal income tax liability of West Side should IRS challenge the write off of assets that are intended to offset the taxable income from the legal verdict. PWC concluded that Tricarichi should have no successor/transferee liability for any corporate level tax as he took nothing out of West Side. At the time Tricarichi sold West Side, it was a solvent corporation. Tricarichi was not the transferee of any West Side asset.
- In an email between Rich Stovsky and Tim Lohnes (both of PWC) on August 17, 2003, there was discussion about reviewing the question of whether any of the income received by West Side in its legal verdict could qualify as nontaxable for any reason, thus making the stock sale unnecessary. (PWC-WS 64)

Failure to Disclose Listed Transaction

The Intermediary transaction involving West Side was not disclosed on West Side's returns for the taxable years ended 12/31/2003 or 12/31/2004 or in any other manner.

Summary

As can be seen in the narrative of facts, the stock sale to Fortrend was constructed in order to avoid corporate income tax upon the receipt of settlement proceeds and liquidation of the company.

LAW AND ARGUMENT

The issues to be considered may be summarized as follows:

- Whether Fortrend, via Nob Hill Holdings, Inc., served as a mere conduit in the transactions between West Side and its shareholder Michael Tricarichi, in order to shelter the gain associated with the settlement proceeds for a fee, with the result that the transfer of assets to Michael Tricarichi in exchange for his stock may be characterized as liquidating distributions:
- 2) Whether the purported sale of the West Side stock to Nob Hill Holdings is properly collapsed under the step transaction doctrine into a transaction in which West Side directly acquired its own shares from its 100% shareholder as part of a liquidation; and
- 3) Whether transferee liability may be asserted against the West Side shareholder.

Issue 1 - Whether Fortrend, via Nob Hill Holdings, Inc., served as a mere conduit in the transactions between West Side and its shareholder Michael Tricarichi, in order to shelter the gain associated with the settlement proceeds for a fee, with the result that the transfer of assets to Michael Tricarichi in exchange for his stock may be characterized as liquidating distributions.

Nob Hill Holdings purportedly purchased the stock of West Side at a time when West Side was no longer engaged in any business and contained only cash and a future tax liability. The purpose of the participation of Nob Hill Holdings in the overall transaction was to serve as a conduit and shelter the gain associated with the receipt of settlement proceeds for a fee. The purported stock purchase in which the shareholder of West Side received cash in exchange for his stock was part of the overall, prearranged transaction.

In Commissioner v. Court Holding, 324 U.S. 331 (1945), the Supreme Court addressed intermediary arrangements. The Court recognized that conduits may be disregarded in determining the true substance of a transaction by providing that:

The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally 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. [footnote omitted] 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.

Several authorities have focused on the substance of the transaction in determining how a transaction should be treated for Federal income tax purposes. See Estate of Robert G. Kluener v. Commissioner, 154 F.3d 630 (6th Cir. 1998). In Davis v. Commissioner, 88 T.C. 122 (1987), a bank's foreclosure on a partnership's property and the bank's subsequent sale of property to another partnership related to the first partnership pursuant to an understanding between the bank and the first partnership was treated as an indirect sale by the first partnership to the related partnership. See also Del Commercial Properties, Inc. v. Commissioner, 54 T.C. 1305 (1970); West Coast Marketing Corp. v. Commissioner, 46 T.C. 32 (1966); and Rev. Rul. 70-140, 1970-1 C.B. 73.

Courts have disregarded stock transactions using intermediary entities designed to implement tax free corporate distributions and have recognized the purported stock purchasers as mere conduits of the shareholders. For example, *Owens v. Commissioner*, 568 F.2d 1233 (6th Cir. 1977), 64 T.C. 1 (1975), involves a transaction using an intermediary entity in which a purported stock sale was disregarded and recast as a distribution. The taxpayer in *Owens* was an S corporation with taxable income that held nothing except cash. The shareholder arranged the sale of the corporation to two individuals who had existing net operating losses. The new shareholders immediately removed the cash in the corporation, which did not engage in any further business activities. The Tax Court determined that the "sale" was a cover for a distribution by the S corporation of its assets to the shareholder, with a commission having been paid to the parties that purportedly purchased the stock.

Whether a court will respect the taxpayer's characterization of a transaction depends upon whether there is a bona fide transaction with economic substance, compelled or encouraged by business or regulatory realities, imbued with tax-independent considerations, and not shaped primarily by tax avoidance features that have meaningless labels attached. *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978).

In the case of West Side, the parties engaged in mere formalisms designed to avoid tax and thereby increase the cash proceeds to the shareholder from the receipt of settlement proceeds. Unlike the transaction in *Frank Lyon Co.*, the transaction involving the West Side shareholder, was not compelled or encouraged by business or regulatory realities, and there were no taxindependent considerations. In fact, West Side had no substantial business activities following its acquisition by the promoters.

The net effect of the overall transaction was that the cash that would have been used to pay West Side's taxes was instead distributed to the West Side shareholder and the tax shelter promoter. Furthermore, as West Side's business assets had previously been transferred to another entity, West Side was left as nothing but a corporate shell.

The purported stock sale was nothing more than an exchange of cash couched in a form designed to avoid the payment of corporate level tax. The overall transaction should be treated consistent with its substance, with the result that the shareholder of West Side received the cash from West Side as a liquidating distribution in the guise of a purported stock sale

Whether a corporation is in the process of liquidation is a question of fact. Olmstead v. Commissioner, T.C. Memo. 1984-381, citing T.T. Word Supply Co. v. Commissioner, 41 B.T.A. 965, 981 (1940); Wood v. Commissioner, 27 B.T.A. 162 (1932). The courts have developed the following three-part test to use in determining whether a corporation has liquidated: (1) Whether an intent to liquidate exists; (2) Whether there is a continuing purpose to terminate corporate affairs and dissolve the corporation; and (3) Whether the corporation's activities are directed and confined to that purpose. Estate of Maguire v. Commissioner, 50 T.C. 130, 142 (1968), citing Wood v. Commissioner, 27 B.T.A. 162, 166-167 (1932). A liquidation ultimately results in the winding up of the corporation's business. Wood, 27 B.T.A. at 166-167.

Here, the shareholder of West Side intended to cease business operations and liquidate West Side, but decided, at the advise of his counsel, to engage in a purported stock sale transaction instead, in an attempt to increase his proceeds. The actions of the promoter demonstrate a clear intention to liquidate West Side, as West Side was left with no valid business activities and no significant assets. Each step in the overall transaction moved West Side to a winding up of its activities. Accordingly, West Side was effectively liquidated following the Intermediary tax shelter transaction.

The result of recasting the overall transaction to be consistent with its substance is that the purported sale of stock to Nob Hill Holdings by Michael Tricarichi is disregarded. Rather than receiving a payment for the sale of West Side stock, which purportedly prevented the shareholder from being treated as a transferee, in reality the shareholder received a liquidating distribution from West Side on 9/9/2003 in the form of stock sale proceeds. Accordingly, Michael Tricarichi received transfers from West Side and may be treated as a transferee. See *Owens v. Commissioner*, 568 F.2d 1233 (6th Cir. 1977); *Caire v. Commissioner*, 101 F.2d 992 (5th Cir 1939); *D'agostino v. Commissioner*, TC Memo 1973-202. The total amount of the liquidating distributions received by Michael Tricarichi from West Side is \$35,199,372.

Issue 2 - Whether the purported sale of the West Side stock to Nob Hill Holdings is properly collapsed under the step transaction doctrine into a transaction in which West Side directly acquired its own shares from the West Side shareholder as part of a liquidation.

The step transaction doctrine may also be used to disregard an entity that acted as a mere shell or conduit in an attempt to avoid taxation. Under the step transaction doctrine, separate steps of a transaction may be collapsed in order to recognize the end result for tax purposes, even in cases where the overall transaction was found to have economic substance. "Where an interrelated series of steps are taken pursuant to a plan to achieve an intended result, the tax consequences are to be determined not by viewing each step in isolation, but by considering all of them as an integrated whole" (Packard v. Commissioner, 85 T.C. 397, 420).

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The tests for determining whether the step transaction doctrine should be applied are summarized in *Penrod v. Commissioner*, 88 T.C. 1415 (1987):

- 1) Binding commitment test a series of transactions should be collapsed if, at the time ..., the first step was entered into, there was a binding commitment to undertake the later step. This test has been criticized because the result is "easily manipulable" by taxpayers. Penrod at 1429.
- 2) End result test the step transaction doctrine will be applied if it appears that a series of formally separate steps are really prearranged parts of a single transaction intended from the outset to reach the ultimate result. The end result test is flexible and bases tax consequences on the real substance of the transactions, not the formalisms chosen by the participants.
- 3) <u>Interdependence test</u> the step transaction will be used if "the steps are so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series" (*Redding v. Commissioner*, 630 F.2d 1169, 1177 (7th Cir. 1980).

The tax benefits purportedly generated by the transaction between the West Side shareholder and Nob Hill Holdings depended upon the completion of the following prearranged and interdependent steps:

- 1 West Side had transferred all of its assets to LXV Group, except cash, and paid off all of its liabilities, leaving cash of \$39,949,373 in its corporate account at Pershing Bank at the outset of the stock purchase transaction.
- 2 West Side transferred its ending cash balance to a new account set up at Rabobank, as planned by the promoter.
- 3 Nob Hill Holdings was a shell corporation formed to carry out the stock purchase transaction. It had no cash on hand at the outset of the transaction.
- 4 Rabobank transferred loan proceeds of \$29,900,000 to a new account set up by Nob Hill Holdings at Rabobank. Another promoter related entity also transferred \$5,000,000 to the Nob Hill Holdings account as a short-term loan.

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- 5 Nob Hill then transferred stock purchase price of \$34,621,594 to the Tricarichi Escrow account.
- 6 The cash of \$39,949,373 was then transferred from West Side to the Nob Hill account.
- 7 The loan proceeds of \$34,900,000 were then repaid by Nob Hill, on the same day as they were received.
- 8 The remaining spread was then disbursed to the promoter and/or its associates.

As seen in the steps above, the promoter, with the assistance of the then owner of West Side, Michael Tricarichi, used the cash in West Side to obtain a loan. The promoter used the loan to purchase the stock of West Side from Michael Tricarichi. The entire transaction was pre-planned.

The sale of West Side to Nob Hill and the allocation of West Side's cash among the various parties to the transaction were planned from the outset by the promoters and were carried out by entities that were controlled by the promoters and/or its associates. The fact that numerous similar transactions involving other acquired corporations were completed by the promoters prior to the West Side transaction, using similar steps and entities, demonstrates the prearranged nature of the overall transaction for West Side. See *Packard*, 85 T.C. 397, 421.

The steps for the West Side transaction are interdependent because the tax effect desired by the parties (i.e. a purported stock sale followed by the avoidance of tax by West Side) could not be obtained unless all of the steps were completed. There was no valid business reason for Michael Tricarichi to sell its West Side stock to Nob Hill Holdings. The process left the stock of West Side in the hands of a promoter entity with access to an inflated basis asset to wipe away the gain. Through the guise of a stock sale, the cash in West Side was disbursed among the participants, leaving West Side with no business assets and no cash to pay its liabilities.

The transfer of West Side's business assets to another entity created by West Side's shareholder and the subsequent stock sale was designed to achieve tax consequences differing from those that direct liquidating distributions to the West Side shareholder would have produced. If the West Side shareholder intended for West Side to pay its taxes, the shareholder could have arranged for West Side to pay the taxes and then liquidate. There was no need to involve Nob Hill Holdings.

The purported sale of West Side's stock resulted in a flow of funds from West Side's account back to the bank accounts of its shareholder, with a portion of the money being retained by Fortrend and its associates as compensation for structuring the transaction.

The transaction between the West Side shareholder and Nob Hill Holdings meet both the "end result test" and the "interdependence test" for application of the step transaction doctrine. The application of the step transaction doctrine would cause the collapse of the step in which Michael Tricarichi sold its stock in West Side to Nob Hill Holdings. The end result to be recognized for tax purposes would be as follows with respect to the purported stock sale portion of the overall Intermediary transaction:

Step	Amount
Cash in West Side at outset of transaction	40,577,151
Liquidating distribution to shareholder	(35,199,372)
Fee distribution to Fortrend	(5,377,779)
Balance	-0-

Accordingly, under the step transaction doctrine the purported sale of stock to Nob Hill Holdings is disregarded, and the overall transaction, including the asset transfer, is recharacterized as a liquidation of West Side. The total amount of the liquidating distributions received by Michael Tricarichi from West Side is \$35,199,372.

IRC § 6901(a) provides a procedure through which the Service may collect from a transferee of assets unpaid taxes owed by the transferor of the assets if a basis exists under applicable Federal or state law or in equity for holding the transferee liable. Bresson v. Commissioner, 111 T.C. 172 (1998); and Hagaman v Commissioner, 100 T.C. 180, 183 (1993). A transferee's liability may be established either at law or in equity. Estate of Stein v. Commissioner, 37 T.C. 945 (1962). Section 6901 does not create the liability of a transferee, but is a secondary method for enforcement of the existing liability of the transferor. Mysse v. Commissioner, 57 T.C. 680 (1972). Although § 6901 provides a method by which to collect the tax, Federal or state law determines the existence and extent of the liability of a transferee. Gumm v. Commissioner, 93 T.C. 475, 479 (1989); Nicholson v. Commissioner, T.C. Memo. 1984-299; Adams v. Commissioner, 70 T.C. 373 (1978), aff'd in part dismissed in part, 688 F.2d 815 (2d Cir. 1982); and Pierce v. Commissioner, 61 T.C. 424, 432 (1974).

In the case of a shareholder, liability may arise based on court decisions applying the trust fund doctrine or under the Federal Debt Collection and Procedure Act or state statutes such as the Uniform Fraudulent Transfer Act or the Uniform Fraudulent Conveyance Act. C.D. Construction Corp. v. Commissioner, 451 F.2d 470 (4th Cir. 1971); Ginsberg v. Commissioner, 305 F.2d 664 (2d Cir. 1962) (applying the law of fraudulent transfers).

In general, the elements of a transferee liability as they apply to the transfers of West Side's assets are summarized as follows:

(1) That the transferor was insolvent prior to or because of the transfer of property - the transfers of cash to Michael Tricarichi resulted in the insolvency of West Side. The further transfers to the promoter and its associates increased the insolvency of West Side. West Side's insolvency because of the transfers of property is calculated as follows:

Cash in West Side	39,949,373
Notes Receivables - shareholder, escrow	627,778
Total West Side assets	40,577,151
Estimated income tax liabilities (per doc WC 104)	(16,853,378)
Excess of assets over liabilities at outset	23,723,773
Distribution to shareholder in purported stock sale	(35,199,372)
Excess of liabilities over assets	(11,475,599)
Distribution to Fortrend and associates	(5,377,779)
Insolvency of West Side at conclusion of transaction	(16,853,378)

- (2) That the transfer was made without consideration or for less than adequate consideration the West Side shareholders gave up the stock of West Side, which had no value following the completion of the Intermediary transaction; therefore, the transfers were made without adequate consideration:
- (3) That the transfer was made during or after the period for which the tax liability of the transferor accrued the receipt of settlement proceeds resulting in a significant taxable gain and the subsequent transfers to the West Side shareholders both occurred during the tax year ended 12/31/2003, about 5 months apart. The settlement agreement was entered into on 4/2/2003 and the liquidating transfers were made on 9/9/2003;
- (4) That the transferor was liable for the tax as explained in the Facts section of this report, West Side's return for the period ended 12/31/2003 was examined. No support was ever provided for the bad debt losses that were used to offset the gain from the settlement proceeds. As a result, the claimed losses were disallowed in full and a tax deficiency is owed by West Side;

- (5) That all reasonable efforts to collect from the transferor were made and that further collection efforts would be futile the IRS has been unable to locate any funds of West Side. The last tax return filed by West Side did not reflect any assets, and the IRS is unaware of any assets currently held by West Side. Accordingly, any collection efforts would be futile;
- (6) That the alleged transferee received property of the transferor when the Intermediary transaction is recharacterized according to its substance, Michael Tricarichi is deemed to have received liquidating distributions of West Side's assets; and
- (7) The value of the transferred property (which determines the limit of the transferree's liability) as explained in the facts section of this report, cash proceeds received by Michael Tricarichi or deposited in the Pershing account on behalf of Michael Tricarichi total \$34,621,594. Michael Tricarichi also received a check in the amount of \$577,778 that was endorsed over to the corporation for repayment of his shareholder loan. Thus, Michael Tricarichi received distributions totaling \$35,199,372.

The above factors are only a guide as the existence and extent of transferee liability is determined by the applicable Federal or state law. See *Hagaman v. Commissioner*, 100 TC 180 (1993); *Commissioner v. Stern*, 357 US 39 (1958). With respect to West Side's unpaid income tax liabilities, the potential grounds for setting aside the transfers of corporate property to West Side's shareholder, in equity or at law are discussed separately below.

Trust Fund Doctrine

In general, shareholders who receive a liquidating distribution from a corporation that subsequently winds up its affairs and dissolves without paying a federal income tax liability have been held to be transferees under the trust fund doctrine. *Dillman v. Commissioner*, 64 T.C. 797 (1975); *Commercial Finance Co. v. Commissioner*, T.C. Memo. 1968-229; *Foster v. Commissioner*, T.C. Memo 1967-224. The trust fund doctrine is an equitable principle that contemplates that assets of a dissolved corporation are held in "trust" for the benefit of the creditors of the corporation. *In re Mortgage America Corp.*, 714 F.2d 1266 (5th Cir. 1983); and *Albert v. Commissioner*, 56 T.C. 447 (1971).

The trust fund doctrine makes a shareholder liable as a transferee following any distribution after which the transferor is insolvent. *Drew, N.B. v. United States*, 367 F.2d 828 (Ct. Cl. 1966). The distribution may include a redemption of stock See *Botz v. Helvering*, 134 F.2d 538 (8th Ctr. 1943) (holding shareholders who redeemed their stock under an employee stock repurchase agreement were transferees). The most common instance of transferee liability based on the trust fund doctrine is that asserted against the shareholders of a corporation which has been liquidated by transferring assets to its shareholders. In that situation, the shareholders are jointly and severally liable, to the extent of the assets received, for unpaid taxes of the corporation. *Cold Metal Process Co. v. Commissioner*, 25 T.C. 1333 (1956), rev'd on other grounds, 247 F.2d 864 (6th Cir. 1957). The courts look to the substance of a transaction in determining whether it was a liquidating distribution, even though executed under the guise of a sale. *D'Agostino v. Commissioner*, T.C. Memo 1973-202.

In order to impose liability under the trust fund doctrine, the transfer must be made during or after the time when the tax liability accrued, the tax must still be unpaid, and the transferor must be liable for the tax. Pasadena ENT Clinic. P.S. v. Commissioner, T.C. Memo 1996-448. This is true even though the transferor's tax liability was not finally determined at the time of the transfer. Papineau v. Commissioner, 28 T.C. 54, 58 (1957). In the case of federal taxes, the liability becomes due as of the due date of the return. Hagaman, 100 T.C. at 188; Pert v. Commissioner, T.C. Memo. 1997-150. In addition, the transferor must be insolvent at the time of the transfer or rendered insolvent by the transfer. Kreps v. Commissioner, 351 F.2d 1 (2d Cir. 1965).

In the instant case, during 2003 Michael Tricarichi received from West Side distributions of cash totaling \$35,199,372, as detailed below:

Proceeds from Purported Stock SaleWire transfer into M Tricarichi, escrow acct at Rabobank34,621,594Check in the amount of shareholder loan577,778Total proceeds in 200335,199,372

These distributions, along with the distributions to the promoter and its associates, rendered West Side insolvent. The government contends that Michael Tricarichi is liable as a transferee under the trust fund doctrine since he received distributions from a corporation that rendered the corporation insolvent.

Ohio State Statutes for Transferee Liability

West Side was formed as an Ohio corporation and conducted its business activities in Ohio from its inception up until the time when its business assets were sold / transferred to LXV Group. West Side's former shareholder resided in Ohio at the time of the legal settlement and the asset sale but moved to Las Vegas, Nevada sometime during the tax year 2003. [The shareholder still owns his residence in Ohio] Although the closing for the purported stock purchase occurred in California (location of the promoter), the transfer of funds originated from West Side's business, located in Ohio. Accordingly, the transferee liability statutes of Ohio are applicable with respect to the transfers to Michael Tricarichi.

Ohio has adopted the Uniform Fraudulent Transfer Act (Chapter 1336). The potential grounds that are available to the IRS for setting aside a transfer that is fraudulent as to a tax debt-under the Ohio fraudulent conveyance statutes are shown below:

OHIO UCC § 1336.04: TRANSFER MADE OR OBLIGATION INCURRED FRAUDULENT AS TO CREDITOR

- (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
 - (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
 - (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (b) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

- (B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
 - 1. whether the transfer or obligation was to an insider;
 - whether the debtor retained possession or control of the property transferred after the transfer;
 - 3. whether the transfer or obligation was disclosed or concealed;
 - whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
 - 5. whether the transfer was of substantially all of the debtor's assets;
 - 6. whether the debtor absconded;
 - 7. whether the debtor removed or concealed assets;
 - whether the value of the consideration received by the debtor was reasonably
 equivalent to the value of the asset transferred or the amount of the obligation
 incurred;
 - whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
 - whether the transfer occurred shortly before or shortly after a substantial debt was incurred; and
 - 11. whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

The specific provisions of the Ohio UCC §1336.04 that are applicable with respect to the tax shelter transaction of West Side are discussed separately below.

OHIO UCC § 1336.04 (A)(1) - Transfers Made with Actual Intent to Hinder, Delay, or Defraud a Creditor

The provisions of OHIO UCC § 1336.04 (A)(1) relating to transfers made with actual intent to hinder, delay, or defraud a creditor are applicable for transfers made with respect to a debt owed whether such debt arises before or after the transfer. OHIO UCC § 1336.04 (B) lists various factors to be considered, among other things, in determining actual intent under the provisions of § 1336.04(A)(1) Relevant factors from the list are discussed separately below:

1) The transfer or obligation was to an insider.

If the debtor is a corporation, Ohio UCC § 1336.01(G)(d) provides that an insider includes a director of the corporation, or an officer of the corporation, or person in control. At the time of the transfer, Michael Tricarichi was President of West Side and also a director. Further, he was the person in control of the corporation. Accordingly, the transfer was made to an insider.

2) The transfer was of substantially all of the debtor's assets.

The transfer to the shareholder of West Side was of substantially all of West Side's assets. At the time of the purported stock sale West Side had assets of \$40,577,151. \$35,199,372 was distributed to the shareholder as a purported stock sale, which was about 87% of the total assets. The remaining cash of \$5,377,779 appears to have been removed by the promoter and distributed to itself and its associates, apparently as compensation for implementing the tax shelter transaction.

3) The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred.

The shareholder of West Side received a transfer of assets for which he gave up nothing other than his shares of stock in West Side. Based on the amount of assets left in the corporation following the liquidating distributions, the stock of West Side that Michael Tricarichi gave up was not reasonably equivalent in value to the assets that were distributed to him. Once the promoters removed all of the remaining cash from the corporation as part of the same overall tax shelter transaction, the corporate stock became worthless.

4) The debtor was insolvent or became insolvent shortly after the transfer was made:

At the time of the transfer, West Side had incurred income tax liabilities of approximately \$16,853,378. Once West Side's cash had been distributed to Michael Tricarichi, West Side's remaining assets of \$5,377,779 were less than its liabilities of \$16,853,378, and West Side became insolvent. Furthermore, the remaining assets of \$5,377,779 were removed by the promoters and were not available to pay West Side's income tax liabilities.

5) The transfer occurred shortly after a substantial debt was incurred.

The transfer to Michael Tricarichi of cash occurred on 9/9/2003, which was about 5 months after the receipt by West Side of settlement proceeds, resulting in a substantial taxable gain, resulting in a debt for income taxes in the estimated amount of \$16,853,378.

OHIO UCC § 1336.04 (A)(2) - Transfers That are Not Made for Reasonably Equivalent Value and the Debtor was Engaged or was about to Engage in a Business or 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 whave believed that the Debtor would incur, Debts beyond the Debtor's ability to pay.

With respect to the "reasonably equivalent value" test, the shareholder of West Side received a transfer of assets for which he gave up nothing other than his shares of stock in West Side. Based on the amount of assets left in the corporation following the liquidating distributions, the stock did not have a value that was reasonably equivalent to the amount of assets distributed to the shareholder.

Further, at the time of the transfer to Michael Tricarichi, West Side was engaged in a transaction for which the remaining assets were unreasonably small in relation to the transaction. The transaction was the Intermediary Transaction tax shelter, in which the tax shelter promoters (Fortrend) attempted to avoid Federal income taxes on the gain from West Side's settlement proceeds sale by claiming a bad debt that the promoters knew or had reason to know would be disallowed if West Side's income tax return were to be examined.

OHIO UCC § 1336.05: CLAIMS ARISING BEFORE THE TRANSFER OR OBLIGATION INCURRED.

(A) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. 1

(B) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Ohio UCC §1336.05 (A) - Transfers not made for a reasonably equivalent value by an insolvent Transferor (or Transferor rendered insolvent by the Transfer).

This provision is applicable with respect to debts that arise before the transfer is made. Since Federal income tax liabilities do not accrue until the end of a tax period, a question may be raised as to whether a transfer that is made after a taxable event, but prior to the end of the tax year, is a transfer subject to Ohio UCC §1336.05 (A).

The generally accepted and applied theory of transferee liability in equity is that a transferee is "retroactively" liable for the transferor's taxes in the year of the transfer and also prior years. Thus a transferor's tax debt incurred during the tax period in which the transfer at issue occurred is retroactively treated as having been incurred before the transfer for purposes of this constructive fraud law. In the case of West Side, the debt in the form of income tax due on the gain from the litigation settlement is treated as having been incurred prior to the transfer of assets to West Side's shareholder in exchange for his stock.

As noted above, based on the amount of assets left in the corporation following the liquidating distributions, the stock of West Side that Michael Tricarichi gave up did not have a value that was reasonably equivalent to the amount of assets distributed to him. Furthermore, the transfers to the shareholder rendered West Side insolvent and unable to pay the corporate income tax liabilities arising from the large legal settlement previously received. Accordingly, the unpaid Federal income tax liabilities of West Side may be collected from Michael Tricarichi as a transferee of the assets of West Side in the amount of \$35,199,372.

Federal Debt Collection and Procedure Act

Effective on May 29, 1991, Congress enacted the Federal Debt Collection and Procedure Act ("FDCPA") of 1990, 28 U.S.C. § 3001 et. seq., which describes potential grounds (in § 3304) for setting aside transfers that are fraudulent as to debts owed the United States, including tax debts. The transferee liability provisions of § 3304 of the FDCPA may be used to impose personal transferee liability under IRC § 6901 and to collect unpaid taxes owed by a transferor from a transferee of the transferor's assets.

¹ See 14 Mertens Law of Federal Income Taxation (2000) § 53.27 and § 53.38; IRM 5.17.14.3.6:(2)c; Caire v. Commissioner, 101 F.2d 992 (5th Cir. 1939) (stockholder receiving March 1931 check held liable as transferee for corporate tax debt for year ending November 1931); Kreps v. Commissioner, 351 F.2d 1, 8 (2nd Cir. 1965) (corporate officer receiving proceeds of redeemed airline tickets during fiscal year ending February 28, 1951, held liable as transferee for corporate tax debt for that fiscal year); Holmes v. Commissioner, 47 T.C. 622 (1967) (stockholder receiving \$ 28,545.00 payment from corporation on January 2, 1956, held liable as transferee for corporation's income tax liability for year ended March 31, 1956); Leach v. Commissioner, 21 T.C. 70, 75-6 (1953) ("The transferee is retroactively liable for transferor's taxes in the year of transfer and prior years"); Delpit v. Commissioner, T.C. Memo 1991-147; D'Agostino v. Commissioner, T.C. Memo 1973-202. But see Reid Ice Cream Corp. v. Commissioner, 59 F.2d 189 (2nd Cir. 1932) (interpreting scope of a purchaser's liability assumed at law, under a contract), Pert v. Commissioner, T.C. Memo 1997-150 (dicta, that the Service becomes a taxpayer's creditor for transferee liability purposes at the close of a taxable period in which tax arises).

As shown below, the potential FDCPA grounds that are available to the IRS for setting aside a transfer that is fraudulent as to a tax debt owed the United States are very similar to the State of Ohio statutes cited above:

28 U.S.C. § 3304. Transfer fraudulent as to a debt to the United States

- (a) Debt arising before transfer.--Except as provided in <u>section 3307</u>, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States which arises before the transfer is made or the obligation is incurred if--
 - (1)(A) the debtor makes the transfer or incurs the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
 - (B) the debtor is insolvent at that time or the debtor becomes insolvent as a result of the transfer or obligation; or
 - (2)(A) the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time; and
 - (B) the insider had reasonable cause to believe that the debtor was insolvent.
- (b) Transfers without regard to date of judgment.--(1) Except as provided in section 3307, a transfer made or obligation incurred by a debtor is fraudulent as to a debt to the United States, whether such debt arises before or after the transfer is made or the obligation is incurred, if the debtor makes the transfer or incurs the obligation--
 - (A) with actual intent to hinder, delay, or defraud a creditor; or
 - (B) without receiving a reasonably equivalent value in exchange for the transfer or obligation if the debtor--
 - (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

The specific provisions of the FDCPA that are applicable with respect to the tax shelter transaction of West Side are discussed separately below.

28 U.S.C. § 3304 (a)(1)(A) - Transfers That Are Not Made for Reasonably Equivalent Value by an Insolvent Transferor (or Transferor Rendered Insolvent by the Transfer)

This provision of the FDCPA is applicable with respect to debts owed the United States that arise before the transfer is made. As discussed above, a transferee is "retroactively" liable for the transferor's taxes in the year of the transfer and also prior years. Thus a transferor's tax debt incurred during the tax period in which the transfer at issue occurred is retroactively treated as having been incurred before the transfer. In the case of West Side, the debt to the United States in the form of income tax due on the gain from the litigation settlement is treated as having been incurred prior to the transfer of assets to West Side's shareholder in exchange for his stock.

With respect to the "reasonably equivalent value" test, Michael Tricarichi received transfer of assets for which he gave up nothing other than his shares of stock in West Side. Based on the amount of assets left in the corporation following the liquidating distributions, the stock did not have a value that was reasonably equivalent to the amount of cash distributed to Michael Tricarichi. Furthermore, the transfer to Michael Tricarichi rendered West Side insolvent and unable to pay the corporate income tax liabilities arising from the prior litigation settlement. Accordingly, the unpaid Federal income tax liabilities of West Side may be collected from Michael Tricarichi as a transferee of the assets of West Side in the amount of \$35,199,372.

28 U.S.C. § 3304(b)(1)(A) - Transfers Made with Actual Intent to Hinder, Delay, or Defraud a Creditor

The provisions of 28 U.S.C. § 3304(b)(1)(A) relating to transfers made with actual intent to hinder, delay, or defraud a creditor are applicable for transfers made with respect to a debt owed to the United States whether such debt arises before or after the transfer.

28 U.S.C. § 3304(b)(2) lists various factors to be considered, among other things, in determining actual intent under the provisions of 28 U.S.C. § 3304(b)(1)(A). Relevant factors from the list

are discussed separately below:

- The transfer or obligation was to an insider. If the debtor is a corporation, 28 U.S.C. §
 3301(5)(B) provides that an insider includes a director of the corporation and an officer
 of the corporation. At the time of the transfer, Michael Tricarichi was President of West
 Side and also a director. Accordingly, the transfer was made to an insider.
- 2) The transfer was of substantially all of the debtor's assets. The transfers to Michael Tricarichi were of substantially all of West Side's assets. At the time of the purported stock sale West Side had assets of \$40,577,151. \$35,199,372 was distributed to the shareholder as a purported stock sale, which was about 87 % of the total assets. The remaining cash of \$5,377,779 appears to have been removed by the promoters and its associates, apparently as compensation for implementing the tax shelter.
- 3) The value of the consideration received by the debtor was not reasonably equivalent to the value of the asset transferred. As noted above, based on the amount of assets left in the corporation following the liquidating distributions, the stock of West Side that Michael Tricarichi gave up did not have a reasonably equivalent value to the assets that were distributed to him. Once the promoters removed all of the remaining cash from the corporation as part of the same tax shelter transaction, the corporate stock became worthless.
- 4) The debtor was insolvent or became insolvent shortly after the transfer was made. At the time of the transfer, West Side had incurred income tax liabilities of \$16,853,378. Once West Side's cash had been distributed to Michael Tricarichi, West Side's remaining assets of \$5,377,779 were less than its liabilities of \$16,853,378, and West Side became insolvent. Furthermore, the remaining assets of \$5,377,779 were removed by the promoters and were not available to pay West Side's income tax liabilities.
- 5) The transfer occurred shortly after a substantial debt was incurred. The transfer to Michael Tricarichi occurred on 9/9/2003, which was about 5 months after the litigation settlement proceeds were received on or about 4/2/2003 at a substantial taxable gain, resulting in a debt owed to the United States for income taxes in the amount of \$16,853,378.

28 U.S.C. § 3304(b)(1)(B)(i) - Transfers That are Not Made for Reasonably Equivalent Value and the Debtor was Engaged or was about to Engage in a Business or Transaction for Which the Remaining Assets of the Debtor were Unreasonably Small in Relation to the Business or Transaction

At the time of the transfer to Michael Tricarichi, West Side was engaged in a transaction for which the remaining assets were unreasonably small in relation to the transaction. The transaction was the Intermediary Transactions tax shelter, in which the tax shelter promoters (Fortrend and associates) attempted to avoid Federal income taxes on the gain from the settlement proceeds by claiming losses that the promoters knew or had reason to know would be disallowed if West Side's income tax return were to be examined.

CONCLUSION

It is the Government's position that Nob Hill Holdings was a mere conduit through which the shareholder of West Side could withdraw the assets of West Side pursuant to a prearranged plan. At the time of the purported stock sale, West Side was not engaged in any business activities and was holding cash remaining from the settlement proceeds after paying off all outstanding liabilities (except for tax liabilities of the 2003 tax year). The stock sale served as a conduit whereby Michael Tricarichi could convert the withdrawal of cash proceeds generated from the litigation settlement to proceeds generated from a stock sale. The sole purpose of using Nob Hill Holdings was to avoid paying corporate income tax. The tax avoidance scheme allowed the shareholder to receive more money from his corporation than he would have received if the corporation had sold its assets and then liquidated.

The Government contends that the transaction should be recast in the form that follows economic reality, i.e., that Nob Hill Holdings was a mere conduit, so that the purported sale of stock to Nob Hill Holdings should be disregarded. As a result, the West Side shareholder should be treated as a transferee of the assets of West Side through distributions of the proceeds of the litigation settlement as part of the purported stock sale. As the shareholder, Michael Tricarichi is a transferee of assets in the amount of \$35,199,372.

Exhibit Index-West Side Cellular, Inc.

Cash Flow Spreadsheet	Exhibit A
Description of money flow from Michael Tricarichi's Pershing accounts (document HL 2874)	Exhibit B
Rabobank input document reflecting receipt of funds of \$39,929,373 into West Side Cellular account #21577 on 9/8/03 (document Rabo-F-5455)	Exhibit C
Letter to Rabobank requesting wire transfer for cash portion of Stock Purchase Price (\$34,621,594) from Nob Hills account to escrow account, dated 9/9/2003 (document Rabo-F-5565)	Exhibit D
Letter to Rabobank requesting wire transfer of \$34,621,594 from the escrow account to Michael Tricarichi's account at Pershing Bank, dated 9/9/2003 (document Rabo-F-5489)	Exhibit E
Pershing Bank Statement showing receipt of funds from Rabobank (document MT-6)	Exhibit F
Copy of check portion of Stock Purchase Price (\$577,777) issued to Michael Tricarichi, with endorsement back to the corporation (document WC 178); copy of portion of Stock Purchase Agreement explaining the check (document WC 75)	Exhibit G
Summary of Assets transferred by West Side to Michael Tricarichi	Exhibit H
Analysis of Transferor's Liability – West Side Cellular	Exhibit I
Examination Report, Form 4549 for West Side, dated 1/29/2008	Exhibit J

Exhibit A

Summary of Cash Flow Spreadsheet prepared by Examiner

Bank Rabobank
Account Num 0002157
Name West Side Celular
Sgnature Authority Michael Tincanchi transfers to John McNabola Bank Pershing Account Num 31v001900 Name West Side Cellular Signature Authonity Michael Tricanchi Bank Business Bank of California Account Num #55800144 Name Wast Skid Callular Signäture Authority John McNabola, Timothy Conn, Aace Dill Wire Transfers Deposits Transfers Balance Date Description
Ending Cash Balance received from
Westside Cellular -business account Description Deposits Transfers Balance
Received from WSC Acci #21577
at Rabobank 5,100,577,03 fees misc acci Description Deposits Date Ending cash balance at 8/31/2003 9/10/03 at Rabobank 39,949,373 12 39,949,373 12 Ending cash balance wire transferred to Westarde Cetular #21577 at Rabobank 9:003 Inderest earned on overnight lime deposit 9:003 datu/rament to where? 9:003 recide from blob Het Holdings 9:003 Transferred to Nob Het Holdings 9:003 Transferred to winnown 9:000 Transferred to winnown 9:000 Transferred to winnown 9:003 disposal from 9:003 dis 5,099,949 53 Bank Rabobank Account Num #21595 Name Tricanchi Escrow Signature Authority Michael Tricanchi 50,200,528 56 50,200,525 58 Transfers Description
Rec'd from Nob Hill Holdings (Stock Deposits Ending Balance 0 00 Purchase Price)
Transferred to Tricanchi acct at Pershing
9/9/03 #310091918 34 621,594 06 34,621,594.06 Bank Business Bank of California
Account Num #65900136
Name Nob Hal Holdings
Signature Authority John McNabolal, Timothy Conn
Date Description Deposits
HECENER from Nob Hall Acci
118/03 (201658 at Rabobank 78,542 64
118/03) (ransferred ending balance to Bank Pershing Account Num 310091918 Name Michael Tricanchi Signature Authority Michael Tricanchi labola, Timothy Conn
tion Deposits Transfers Balance Date Description
9/9/2003 Recid from Tricanchi Escrow al Rabohank Deposits Transfers 34 621,594 06 WSC #65800144 78,542 64 Cash Balance Rec'd by Fortrend Escrow previously recid Stock Purchase Price paid out by Fortrend Profit to Fortrend at Closing 34,621,594 00 5,377,779 00 Payout to Fortrend owned accounts Guarantee Fee Escrow 5 179 120 00 50,000 00

Exhibit B

Description of money flow from Michael Tricarichi's Pershing accounts (document HL 2874) Here is a description of the transactions:

On September 8th, 2003, all of the stock of Westside Cellular Inc. was sold to Nob Hill Holdings Inc, a Delaware corporation. In order to facilitate the transaction, on September 8th, all of the assets of Westside cellular, including the funds on deposit in Pershing account #31v001900 were wired to an account at Rabobank in Ny which was opened for such purpose. On September 9th, in accordance with the stock purchase agreement, the proceeds of the sale of Mr. Tricarichi's stock were wired by Rabobank to his personal account established at Pershing (Acct #31v001918). After those funds were received, per Mr. Tricarichi's instructions, I initiated a transfer of some of those funds to a second account I manage for him at Charles Schwab & Co. That account has a lower commission rate. I hope that clears things up.

Exhibit C

Rabobank input document reflecting receipt of funds of \$39,929,373 into
West Side Cellular account #21577 on 9/8/2003
(document Rabo-F-5455)

09/10/2003

WEST SIDE CELLULAR INC 09:09 AM

ACCOUNT# CURR ACCOUNT TYPE/DESCRIPTION 00021577 USO 000-Normal Account

STATEMENT PERIOD 09/01/2003-09/09/2003

Entru.	Text			Rof≞	Value	Amount
		22.000-2007				THE RESIDENCE OF THE PROPERTY
OPENING	Ealance	Book:		0.000	R Avail:	0.00DR
09/08/200	JAV - NAC	UE DATE SET	TLEMT.	00486435	09/98/2003	39,949,373.12DR
09/08/200	03/314-001	900-1 FOR /	21577	80727000	09/98/2003	39,949,373,12CR
09/08/208)35alance	Book:		0.00D	R Avail:	0.00GR
69/69/206	TAN - MME	URITY SETTL	EMENT	00486436	09/09/2003	39,950,449.53CR
09/09/200	3MM - VAL	UE DATE SET	TLEMT.	00486486	09/09/2003	5.099.949.53DR
09/09/200	DONDB HILL	HOLDINGS.I	NC. FO	RPFIHB/0	69/09/2003	150.000.00CR
09/03/200	SWEST SIC	E CELLULAR,	INC.	RPFIHB/0	09/09/2003	35,000,000.00DR
03/03/206	DIE TREME	E CELLULAR,	INC.	RPFIMB/0	09/09/2003	5,000,000.00DR
						A

Enter \E to exit or <or> to continue

Exhibit D

Letter to Rabobank requesting wire transfer for cash portion of Stock Purchase Price (\$34,621,594) from Nob Hills account to Michael Tricarichi escrow account, dated 9/9/2003 (document Rabo-F-5565)

and

Rabobank input document reflecting receipt of funds into Michael Tricarichi escrow account #21595 on 9/9/2003 (document Rabo-F-5493)

Nob Hill Holdings, Inc.

Suptember 9, 2003

Chris Konlandt Rabohank International New York Branch 245 Park Avenue New York, NY 10167-0062

Dear Mr. Komlandt:

We hereby instruct you to execute the following transfers:

Amount:

\$ 34,621,594.06

. Bank of New York ABA #021-0000-18

Credit to:

Rabobank Nederland, New York Branch

Acat. #802-6002-533

Further Credities Michael Tricarichi Escrow Account

Acct. # 21595

Reference:

Stock purchase prize

Please debit our account at your Bank (#21568).

Thank you for your attention to this matter.

Very truly yours,

John P. McNubolu-

Presiden!

09/08/01 MON 21:11 [TX/RX NO 6405]

RABO-F- 0005565

TRICAR-NV0067052

PABOBONIK MEDERLAND HEM YORK DOA

Dai Financial Inquiry By Accord 09/09/2003

ROCCURTI: ACCOUNT TITLE

00021595 TRICARICHI ESCROW

CURRENCY USD

CREDIT 34.621.594.05

ACCOUNT TYPE : 000 Hormal Account

TRANS IDA FROM NCCT 25240110093

AMOUNT CHECK # RC VALLOTE, ENTITIME FLG 34,521,594.06CR M. TRICA 60 09/09/200309:24 AM 0

Enter "\E" for new account, "\A" lean from Other Modules __

RABO-F- 0005493

Exhibit E

Letter to Rabobank requesting wire transfer of \$34,621,594 from Michael Tricarichi escrow account to Michael Tricarichi's account at Pershing Bank, dated 9/9/2003 (document Rabo-F-5489)

9/9/2003

Mike Tricarichi 341 Arbour Garden Avenue Las Vegas, Nv 89140

To: Chris Kortlandt Rabobank Nederland, New York Branch 245 Park Ave. 37th Floor New York, Ny 10167 Fax # 212-808-2584

Dear Chris:

Amount: \$34,621,594.06

Please wire all funds in Acct # 21595 (Michael Tricarichi Escrow Account) to:

Chase NYC ABA#021000021 DIJ Pershing Division 950-1-1032992 F/C Michael Tricarichi 31V-001918

The amount therein should be approximately \$34,621,594. Thank you for your cooperation in this matter. If you have any questions or problems, please contact the at 216-978-9000

00 10 -

Michael Triearichi Escrow Agent

Sincerely yours

09/08/03 MON 15:55 [TX/RX NO 6405]

RABO-F- 0005489

711

Exhibit F

Pershing Bank Statement showing receipt of funds from Rabobank

(document MT-5, MT-6, MT-8)

YOUR Brokerage Account

Statement Period: 05/02/2003 - 09/30/2003

Portfolio Holdings (continued)

Pershing INVESTMENT MANAGER SERVICE

	Market	*:	Estimated
Description	Value		Annual Income
Total Portfolio Holdings	\$10,002,536.66	•	\$15,847.60

Disclosures and Other Information

Pricing - Securities prices may vary from actual liquidation value. Prices shown should only be used as a general guide to portfolio value. Prices are received from various pricing services. However, pricing services are sometimes unable to provide timely information. Where pricing sources are not reactly available, particularly on certain debt securities, estimated prices may be generated by a matrix system taking various factors into consideration. The pricing of listed options takes into account the last closing price, as well as the current bid and offer prices. Where securities have not been priced, such securities have not been priced, such securities have not been priced in the Asset Allocation information at the beginning of this statement.

Reinvestment - The dollar amount of Mutual Fund distributions, Money Market Fund income, or dividends or other securities shown on your statement may have been reinvested into additional

shares. You will not receive confirmation of these reinvestment transactions. However, information pertaining to these transactions which would otherwise appear on confirmations, including the time of execution and the name of the person from whom your security was purchased, will be furnished to you upon written request to your introducing firm. In dividend reinvestment transactions, Pershing acts as your agent and receives payment for order flow, the source and nature of which payment will be furnished to you upon written request to your introducing firm.

Option Disclosure - Information with respect to commissions and other charges incurred in connection with the execution of option transactions has been included in confirmations previously turnished to you. A summary of this information is available to you promptly upon your written request directed to your introducing firm. In order to assist your introducing firm in maintaining current background and financial information concerning your option accounts, please promptly acvise them in writing of any material change in your investment objectives or financial situation. Expliring options which are valuable are exercised automatically pursuant to the exercise by exception procedure of the Options Clearing Corporation. Additional information regarding this procedure is available upon written request to your introducing firm.

Price

Accrued Interest

Transactions by Type of Activity

Process/	Trade/	
Settlement	Transact	tion
Date	Date	Activity Type

ダナング

09/17/03 09/12/03 PURCHASED MKR ON EXCH AND ACTED AS PRINCIPAL 09/18/03 09/15/03 PURCHASED BP PLC SPONS ADR A PERSHING CO IS MKT 600 000 42,8700 -2 09/18/03 09/15/03 PURCHASED MKR ON EXCH AND ACTED AS PRINCIPAL 09/18/03 09/15/03 PURCHASED HURCHASED HURCHAS					
09/17/03 09/12/03 PURCHASED MKR ON EXCH AND ACTED AS PRINCIPAL 09/18/03 09/15/03 PURCHASED MKR ON EXCH AND ACTED AS PRINCIPAL 09/18/03 09/15/03 PURCHASED MCR ON EXCH AND ACTED AS PRINCIPAL 09/18/03 09/15/03 PURCHASED HURCHASED	Securities Bought and Sold		Walter to the State of the Stat		
09/17/03	09/17/03 09/12/03 PURCHASED		400.000	42.8700	-17,160.00
09/18/03 09/15/03 PURCHASEO CHEVRONTEXACO CORP COM 900.000 72.8200 -6 A PERSHING CO IS MKT MKR ON EXCH AND ACTED AS PRINCIPAL	09/17/03 09/12/03 PURCHASED	BP PLC SPONS ADR A PERSHING CO IS MKT	600 000	42.8700	-25,740.00
Po	09/18/03 09/15/03 PURCHASED	CHEVRONTEXACO CORP COM A PERSHING CO IS MKT MKR ON EXCH AND	900.000	72.8200	-65,565.00
					Page 3 of 8

*1300

PAR-01-ROLL

Fransactions by Type of Activity (continued) Process/ Trode/ Settlement Transaction

Date	Date	Activity Type	Description	Quantity	Price	Accrued Interest	Announ
Securities	Bought an	d Sold (continued)					
20/81/60	09/15/03	PURCHASED	CHEVRONTEXACO CORP COM A PERSHING CO IS MKT MKR ON EXCH AND ACTED AS PRINCIPAL	100,600	72,8200		-7,285 00
09/18/03	09/15/03	PURCHASED	KERR MCGEE CORP A PERSHING CO IS SPCLST ON EXCH & MAY HAVE ACTED AS PRIN	1,000 000	43.7200		-43,750.00
09/22/03	09/17/03	PURCHASED	BP PLC SPONS ADR A PERSHING CO IS MKT MKR ON EXCH AND ACTED AS PRINCIPAL	1,000.000	42,7600		-42,790.00
09/22/03	09/17/03	PURCHASED	EXXON MOBIL CORP COM A PERSHING CO IS MKT MKR ON EXCH AND ACTED AS PRINCIPAL	400.000	36.9600		-14,796.00
09/22/03	09/17/03	PURCHASED	EXXON MOBIL CORP COM A PERSHING CO IS MKT MKR ON EXCH AND ACTED AS PRINCIPAL	600,000	36.9600		-22,194.00
09/29/03	09/24/03	PURCHASED	EXXON MOBIL CORP COM A PERSHING CO IS MIXT MIXE ON EXCH AND ACTED AS PRINCIPAL	1,000.000	36.9400		-36,970.00
09/30/03	09/25/03	PURCHASED	KERR MCGEE CORP A PERSHING CO IS SPCLST ON EXCH & MAY HAVE ACTED AS PRIN	1,000.000	44,2200		-44,250.00
Total Sec	urities Bou	ght and Sold					-\$320,500.00
Cash Wit	thdrawals a	nd Deposits					
09/09/03		FEDERAL FUNDS RECEIVED FEDERAL FUNDS SENT	RABOBANK NEDERLAND 1307 CITIBANK N.A.				34,621,594.06 -24,621,000.00
Total Ca	sh Withdra	wals and Deposits					\$10,000,594.06
Fees 09/11/03		WIRED FUNDS FEE	W/F TRANS CHGS A/O 09/10 RR: MSH				-15.00
Total Fee	es es						-\$15.00
Dividend	is and Inter	rest					
09/30/03		MONEY MARKET FUND INCOME RECEIVED	ALLIANCEBERNSTEIN				4,327 50
Total Di	vidends and	i Interest					\$4,327.60
Total V	alue of a	II Transactions					\$9,684,406.66
The origin	and outsoft	v displayed may have been rounded	r .				

The price and quantity displayed may have been rounded.

Account Number, 31V-001918

TRICAR-NV0067058

Page 4 of 8

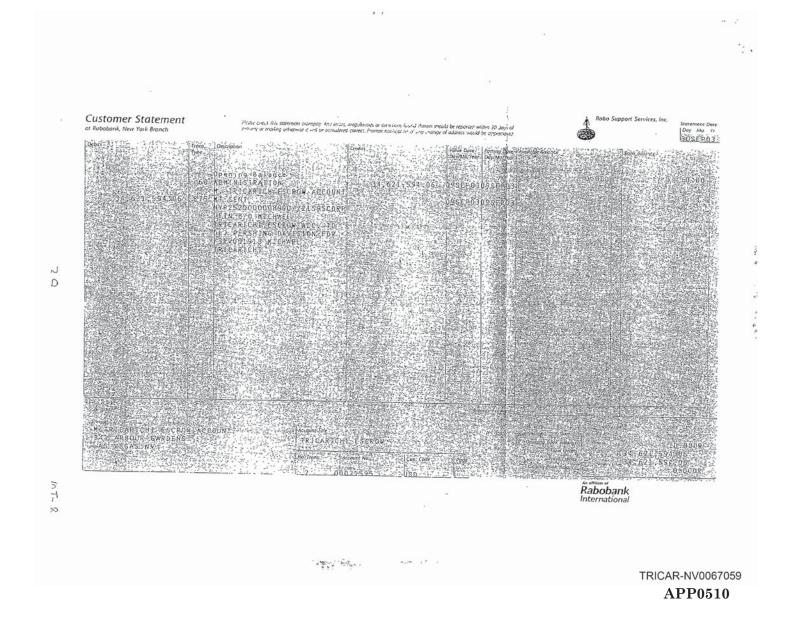


Exhibit G

Copy of check portion of Stock Purchase Price (\$577,777) issued to Michael Tricarichi, with endorsement back to the corporation (document WC 178)

and

Copy of portion of Stock Purchase Agreement explaining the check portion of the purchase price (document WC 75, WC 76)



WW 000178

"Transaction with Contractual Protection" means a Transaction for which the taxpayer has been provided Contractual Protection for purposes of Treasury Regulations Section 1.6011-4(b)(4).

The second secon

"Transaction with a Significant Book-Tax Difference" means a Transaction with a Significant Book-Tax Difference for purposes of Treasury Regulations Section 1,6011-4(B)(6).

"Treasury Regulations" means regulations (including temporary regulations) published by the U.S. Treasury Department-pursuant to the Code, including successor provisions to such regulations.

"UAFC" means Utrecht-America Finance Co.

::,

Section 1.2 Interpretation. In this Agreement, unless the contrary intention appears:

- (a) a reference to an Article, Section or Exhibit is a reference to an Article or Section of, or Exhibit to, this Agreement and references to this Agreement include any recital in, or Exhibit to, this Agreement;
- (b) any agreement referred to herein shall mean such agreement as amended, supplemented and modified as of the Closing Date to the extent permitted by the applicable provisions thereof, and shall include all exhibits, schedules, and other documents or agreements attached thereto:
- (c) a reference to a statute, ordinance; code or other law includes regulations under it and consolidations, amendments, reenactments or replacements thereof;
 - (d) the singular includes the plural and vice versa; and
- (c) whenever the words "include;" "includes" or "including" are used in this Agreement, they are deemed to be followed by the words "without limitation."

ARTICLE.2

PURCHASE AND SALE OF SHARES

Section 2.1 <u>Purchase and Sale</u>. Upon the terms and subject to the conditions set forth herein, Seller shall sell; convey, transfer assign and deliver to Buyer, and Buyer shall purchase, acquire and accept from Seller, all of the Shares, as set forth on <u>Schedule 3.2(b)</u> to this Agreement, for an aggregate purchase price of Thirty-Five Million One Hundred Ninety-Nine Thousand Three Hundred Seventy One Dollars and Bighty Three Cents (\$35,199,371.83 (such amount, the "Purchase Price"). Buyer shall, upon satisfaction or waiver of all the conditions in <u>Section 6.1</u> of this Agreement, and once all of the necessary documents have been delivered for the delivery of such documents has been waived to Buyer in accordance with <u>Section 7.2</u> of this Agreement, pay to Seller. (i) cash in the amount of Thirty-Four Million Six Hundred and Twenty-One Thousand Five Hundred and Ninety-Four Dollars and Six Cents (\$34,621,594.06 (such amount, the "Cash Portion of the Purchase Price") in immediately available funds by wire transfer in accordance with the wire instructions attached hereto as <u>Exhibit A</u>, and (ii) a check

7

WC 000075

in the amount of Five Hundred and Seventy-Seven Thousand Seven Hundred and Seventy-Seven Dollars and Seventy-Seven Cent (\$577,777.77 made payable to Seller as an advance to repay the Seller Loan (such check, the "Seller Loan Advance Check"). Seller, upon satisfaction or waiver of all of the conditions in <u>Section 6.2</u> and once all of the necessary documents have been delivered to Seller (or the delivery of such documents has been waived) in accordance with <u>Section 7.4</u>, shall transfer the Shares to Buyer.

ARTICLE 3

REPRESENTATIONS AND WARRANTIES OF SELLER

Section 3.1 Representations of Seller, represents and warrants to Buyer that the following are true and correct as of the date hereof and shall be true and correct as of the Closing Date:

- (a) Government and Other Consents: No authorization or approval or other action by, and no notice to or filing with, any Governmental Authority is required to be obtained or made, and no consent of any third party is required to be obtained by Seller for the due execution, delivery and performance by Seller of this Agreement, other than any filing or registration required by any applicable provision of the Code and the regulations promulgated therewith.
- (b) No Violation of Statute or Breach of Contract. Seller is not in default under or in violation of: (i) to Seller's Knowledge, any material applicable Requirement of Law affecting Company or the Shares or (ii) any material Contractual Obligation to which Seller is a party affecting Company or the Shares. Seller has not received notice that any Person claims that Seller has committed such a default or violation. The execution of this Agreement by Seller will not constitute a default under or a violation of any Requirement of Law nor any material Contractual Obligation to which Seller is a party:

34.

- (c) <u>Enforceable Obligations</u>. This Agreement has been duly executed and delivered on behalf of Seller and constitutes the legal, valid and binding obligation of Seller, enforceable against Seller in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general principles of equity.
- (d) No Litigation. No litigation, investigation by any Governmental Authority or proceeding of or before any arbitrator or Governmental Authority is pending or, to the Knowledge of Seller, threatened by or against Seller with respect to Company, this Agreement or any of the transactions contemplated liercby.
- (e) Ownership of the Shares. Seller is the owner of the number of issued and outstanding Shares listed as being owned by lim on Schedule 3.2(b). All of the Shares are free and clear of any liens, claims or encumbrances other than transfer restrictions imposed by applicable securities laws. Seller has the right to transfer title to the Shares to Buyer. There are no commitments, agreements or rights relating to the purchase, sale or other disposition of the Shares or any interest therein (including, without limitation, any subscription agreement, preemptive right or right of first refusal) that, individually or cumulatively, would adversely

8

WC 000076

Exhibit H

Summary of Assets transferred by West Side to Michael Tricarichi

Exhibit H Michael Tricarichi, Transferee Assets Transferred

Assets Transferred by West Side Cellular, Inc. to Michael Tricarichi:

Michael Tricarichi, Transferee 200312

	ASSET DESCRIPTION	AC/LAC	COST	MORTGAGE/DEBT ASSUMED	FMV ON DATE OF TFR	DATE OF TFR
1.	CASH	LAC	34,621,594	0	34.621.594	9/9/2003
2.	Check (amount of s/h loan)	LAC	577,778		577,778	9/9/2003
3.						
4.						
5.						
6.						
7.						
8.		*				
9.						
	TOTALS		35.199.372	0	35.199.372	

AC Adequate consideration

LAC Less than adequate consideration

Exhibit I

Analysis of Transferor's Liability - West Side Cellular

Exhibit \mathcal{I} Analysis of Transferor's Liability – West Side Cellular

West Side Cellular. Transferor For the tax year ended December 31, 2003

Tax per Return		0	
Plus Tax per Examination Report dated 1/29/2008		15.186.569	
Less: Payments	ei o	0	
Tax Balance Due		\$15,186,569	
Penalties – Negligence/Substantial Understatement			
IRC 6662(c). IRC 6662(d)	61.851		
Penalties – Overvaluation – IRC 6662(e)	5,950,926		
Total Penalties	-	6,012.777	
Interest		Not yet determined	
Fees/Collection Costs		determined	
Total Transferor's Liability	_	\$21,199,346	(A)
	0.5		
Total Assets Transferred to Frank Sawyer Trust (see			
Exhibit 1)	-	\$35,199,372	(B)

If (A) exceeds (B), the transferee's liability is limited to the amount at (B)

Exhibit J

Examination Report Form 4549 for West Side Cellular dated 1/29/2008

Form 4549-A (Rev. 3-2005)	Department of the Treasury - Internal Revenue Service Page 1 Continue Tax Examination Changes					Page 1 of 102
Name and Address of		Taxpayer 34-168505	Identific	cation Nu	mber	Return Form No. 1120
West Side Cellular, 1155 W. Fourth St. Reno, NV		Person wa whom exam changes w discussed	nination vere	Name an Randall POA	d Title	370
1. Adjustments to 1	Income	/:	Year:	12/2003	Year:	Year:
a. Per RAR - For	cm 4549-B's		45,	114,009	7-11-43-40-1	
2. Total Adjustment 3. Taxable Income B	rs Per Return or as Previously Adju	usted		114,009 723,813		
4. Corrected Taxabl	e Income		43,	390,196		
Tax Method Filing Status 5. Tax 6. Additional Taxes	:/Alternative Minimum		15,	, 186, 569 0		
7. Corrected Tax Li	ability		15,186,569			
8. Less Credits: a. Foreign Tax C b. Other Subpart c. General Busin d. Minimum Tax C	B Credits			0 0 0		×
9. Balance (Line 7	less total of 8a-8d)		15	, 186, 569		
	s Tax/Recapture Mınımum Tax (Before 2000)			0 N/A N/A N/A		
	Income Tax Liability s Lines 10a-10d)		15,	186,569		
12. Total Tax Shown 13. Adjustments to: a. b c. d.	on Return or as Previously Adj	justed		0 0 0		
	crease in Tax or - Decrease in Tax) ines 12 & 13a-13d)		15,	186,569		
15. Adjustment to P	repayment Credits - incr (decr)			0		
	(Overpayment) (Line 14 less Lin rest and penalties)	ne 15)	15.	. 186, 569		

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CG Form 4549-A (Rev. 3-2005)

orm 4549-A Department of the Treasury - Internal Revenue Service Page 2 or Income Tax Examination Changes				
Name of Taxpayer West Side Cellular, Inc.	Taxpayer Identifi 34-1685059	Return Form No.		
17. Penalties Code Section	Year: 12/2003	Year:	Year:	
a. IRC 6662 Accuracy Related Penalty - 20% b. IRC 6662 Accuracy Related Penalty - 40% c.	61,851 5,950,926 0			
e. f. g. h.	0			
i. J. k. 1.	0			
18. Total Penalties	6,012,777			
Underpayment attributable to negligence: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed.	. 0			
Underpayment attributable to fraud: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed.	0			
Underpayment attributable to Tax Motivated Transactions (TMT). The interest will accrue and be assessed at 120% of underpayment rate in accordance with IRC Sec. 6621(c)	0			
19. Summary of Taxes Penalties and Interest: a. Balance Due/(Overpayment) (Line 16) b. Penalties (Line 18) computed to c. Interest (IRC 6601) computed to d. TMT Interest computed to e. Amount due (refund) - (sum of Lines a-d)	15,186,569 6,012,777 0 0 21,199,346			

. Other Information:

Examiner's Signature			
	75-11917	Fort Worth, Texas	S48
Name: Denise McCaskill	Employee ID	Office	Date / -29-03

The Internal Revenue Service has agreements with state tax agencies under which information about federal tax, including increases or decreases, is shared with the states. If this change affects the amount of your state income tax, you should amend your state return by filing the necessary forms.

You may be subject to backup withholding if you underreport your interest, dividend, or patronage dividend income you earned and do not pay the required tax. The IRS may order backup withholding (withholding of a percentage of your dividend and/or interest payments) if the tax remains unpaid after it has been assessed and four notices have been issued to you over a 120-day period.

Catalog Number 23110T

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CG Form 4549-A (Rev. 3-2005)

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Exhibit 12

1	DISTRICT COURT
2	CLARK COUNTY, NEVADA
3	x
4	MICHAEL A. TRICARICHI, :
5	Plaintiff, : CASE NO.: A-16-735910-B
6	DEPT. NO.: XI vs. :
7	PRICEWATERHOUSECOOPERS LLP, :
8	COÖPERATIEVE RABOBANK U.A., :
9	UTRECHT-AMERICA FINANCE CO.,:
10	SEYFARTH SHAW LLP, and :
11	GRAHAM R. TAYLOR, :
12	Defendants. :
13	x
14	
15	VIDEOTAPED DEPOSITION OF
16	GLENN MILLER
17	CONDUCTED VIRTUALLY
18	TUESDAY, AUGUST 18, 2020
19	10:10 a.m. CST
20	
21	
22	
23	Job No.: 315702
24	Pages: 1 - 96
25	Reported By: Cheryl A. Dixon, RPR, CRR

1	Videotaped deposition of GLENN MILLER,
2	conducted virtually.
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	Pursuant to notice, before Cheryl A. Dixon,
13	Registered Professional Reporter, Certified Realtime
14	Reporter and Notary Public in and for the State of
15	Texas.
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	

1	APPEARANCES
2	
3	ON BEHALF OF THE PLAINTIFF:
4	Mr. Blake Sercye
5	SPERLING & SLATER, P.C. 55 West Monroe Street
6	Suite 3200 Chicago, Illinois 60603
7	(312)641-3200 bsercye@sperling-law.com
8	
9	ON BEHALF OF DEFENDANT PRICEWATERHOUSECOOPERS LLP:
10	Mr. Daniel C. Taylor
11	BARTLIT BECK LLP 1801 Wewatta Street
12	Suite 1200
13	Denver, Colorado 80202 (303)592-3100
14	daniel.taylor@bartlitbeck.com
15	
16	ON BEHALF OF GLENN MILLER:
17	Mr. Michael Verde KATTEN MUCHIN ROSENMAN
18	575 Madison Avenue New York, New York 10022
19	(212)940-8800 michael.verde@katten.com
20	michael. veldegkatten. com
21	
22	ALSO PRESENT:
23	Michael Tricarichi
24	Michael Tag, Videographer
25	Gabriel Eli, AV Technician

1	I N D E X	
2		PAGE
3	Appearances	3
4	GLENN MILLER	
5	Examination By Mr. Taylor	6
6	Examination By Mr. Sercye	90
7		
8	EXHIBITS	
9	MILLER DEPOSITION	PAGE
10	Exhibit 71 IRS letter dated February 3, 2009	29
11	Exhibit 74 IRS Letter dated August 11, 2009	45
12	Exhibit 76 Letter from Glenn Miller dated	50
13	October 9, 2009 Exhibit 78 Fax transmission dated March 8, 2011	58
14	Exhibit 104 IRS letter dated January 22, 2008	26
15	Exhibit 108 Letter from Glenn Miller dated	34
16	April 29,2009 Exhibit 112 Email string dated January 27, 2010	67
17	Exhibit 117 Email string dated June 9, 2010	69
18	Exhibit 146 Email string dated March 15 & 16,	81
19	2011 Exhibit 154 Email string dated October 11, 2011	77
20	Exhibit 157 Email string dated March 2, 2012	84
21	Exhibit 159 Email string from July 2012	79
22	Exhibit 305 Email string dated October 22, 2010	73
23		
24		
25		

1	MR. TAYLOR: I'm sorry, we're getting a	10:26:29
2	lot of feedback. Let's go off the record for a second	10:26:29
3	and see if we can resolve that.	10:26:31
4	VIDEOGRAPHER: We're going off the	10:26:34
5	record. Time on the video monitor is 10:26 a.m.	10:26:35
6	(Discussion held off the record.)	10:28:22
7	VIDEOGRAPHER: Back on the record. Time	10:28:22
8	is 10:28 a.m. Videographer's correction: When we	10:28:23
9	originally went on the record I said "11:10 a.m."	10:28:27
10	instead of "10:10 a.m."	10:28:30
11	BY MR. TAYLOR:	10:28:37
12	Q. I'd like to ask you, Mr. Miller, about the	10:28:37
13	tax dispute related to the sale of West Side that you	10:28:40
14	represented Michael Tricarichi in, okay? Just at a high	10:28:44
15	level, what do you recall was the general nature of that	10:28:54
16	dispute?	10:28:58
17	A. As I recall, the issue was that there had	10:29:05
18	been an asset sale by the company that resulted in a	10:29:12
19	substantial amount of cash at the company level inside	10:29:18
20	the corporation, and that Mr. Tricarichi had been	10:29:22
21	approached by a group that proposed to buy his company	10:29:31
22	and pay him cash for the shares so that rather than	10:29:38
23	paying tax at the company level and paying a second	10:29:45
24	level of tax on the distribution, they proposed to	10:29:48
25	purchase the shares from the company from him, and	10:29:57
		1

1	they were planning on they had some sort of technique	10:30:02
2	regarding the tax liability of the company itself at the	10:30:08
3	company level, that they had some sort of a so-called	10:30:13
4	mitigation technique, and that they would just pay for	10:30:17
5	his shares and then they would worry about the tax bill	10:30:21
6	and he would get cash and pay capital gains upon the	10:30:27
7	sale of the shares.	10:30:32
8	Q. Do you recall about when Mr. Tricarichi hired	10:30:34
9	you to represent him in connection with this West Side	10:30:36
10	dispute?	10:30:43
11	A. I don't remember the year precisely. I	10:30:44
12	remember that it was after he had been contacted by the	10:30:46
13	Internal Revenue Service and had been under audit.	10:30:51
14	Q. And do you recall how Mr. Tricarichi reached	10:30:56
15	out to you about representing him in this matter?	10:30:59
16	MR. SERCYE: Object to the form.	10:31:04
17	BY MR. TAYLOR:	10:31:13
18	Q. You can answer, if you know.	10:31:13
19	A. Am I supposed to answer? Okay.	10:31:15
20	Q. Yeah, unless there's an instruction not to	10:31:17
21	answer, you should still answer after objections.	10:31:19
22	A. My recollection was that Michael Tricarichi	10:31:21
23	reached out to me and said something to the effect, "I	10:31:26
24	have another tax issue for you. You did a good job on	10:31:32
25	the last one," or words to that effect. "I need you to	10:31:37

1	help me with this one," and he sent me the sent me	10:31:40
2	some materials.	10:31:43
3	Q. So when Mr. Tricarichi reached out to you	10:31:44
4	about the West Side matter, your work on the excise tax	10:31:47
5	matter had already been concluded?	10:31:50
6	A. My recollection is that it had been concluded	10:31:54
7	and that he called me about the personal matter.	10:31:57
8	Q. Now what specifically did Mr. Tricarichi hire	10:32:04
9	you to do with respect to the West Side dispute with the	10:32:06
10	IRS?	10:32:10
11	MR. SERCYE: If I could, please, I just	10:32:13
12	want to be clear as the questions tend to venture into	10:32:14
13	communications with Mr. Tricarichi.	10:32:20
14	I do want to be sure the witness	10:32:21
15	understands that we only have a very limited waiver of	10:32:23
16	that privilege, and that is related to material	10:32:27
17	discussions with Mr. Tricarichi that are related to the	10:32:33
18	compliance of the IRS Notice 2008-111, his chance of	10:32:36
19	success in litigation with the IRS, and also potential	10:32:41
20	settlement with the IRS. So I just want to be sure that	10:32:44
21	we're careful as the questions venture into	10:32:47
22	communications with Mr. Tricarichi that he still has a	10:32:49
23	privilege, and any waiver of that privilege is only	10:32:52
24	limited to those three topics as communicated and	10:32:55
25	discussed with him.	10:33:00

1	MR. TAYLOR: Yes, thanks for noting that.	10:33:01
2	I disagree that it's a narrow waiver. I agree that	10:33:03
3	you've accurately described the three topics and I'm	10:33:05
4	sure that if any of my questions I will certainly	10:33:09
5	intend to limit my questions to those areas but I'm sure	10:33:10
6	you'll make an appropriate objection if you feel that	10:33:14
7	anything is venturing outside of those.	10:33:17
8	MR. VERDE: Mr. Sercye, as you know,	10:33:21
9	Mr. Tricarichi holds a privilege here so we will look to	10:33:23
10	you to make the objection if the question calls for	10:33:28
11	something outside that privilege waiver.	10:33:31
12	MR. SERCYE: Will do.	10:33:34
13	MR. VERDE: Okay.	10:33:35
14	BY MR. TAYLOR:	10:33:35
15	Q. And so my question again is simply what did	10:33:35
16	Mr. Tricarichi hire you to do with respect to the West	10:33:38
17	Side dispute with the IRS?	10:33:41
18	A. You say the "West Side dispute," what do you	10:33:44
19	mean? Do you mean the excise tax or do you mean the	10:33:48
20	period of the transferee case?	10:33:55
21	Q. I meant the transferee case. So let's go	10:33:55
22	ahead and agree on some nomenclature. Can we agree that	10:33:56
23	going forward when we talk about the "West Side dispute"	10:34:01
24	we're referring to the transferee liability dispute with	10:34:04
25	the IRS; is that fair?	10:34:07

1	And if you'd like, we can call it the "West	10:34:13
2	Side transferee liability dispute"; why don't we do that	10:34:21
3	just to be clear?	10:34:23
4	A. Fine.	10:34:23
5	Q. All right. So again, to restate the	10:34:23
6	question, what did Mr. Tricarichi hire you to do with	10:34:27
7	respect to the West Side transferee liability dispute?	10:34:30
8	A. He asked me to represent represent him in	10:34:37
9	the matter before the Internal Revenue Service.	10:34:43
10	Q. And you were with Bingham McCutchen at the	10:34:53
11	time; correct?	10:34:58
12	A. I believe at that time it was Bingham. The	10:35:00
13	Bingham merger occurred around 2006.	10:35:03
14	Q. Did other attorneys at Bingham work with you	10:35:08
15	on the West Side transferee liability dispute?	10:35:11
16	A. Yes. I assembled a team of tax litigators	10:35:21
17	controversy experts to help on the matter because it	10:35:27
18	was a sizable matter and that it was of importance.	10:35:30
19	Q. Who was on the team at Bingham?	10:35:36
20	A. I brought in Sheri Dillon who is, I believe,	10:35:41
21	still a partner and she's at Morgan Lewis. And I	10:35:48
22	brought in Michael Desmond.	10:35:52
23	Q. Now Sheri Dillon has done tax work for	10:35:59
24	President Donald Trump; correct?	10:36:03
25	A. Yes.	10:36:09
		i .

1	Q. Was there an attorney named Michael Kummer,	10:36:15
2	K-u-m-m-e-r, at Bingham who also worked on the matter?	10:36:17
3	A. Yes, he was an associate at the time. I	10:36:25
4	think he's now a partner.	10:36:32
5	Q. Was there a Bingham attorney named William or	10:36:34
6	Bill Wilhelm, Jr. who worked on the West Side matter?	10:36:39
7	A. Bill may have had some minor involvement.	10:36:45
8	Bill was not a tax lawyer and is not a tax lawyer.	10:36:49
9	Q. Did someone named Tony Carbone at Bingham	10:36:53
10	work on the matter?	10:36:58
11	A. I don't recall. Tony was the head of the tax	10:37:00
12	code and he may have had some minor involvement but he	10:37:03
13	was not he's not a tax litigator.	10:37:08
14	Q. How about someone named Larissa Rosen, did	10:37:12
15	she work on the West Side transferee liability matter	10:37:19
16	with you?	10:37:23
17	A. She may have. She was another associate. I	10:37:24
18	don't recall. Your mentioning her name, it probably	10:37:26
19	means she billed some time.	10:37:32
20	Q. You mentioned Michael	10:37:33
21	A. I was focusing on the partners.	10:37:35
22	Q. And that's fair. One of the partners you	10:37:39
23	mentioned is Michael Desmond; correct?	10:37:41
24	A. Correct.	10:37:47
25	Q. And he was a partner at Bingham when the West	10:37:47

1	MR. SERCYE: Object to the form.	10:58:52
2	A. I don't remember for sure, but I believe that	10:59:01
3	we did and I believe	10:59:05
4	BY MR. TAYLOR:	10:59:07
5	Q. And I didn't I'm sorry, go ahead.	10:59:07
6	A. I don't remember for sure, but my	10:59:11
7	recollection is that at this point of the dispute we	10:59:13
8	became highly engaged and helped respond. I don't	10:59:17
9	remember if it was me or whether it was Don Korb; I do	10:59:23
10	mean we responded.	10:59:28
11	Q. And I didn't mean it as a trick question.	10:59:29
12	We're going to go now to another exhibit which is the	10:59:31
13	rest of the response. Could we turn to Exhibit 108,	10:59:36
14	Please?	10:59:40
15	A. Uh-huh. Yeah.	10:59:42
16	(Exhibit No. 108 marked.)	10:59:58
17	BY MR. TAYLOR:	10:59:58
18	Q. Mr. Miller, I've marked PwC Deposition	10:59:58
19	Exhibit 108, which is an April 29, 2009 letter from you	11:00:03
20	to the Internal Revenue Service responding to the draft	11:00:07
21	transferee report that the IRS had sent Mr. Tricarichi;	11:00:13
22	correct?	11:00:17
23	A. Correct.	11:00:18
24	Q. And if you turn to the last page, Bates	11:00:19
25	ending in 752, the letter is signed by you; correct?	11:00:23
		î .

1	A. Yes.	11:00:28
2	Q. Now as you state let's go back to the	11:00:41
3	first page of the letter, please.	11:00:43
4	A. Yes.	11:00:44
5	Q. As you stated in the first sentence of the	11:00:46
6	letter to the IRS, the letter was written in response to	11:00:49
7	the draft transferee report sent to Michael Tricarichi	11:00:51
8	on February 3, 2009, finding Mr. Tricarichi liable as a	11:00:56
9	transferee of West Side Cellular, under Section 6901 of	11:01:03
10	the Internal Revenue Code of 1986 as amended; correct?	11:01:07
11	A. Yes.	11:01:13
12	Q. And you go on to state that as counsel for	11:01:14
13	Mr. Tricarichi in the matter you are taking the	11:01:16
14	opportunity to comment on the draft report prior to its	11:01:19
15	finalization because we believe that Mr. Tricarichi is	11:01:23
16	not liable as a transferee for the tax liabilities of	11:01:25
17	West Side; right?	11:01:30
18	A. Yes.	11:01:33
19	Q. So in this letter you were providing	11:01:34
20	responses to the assertions and arguments that were made	11:01:37
21	in the IRS's draft transferee liability report; is that	11:01:43
22	fair?	11:01:47
23	A. That's fair.	11:01:47
24	Q. Now, did Mr. Tricarichi review a draft of	11:01:50
25	this letter before it was sent to the IRS, that you	11:01:54
		Ī

		1
1	recall?	11:01:58
2	MR. SERCYE: Object to the form.	11:02:03
3	A. My recollection is that Mike, who's	11:02:04
4	quite smart and thoughtful, did review this before it	11:02:06
5	went out.	11:02:17
6	BY MR. TAYLOR:	11:02:35
7	Q. And do you recall discussing with	11:02:35
8	Mr. Tricarichi the arguments that were set forth in the	11:02:39
9	letter that is included in Exhibit 108?	11:02:44
10	MR. SERCYE: I'm going to object on the	11:02:49
11	basis of privilege to the extent that this conversation	11:02:50
12	might go there.	11:02:53
13	Dan, as I understand it, the IR the	11:03:00
14	transferee report discusses Notice 2001-16. If you're	11:03:03
15	trying to venture into the limited waiver, I think you'd	11:03:09
16	be trying to do it on the basis that it relates somehow	11:03:12
17	to 2008-111, but I don't think that's the case here.	11:03:12
18	MR. TAYLOR: At this point I'm just	11:03:15
19	asking if he recalls discussing the arguments. I'm not	11:03:17
20	asking for any privilege.	11:03:22
21	A. It's been a long time, it's been more than 11	11:03:27
22	years, but I recall having conversations with Mike about	11:03:29
23	the strategy and the letter.	11:03:34
24	BY MR. TAYLOR:	11:03:53
25	Q. If we could turn please to page 6 of your	11:03:53
		1

1	letter, and that's with Bates page ending 736.	11:03:56
2	A. Yes.	11:04:08
3	Q. Now, there's a heading there, A, titled "The	11:04:09
4	Stock Sale is not an Intermediary Transaction"; right?	11:04:14
5	A. Yes.	11:04:19
6	Q. And then a subheading 1 also in bold, Notice	11:04:21
7	2001-16 and Notice 2008-111; right?	11:04:24
8	A. Yes.	11:04:33
9	Q. And in the first sentence under the	11:04:35
10	paragraph under the heading you wrote that, "In the	11:04:39
11	draft report, the service notified Mr. Tricarichi that	11:04:41
12	he had, in the service's view, engaged in the	11:04:44
13	transaction that was substantially similar to the	11:04:48
14	intermediary transaction's tax shelter described in	11:04:53
15	Notice 2001-16." Correct?	11:04:57
16	A. Correct.	11:05:05
17	Q. And then if we go to the next paragraph you	11:05:05
18	wrote that, "Notice 2008-111, generally effective as of	11:05:08
19	January 19, 2001, clarifies the notice by setting forth	11:05:19
20	more objective standards through which intermediary	11:05:21
21	transactions can be identified." Correct?	11:05:26
22	A. Correct.	11:05:31
23	Q. Now let me ask you, what is Notice 2008-111	11:05:32
24	which was referenced in the sentence we just read?	11:05:36
25	A. My recollection, and I don't have it in front	11:05:48
		1

1	intermediary transaction have four parties: (1) "X,"	11:11:20
2	the stock seller; (2) "T," the corporation whose stock	11:11:22
3	is sold; (3) "M," the intermediary; and (4) "Y," the	11:11:26
4	buyer. The sale did not meet the requirement that there	11:11:33
5	be four participants because there was no intermediary."	11:11:35
6	Again, that's what you argued to the IRS;	11:11:42
7	right?	11:11:44
8	A. Yes.	11:11:48
9	Q. And so one of the arguments you made to the	11:11:49
10	IRS was that Mr. Tricarichi's sale of West Side Cellular	11:11:53
11	in 2003 was not an intermediary transaction under Notice	11:11:58
12	2008-111 because there was no intermediary involved?	11:12:08
13	A. Correct.	11:12:14
14	Q. That's essentially the argument that you	11:12:15
15	A. That was the argument.	11:12:16
16	Q. Continuing on in the analysis section on page	11:12:23
17	9 of your letter, the middle paragraph, you go on to	11:12:26
18	note that or argue that, "As noted in Notice 2008-111,	11:12:30
19	without the existence of an asset buyer, Y, and without	11:12:37
20	the existence of built-in gain assets, a transaction	11:12:40
21	cannot be an intermediary transaction;" right?	11:12:43
22	A. That's correct. Yeah, a typical Midco	11:12:50
23	involves the sale of assets and it's tax exempt for	11:12:58
24	other organizations to meddle in, and that was lacking	11:13:06
25	here.	11:13:08

1	Q. Now do you recall discussing Notice 2008-111	11:13:08
2	with Michael Tricarichi?	11:13:12
3	A. I don't recall specifically talking about it	11:13:22
4	but I recall having conversations about the general	11:13:25
5	nature of Midco and notices. I don't recall if we	11:13:30
6	talked about this notice specifically.	11:13:35
7	Q. You recall discussing with Michael Tricarichi	11:13:38
8	the argument that you made to the IRS here that the West	11:13:42
9	Side sale was not a Midco transaction because there was	11:13:45
10	no intermediary?	11:13:49
11	A. I vaguely remember discussing that as an	11:13:53
12	argument that we had made.	11:14:01
13	Q. And did you believe that the argument that	11:14:03
14	you are making to the IRS in Exhibit 108 that that was a	11:14:05
15	reasonable argument?	11:14:12
16	MR. SERCYE: Object to the form.	11:14:13
17	A. I believe that it was a reasonable argument	11:14:20
18	that the transaction at issue here was distinguishable	11:14:22
19	from the specific Midco transactions laid out in the	11:14:31
20	notices; but that's again the concept of transferee	11:14:35
21	liability. It's much broader than merely Midco	11:14:40
22	transactions. You can have a transferee liability case	11:14:45
23	without there being a Midco.	11:14:50
24	BY MR. TAYLOR:	11:14:52
25	Q. So ultimately the question of whether	11:14:52
		I

1	Mr. Tricarichi would ultimately be held liable as a	11:14:54
2	transferee is a different question from whether the	11:14:58
3	transaction was a Midco; is that fair?	11:15:02
4	MR. SERCYE: Object to the form.	11:15:06
5	A. The question of whether the transaction was	11:15:08
6	ultimately subject to transferee liability or not is a	11:15:12
7	broader question as to whether a particular transaction	11:15:17
8	necessarily fit within the definition set forth in the	11:15:20
9	two notices that were referenced here.	11:15:27
10	BY MR. TAYLOR:	11:15:35
11	Q. Did you ever provide Mr. Tricarichi with a	11:15:35
12	copy of IRS Notice 2008-111?	11:15:37
13	A. I don't recall whether I provided him a copy	11:15:43
14	or whether he pulled it up off the Internet.	11:15:46
15	Q. Now, when you were preparing the letter	11:15:51
16	your April 29, 2009 letter to the IRS, which is Exhibit	11:15:55
17	108, did Michael Tricarichi ever ask you to reach out to	11:16:02
18	anyone from PricewaterhouseCoopers to get their views on	11:16:06
19	the issues addressed in your letter?	11:16:10
20	MR. SERCYE: Objection. I'm objecting on	11:16:13
21	the basis of privilege. I'm not sure that's within the	11:16:15
22	limited waiver, Dan.	11:16:18
23	You're asking him about communications	11:16:21
24	that his client had with him, generally about the letter	11:16:24
25	and not about anything related specifically to our	11:16:27

1	CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC
2	I, Cheryl A. Dixon, Registered Professional
3	Reporter, Certified Realtime Reporter and Notary Public,
4	the officer before whom the foregoing deposition was
5	taken, do hereby certify that the foregoing transcript
6	is a true and correct record of the testimony given;
7	that said testimony was taken by me stenographically and
8	thereafter reduced to typewriting under my supervision;
9	and that I am neither counsel for or related to, nor
10	employed by any of the parties to this case and have no
11	interest, financial or otherwise, in its outcome.
12	IN WITNESS WHEREOF, I have hereunto set my
13	hand and affixed my notarial seal this 3rd day of
14	September, 2020.
15	My commission expires December 3, 2023.
16	
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18	
19	
20	Cheryl a Diepn
21	
22	Registered Professional Reporter
23	Certified Realtime Reporter
24	Notary Public In And For
25	The State of Texas

Snell & Wilmer

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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

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 Batesstamp 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 <i>In Limine</i> 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

LAS VEGAS, NEVADA 89169 (702)784-5200

ſ	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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By: /s/ Bradley Austin

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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 2 OF 4) 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 $|\mathsf{X}|$ addresses set forth below and/or included on the Court's Service List for the abovereferenced case. BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below. BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day. BY PERSONAL DELIVERY: by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below. BY ELECTRONIC SUBMISSION: submitted to the above-entitled Court for electronic X filing and service upon the Court's Service List for the above-referenced case. Mark A. Hutchison Scott F. Hessell (Admitted *Pro Hac Vice*) Todd L. Moody Thomas D. Brooks (Admitted *Pro Hac Vice*) Todd W. Prall SPERLING & SLATER, P.C. 55 West Monroe, Suite 3200 **HUTCHISON & STEFFEN, LLC** 10080 West Alta Drive, Suite 200 Chicago, IL 60603 Las Vegas, NV 89145 shessell@sperling-law.com mhutchison@hutchlegal.com tbrooks@sperling-law.com tmoody@hutchlegal.com tprall@hutchlegal.com Attorneys for Plaintiff Attorneys for Plaintiff DATED this 13th day of November, 2020. /s/ Lyndsey Luxford An Employee of Snell & Wilmer L.L.P. 4851-4781-9474

Exhibit 13

1	DISTRICT COURT
2	CLARK COUNTY, NEVADA
3	
4	x
5	MICHAEL A. TRICARICHI, : Case No.: A-16-735910-B
6	Plaintiff, : Dept. No.: XI
7	v. :
8	PRICEWATERHOUSECOOPERS LLP, :
9	COOPERATIVE RABOBANK U.A., :
10	UTRECHT-AMERICA FINANCE CO.,:
11	SEYFARTH SHAW LLP, and :
12	GRAHAM R. TAYLOR, :
13	Defendants. :
14	x
15	
16	VIDEOTAPED DEPOSITION OF DONALD L. KORB
17	CONDUCTED VIRTUALLY
18	Tuesday, August 11, 2020
19	10:04 a.m. EDT
20	
21	Job No.: 314221
22	Pages: 1 - 188
23	Reported by: Monique Vouthouris, CCR, RPR, CRR
24	Realtime Systems Administrator
25	

1	
2	REMOTE videotaped deposition of DONALD L. KORB,
3	pursuant to agreement, before Monique Vouthouris, CCR,
4	RPR, CRR, Realtime Systems Administrator, Notary
5	Public in and for the State of New Jersey.
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1	APPEARANCES
2	
3	ON BEHALF OF PLAINTIFF MICHAEL A. TRICARICHI:
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5	BLAKE P. SERCYE, ESQ.
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16	303.592.3100
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20	STEPHEN EHRENBERG, ESQ.
21	RACHEL ROLNICK, ESQ.
22	SULLIVAN & CROMWELL LLP
23	125 Broad Street
24	New York, New York 10004-2498
25	212.558.4000

1	ALSO PRESENT:
2	MICHAEL A. TRICARICHI
3	BEN SCHRAMM, Videographer
4	KEVIN OFFETT, A/V Technician
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2	EXAMINATION C	OF DONALD L. KORB	PAGE
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4	By Mr. H	Messell	140
5	By Mr. T	Caylor	183
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8			
9		EXHIBITS	
10		(Attached to transcript.)	
11	PwC DEPOSITIO	ON EXHIBIT	PAGE
12	Exhibit 3	Copy of IRS Notice 2008-111,	
13		TRICAR-NV0026636 through 26644.	44
14	Exhibit 116	Email 4/23/2010, TRICAR-NV0131186.	59
15	Exhibit 117	Email June 9, 2010 with attachment,	
16		TRICAR-NV0123530 through 123589.	62
17	Exhibit 123	Records Department Filing Form,	
18		9/24/19, TRICAR-NV0133950 through	
19		134287.	78
20	Exhibit 124	Email chain September 16, 2010,	
21		TRICAR-NV0123433 through 123435.	74
22	Exhibit 125	Letter September 17, 2010 to	
23		Michael A. Tricarichi,	
24		TRICAR-NV0104721 through 104724.	76
25			

1	lawyer?	10:13:28
2	A Since 1974.	10:13:28
3	Q So that's over 45 years at this point?	10:13:30
4	A 46, I think.	10:13:34
5	Q Where did you get your undergraduate degree?	10:13:35
6	A John Carroll University in Cleveland.	10:13:40
7	Q Where did you get your law degree?	10:13:43
8	A Case Western Reserve in Cleveland.	10:13:45
9	Q Did you also receive an LLM in taxation?	10:13:48
10	A Yes, from Georgetown in Washington.	10:13:51
11	Q We can just go over these briefly, but what	10:13:54
12	jobs have you had since graduating from law school?	10:13:59
13	A You're going to be surprised how many.	10:14:02
14	Let's think about that.	10:14:07
15	THE WITNESS: It's okay for me to answer,	10:14:10
16	right, Jake?	10:14:12
17	MR. CROKE: Yes, that's fine.	10:14:13
18	A I mean, I'm just going to go through this	10:14:14
19	with you. First, the United States Army, actually. I	10:14:16
20	was a first lieutenant in the Army. Then I had a	10:14:21
21	position in the Office of Chief Counsel in Washington.	10:14:26
22	I was a attorney advisor was the title.	10:14:28
23	Q And that's the excuse me. That's the IRS	10:14:32
24	Office of Chief Counsel?	10:14:35
25	A IR that's right, IRS office, the office I	10:14:36

1	later headed. So I was there four years.	10:14:39
2	Then I joined as an associate a Cleveland	10:14:43
3	firm called Thompson, Hine and Flory. After I made	10:14:47
4	partner, I was recruited by the Reagan administration	10:14:51
5	to serve as the assistant to the IRS Commissioner. I	10:14:55
6	did that for I do know those dates May of '84	10:14:59
7	through September of '86. Returned to Thompson Hine,	10:15:04
8	and at some point, '97, I became a member of the	10:15:11
9	one of the predecessor firms of your client, Coopers &	10:15:20
10	Lybrand. I left the day the merger took place, so	10:15:24
11	that was in 1998. I was there 18 months. Returned to	10:15:29
12	Thompson Hine. That was my I hold the record at	10:15:32
13	Thompson Hine most times joining the firm, most times	10:15:36
14	leaving the firm.	10:15:40
15	Then in 2003 the President nominated me to	10:15:42
16	be the IRS Chief Counsel. I was confirmed in April of	10:15:46
17	2004, sworn in on April 15th, I remember that date as	10:15:54
18	well, 2004.	10:16:00
19	These are major life events. You can	10:16:02
20	understand why I can recall them.	10:16:05
21	Q No, I understand. And let me just stop you	10:16:06
22	there if I could. You mentioned becoming you	10:16:09
23	mentioned that the President nominated you to be IRS	10:16:11
24	Chief Counsel. Was that President George W. Bush?	10:16:15
25	A Yes, it was no George W. Bush, that's	10:16:18
		I

1	right, that's exactly right.	10:16:22
2	Q And after the President nominated you, were	10:16:22
3	you confirmed by the United States Senate to that	10:16:25
4	position?	10:16:28
5	A Yes, I was.	10:16:29
6	Q And were you confirmed unanimously by the	10:16:29
7	Senate?	10:16:32
8	A I think it was something called Executive	10:16:36
9	Action, whatever that means.	10:16:40
10	Q Did any senators vote against you? Let me	10:16:42
11	put it that way.	10:16:48
12	A I have no idea.	10:16:49
13	Q So you said you became IRS Chief Counsel	10:16:51
14	April 15th of 2004?	10:16:54
15	A Yeah, I happen to remember that.	10:16:56
16	Q And I'm not going to ask you about specifics	10:16:58
17	of your job, but just at a high level, what does the	10:17:01
18	IRS Chief Counsel do?	10:17:04
19	A I was the Chief Legal Officer. You've	10:17:06
20	already interviewed Mike Desmond, right; the guy who	10:17:10
21	has the job currently?	10:17:12
22	Q We're going to talk about him later. His	10:17:13
23	deposition is scheduled	10:17:16
24	A It's the job that he	10:17:16
25	Q but it hasn't happened yet.	10:17:16

1	A So I don't want to contradict anything he	10:17:19
2	said since he's the incumbent. You're the Chief Legal	10:17:22
3	Officer for the Internal Revenue Service, you're	10:17:24
4	probably the government's top tax lawyer.	10:17:28
5	Chief Counsel's Office is the largest law	10:17:29
6	firm in the in the world I think. It's a big	10:17:32
7	outfit.	10:17:35
8	Q No kidding. How many how many tax	10:17:35
9	lawyers worked for you when you were the Chief	10:17:38
10	Counsel	10:17:38
11	A For me it was 1500. I think it's more now.	10:18:03
12	(Reporter clarification.)	10:18:03
13	THE WITNESS: Oh, okay. I'm hearing you on	10:18:03
14	my end. I'm not having any problem.	10:18:03
15	A What was what was the question, Dan?	10:18:03
16	Q Don, I think it's an issue with the court	10:18:03
17	reporter. She has to take down everything, so we have	10:18:06
18	to try hard not to talk over each other.	10:18:06
19	A All right.	10:18:06
20	Q My question was how many tax lawyers worked	10:18:10
21	for you while you were the Chief Counsel of the IRS?	10:18:12
22	A 1500.	10:18:15
23	Q When did you leave your position as IRS	10:18:18
24	Chief Counsel?	10:18:20
25	A I left in December of 2008, after the	10:18:21
		I

1	Q Does that appear to be the case to you?	10:21:17
2	A Yes, it does.	10:21:19
3	MR. CROKE: Is there a how are we going	10:21:20
4	to be doing the exhibits here for us? Are they going	10:21:24
5	to be emailed? Sent through the chat? What's the	10:21:26
6	best way to do that?	10:21:29
7	MR. TAYLOR: I think we can do it any way.	10:21:30
8	What I've done in the past is the tech, Kevin, can	10:21:34
9	send you a chat with a link to the exhibit.	10:21:39
10	Kevin, does that work for you?	10:21:42
11	THE TECHNICIAN: Yeah. Everybody would have	10:21:47
12	to agree that I can share the link. I'm not supposed	10:21:49
13	to share the link with anybody that isn't really	10:21:52
14	authorized. So if you say I can give him the link,	10:21:55
15	then, yeah, I can send him the link to the exhibits.	10:21:58
16	MR. TAYLOR: Yes, I authorize you to send a	10:22:01
17	link to the exhibits to any of the attorneys on in	10:22:03
18	the deposition after the exhibit is marked on the	10:22:05
19	record.	10:22:07
20	THE TECHNICIAN: So the link I have is to	10:22:07
21	the big folder of exhibits, you know, so that's why	10:22:10
22	that's why I'm asking.	10:22:13
23	MR. TAYLOR: Oh, yeah, that's fine. You can	10:22:15
24	share that.	10:22:19
25	THE TECHNICIAN: Okay. So, like when I send	10:22:20
		Ī

1	the link, they'll have all the exhibits. I just want	10:22:22
2	to confirm that that's a true confirm.	10:22:25
3	MR. TAYLOR: That's fine.	10:22:27
4	THE TECHNICIAN: All right. I'll put it in	10:22:29
5	the give me one second.	10:22:30
6	MR. CROKE: Obviously not a major issue for	10:22:33
7	this one. Just figured it will be easier down the	10:22:35
8	road.	10:22:35
9	MR. TAYLOR: No, it's fair. So I think	10:22:35
10	you're going to get a link to a collection of all	10:22:36
11	of all the exhibits.	10:22:38
12	BY MR. TAYLOR:	10:22:38
13	Q Okay. Those technical issues aside, again,	10:22:42
14	Exhibit 307 is a copy of your current bio on Sullivan	10:22:46
15	& Cromwell's website, correct?	10:22:52
16	A Yes.	10:22:54
17	MR. TAYLOR: And I would just like to zoom	10:22:55
18	in, if we could, Kevin, to the bottom of the first	10:22:58
19	page.	10:23:01
20	A Remember, I can't talk about anything	10:23:05
21	dealing with what I did at the IRS.	10:23:07
22	Q I understand. I'm not going to ask you	10:23:09
23	I'm not going to ask you specifics about what was done	10:23:12
24	at the IRS, but	10:23:15
25	A Because it's	10:23:15
		l

1	Q I just wanted to	10:23:15
2	A If we went down that road, then we'd have to	10:23:17
3	bring in lawyers from the Chief Counsel Office to be	10:23:20
4	part of this.	10:23:23
5	Q I understand. I'm just going to ask you,	10:23:24
6	sir, about or, Don, about what is publicly stated	10:23:26
7	here on your website bio	10:23:32
8	A Okay.	10:23:32
9	Q about the work at the Chief Counsel's	10:23:34
10	Office.	10:23:34
11	And so in your Sullivan & Cromwell biography	10:23:37
12	on the website, it states that you were IRS Chief	10:23:43
13	Counsel from 2004 to 2008, right?	10:23:45
14	A Yes, that's right.	10:23:48
15	Q And then the biography also states that you,	10:23:49
16	quote, "played a prominent role in increasing the	10:23:54
17	effectiveness of the Chief Counsel's Office," and	10:23:58
18	you're "best known for developing the litigation	10:24:00
19	strategy that led to the stunning success by the	10:24:03
20	government in litigating tax shelter cases during his	10:24:07
21	almost five-year tenure." Correct?	10:24:11
22	A Yes, that's correct.	10:24:13
23	Q So your work on tax shelters at Chief	10:24:13
24	Counsel's Office is something that Sullivan & Cromwell	10:24:18
25	emphasizes in your biography on the website. Is that	10:24:22

1	fair?	10:24:28
2	A I've	10:24:29
3	MR. HESSELL: Objection.	10:24:29
4	A I've	10:24:29
5	MR. HESSELL: Objection to the form of the	10:24:29
6	question.	10:24:31
7	Go ahead.	10:24:31
8	THE WITNESS: I'm sorry.	10:24:32
9	A Well, I	10:24:34
10	Q You can still answer.	10:24:34
11	A Restate it and I'll answer.	10:24:35
12	Q Your work on tax shelters at the Chief	10:24:38
13	Counsel's Office	10:24:38
14	THE WITNESS: I'm sorry, Scott, that I went	10:24:45
15	so fast. I'll be more careful now.	10:24:46
16	MR. HESSELL: Sure.	10:24:46
17	BY MR. TAYLOR:	10:24:48
18	Q Your work on tax shelters at the Chief	10:24:48
19	Counsel's Office is something that you and Sullivan &	10:24:52
20	Cromwell emphasize in your publicly available bio on	10:24:55
21	the firm's website, correct?	10:24:58
22	MR. HESSELL: Same objection.	10:25:01
23	A Okay.	10:25:01
24	THE WITNESS: Can I answer or not?	10:25:06
25	MR. CROKE: Yeah, you can answer.	10:25:09

1	Mr. Szpalik is setting forth two different offers from	13:13:47
2	the IRS to Mr. Tricarichi, one dated December of 2010	13:13:50
3	and the other dated August 2011?	13:13:55
4	A No. This is their form. This isn't what we	13:14:02
5	do, but that's what it looks like.	13:14:06
6	Q And if we look down on the left-hand column,	13:14:09
7	the December 2010 settlement computation, there are a	13:14:15
8	variety of numbers, but the bottom line it appears	13:14:20
9	is three lines from the bottom, where it says Net	13:14:24
10	Transferee Liability, \$16,138,251, right?	13:14:29
11	A Let me I really should understand what	13:14:37
12	they're trying	13:14:39
13	Q Sure, sure. Take a moment.	13:14:40
14	A Give me a second.	13:14:42
15	What was that number again, the 16,138,251?	13:15:03
16	Q Yeah, the net transferee liability.	13:15:08
17	A Yeah, that appears to be exactly that.	13:15:12
18	Q So that is the settlement offer that the IRS	13:15:16
19	was making in the December 2010 column, right?	13:15:18
20	A It looks like it, yes.	13:15:21
21	Q And then on the right-hand side it set forth	13:15:23
22	the revised settlement offer in August 2011, right?	13:15:25
23	A Yeah, August 26, 2011.	13:15:31
24	Q And then the net transferee liability number	13:15:33
25	for the revised settlement offer is 12,416,438, right?	13:15:39
		1

1	A Yeah, that's right.	13:15:47
2	Q And so is it your understanding that if	13:15:48
3	Mr that the IRS would have settled the case with	13:15:50
4	Mr. Tricarichi for \$12,416,438 under this August 2011	13:15:53
5	settlement offer?	13:16:02
6	A Yes, I think that's what this is showing	13:16:04
7	here.	13:16:07
8	MR. TAYLOR: If we could turn now to Exhibit	13:16:43
9	152.	13:16:45
10	(PwC Exhibit 152, Email August 29, 2011 to	13:16:47
11	Michael Tricarichi, TRICAR-NV0122276, marked for	13:16:48
12	identification.)	13:16:49
13	A Okay.	13:16:49
14	Q And Exhibit 152 is an email from you to	13:17:02
15	Michael Tricarichi, dated August 29, 2011, subject	13:17:07
16	Proposed Settlement Computation, correct?	13:17:11
17	A Yes, it is.	13:17:14
18	Q Now, the same question, did you send this	13:17:17
19	email to Mr. Tricarichi?	13:17:20
20	A No, I don't have any independent recollection,	13:17:22
21	but it sure looks like it.	13:17:24
22	Q Now, you state to Mr. Tricarichi that,	13:17:26
23	"Attached is the computation prepared by the IRS	13:17:28
24	Appeals Officer showing both the original offer he	13:17:31
25	made in October, as well as the latest offer made by	13:17:33

1	him the week before last which you and I discussed the	13:17:37
2	same day," right?	13:17:40
3	A It says that, but you notice that the date	13:17:45
4	of it wasn't October, it was 12/20, so it was	13:17:47
5	December. That's a mistake somewhere in there. Do	13:17:53
6	you see the inconsistency?	13:17:58
7	Q The inconsistency in your email; you got the	13:17:59
8	month wrong?	13:18:01
9	A Right. That's right. That's exactly right.	13:18:02
10	Q But in the in any event, you sent to	13:18:05
11	Mr. Tricarichi with this email, as an attachment, the	13:18:10
12	computation from the IRS Appeals Officer, right?	13:18:12
13	A I'm assuming it's the same document. It	13:18:15
14	sure looks like it.	13:18:19
15	Q And so you have no reason to question that	13:18:20
16	you sent Mr. Tricarichi with this email the fax from	13:18:23
17	the IRS that is marked as Deposition Exhibit 151?	13:18:29
18	A No. I have no independent recollection, but	13:18:32
19	sure looks like it.	13:18:35
20	Q Now, in the second sentence of this email	13:18:44
21	you state that, "I will touch base with you tomorrow,	13:18:47
22	and after that, call him back, thank him for the	13:18:50
23	computation, but say that you still plan to go on to	13:18:53
24	litigation, so he should go ahead and send the case	13:18:56
25	back to Examination for them to prepare the Statutory	13:18:59

1	CERTIFICATE OF CERTIFIED SHORTHAND REPORTER
2	
3	I, MONIQUE VOUTHOURIS, New Jersey License No.
4	30XI00083400, the officer before whom the foregoing
5	deposition was taken, do hereby certify that the
6	foregoing transcript is a true and correct record of
7	the remote testimony given; that said testimony was
8	taken by me stenographically and thereafter reduced to
9	typewriting under my direction; that reading and
10	signing was requested; and that I am neither counsel
11	for, related to, nor employed by any of the parties to
12	this case and have no interest, financial or
13	otherwise, in its outcome.
14	IN WITNESS WHEREOF, I have hereunto set my hand
15	this 21st day of August 2020.
16	
17	
18	Mongre Conthorns
19	
20	Monique Vouthouris
21	Notary Public of the State of New Jersey
22	
23	
24	My commission expires: April 8, 2024
25	
	My commission expires: April 8, 2024

Exhibit 14

1	DISTRICT COURT
2	
3	CLARK COUNTY, NEVADA
4	x
5	MICHAEL A. TRICARICHI, :
6	Plaintiff, : CASE NO.: A-16-735910-B DEPT. NO.: XI
7	vs. :
8	PRICEWATERHOUSECOOPERS LLP, :
9	COÖPERATIEVE RABOBANK U.A., :
10	UTRECHT-AMERICA FINANCE CO.,:
11	SEYFARTH SHAW LLP, and :
12	GRAHAM R. TAYLOR, :
13	Defendants. :
14	x
15	
16	VIDEOTAPED DEPOSITION OF
17	MICHAEL DESMOND
18	CONDUCTED VIRTUALLY
19	WEDNESDAY, AUGUST 19, 2020
20	8:56 a.m. CST
21	
22	
23	Job No.: 315709
24	Pages: 1 - 156
25	Reported By: Cheryl A. Dixon, RPR, CRR

1	Videotaped deposition of MICHAEL DESMOND,
2	conducted virtually.
3	
4	
5	
6	
7	
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9	
10	
11	
12	Pursuant to agreement, before Cheryl A. Dixon,
13	Registered Professional Reporter, Certified Realtime
14	Reporter and Notary Public in and for the State of
15	Texas.
16	
17	
18	
19	
20	
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22	
23	
24	
25	

1	APPEARANCES						
2							
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12							
13	ON BEHALF OF DEFENDANT						
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19							
20	ALSO PRESENT:						
21	Jett Rominger, Videographer						
22	Gabriel Eli, AV Technician						
23							
24							
25							

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1	Q. All right. Now you said you've been	09:08:06
2	practicing tax law for about 25 years, do you have any	09:08:09
3	particular expertise or subspecialty within tax law?	09:08:13
4	A. I would say tax controversy has been the	09:08:19
5	principal focus of my practice. Not exclusive, but the	09:08:23
6	principal focus.	09:08:29
7	Q. Now, do you I'm sorry, go ahead.	09:08:31
8	A. No, on it's up through litigation and even	09:08:33
9	appellate litigation.	09:08:35
10	Q. From time to time over your 25 years	09:08:37
11	practicing tax law, have you provided tax advice to	09:08:40
12	taxpayers, meaning not in litigation but on whether they	09:08:44
13	could claim certain deductions, you know, or other	09:08:49
14	things as part of their taxes or that they're	09:08:53
15	preparing?	09:08:57
16	MR. HESSELL: Object to the form of the	09:09:02
17	question.	09:09:03
18	BY MR. LEVINE:	09:09:04
19	Q. Let me reask it.	09:09:04
20	During the from time to time during your	09:09:04
21	25 years practicing tax law, have you given advice	09:09:06
22	outside of litigation to taxpayers?	09:09:08
23	A. Only in a very I can't think of one, but I	09:09:11
24	do not render opinions. There's certainly instances	09:09:17
25	where my advice has lent itself to a reporting position	09:09:21

1	to counter an amended return, but I do not give	09:09:27
2	opinions. I'm not a transactional lawyer. So probably	09:09:30
3	more than 99 percent of my work, if not close to a	09:09:34
4	hundred percent of my work, is after returns have been	09:09:39
5	filed and positions have been taken on a return.	09:09:39
6	Q. All right. So let's talk about the tax	09:09:44
7	dispute involving Mr. Tricarichi. For eight years, with	09:09:46
8	a break of several months, you were one of the lawyers	09:09:51
9	representing Michael Tricarichi in the dispute with the	09:09:54
10	IRS; correct?	09:09:59
11	A. That's right.	09:10:00
12	Q. And the dispute related to taxes on a	09:10:01
13	transaction that Mr. Tricarichi entered into in	09:10:04
14	September 2003; correct?	09:10:07
15	A. Yes, I think that's correct, 2003, yes.	09:10:09
16	Q. And if I refer to that transaction as the	09:10:12
17	Tricarichi West Side transaction, we understand what I'm	09:10:15
18	referring to?	09:10:18
19	A. I do, yes.	09:10:19
20	Q. When is it you started working on the tax	09:10:21
21	lawyer team for Mr. Tricarichi?	09:10:24
22	A. Within sometime after the merger with Bingham	09:10:31
23	McCutchen, so late 2009, maybe 2010. Could have been	09:10:34
24	later into 2010.	09:10:39
25	Q. Who brought you into that team?	09:10:40
		I

1	A. Glenn Miller was my partner at Bingham	09:10:43
2	McCutchen, and he had been working on an administrative	09:10:46
3	appeal that had already been filed with respects to the	09:10:51
4	dispute.	09:10:52
5	Q. Did Mr. Miller have experience in tax law?	09:10:53
6	A. He did, yes.	09:10:55
7	Q. So at the time that you started working on	09:10:56
8	the Tricarichi tax dispute, it was in the administrative	09:10:58
9	appeals process; is that right?	09:11:05
10	A. That's correct.	09:11:06
11	Q. And at that point the IRS had issued a report	09:11:10
12	and Mr. Tricarichi had filed a protest; is that right?	09:11:14
13	A. (No audible response.)	09:11:22
14	MR. HESSELL: I didn't hear the answer to	09:11:28
15	that.	09:11:29
16	THE WITNESS: Yes.	09:11:30
17	BY MR. LEVINE:	09:11:31
18	Q. Besides Mr. Miller, who was your partner at	09:11:31
19	the time at Bingham, were there other lawyers on the	09:11:33
20	team representing Mr. Tricarichi?	09:11:37
21	A. There was another associate whose name	09:11:39
22	escapes me, a woman that was assisting Mr. Miller with	09:11:44
23	the protest at the time I became involved, so they had	09:11:47
24	both been working on the submission of the protest.	09:11:50
25	Q. Were there other were there lawyers from	09:11:53
		1

1	another law firm that became involved in representing	09:11:57
2	Mr. Tricarichi in the IRS administrative appeal?	09:12:00
3	A. Around that time Don Korb from Sullivan &	09:12:04
4	Cromwell was I don't recall if he had been formally	09:12:08
5	engaged, but, yeah, Mr. Korb and Sullivan & Cromwell	09:12:13
6	were came on to came into the case at about the	09:12:17
7	same time I did.	09:12:20
8	Q. And Sullivan & Cromwell is a large New York	09:12:22
9	law firm; is that right?	09:12:25
10	A. That's correct. Mr. Korb was based in the	09:12:27
11	Washington D.C. office, but that's correct.	09:12:31
12	Q. And Mr. Korb, is he the former IRS chief	09:12:32
13	counsel?	09:12:35
14	A. Yes.	09:12:36
15	Q. So Mr. Korb had the same job back then that	09:12:36
16	you have now; is that right?	09:12:39
17	A. Yes.	09:12:40
18	Q. And did you know Mr. Korb when he was IRS	09:12:41
19	chief counsel and you were in tax policy at Treasury?	09:12:45
20	A. I did.	09:12:48
21	Q. Did you consider Mr. Korb to be knowledgeable	09:12:49
22	about tax-law issues?	09:12:52
23	A. I did.	09:12:54
24	Q. What skills did you bring to the team besides	09:12:55
25	those that Mr. Miller and Mr. Korb had?	09:12:58
		1

1	the team and Mr. Tricarichi?	09:43:33
2	A. Yes.	09:43:35
3	MR. HESSELL: Objection; foundation.	09:43:36
4	BY MR. LEVINE:	09:43:37
5	Q. And do you have any reason to believe that	09:43:37
6	Mr. Korb did not share the IRS proposed settlement	09:43:39
7	computation with you in August 2011?	09:43:46
8	MR. HESSELL: Same objection.	09:43:48
9	A. I don't have any reason to believe that, no.	09:43:50
10	BY MR. LEVINE:	09:44:09
11	Q. The email or the fax transmission to	09:44:09
12	Mr. Korb says, "Pursuant to our telephone discussion	09:44:10
13	this past Thursday, August 25th, attached is a proposed	09:44:10
14	settlement computation. And the attached spreadsheet	09:44:11
15	sets forth the estimated proposed figures discussed	09:44:15
16	December 20, 2010, and the revised figures dated	09:44:19
17	August 26, 2011."	09:44:24
18	Do you see that?	09:44:26
19	A. I do, yes.	09:44:26
20	Q. And then if we look at the second page of	09:44:27
21	Exhibit 151, do you see there's a chart there with	09:44:30
22	"Settlement Computation for Tricarichi" for dated the	09:44:34
23	first on the left, December 20, 2010, and on the right	09:44:38
24	August 26, 2011?	09:44:44
25	A. I see that, yes.	09:44:47

1	Q. And do you see the amount under "Net	09:44:48
2	Transferee Liability" went from a little over \$16.1	09:44:51
3	million in December 20, 2010 to a little over \$12.4	09:44:54
4	million in August 26, 2011?	09:44:59
5	A. I see those numbers, yes.	09:45:06
6	Q. Do you recall any discussion in August or so	09:45:08
7	of 2011 about a response to the IRS demand?	09:45:12
8	A. I do not recall, no.	09:45:17
9	Q. Again, at that point in 2011, you weren't	09:45:19
10	taking the lead, it was Sullivan & Cromwell; right?	09:45:22
11	A. That is correct.	09:45:28
12	Q. The ultimately, the settlement process	09:45:29
13	with the IRS did not succeed; correct?	09:45:31
14	A. Yeah. And I think that happened after I left	09:45:34
15	Bingham, so I wasn't involved at that time. But, yes,	09:45:37
16	that is it did not resolve in appeals.	09:45:41
17	Q. So just moving forward in time, you worked on	09:45:44
18	the matter until the end of 2011 while you were at	09:45:48
19	Bingham; correct?	09:45:52
20	A. Yes.	09:45:54
21	Q. And then January 2012 you started your own	09:45:55
22	firm in Santa Barbara; correct?	09:45:59
23	A. Correct.	09:46:01
24	Q. And then at some point later in 2012 you were	09:46:01
25	hired by Mr. Tricarichi out of your new firm to work on	09:46:05
		I

1	the matter; correct?	09:46:10
2	A. Correct.	09:46:11
3	Q. And at that point when Mr. Tricarichi hired	09:46:13
4	you to work again on the matter in 2012, had the IRS	09:46:16
5	issued a notice of transferee liability?	09:46:20
6	A. It either had issued or we knew it would be	09:46:25
7	issued shortly.	09:46:29
8	Q. And that notice of transferee liability is	09:46:30
9	dated June 25th, 2012. Does that help refresh your	09:46:34
10	memory as to whether you got engaged right before it was	09:46:40
11	issued or right after it was issued?	09:46:46
12	MR. HESSELL: Objection; foundation.	09:46:47
13	You don't have to accept what he says,	09:46:50
14	but he could show you a document that show what he says.	09:46:50
15	BY MR. LEVINE:	09:46:50
16	Q. Go ahead.	09:46:50
17	A. Yeah, I admit that sounds consistent with my	09:46:51
18	recollection. I would have thought it was later in 2012	09:46:54
19	that I was engaged, but my recollection isn't perfect on	09:46:59
20	that. So I wouldn't disagree with that June 2012.	09:47:04
21	Q. When you were hired as part of your new law	09:47:09
22	firm to work for Mr. Tricarichi, had a decision already	09:47:12
23	been reached about whether to file in tax court or file	09:47:17
24	in federal court?	09:47:23
25	A. In Federal District Court or Court of Federal	09:47:29
		I

1	Claims? I don't recall a lot of discussion around that	09:47:33
2	but I think that was certainly the working assumption,	09:47:37
3	and I don't know that there was ever any date of	09:47:40
4	discussion about	09:47:43
5	Q. I guess what I'm asking is, did you file the	09:47:46
6	first document in tax court or was that filed by some	09:47:49
7	other lawyer and then you joined on?	09:47:52
8	A. My name was on the petition when it was	09:47:54
9	filed.	09:47:56
10	Q. And after the notice of transfer a notice	09:47:57
11	of liability comes out from the IRS, does a taxpayer	09:48:00
12	such as Mr. Tricarichi have a choice of paying the	09:48:05
13	amount owed and going to Federal District Court or Court	09:48:08
14	of Claims or not paying and disputing and going to tax	09:48:11
15	court?	09:48:16
16	A. That's generally correct. There is that	09:48:18
17	option, yes.	09:48:21
18	Q. Did you have any discussions with	09:48:21
19	Mr. Tricarichi not paying, disputing going to tax court	09:48:23
20	as opposed to paying and then filing an action in	09:48:28
21	Federal District Court?	09:48:34
22	A. I don't have any specific recollection. That	09:48:35
23	is one of the issues that's always raised, and it	09:48:38
24	requires coming up with the funds to pay, of course. So	09:48:45
25	oftentimes that's not a practical option.	09:48:48

1	CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC
2	I, Cheryl A. Dixon, Registered Professional
3	Reporter, Certified Realtime Reporter and Notary Public,
4	the officer before whom the foregoing deposition was
5	taken, do hereby certify that the foregoing transcript
6	is a true and correct record of the testimony given;
7	that said testimony was taken by me stenographically and
8	thereafter reduced to typewriting under my supervision;
9	and that I am neither counsel for or related to, nor
10	employed by any of the parties to this case and have no
11	interest, financial or otherwise, in its outcome.
12	IN WITNESS WHEREOF, I have hereunto set my
13	hand and affixed my notarial seal this 6th day of
14	September, 2020.
15	My commission expires December 3, 2023.
16	
17	
18	
19	0/2 10 0 0 0
20	Cheryl a. Dijon
21	
22	Registered Professional Reporter
23	Certified Realtime Reporter
24	Notary Public In And For
25	The State of Texas

Exhibit 15

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INSIGHT, BUSINESS INST

Glenn S. Miller
Direct Phone: 202.373.6764
Direct Fax: 202.373.6001
glenn.miller@bingham.com

April 29, 2009

VIA FACSIMILE AND REGULAR MAIL

Internal Revenue Service 5450 Stratum Drive, Suite 150 Fort Worth, TX 76137 Attn: Denise McCaskill

Re: MC:4296NFTW

Dear Ms. McCaskill:

This letter is written in response to the draft Transferee Report sent to Michael Tricarichi, SS# 268-56-5446, on February 3, 2009 (the "Draft Report") finding Mr. Tricarichi liable as a transferee of West Side Cellular, Inc., EIN # 34-1685059, ("West Side") under Section 6901 of the Internal Revenue Code of 1986, as amended (the "Code"). As counsel to Mr. Tricarichi in this matter, we are taking this opportunity to comment on the Draft Report prior to its finalization because we believe that Mr. Tricarichi is not liable as a transferee for the tax liabilities of West Side.

Note that we do not address the underlying merits of the West Side audit in this letter (in particular the basis of the Japanese debt and the offsetting losses denied to West Side by the United States Internal Revenue Service (the "Service")). We reserve the right to challenge these underlying merits (if necessary) at a later date when Mr. Tricarichi will have greater access to West Side's books and records.

I. STATEMENT OF FACTS

A. History of Discrimination Suit

West Side was an Ohio corporation which, from 1988 through 2003, was engaged in the business of, among other things, reselling cellular telecommunications service. During this time, the stock of West Side was owned 100% by Michael Tricarichi. In October of 1993, West Side (doing business as Cellnet) filed a complaint with the Public Utilities Commission of Ohio (PUCO) against certain wholesale cellular service providers, including Ameritech and the company now known as Verizon. The complaint asserted that Verizon and Ameritech engaged in various discriminatory and illegal business practices against Cellnet in an effort to prevent Cellnet from fairly competing against them for cellular customers. On January 18, 2001, PUCO ruled in favor of Cellnet and held that Verizon and Ameritech engaged in unlawful discrimination. On December 30, 2002, the Ohio Supreme Court affirmed PUCO's decision in favor of West Side.

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B. The Settlement Agreement

In April of 2003, West Side entered into a settlement agreement with Verizon and a separate settlement agreement with Ameritech successor Cingular (the "Settlement Agreement"). Pursuant to the Settlement Agreement, West Side received a cash payment of approximately \$64,250,000. The terms of the Settlement Agreement required that the business relationship between Cellnet and the counterparties to the settlement be terminated effective as of June 10, 2003. Furthermore, the settlement counterparties would be under no obligation, after 11:59pm on June 10, 2003, to provide cellular network or any other form or types of goods or services to Cellnet, Mr. Tricarichi, or any entity under their common ownership or control. After the payment of approximately \$25,000,000 in professional fees and employee bonuses, paid upon the order of Mr. Tricarichi to reward various long-time employees, West Side was left with cash of approximately \$40,000,000.

Although Mr. Tricarichi and West Side were required to end their business relationships with the settlement counterparties by June 10, 2003, Mr. Tricarichi was under no obligation to liquidate West Side or to completely exit the cellular business. In 2003, West Side was permitted to and, in fact, continued to conduct business with cellular service carriers other than Verizon and Cingular. Mr. Tricarichi intended to continue operating his cellular resale business notwithstanding the limitations placed on him and West Side under the terms of the Settlement Agreement.

C. The Stock Sale

In May of 2003, Mr. Tricarichi was introduced to MidCoast Investments, Inc. ("MidCoast") by his then-counsel Hahn Loeser & Parks LLP ("HLP"). MidCoast indicated that they were in the receivables collection business and that they would be interested in purchasing Mr. Tricarichi's company. Another company, Fortrend International, LLC ("Fortrend") indicated a willingness to pay more for West Side than MidCoast. Mr. Tricarichi and HLP entered into a series of negotiations with Fortrend. Ultimately, it was agreed that West Side would dispose of its cellular customer base and receivables in a taxable transaction, and that Fortrend would purchase West Side and its remaining businesses, which consisted of approximately \$40,000,000 in cash and certain causes of action against the United States Government for the recovery of telecommunications excise taxes (discussed in further detail below). On June 11, 2003, West Side sold certain of its business assets, including its customer base and various receivables, to LXV Group, Inc. ("LXV") pursuant to an Asset Purchase Agreement entered into by West Side and LXV (the "Asset Sale"). After the sale to LXV, the assets remaining in West Side included cash, a \$577,000 note and the federal excise tax causes of action. Currently, Mr. Tricarichi owns a 25% stake in LXV and he conducts his remaining businesses through another entity, Telecom Acquisition, Inc.

Fortrend, through its pre-existing subsidiary Nob Hill (formed by Fortrend in November of 2001), ultimately purchased the stock of West Side on September 9, 2003 for approximately \$35,000,000 using financing of \$29,900,000 from Rabobank and

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\$5,000,000 in cash (the "Stock Sale"). As indicated in an email sent by Steve Block of Fortrend on July 13, 2003 to the deal team and in a Term Sheet¹ related to the transaction, Fortrend was focused on ensuring that West Side had a clear continuing business operation and that the post-acquisition business activities of West Side would be profitable on a "go forward" basis. In addition to the cash in the company, West Side retained the assets and liabilities associated with the federal excise tax causes of action. West Side and its new owners continued to actively manage and pursue these causes of action for more than five (5) years after the sale of West Side to Fortrend.

D. The Excise Tax Claims Held by West Side Post-Acquisition

Because of the complexity inherent in the federal telecommunications excise tax law, West Side had consulted with HLP to aid in determining whether it was required to pay and/or collect a federal excise tax from its customers under Sections 4251-4254 of the Code. HLP informed West Side that the tax law in this area was unclear and, after researching case law on cellular resellers and their customers, concluded that the federal telecommunications excise tax in all likelihood did not apply to West Side or its customers. HLP, a firm with considerable expertise in telecommunications and tax law, advised West Side that the tax probably did not apply to West Side because West Side was a rebiller rather than a reseller of telephone services and the tax probably did not apply to West Side's customers because on its face, the statute was inapplicable to the types of telephonic services provided to West Side's customers.

Michael Tricarichi ultimately caused West Side to voluntarily pay \$3,131,579.92 in federal excise taxes and accrued interest to the United States Government for the tax periods ending September 30, 1991 through June 30, 2003. West Side voluntary submitted revised excise tax returns and paid the amount above on July 31, 2003² (which amount was received by the Service on August 2, 2003), even though the Service had not audited West Side or Mr. Tricarichi or contacted either of them in any way regarding the possible excise tax liability. This occurred prior to the Stock Sale and after the June 10,

¹ The Term Sheet was a letter sent via email to Chris Kortlandt of Rabobank from Alice Dill of Fortrend on August 13, 2003. The letter set forth basic information concerning the acquisition of West Side by Fortrend via Nob Hill.

² In a protest submitted to the Taxpayer Advocate Service (the "Protest") on behalf of West Side by the law firm of Swidler, Berlin, Shereff, Friedman LLP ("Swidler Berlin"), dated September 30, 2004, challenging the assessment of penalties against West Side for failure to pay certain federal telecommunications excise taxes, the statement of facts provides that on July 31, 2003, West Side paid a total of \$3,131,579.92 to the Service representing the excise taxes payable.

2003 Asset Sale to LXV. The Service subsequently contacted West Side in late 2003 and assessed penalties for failure to file and failure to pay in the amount of \$1,061,999.06.

Mr. Tricarichi and West Side also became aware of the possibility that the federal telecommunications excise tax might ultimately be held to be illegal, which potentially would entitle West Side to a full refund of all amounts paid to the government. At the time of the Stock Sale, a number of court cases were pending (See American Bankers Insurance Group, Inc. v. U.S., 308 F Supp 2d 1360 (S.D. Fla. 2004), and Office Max. Inc. v. U.S., 309 F Supp 2d 984 (D.Ohio 2004)) in which taxpayers were taking the position that the federal telecommunications excise tax had been improperly imposed.³ On or around May of 2006, the Service acknowledged in Notice 2006-50 that they incorrectly imposed excise taxes pursuant to Section 4251 of the Code on certain types of telephonic communications (which included those provided to West Side's customers). Accordingly, West Side was potentially entitled to a refund claim of \$3,131,579.92 from the Service.

Fortrend ultimately purchased West Side with both the penalty claim and the refund claim against the Service pending. Following its purchase by Fortrend, West Side actively managed both the \$1,061,999.06 penalty dispute and the \$3,131,579.92 refund claim over the next several years. This active management consisted of hiring, consulting with, overseeing, and paying outside legal consultants and interacting with the Service and the federal courts regarding both issues. The penalty dispute began in late 2003 when West Side received notice of the potential penalties from the Service. In March of 2004, the Taxpayer Advocate Service (the "TAS") issued a decision finding that the penalties were properly assessed against West Side. Thereafter, West Side engaged Swidler Berlin to protest the findings of the TAS. In September of 2004, more than one year after the closing of the Stock Sale, Swidler Berlin submitted the Protest requesting abatement of the assessed penalties. West Side was ultimately successful in having all \$1,061,999.06 in penalties waived in late 2006 -- approximately three (3) years after the Stock Sale.

West Side then commenced a refund claim and litigation against the Service seeking a refund of more than \$3 million in excise taxes previously paid. On or about August of 2006, the Service formally denied West Side's refund request. In September

³ Section 4252(b)(1) provides that toll telephone service means "a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States." The cellular services provided by West Side were not charged based on the varying distance and elapsed time of each individual communication; therefore, they do not fit within the definition of toll telephone service in the plain statutory language of Section 4252 of the Code.

of that year, West Side filed a complaint against the United States in the United States District Court for the Northern District of Ohio seeking reimbursement for the overpaid taxes. Between September 2006 and July 2008, West Side vigorously pursued its lawsuit against the United States, filing numerous pleadings in the case, including motions, replies and related memoranda and attending case conferences. Below is a sample of the activity in this case:

- · Complaint filed by West Side on September 18, 2006;
- · Parties Attended Case Management Conference on February 15, 2007;
- · Parties Attended Telephone Conference on March 16, 2007;
- Motion for Extension of Time to File Dispositive Motions filed by West Side on July 24, 2007;
- Motion for Summary Judgment filed by West Side on August 30, 2007;
- Joint Motion for Extension of Time to File Dispositive Motions filed by both Parties November 2, 2007;
- Memorandum Contra Defendant's Motion for Summary Judgment filed by West Side on November 19, 2007; and
- · Judgment and Order issued on July 7, 2008.

After maintaining this claim for approximately two (2) years (ending in 2008), the District Court ultimately ruled against West Side and denied the refund. Although the Service admitted that they improperly imposed the excise taxes on West Side and its customers, the case was dismissed on procedural grounds. Nevertheless, it is clear that for more than five (5) years after the closing of the Stock Sale, West Side actively managed its refund claim and the penalties dispute and those causes of action were extremely important to the company.

It should be noted that the existence of the post-acquisition federal excise tax causes of action and West Side's related post-acquisition business activity are consistent with Mr. Tricarichi's statements made in his interview with the Service on November 30, 2007 (summarized in the Revenue Agent's Report issued to West Side in January of 2008) discussing the assets transferred in both the Asset Sale and the Stock Sale. In the interview, Mr. Tricarichi specifically mentioned certain West Side assets (the customer base and the accounts receivables) that were transferred to LXV in the Asset Sale. All of the assets and liabilities that were not so transferred (including West Side's federal excise tax liability and any related causes of action) were retained by the company.

II. RESPONSE TO INTERNAL REVENUE SERVICE DRAFT REPORT

The issuance of a deficiency notice to Mr. Tricarichi for the tax liabilities of West Side would be inequitable and inappropriate based on the facts of this case. Mr. Tricarichi intended from the beginning of his negotiations for the sale of his interest in West Side to engage in a bona fide sale of the Stock to a third party. He never intended

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either directly or indirectly to liquidate West Side. In the Draft Report, the Service attempts to argue that the Stock Sale was an Intermediary Transaction (defined below) and that transferee liability should be asserted against Mr. Tricarichi in this case by recharacterizing the Stock Sale as a liquidating distribution to Mr. Tricarichi based on the mere conduit line of cases and the step transaction doctrine. However, as discussed further below, an analysis of the facts of this case in light of relevant case law makes the application of these theories of liability inapplicable.

A. The Stock Sale is not an Intermediary Transaction

1. Notice 2001-16 and Notice 2008-111

In the Draft Report, the Service notified Mr. Tricarichi that he had in the Service's view engaged in a transaction that is substantially similar to the intermediary transactions tax shelter described in Notice 2001-16, 2001- C.B. 730, (the "Notice"). The Notice describes certain transactions ("Intermediary Transactions") being marketed to taxpayers for the avoidance of federal income tax. The Intermediary Transactions described in the Notice generally involve four parties: (i) the seller of corporate stock (X), (ii) the corporation whose stock is to be sold (T), (iii) an intermediary corporation (M), and (iv) the buyer (Y) who desires to purchase the assets, and not the stock, of T. Pursuant to a plan, X sells T stock to M. T then sells assets to Y and Y claims a basis in the acquired assets equal to the purchase price. The tax avoidance in an Intermediary Transaction generally results from (i) T becoming part of M's consolidated group whereby T's inherent gain on the assets sold is offset with the M group's losses or (ii) M, a tax-exempt entity, liquidating T before the T assets are sold to Y. The Notice provides that the Service can reclassify an Intermediary Transaction as M acting as either T or Y's agent. Alternatively, the Intermediary Transaction can be recharacterized by treating X as having sold T's assets or T as having sold the assets while still owned by X. Transactions that are the same or substantially similar to those described in the Notice are identified as "listed transactions."

Notice 2008-111, 2008-51 IRB 1288 ("Notice 2008-111"), generally effective as of January 19, 2001, clarifies the Notice by setting forth more objective standards through which Intermediary Transactions can be identified. Under Notice 2008-111, a transaction is treated as an Intermediary Transaction with respect to a particular person only if: (i) that person engages in the transaction pursuant to a "Plan" (as defined below), (ii) the transaction contains four objective components indicative of an Intermediary Transaction, and (iii) no safe harbor exception applies to the transaction.

a) The Plan

Notice 2008-111 provides that an Intermediary Transaction involves a corporation (T) that would recognize a taxable gain and incur a federal income tax liability were it to dispose of its assets in a taxable transaction ("Built-in Gain Assets") in which the acquiror (Y) would also generate a cost or fair market value basis in the assets acquired. An Intermediary Transaction is structured to cause the tax obligation that would arise in the taxable disposition of Built-in Gain Assets, to arise in connection with

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the disposition by X of all or a controlling interest in T stock, under circumstances where the third party primarily liable for any federal income tax liability with respect to the disposition of the Built-in Gain Assets will not pay that tax (the "Plan"). Logically, a transaction cannot be an Intermediary Transaction for purposes of Notice 2008-111 if there is no "Plan".

b) The Components

There are four components to an Intermediary Transaction and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in the Notice, even if the transaction is engaged in pursuant to the Plan. ⁴ The four components are:

- (1) T directly or indirectly owns Built-in Gain Assets, and, as of the Stock Disposition Date (as defined below) has insufficient tax benefits to eliminate or offset such taxable gain in whole.
- (2) At least 80% of the T stock (by vote and value) is disposed of by X, other than in liquidation of T, in one or more related transactions within a 12 month period (the "Stock Disposition"). The first date on which at least 80% of the T stock has been disposed of by X in a Stock Disposition is the "Stock Disposition Date".
- (3) Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65% (by value) of T's Built-in Gain Assets are disposed of ("Sold T Assets") to Y in one or more transactions in which gain is recognized with respect to Sold T Assets.
- (4) At least half of the tax resulting from the disposition of the Sold T Assets is offset, avoided or not paid.

c) Safe Harbors

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

(1) Any X, if the only T stock it disposes of is publicly traded and prior to the disposition X did not hold 5% (or more) by vote or value of any class of T stock disposed of by X,

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⁴ See Notice 2008-111.

- (2) Any X, T, or M, if, after the acquisition of T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded or is consolidated for financial reporting purposes with such an issuer.
- (3) Any Y, if the only sold T assets it acquires are either (i) securities that are traded on an established securities market and represent a less than 5% interest in that security, or (ii) assets that are not securities and do not include a trade or business.

2. Analysis

Section 6011 of the Code requires that a "reportable transaction" be disclosed on taxpayer's tax return. A reportable transaction means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under Section 6011 of the Code, such transaction had been determined by the Secretary to have a potential for tax avoidance or evasion. A listed transaction means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of Section 6011 of the Code. The listed transactions are identified in Notice 2004-67 and the list includes Intermediary Transactions pursuant to Notice 2001-16. The fact that a transaction is a reportable transaction or a listed transaction does not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

Treasury Regulations Section 301.6111-2(a)(3) provides that the term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences, and that is either factually similar or based on the same or similar tax strategy. Treasury Regulations Section 1.6011-4(c)(4), example 2 provides an illustration of a transaction substantially similar to an Intermediary Transaction. Example 2 notes that the use of different intermediaries to prevent the recognition of gain would be the same or substantially similar to an Intermediary Transaction. Such different intermediaries would include M (a corporation) that does not file a consolidated return, but buys T stock, liquidates T, sells the assets of T to Y and offsets the gain on the sale of assets with currently generated losses.

For the reasons stated below, the Stock Sale does not qualify as a transaction which is substantially similar to an Intermediary Transaction.

a) The Participants in the Instant Transaction do Not Satisfy the Requirements of the Notice and there were No Built-in Gain Assets

The Notice and Notice 2008-111 both require that an Intermediary Transaction have four parties: (1) X -- the stock seller, (2) T -- the corporation whose stock is sold, (3) M -- the intermediary, and (4) Y -- the buyer. The Sale did not meet the requirement that there be four participants because there was no intermediary. Although it is true that Mr.

Tricarichi sold stock of the West Side to the Buyer, there was no other party involved in purchasing the assets of West Side. In other words, there was no M and no Y because no party purchased any T Assets. The very premise behind the Service's challenge of Intermediary Transactions is that the intermediary that purports to stand between the sale of assets from X to Y (thereby stepping up the basis of the sold assets) lacks substance and should be disregarded and ignored for federal income tax purposes. The standard applied in Intermediary Transactions is to eliminate the illusory intermediary and determine what the tax treatment of the asset sale would have been had the assets been sold directly from X to Y. In the instant transaction, there is no intermediary to ignore because there was no asset sale and because there was no asset sale, there were no Builtin Gain Assets. If the Service were to assert that the customer base sold to LXV served as the Built-in Gain Assets in the Intermediary Transaction, that argument would fail for the following reasons: (i) the cash assets in West Side were not generated by the customer-base sale, (ii) the taxable income deemed owed by West Side was not generated by the customer-base sale, and (iii) such an assertion would not capture the types of transactions sought to be addressed by both the Notice and Notice 2008-111.

As noted in Notice 2008-111, without the existence of an asset buyer (Y) and without the existence of Built-in Gain Assets, a transaction cannot be an Intermediary Transaction. Therefore, without an acquisition of Built-in Gain Assets by a Y before or after the Stock Disposition Date, the Stock Sale cannot be substantially similar to an Intermediary Transaction.

b) The Service has Taken Inconsistent Positions in the Draft Report

The attempted application of the Intermediary Transaction rules is inconsistent with the Service's allegation that a deemed liquidation of West Side occurred. As discussed above, the Notice, as clarified by Notice 2008-111, requires that an Intermediary Transaction have four components, one of which is that there be a disposition of T stock by X, other than pursuant to a liquidation of T. Therefore, in order to qualify as an Intermediary Transaction, the Notice prohibits T stock from being transferred in connection with a liquidation of T. If the Notice applies to the Stock Sale (as the Service argues), then the Service cannot in turn conclude that a liquidation has occurred. And if no liquidation occurred, there can be no transferee liability in this case because Mr. Tricarichi sold stock and he did not receive any property directly or indirectly from West Side. In other words, there cannot be transferee liability in an intermediary listed transaction if cash is not taken from the original taxpayer and paid to the alleged transferee. Alternatively, if the Service takes the position that a liquidation has occurred, then the Service will have failed to establish a key requirement of the Notice (a stock sale without a liquidation) and this transaction would not be a listed transaction.

Furthermore, the Notice and Notice 2008-111 apply to transactions in which an intermediary acquires the stock of a company and then sells assets of the company to a third party. Characterization of the transaction as one involving an intermediary acting as an agent for either the shareholder of a corporation or the purchaser of corporate assets in

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accordance with the Notice and Notice 2008-111, is inconsistent with the idea that West Side made a liquidating distribution to Mr. Tricarichi because under the liquidating distribution scenario, no other parties would have been involved in the transaction. The Service recently audited West Side and disallowed post-acquisition deductions for the 2003 tax year. Only after disallowing post-acquisition deductions and unsuccessfully attempting to collect back taxes from the company has the Service made any argument that there was a deemed liquidation, further casting doubt on the application of the Intermediary Transaction rules in this case.

The Service has not demonstrated, and cannot demonstrate, that the Stock Sale constitutes an Intermediary Transaction. The Stock Sale did not involve a Y, there were no Built-in Gain Assets transferred, and there were no Sold T Assets. Moreover, the Service's assertion that their was a liquidating distribution to Mr. Tricarichi is a per se contradiction of the requirements for an Intermediary Transaction. Therefore, the Stock Sale does not qualify as an Intermediary Transaction pursuant to the Notice and Notice 2008-111.

c) The Repayment of the Debt Financing is Insignificant

The Service attempts to infer from Fortrend's use of debt financing, and the immediate repayment of such financing, that somehow the Stock Sale should not be treated as presented by the participants. This inference is incorrect. There are no prohibitions against financing a corporate acquisition through debt financing. It is generally expected, and a common practice, for acquirers to use some form of financing in making an acquisition. It is also common practice for acquirers, especially, for example, private equity firms, to use assets of the acquired corporation to repay the debt incurred in the acquisition. To highlight the legitimate and accepted practice of using debt financing in corporate transactions in an attempt to classify the Stock Sale as something other than a stock sale is without support.

B. Nob Hill Holdings was not a "Mere Conduit"

In the Draft Report, the Service concluded that, in exchange for a fee, Fortrend (via Nob Hill) served as a mere conduit in the transactions between West Side and its shareholder, Mr. Tricarichi, in order to shelter gain associated with settlement proceeds. The Service further concluded that the transfer of cash to Mr. Tricarichi in exchange for his stock should be characterized as a liquidating distribution. This claim is without merit and not supported by the facts in this case. As acknowledged by the Supreme Court in Gregory v. Helvering, 293 U.S. 465, 469 (1935), taxpayers are permitted to structure their business affairs as they please within the bounds of the law and Mr. Tricarichi did so by engaging in a bona fide sale of the Stock to Fortrend.

Mr. Tricarichi intended to sell (and sold) the Stock. The Stock represented an interest in a going concern and Fortrend expressed a clear desire to purchase an ongoing business and for that business to be profitable going forward. Fortrend purchased West Side through its subsidiary Nob Hill, re-engineered the company to begin investing in

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receivables and continued to operate the company and to actively manage and pursue the excise tax recovery claims and the penalties dispute against the Service. West Side was not a corporate shell either pre- or post-acquisition, and it was never liquidated. Therefore, the Stock Sale should be respected and Nob Hill should not be deemed a "mere conduit".

1. Our Facts do not Support the "Mere Conduit" Theory

The Service relies on the mere conduit line of cases to support its contention that Mr. Tricarichi did not sell stock and therefore the transaction should be recharacterized as a liquidating distribution to Mr. Tricarichi. The Service's reliance on the "mere conduit" line of cases to recharacterize the Stock Sale is misplaced. Generally, these cases involve persons who intend to sell assets and then transfer those assets to related parties who then sell the assets to a third party. In each case, the transaction is recharacterized to treat the original owner as the true seller of the assets.

The seminal case on this issue is Comm'r v. Court Holding, 334 U.S. 331 (1945). In Court Holding, a corporation transferred an asset to its shareholders in the form of a liquidating dividend, and the shareholders, in turn, sold the asset (an apartment building) to a third party purchaser. Negotiations for the sale of the apartment building had already taken place between the corporation and the buyer and an agreement was reached as to the terms of the sale and put in writing while the corporation still had legal title to the property. Then, after discovering that the sale would result in a large corporate income tax to the seller, the corporation "called off" the sale and immediately declared a liquidating dividend to its shareholders. The shareholders thereupon immediately sold the building to the third party. The Supreme Court held in Court Holding that the substance of the transaction was a sale by the corporation to the third party purchaser and ignored the intermediary dividend to the shareholder. The facts of our case are different from those in Court Holding. Here, neither Fortrend nor Nob Hill was affiliated (in any way) with Mr. Tricarichi prior to the Stock Sale. Mr. Tricarichi sold the Stock to Nob Hill in an arm's length negotiated transaction where the parties were adverse to each other. The facts demonstrate that Mr. Tricarichi always intended to sell his stock (not assets) to an unrelated buyer. After the sale was consummated, Nob Hill did not then sell the Stock or any other assets of West Side to a third party. Mr. Tricarichi sold the Stock to Nob Hill and Nob Hill continued to operate West Side as a going concern, actively managing West Side's excise tax recovery claims and penalties dispute against the Service. West Side engaged reputable attorneys to represent the company in its disputes with the Service and they consulted with and oversaw the various litigation proceedings on West Side's behalf for five (5) years (through 2008). Under the terms of the Stock Purchase Agreement, Nob Hill was required to keep West Side in business for a period of at least five (5) years and West Side still exists as an entity today. West Side's continued existence and the active management of its outstanding claims against the Service are proof of Nob Hill's intent that West Side remain a viable business entity.

An analysis of <u>Court Holding</u> is generally incomplete without a discussion of <u>U.S. v. Cumberland Public Service</u>, 338 US 451 (1950). In <u>Cumberland</u>, the Supreme

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Court examined whether shareholders were mere conduits where a corporation made a liquidating distribution to its shareholders and the shareholders in turn sold the distributed assets to a third party. The Court found that, unlike in Court Holding, the corporation never entered into initial negotiations to make the sale itself. The Cumberland shareholders offered to sell stock to the buyer and after the buyer rejected their offer, they negotiated to sell assets. The Supreme Court concluded that the shareholders were the sellers of the assets and refused to find that, in substance, the corporation was the actual seller and the shareholders were mere conduits. The Court in Cumberland noted the following with respect to its decision in Court Holdings:

Our Court Holding decision rested on findings of fact by the Tax Court that a sale had been made and gains realized by the taxpayer corporation. There the corporation had negotiated for sale of its assets and had reached an oral agreement of sale. When the tax consequences of the corporate sale were belatedly recognized, the corporation purported to "call off" the sale at the last minute and distributed the physical properties in kind to the stockholders. They promptly conveyed these properties to the same persons who had negotiated with the corporation. The terms of purchase were substantially those of the previous oral agreement. One thousand dollars already paid to the corporation was applied as part payment of the purchase price. The Tax Court found that the corporation never really abandoned its sales negotiations, that it never did dissolve, and that the sole purpose of the so-called liquidation was to disguise a corporate sale through use of mere formalisms in order to avoid tax liability.

In all of the cases cited by the Service in the Draft Report in support of the mere conduit theory, the factual circumstances repeatedly involve a seller who has pre-arranged a transaction and then, for tax purposes, "calls off" the transaction in order to restructure the transaction using a conduit to avoid tax liabilities. In support of this explanation of the mere conduit case law, the Tax Court in Martin Ice Cream Co. v. Comm'r, 110 TC 189 (1998) (holding that a corporation was not a mere conduit in a sale by shareholders to a third party) noted that:

Court Holding and Cumberland also provide a broader principle that helps to explain why a corporate liquidation is respected in one setting and disregarded in another. The substance of a transaction can be found in the negotiations leading up to the closing. Where the negotiations have culminated in an understanding that is inconsistent with the form of the final transaction, that form is said to be inconsistent with the substance, and the substance must prevail. Such is the case when a corporation negotiates all the terms and conditions of a sale of its assets, and then, at the last minute, distributes assets to its shareholders and the shareholders' names are conveniently inserted

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as sellers; the substance of the negotiations will prevail, and the corporation will be regarded as the seller for Federal income tax purposes. This Court and others have acknowledged this broader principle of what Court Holding and Cumberland stand for. Where shareholders are found to have negotiated the sale of corporate assets independently, on their own behalf, the form of the transaction is respected, and the corporation is not recast as the seller, notwithstanding that some negotiations were carried on by the shareholders before the liquidation... Where a corporation is found to have negotiated a transaction, and at the last minute, the shareholders are substituted for the corporation as sellers, Court Holding has been applied to regard the corporation as the seller for Federal income tax purposes. (Emphasis added.)

In the Draft Report, the Service also relied on Estate of Robert G. Kluener v. Comm'r, 154 F.3d 630 (6th Cir. 1998), Davis v. Comm'r, 88 TC 122 (1987) and Rev. Rul. 70-140 for the proposition that courts may disregard transactions involving mere conduits. However, in each of the cases above there also was a pre-existing agreement between the taxpayer and a third party to engage in a particular transaction. For example, in Kluener, in order to decrease his overall losses the taxpayer decided to sell an asset he owned (horses) for a gain. Once advised that a direct sale of the horses would result in a large tax liability, the taxpayer decided to transfer the assets to a wholly-owned entity and then arranged to have that entity sell the horses to the pre-arranged seller and offset the gain with intercompany NOLs. The court found that the transaction was, in fact, a direct sale by the taxpayer to the third party as originally agreed in the pre-existing agreement. Similarly, in Davis, the court had actual evidence that an agreement existed predating the transaction and cited the near-identity of the terms between those negotiated by the taxpayer and the third party and those accepted in the ultimate transaction between the conduit and the third party as indicative of an indirect sale. Finally, the transfer in Rev. Rul. 70-140 involved the shift of assets from a parent company to a newly formed wholly-owned corporation and the consummation of a sale that had been pre-arranged between the parent company and a third party. The Service found in Rev. Rul. 70-140 that the transfer of assets to the wholly owned entity was transitory and without substance since it was clear that the assets were transferred for the purpose of enabling the third party to acquire them without the same gain to the transferor that would have resulted from a direct sale from the parent company.

The facts in our case are clearly distinguishable from the conduit line of authority. Our facts demonstrate that Nob Hill was not a mere conduit. Nob Hill was the vehicle through which Fortrend purchased West Side. Surely the Service is not attempting to recharacterize the transaction as a sale by Mr. Tricarichi directly to Fortrend. Mr. Tricarichi's decision to sell the Stock to Fortrend was not the result of a failed attempt to liquidate the company that was restructured for tax purposes. There is absolutely no evidence that Mr. Tricarichi ever had any direct or indirect intention of liquidating West Side. Nor did the sale of West Side follow a pre-negotiated sale of assets by West Side to Nob Hill, Fortrend, or any other party. From the very beginning

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through the consummation of the transaction, the object of the transaction was always a sale of the stock of West Side by Mr. Tricarichi to Fortrend (or a Fortrend acquisition affiliate). The fact that Fortrend believed its tax position was such that it was willing to pay more for the stock of West Side than Mr. Tricarichi could recognize by liquidating West Side is irrelevant.

2. The Service has Improperly Disregarded the West Side Stock Sale

In the Draft Report, the Service claims that the sale was in reality a disguised liquidating distribution of West Side's cash to Mr. Tricarichi. The Service cites Owens v. Comm'r, 568 F.2d 1233 (6th Cir. 1977), aff'g, 64 TC 1 (1975), for support that courts have previously disregarded stock transactions using intermediary entities and have recognized the purported stock purchasers as mere conduits.

Owens does not apply to the present situation. In Owens, the acquired corporation was immediately liquidated post-acquisition and the cash in the corporation was distributed to the buyer's shareholders. Therefore, in order to apply Owens, the Service must be able to demonstrate that there was a liquidation. As discussed further in Section B.3. below, an intent to liquidate must be manifest by a plan of liquidation. If no formal plan of liquidation is adopted, courts require that the facts and circumstances of a situation evidence a clear intent on the part of the parties to liquidate the company. However, as held by the Tax Court in Association Cable (discussed below) a company will not be deemed to have adopted an informal plan of liquidation if the company has an intent to continue a line of business. In our case, West Side was never liquidated. There was never any intention on the part of Mr. Tricarichi or Nob Hill (either expressed, documented, undocumented or otherwise) to liquidate West Side and there were no board resolutions or other records indicating that West Side had such an intent. Per the terms of the Stock Purchase Agreement, Nob Hill was required to maintain the existence of the company for at least five (5) years following the closing and West Side was required to be engaged in an active trade or business at all times. Moreover, West Side continued to carry on an active business of managing and overseeing two claims for recovery of both federal telecommunications excise taxes and related penalties, each of which involved more than one million dollars. Therefore, the fact that West Side continued an active business is evidence that a liquidation did not occur and Owens is inapplicable.

The 6th Circuit in Owens disregarded the sale of the taxpayer's stock because the taxpayer did not prove that he actually sold stock. The case largely hinged on evidence the taxpayer did not present. The court outlined three main circumstances in the case that the court found persuasive in determining that the taxpayer engaged in a liquidating distribution rather than a stock sale. First, the only asset owned by the target corporation (Mid-Western) in Owens was cash. In our case, West Side held not only cash but also an asset consisting of a multi-million dollar claim for a refund from overpaid federal telecommunications excise taxes that it was required to actively manage, as well as a \$1,061,999.06 potential liability for penalties that it also was required to actively manage. In each case, "active management" consisted of hiring, consulting with, overseeing, and

Exhibit 16

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October 9, 2009

Via Facsimile (817) 232-6549 and Overnight Express Mail

Internal Revenue Service 5450 Stratum Drive, Suite 150 Fort Worth, TX 76137 Attn: Denise McCaskill

Re: LMSB:CTM:1296:NFTW

Dear Ms. McCaskill:

Enclosed please find the formal, written protest ("Protest") submitted on behalf of Mr. Michael Tricarichi in response to the finding by the Internal Revenue Service (the "Service") in the Transferee Report dated August 11, 2009, that Mr. Tricarichi is a transferee of the assets of West Side Cellular, Inc. Mr. Tricarichi respectfully requests a conference in Cleveland, Ohio, with the local IRS Office of Appeals to discuss the findings in the Transferee Report in light of the arguments and analysis advanced in this Protest.

This Protest addresses all contested issues identified in the Transferee Report. On behalf of Mr. Tricarichi and in support of this Protest, we submit herewith a memorandum which states the facts, authorities, and arguments upon which Mr. Tricarichi relies. Mr. Tricarichi reserves the right to amend and/or supplement this Protest in the event the Service changes its position, requests additional information, or identifies new issues for which a taxpayer response is appropriate.

We also submit herewith Form 2848, Power of Attorney and Declaration of Representative, appointing me, along with Tony Carbone and Larysa Rosemann of Bingham McCutchen LLP, as Mr. Tricarichi's representatives with regard to this matter. I will serve as the primary point of contact in connection with this Protest and appeal.

This Protest is submitted solely for the purpose of obtaining Appeals consideration for potential compromise and settlement of the issues protested.

Respectfully submitted,

Glenn S. Miller

Enclosures

cc: Maria Hwang, Director, Field Operations

em S. Miller Suc

Michael Tricarichi

EXHIBIT PwC Dep Ex. No.

76A-16-735910-B

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PROTEST ON BEHALF OF

MICHAEL Tricarichi SSN: 268-56-5446

SUBMITTED OCTOBER 9, 2009

To THE
INTERNAL REVENUE SERVICE
FORT WORTH, TX

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Glenn S. Miller

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October 9, 2009

Via Mail and Facsimile (817) 232-6549

Internal Revenue Service 5450 Stratum Drive, Suite 150 Fort Worth, TX 76137

Attn: Denise McCaskill

Re: LMSB:CTM:1296:NFTW

Dear Ms. McCaskill:

Mr. Michael Tricarichi (the "Taxpayer"), has received a copy of your Transferee Report dated August 11, 2009 (the "Transferee Report") finding that the Taxpayer is a transferee of the assets of West Side Cellular, Inc., EIN# 34-1685059 ("West Side") and as such is liable for the unpaid income tax deficiencies of West Side for its taxable year ending in December 31, 2003. The Taxpayer hereby protests the Internal Revenue Service's (the "Service") findings in the Transferee Report, and, in support thereof, submits the following facts and contentions:

1. Conference

The Taxpayer requests a conference in <u>Cleveland</u>, <u>Ohio</u> to discuss the findings in the Transferee Report with a member of the local Appeals Office.

2. Name, Address and Identification Number of the Taxpayer

Mr. Michael Tricarichi 341 Arbour Garden Ave Las Vegas, NV 89148

SSN:

Redaction

Date and Symbol of Your Letter

August 11, 2009

Reference number LMSB:CTM:1296:NFTW

4. Tax periods involved

The Service has found the Taxpayer liable for the unpaid income tax deficiencies of West Side for the 2003 taxable year.

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5. Findings to Which the Taxpayer Takes Exception

The Taxpayer takes exception to the following findings in the Transferee Report, as discussed further in Section 7 below:

- The sale of West Side stock to Nob Hill Holdings, Inc. ("Nob Hill") is an intermediary transaction.
- B. Nob Hill served as a mere conduit in a transaction between West Side and the Taxpayer and, as a result, the transfer of assets to the Taxpayer in exchange for his stock should be characterized as a liquidating distribution;
- C. The sale of West Side stock to Nob Hill is properly collapsed under the step transaction doctrine into a transaction in which West Side directly acquired its own shares from the Taxpayer, its 100% shareholder, as part of a liquidation; and
- Transferee liability may be asserted against the Taxpayer.

6. Discussion of Disputed Findings

The Taxpayer sold his stock in West Side to Nob Hill for approximately \$35,000,000 in cash on September 9, 2003. Post-acquisition, although West Side remains in existence to date, the Service seeks to assign West Side's tax liability for the 2003 taxable year to the Taxpayer using the transferee liability doctrine. In the Transferee Report, the IRS proposes to disregard the Stock Sale (defined below) by treating Nob Hill as a "mere conduit" and to recharacterize the transfer of the proceeds of the Stock Sale to the Taxpayer as a liquidating distribution. Alternatively, the Transferee Report proposes to collapse the Stock Sale under the step transaction doctrine into a transaction in which West Side is treated as having directly acquired its own shares from the Taxpayer, its 100% shareholder, as part of a liquidation.

Each of the Service's alternative theories in the Transferee Report is based upon the conclusion that West Side was a shell entity that should be deemed to have liquidated for federal income tax purposes. In support of the Service's position that West Side should be deemed to have liquidated, the Transferee Report makes the following inconsistent statements of fact (some of which are on the same page of the Transferee Report): (1) "the only asset remaining in the corporation was cash in the amount of \$39,999,373" (page 5 of the Transferee Report); (2) "West Side was no longer engaged in any business and contained only cash and a future tax liability" (page 10 of the Transferee Report); (3) "West Side had no substantial business activities following its acquisition by the promoters" (page 11 of the Transferee Report); (4) "West Side was left with no valid business activities and no significant assets" (page 11 of the Transferee Report); and (5) "West Side had transferred all of its assets to LXV Group, except cash, and paid off all its liabilities" (page 12 of the Transferee Report). Each of these statements is inaccurate. The Transferee Report simply ignores the fact that West Side never liquidated and that West Side maintained ownership of a claim for over \$3 million in federal telecommunications excise tax refunds, as well as a contested liability for over

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\$1 million in federal telecommunications excise penalties, both of which West Side actively managed, and continues to manage to date. Although the Taxpayer pointed out to the Service the existence of these causes of action (which the Service was unaware of) and explained to the Service that its theories were based upon an erroneous understanding of the facts, the Service was unswerving in maintaining the same theories as before the full facts were known.

It is the Taxpayer's position that the Stock Sale was a bona fide sale to an unrelated third party that should not be disregarded under either the mere conduit theory or the step transaction doctrine because the facts of this case do not support any such recharacterization. Under a proper application of existing case law, the party that should have transferce liability in this case (if any) is Nob Hill - the purchaser of the stock of West Side. Assuming for purposes of this Protest that the Service's case against West Side is correct, it was Nob Hill that took money from West Side and failed to cause West Side to pay the taxes that were owed. As the Service admits in the Transferee Report, however, it has been unsuccessful in collecting any money from Nob Hill. In essence, the Service would like to hold the Taxpayer responsible for West Side's tax liability and make the Service whole on its inability to maintain a successful transferee liability case against Nob Hill despite the fact that (1) West Side was completely solvent at the time of the stock sale, with over \$40 million in cash in its accounts, and (2) the Taxpayer had no control over Fortrend's decisions and actions with respect to West Side's post-acquisition tax planning and operational decisions.

The premise that the Taxpayer should be held responsible for West Side's tax liability or Nob Hill's transferee liability merely because he was allegedly enriched by being paid what the Service has described as a "premium price" for the stock of his company, is simply unsupported by the case law. Such a finding would effectively subject all stock sales to similar scrutiny, and set a bad precedent based on incorrect, vague and arbitrary legal principles.

A. Statement of Facts

West Side is an Ohio corporation which, from 1988 through 2003, was engaged in the business of, among other things, reselling cellular telecommunications services. West Side, which itself had no infrastructure (e.g. cell towers), marketed cellular service to the general public and provided customers with cellular phone access that it purchased from other wholesale cellular service providers. During this time, the stock of West Side was owned 100% by the Taxpayer.

i. <u>History of Discrimination Suit</u>

In October of 1993, West Side (doing business as Cellnet) filed a complaint with the Public Utilities Commission of Ohio (PUCO) against certain wholesale cellular service providers, including Ameritech and the company now known as Verizon. The complaint asserted that Verizon and Ameritech engaged in various discriminatory and illegal business practices against Cellnet in an effort to prevent Cellnet from fairly competing against them for cellular customers. On January 18, 2001, PUCO ruled in favor of Cellnet and held that Verizon and Ameritech engaged in unlawful

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discrimination. On December 30, 2002, the Ohio Supreme Court affirmed PUCO's decision in favor of West Side/Cellnet.

ii. The Settlement Agreement

In April of 2003, West Side entered into a settlement agreement with Verizon and a separate settlement agreement with Ameritech successor Cingular (the "Settlement Agreement"). Pursuant to the Settlement Agreement, West Side received a cash payment of approximately \$64,250,000. The terms of the Settlement Agreement required that the business relationship between Cellnet and the counterparties to the settlement be terminated effective as of June 10, 2003. Furthermore, the settlement counterparties would be under no obligation, after 11:59 pm on June 10, 2003, to provide cellular network or any other form or types of goods or services to Cellnet, the Taxpayer, or any entity under their common ownership or control. After the payment of approximately \$25,000,000 in professional fees and employee bonuses, paid upon the Taxpayer's order to reward various long-time employees, West Side was left with cash of approximately \$40,000,000.

Although the Taxpayer and West Side were required to end their business relationships with the settlement counterparties by June 10, 2003, the Taxpayer was under no obligation to liquidate West Side or to completely exit the cellular business. In 2003, West Side was permitted to and, in fact, continued to conduct business with cellular service carriers other than Verizon and Cingular. The Taxpayer intended to continue operating his cellular resale business notwithstanding the limitations placed on him and West Side under the terms of the Settlement Agreement.

iii. The Stock Sale

In May of 2003, the Taxpayer was introduced to MidCoast Investments, Inc. ("MidCoast") by his then-counsel Hahn Loeser & Parks LLP ("HLP"). MidCoast indicated that they were in the receivables collection business and that they would be interested in purchasing the Taxpayer's company. The Taxpayer was introduced to Fortrend International, LLC ("Fortrend") by attorney Gary Zwick. Fortrend indicated a willingness to pay more for West Side than MidCoast was willing to offer. The Taxpayer and HLP entered into a series of negotiations with Fortrend. Ultimately, it was agreed that West Side would dispose of its cellular customer base and receivables in a taxable transaction, and that Fortrend would purchase West Side and its remaining businesses, which consisted of approximately \$40,000,000 in cash and certain causes of action against the United States Government for the recovery of telecommunications excise taxes (discussed in further detail below). On June 11, 2003, West Side sold certain of its business assets, including its customer base and various receivables, to LXV Group, Inc. ("LXV") pursuant to an Asset Purchase Agreement entered into by West Side and LXV (the "Asset Sale"). After the sale to LXV, the assets remaining in West Side included cash, a \$577,000 note and the federal excise tax causes of action. Currently, the Taxpayer owns a 25% stake in LXV and he conducts his remaining businesses through another entity, Telecom Acquisition, Inc.

Fortrend, through its pre-existing subsidiary Nob Hill (formed by Fortrend in November of 2001), ultimately purchased the stock of West Side on September 9, 2003

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for approximately \$35,000,000 using financing of \$29,900,000 from Rabobank and \$5,000,000 in cash (the "Stock Sale"). As indicated in an email sent by Steve Block of Fortrend on July 13, 2003 to the deal team and in a Term Sheet related to the transaction, Fortrend was focused on ensuring that West Side had a clear continuing business operation and that the post-acquisition business activities of West Side would be profitable on a "go forward" basis. Likewise, it was equally important to the Taxpayer that West Side continue in business post-acquisition. In fact, this sentiment was shared by all parties and reflected both in the transaction documents and West Side's subsequent actions carried out with respect to the federal excise tax cases. In addition to the cash in the company, West Side retained the assets and liabilities associated with the federal excise tax causes of action. West Side and its new owners continued to actively manage and pursue these causes of action for more than five (5) years after the sale of West Side to Fortrend. One of the causes of action remains active to this day.

iv. The Excise Tax Claims Held by West Side Post-Acquisition

Because of the complexity inherent in the federal telecommunications excise tax law, West Side had consulted with HLP to aid in determining whether it was required to pay and/or collect a federal excise tax from its customers under Sections 4251-4254 of the Code. HLP informed West Side that the tax law in this area was unclear and, after researching case law on cellular resellers and their customers, concluded that the federal telecommunications excise tax in all likelihood did not apply to West Side or its customers. HLP, a firm with considerable expertise in telecommunications and tax law, advised West Side that the tax probably did not apply to West Side because West Side was a rebiller rather than a reseller of telephone services and the tax probably did not apply to West Side's customers because on its face, the statute was inapplicable to the types of telephonic services provided by West Side.

The Taxpayer ultimately caused West Side to voluntarily pay \$3,131,579.92 in federal excise taxes and accrued interest to the United States Government for the tax periods ending September 30, 1991 through June 30, 2003. West Side voluntary submitted revised excise tax returns and paid the amount above on July 31, 2003² (which amount was received by the Service on August 2, 2003), even though the Service had not

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¹ The Term Sheet was a letter sent via email to Chris Kortlandt of Rabobank from Alice Dill of Fortrend on August 13, 2003. The letter set forth basic information concerning the acquisition of West Side by Fortrend via Nob Hill.

² In a protest submitted to the Taxpayer Advocate Service on behalf of West Side by the law firm of Swidler, Berlin, Shereff, Friedman LLP ("Swidler Berlin"), dated September 30, 2004, challenging the assessment of penalties against West Side for failure to pay certain federal telecommunications excise taxes, the statement of facts provides that on July 31, 2003, West Side paid a total of \$3,131,579.92 to the Service representing the excise taxes payable.

audited West Side or the Taxpayer or contacted either of them in any way regarding the possible excise tax liability. This occurred prior to the Stock Sale and after the June 11, 2003 Asset Sale to LXV. The Service subsequently contacted West Side in late 2003 and assessed penalties for failure to file and failure to pay, in the amount of \$1,061,999.06.

The Taxpayer and West Side also became aware of the possibility that the federal telecommunications excise tax might ultimately be held to be illegal, which potentially would entitle West Side to a full refund of all amounts paid to the government. At the time of the Stock Sale, a number of court cases were pending (See American Bankers Insurance Group, Inc. v. U.S., 308 F Supp 2d 1360 (S.D. Fla. 2004), and Office Max, Inc. v. U.S., 309 F Supp 2d 984 (D.Ohio 2004)) in which taxpayers were taking the position that the federal telecommunications excise tax had been improperly imposed.³ On or around May of 2006, the Service acknowledged in Notice 2006-50 that they incorrectly imposed excise taxes pursuant to Section 4251 of the Code on certain types of telephonic communications (which included those provided to West Side's customers).

Accordingly, West Side was potentially entitled to a refund claim of \$3,131,579.92 from the Service.

Fortrend ultimately purchased West Side with both the penalty claim and the refund claim pending against the Service. Following its purchase by Fortrend, West Side actively managed both the \$1,061,999.06 penalty dispute and the \$3,131,579.92 refund claim over the next several years. This active management consisted of retaining, consulting with, and overseeing outside legal consultants and interacting with the Service and the federal courts regarding both issues. The penalty dispute began in late 2003 when West Side received notice of the potential penalties from the Service. In March of 2004, the Taxpayer Advocate Service (the "TAS") issued a decision finding that the penalties were properly assessed against West Side. Thereafter, West Side engaged Swidler Berlin to protest the findings of the TAS. In September of 2004, more than one year after the closing of the Stock Sale, Swidler Berlin submitted a protest requesting abatement of the assessed penalties. West Side was ultimately successful in having all \$1,061,999.06 in penalties waived in late 2006 -- approximately three (3) years after the Stock Sale.

West Side then commenced a refund claim and litigation against the Service seeking a refund of the more than \$3 million in excise taxes previously paid. On or about

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³ Section 4252(b)(1) provides that toll telephone service means "a telephonic quality communication for which (A) there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication and (B) the charge is paid within the United States." The cellular services provided by West Side were not charged based on the varying distance and elapsed time of each individual communication; therefore, they do not fit within the definition of toll telephone service in the plain statutory language of Section 4252 of the Code.

August of 2006, the Service formally denied West Side's refund request. In September of that year, West Side filed a complaint against the United States Government in the United States District Court for the Northern District of Ohio seeking reimbursement for the overpaid taxes. Between September 2006 and July 2008, West Side vigorously pursued its lawsuit against the United States, filing numerous pleadings in the case, including motions, replies and related memoranda and attending case conferences. Below is a sample of the activity in this case:

- Complaint filed by West Side on September 18, 2006;
- Parties Attended Case Management Conference on February 15, 2007;
- Parties Attended Telephone Conference on March 16, 2007;
- Motion for Extension of Time to File Dispositive Motions filed by West Side on July 24, 2007;
- Motion for Summary Judgment filed by West Side on August 30, 2007;
- Joint Motion for Extension of Time to File Dispositive Motions filed by both Parties November 2, 2007;
- Memorandum Contra Defendant's Motion for Summary Judgment filed by West Side on November 19, 2007; and
- Judgment and Order issued on July 7, 2008.

After maintaining this claim for approximately two (2) years (ending in 2008), the District Court ultimately ruled against West Side and denied the refund. Although the Service admitted that they improperly imposed the excise taxes on West Side and its customers, the case was dismissed on procedural grounds. Nevertheless, it is clear that for more than five (5) years after the closing of the Stock Sale, West Side actively managed its refund claim and the penalties dispute and those causes of action were extremely important to the company.

Presently, West Side may have an impending cause of action against the United States Government for the failure to refund telephone excise taxes paid directly by West Side. In a recent case, <u>Cohen v. U.S.</u>, 578 F.3d 1 (D.C. Cir. 2009), decided on August 7, 2009, the D.C. Circuit held that Notice 2006-50 was a final agency action subject to judicial review under the Administrative Procedure Act (the "APA"). The D.C. Circuit remanded the case to the district court for a determination of whether under Notice 2006-50, the Service developed a refunds scheme that was inadequate and unlawful under the APA. The government has requested *en banc* review of this decision by the D.C. Circuit. If the Notice is struck down, West Side will have an alternative cause of action against the government that it may pursue either independently or as part of a class action.

It should be noted that the existence of the post-acquisition federal excise tax causes of action and West Side's related post-acquisition business activity are consistent

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with the Taxpayer's statements made in his interview with the Service on November 30, 2007 (summarized in the Revenue Agent's Transferee Report issued to West Side in January of 2008) discussing the assets transferred in both the Asset Sale and the Stock Sale. In the interview, the Taxpayer specifically mentioned certain West Side assets (the customer base and the accounts receivables) that were transferred to LXV in the Asset Sale. All of the assets and liabilities that were not so transferred (including West Side's federal excise tax liability and any related causes of action) were retained by the company.

B. Statement of Law and Discussion

i. Response to the Transferee Report's Finding of Fact: The Stock Sale was an Intermediary Transaction

In the Transferee Report, the Service notified the Taxpayer (in the statement of facts) that he had, in the Service's view, engaged in a transaction that is substantially similar to the intermediary transactions tax shelter described in Notice 2001-16, 2001-C.B. 730, (the "Notice"). This conclusion is incorrect -- the facts of this case are not the same or substantially similar to the tax shelter described in the Notice.

Notice 2001-16 and Notice 2008-111

The Notice describes certain transactions ("Intermediary Transactions") being marketed to other taxpayers for the avoidance of federal income tax. The Intermediary Transactions described in the Notice generally involve four parties: (i) the seller of corporate stock (X), (ii) the corporation whose stock is to be sold (T), (iii) an intermediary corporation (M), and (iv) the buyer (Y) who desires to purchase the assets, and not the stock, of T. Pursuant to a plan, X sells T stock to M. T then sells assets to Y and Y claims a basis in the acquired assets equal to the purchase price. The tax avoidance in an Intermediary Transaction generally results from (i) T becoming part of M's consolidated group whereby T's inherent gain on the assets sold is offset with the M group's losses or (ii) M, a tax-exempt entity, liquidating T before the T assets are sold to Y. The Notice provides that the Service can reclassify an Intermediary Transaction as M acting as either T or Y's agent. Alternatively, the Intermediary Transaction can be recharacterized by treating X as having sold T's assets or T as having sold the assets while still owned by X. Transactions that are the same or substantially similar to those described in the Notice are identified as "listed transactions."

Notice 2008-111, 2008-51 IRB 1288 ("Notice 2008-111"), generally effective as of January 19, 2001, clarifies the Notice by setting forth more objective standards through which Intermediary Transactions can be identified. Under Notice 2008-111, a transaction is treated as an Intermediary Transaction with respect to a particular person only if: (i) that person engages in the transaction pursuant to a "Plan" (as defined below), (ii) the transaction contains four objective components indicative of an Intermediary Transaction, and (iii) no safe harbor exception applies to the transaction.

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a. The Plan

Notice 2008-111 provides that an Intermediary Transaction involves a corporation (T) that would recognize a taxable gain and incur a federal income tax liability were it to dispose of its assets in a taxable transaction ("Built-in Gain Assets") in which the acquiror (Y) would also generate a cost or fair market value basis in the assets acquired. An Intermediary Transaction is structured to cause the tax obligation that would arise in the taxable disposition of Built-in Gain Assets, to arise in connection with the disposition by X of all or a controlling interest in T stock, under circumstances where the third party primarily liable for any federal income tax liability with respect to the disposition of the Built-in Gain Assets will not pay that tax (the "Plan"). Logically, a transaction cannot be an Intermediary Transaction for purposes of Notice 2008-111 if there is no "Plan".

b. The Components

There are four components to an Intermediary Transaction and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in the Notice, even if the transaction is engaged in pursuant to the Plan.⁴ The four components are:

- (1) T directly or indirectly owns Built-in Gain Assets, and, as of the Stock Disposition Date (as defined below) has insufficient tax benefits to eliminate or offset such taxable gain in whole.
- (2) At least 80% of the T stock (by vote and value) is disposed of by X, other than in liquidation of T, in one or more related transactions within a 12 month period (the "Stock Disposition"). The first date on which at least 80% of the T stock has been disposed of by X in a Stock Disposition is the "Stock Disposition Date".
- (3) Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65% (by value) of T's Built-in Gain Assets are disposed of ("Sold T Assets") to Y in one or more transactions in which gain is recognized with respect to Sold T Assets.
- (4) At least half of the tax resulting from the disposition of the Sold T Assets is offset, avoided or not paid.

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⁴ See Notice 2008-111.

Safe Harbors

A transaction is not an Intermediary Transaction with respect to the following persons under the following circumstances:

- (1) Any X, if the only T stock it disposes of is publicly traded and prior to the disposition X did not hold 5% (or more) by vote or value of any class of T stock disposed of by X,
- (2) Any X, T, or M, if, after the acquisition of T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded or is consolidated for financial reporting purposes with such an issuer.
- (3) Any Y, if the only sold T assets it acquires are either (i) securities that are traded on an established securities market and represent a less than 5% interest in that security, or (ii) assets that are not securities and do not include a trade or business.

2. Summary of Applicable Code and Regulations

Section 6011 of the Code requires that a "reportable transaction" be disclosed on the taxpayer's tax return. A reportable transaction means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under Section 6011 of the Code, such transaction had been determined by the Secretary to have a potential for tax avoidance or evasion. A listed transaction means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of Section 6011 of the Code. The listed transactions are identified in Notice 2004-67 and the list includes Intermediary Transactions pursuant to Notice 2001-16. The fact that a transaction is a reportable transaction or a listed transaction does not affect the legal determination of whether the taxpayer's treatment of the transaction is proper.

Treasury Regulations Section 301.6111-2(a)(3) provides that the term "substantially similar" includes any transaction that is expected to obtain the same or similar types of tax consequences, and that is either factually similar or based on the same or similar tax strategy. Treasury Regulations Section 1.6011-4(c)(4), example 2 provides an illustration of a transaction substantially similar to an Intermediary Transaction. Example 2 notes that the use of different intermediaries to prevent the recognition of gain would be the same or substantially similar to an Intermediary Transaction. Such different intermediaries would include M (a corporation) that does not file a consolidated return, but buys T stock, liquidates T, sells the assets of T to Y and offsets the gain on the sale of assets with currently generated losses.

3. Application of the Intermediary Transaction Rules

For the reasons stated below, the Stock Sale does not qualify as a transaction which is the same as or substantially similar to an Intermediary Transaction.

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> a. The Participants in the Instant Transaction do not Satisfy the Requirements of the Notice and the Service has Taken Inconsistent Positions in the Transferee Report

The Notice and Notice 2008-111 both require that an Intermediary Transaction have four parties: (1) X -- the stock seller, (2) T -- the corporation whose stock is sold, (3) M -- the intermediary, and (4) Y -- the buyer. The Stock Sale did not meet the requirement that there be four participants because there was no intermediary. Although it is true that the Taxpayer sold stock of the West Side to the Buyer, there was no other party involved in purchasing the assets of West Side. In other words, there was no M and no Y because no party purchased any T Assets. The very premise behind the Service's challenge of Intermediary Transactions is that the intermediary that purports to stand between the sale of assets from X to Y (thereby stepping up the basis of the sold assets) lacks substance and should be disregarded and ignored for federal income tax purposes. The standard applied in Intermediary Transactions is to eliminate the illusory intermediary and determine what the tax treatment of the asset sale would have been had the assets been sold directly from X to Y. In the instant transaction, there is no intermediary to ignore because there was no asset sale and because there was no asset sale, there were no Built-in Gain Assets. The Transferee Report misses the point that the policy premise behind the Intermediary Transaction rules is notably absent from the instant situation. In a classic Intermediary Transaction, if the sale to the intermediary is ignored, additional gain would be recognized upon the ultimate sale of the T Assets. In the instant transaction, if the sale to Buyer were ignored, there would be no effect on the tax liability of the company. In essence, the Service is erroneously seeking to apply the Intermediary Transaction doctrine to a transaction with only a buyer and a seller. Such a conclusion cannot stand as it would expand the Intermediary Transaction doctrine far beyond its current scope to include transactions in which there are no intermediaries.

If the Service were to assert that the customer base sold to LXV served as the Built-in Gain Assets in the Intermediary Transaction, that argument would fail for the following reasons: (i) the cash assets in West Side were not generated by the customer-base sale, (ii) the taxable income deemed owed by West Side was not generated by the customer-base sale, and (iii) such an assertion would not capture the types of transactions sought to be addressed by both the Notice and Notice 2008-111.

As noted in Notice 2008-111, without the existence of an asset buyer (Y) and without the existence of Built-in Gain Assets, a transaction cannot be an Intermediary Transaction. Therefore, without an acquisition of Built-in Gain Assets by a Y before or after the Stock Disposition Date, the Stock Sale cannot be substantially similar to an Intermediary Transaction.

Furthermore, the Service has taken fatally inconsistent positions in the Transferee Report with respect to the application of the Intermediary Transaction rules. The attempted application of the Intermediary Transaction rules is irreconcilably inconsistent with the Service's contention in the Transferee Report that a deemed liquidation of West Side occurred. As discussed above, the Notice, as clarified by Notice 2008-111, requires that an Intermediary Transaction have four components, one of which is that there be a

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disposition of T stock by X, other than pursuant to a liquidation of T. Therefore, the Service is precluded by the Notice from taking the position that the required transfer of the T stock occur by way of a liquidation of T. If the Service takes the position that the Notice applies to the Stock Sale, then the Service is necessarily conceding that the Taxpayer sold West Side's stock and cannot in turn conclude that a liquidation occurred while the stock of West Side was held by the Taxpayer. And if no liquidation occurred, there can be no transferee liability in this case because the Taxpayer sold stock and he did not receive any property directly or indirectly from West Side. In other words, it is clear that transferee liability will not exist in an intermediary listed transaction if cash is not taken from the original taxpayer and paid to the alleged transferee. In this case, no cash was taken from West Side and paid to the Taxpayer. Alternatively, if the Service takes the position that a liquidation has occurred, then the Service will have failed to establish a key requirement of the Notice (a stock sale without a liquidation) and this transaction would not be a listed transaction.

The Repayment of the Debt Financing is Insignificant

The Service attempts to conclude from Fortrend's use of debt financing, and the immediate repayment of such financing, that somehow the Stock Sale should not be treated as presented by the participants. This conclusion is incorrect. There are no prohibitions against financing a corporate acquisition through debt financing. It is generally expected, and a common practice, for acquirers to use some form of financing in making an acquisition. It is also common practice for acquirers, especially, for example, private equity firms, to use assets of the acquired corporation to repay the debt incurred in the acquisition. To highlight the legitimate and accepted practice of using debt financing in corporate transactions in an attempt to classify the Stock Sale as something other than a stock sale is without support.

The Service does not appear to have argued that the Stock Sale was an Intermediary Transaction in its "Issues" section of the Transferee Report, limiting the analysis to a conclusory discussion in the "Facts" section of the Transferee Report. We must assume that the failure to treat this point as an "Issue," represents the abandonment of the Service's effort to treat the Stock Sale as an Intermediary Transaction.

ii. Response to the Transferee Report's Primary Position: Nob Hill Served as a Mere Conduit in a Transaction between West Side and the Taxpayer, Resulting in a Liquidating Distribution to the Taxpayer

In the Transferee Report, the Service concluded that, in exchange for a fee, Fortrend (via Nob Hill) served as a mere conduit in a transaction between West Side and the Taxpayer, in order to shelter gain associated with settlement proceeds. The Service further concluded that the transfer of cash to the Taxpayer in exchange for his stock should be characterized as a liquidating distribution. These conclusions are grounded principally in the contention that Nob Hill was effectively liquidated following the Stock Sale. The conclusions in the Transferee Report are without merit and not supported by the facts in this case. As acknowledged by the Supreme Court in Gregory v. Helvering,

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293 U.S. 465, 469 (1935), taxpayers are permitted to structure their business affairs as they please within the bounds of the law and the Taxpayer did so by engaging in a bona fide sale of the Stock to Fortrend, an unrelated third party.

The Taxpayer intended to sell (and sold) the Stock. The Stock represented an interest in a going concern and Fortrend expressed a clear desire to purchase an ongoing business and for that business to be profitable going forward. Fortrend purchased West Side through its subsidiary Nob Hill to re-engineer the company to begin investing in receivables and continued to operate the company and to actively manage and pursue the excise tax recovery claims and the penalties dispute against the Service. West Side was not a corporate shell either pre- or post-acquisition, and it was never liquidated. Therefore, the Stock Sale should be respected and Nob Hill should not be deemed a "mere conduit".

 The "Mere Conduit" Theory Does Not Support the Service's Proposed Recharacterization of the Stock Sale

The Service's reliance on the "mere conduit" line of cases to support its contention that the Taxpayer did not sell stock and that the transaction should be recharacterized as a liquidating distribution to the Taxpayer is misplaced. The Service, in effect, argues that the Stock Sale to Nob Hill should be disregarded, and that West Side should be deemed to have liquidated, causing the Taxpayer to be treated as a transferee of the cash. Therefore, the Service is attempting to use the "mere conduit" cases not only to disregard a step in the transaction, but to manufacture an event that never occurred at all – the liquidation of West Side. The "mere conduit" cases do not stand for such a proposition.

The "mere conduit" line of cases, beginning with the seminal case of Comm'r v. Court Holding, 324 U.S. 331 (1945), generally stand for the proposition that 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. In each of these cases, there is no question that an asset sale took place - the only question for the court was the proper identity of the seller. In Court Holding, a corporation transferred an apartment house in the form of a liquidating dividend to it's two shareholders, and the shareholders then conveyed the building to a purchaser who had originally negotiated the purchase from the corporation. The corporation had "called off" the sale to the purchaser at the last moment upon learning that the sale would result in a large tax liability for the corporation. The Supreme Court affirmed the Tax Court's conclusion that despite the declaration of a liquidating dividend followed by the transfers of legal title, the corporation had not abandoned the sales negotiations, and accordingly, the facts of the entire transaction indicated that the executed sale was in substance a sale from the corporation to the purchaser. The Court did not deny that an asset originally held in corporate form had been sold; it simply held that the asset had been sold by the corporation before its distribution in liquidation, not by the shareholders afterward. Likewise, in U.S. v. Cumberland Public Service, 338 U.S. 451 (1950), the Supreme Court again addressed the issue of the proper identity of the seller when a corporation made a liquidating distribution to its shareholders, and the shareholders in turn sold the distributed assets to a

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third party. The Court determined that, unlike in Court Holding, the corporation never entered into negotiations to make the sale itself. Accordingly, the Court held that the shareholders were the sellers of the assets and were not mere conduits in a sale from the corporation to the third party. The Court noted that its decision in Court Holding was an approval of the action of the Tax Court in looking behind the papers executed by the corporation and shareholders in order to determine whether the sale had actually been made by the corporation, and explained that its Court Holding decision emphasized the established principle that in resolving such questions as who made a sale, fact-finding tribunals in tax cases can consider motives, intent, and conduct in addition to what appears in written instruments used by parties to control rights as among themselves.

The principles regarding the "mere conduit" theory articulated by the Supreme Court in Court Holding and Cumberland Public Service do not support the Service's proposed recharacterization of the Stock Sale transaction. In Court Holding and <u>Cumberland Public Service</u>, there was no doubt that a corporation transferred assets to its shareholders, and such assets ended up in the hands of the ultimate buyer. The question addressed by the Court in each of these cases was whether it was proper to disregard the intermediary asset transfer to shareholders as illusory. Here, the Service is not attempting to look behind the papers executed by the Taxpayer to determine whether the Stock Sale had actually been made by him as opposed to another party, and surely the Service is not attempting to recharacterize the transaction as a sale by the Taxpayer directly to Fortrend. Instead, the Service seeks to disregard the Stock Sale to Nob Hill, and also seeks to impute the occurrence of a liquidating distribution of the cash in West Side to the Taxpayer. In Court Holding, although the Court determined that it was proper to disregard the intermediary asset transfer as illusory, it did not manufacture a transaction that never occurred, and the case does not support such a proposition. Additionally, in this case, after the Stock Sale, Nob Hill continued to operate West Side as a going concern, actively managing West Side's excise tax recovery claims and penalties dispute against the Service. In fact, the Stock Purchase Agreement required Nob Hill to keep West Side in business for a period of at least five years from the date of the Stock Sale, and West Side still exists as an entity today. Whereas the "mere conduit" theory advanced by the Service in Court Holding and Cumberland Public Service is based on a situation where assets are transferred to an ultimate buyer, here the Service does not explain how the stock in West Side came to be owned by Nob Hill under its proposed recharacterization, or how West Side ceased to remain a viable business entity in the face of West Side's continued existence and the active management of its outstanding claims against the Service. Furthermore, the Service does not explain how its theory comports with the fact that the Taxpayer sold his stock to Nob Hill in an arm's-length negotiated transaction with an unrelated buyer. Extending the "mere conduit" line of cases to a transaction in which the taxpayer does not control the so-called "conduit" entity would constitute a significant expansion of Court Holding and its progeny.

Furthermore, the "mere conduit" theory does not support the Service's attempt to disregard the Stock Sale because there was no pre-existing arrangement that supports characterizing Nob Hill as a conduit. The cases cited by the Service demonstrate that the "mere conduit" theory supports disregarding a transaction where a pre-existing arrangement to sell assets exists, and the transaction is "called off" or altered and restructured to avoid tax liabilities. That is not the case here. As explained above, the

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Supreme Court reached different conclusions in Court Holding and Cumberland Public Service based on the fact that the corporation in Court Holding had originally negotiated the asset sale and later called it off, while the corporation in Cumberland Public Service had never negotiated the sale itself. Additionally, in Estate of Robert G. Kluener v. Comm'r, 154 F.3d 630 (6th Cir. 1998), the taxpayer, upon being advised that a direct sale of his horses would result in a large tax liability, transferred the horses to a wholly-owned entity and then arranged to have that entity sell the horses to a pre-arranged buyer and offset the gains with intercompany NOLs. The court determined that the transaction was, in fact, a direct sale by the taxpayer to the third party as originally agreed under the preexisting arrangement with the third party buyer. Similarly, in Davis v. Comm'r, 88 T.C. 122 (1987), the court relied on actual evidence that an agreement pre-dated the transaction at issue, and cited the near-identity of the terms between those negotiated by the taxpayer and the third party and those accepted in the ultimate transaction between the conduit and the third party as indicative of an indirect sale by the taxpayer. Likewise, in Revenue Ruling 70-140, the taxpayer shifted assets from a parent company to a newly formed wholly-owned corporation pursuant to a plan of sale that had been pre-arranged between the parent company and a third party buyer. The Service determined that the transfer of assets to the wholly owned entity was transitory and without substance because it was apparent that the assets were transferred for the purpose of enabling the third party to acquire them without the same gain to the transferor that would have resulted from a direct sale from the parent company.

In this case, there is no evidence of a pre-existing arrangement that would support characterizing Nob Hill as a conduit under the "mere conduit" line of cases. The facts demonstrate that the Taxpayer always intended to sell his stock to an unrelated buyer. Neither Fortrend nor Nob Hill was affiliated in any way with the Taxpayer prior to the Stock Sale. Unlike the "mere conduit" cases discussed above, the Stock Sale was not part of a pre-negotiated transaction that was called off or altered to avoid tax liability. From the very beginning through the consummation of the transaction, the object of the transaction was always a sale of the stock of West Side by the Taxpayer to Fortrend or a Fortrend acquisition affiliate. Furthermore, there is absolutely no evidence that the Taxpayer ever had any direct or indirect intention of liquidating West Side. As stated above, Nob Hill was required under the Stock Purchase Agreement to keep West Side in existence for at least five years after the Stock Sale, and West Side still exists as an entity today. Accordingly, the Service's proposed recharacterization of the Stock Sale as a liquidating distribution under the "mere conduit" theory is without support.

The Service has Improperly Cited <u>Owens v. Comm'r</u> as Support for Disregarding the West Side Stock Sale

In the Transferee Report, the Service contends that the sale was in reality a disguised liquidating distribution of West Side's cash to the Taxpayer. The Service cites Owens v. Comm'r, 568 F.2d 1233 (6th Cir. 1977), aff'g, 64 TC 1 (1975), for support that courts have previously disregarded stock transactions using intermediary entities and have recognized the purported stock purchasers as mere conduits.

Owens does not apply to the present situation. In Owens, the acquired corporation was immediately liquidated post-acquisition and the cash in the corporation

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was distributed to the buyer's shareholders. Therefore, in order to apply Owens, the Service should be required to demonstrate that there was a liquidation. As discussed further in Section B.3. below, an intent to liquidate must be manifest by a plan of liquidation. If no formal plan of liquidation is adopted, courts require that the facts and circumstances of a situation evidence a clear intent on the part of the parties to liquidate the company. However, as held by the Tax Court in Association Cable (discussed below) a company will not be deemed to have adopted an informal plan of liquidation if the company has an intent to continue a line of business. In our case, West Side was never liquidated. There was never any intention on the part of the Taxpayer or Nob Hill (either expressed, documented, undocumented or otherwise) to liquidate West Side and there were no board resolutions or other records indicating that West Side had such an intent. Per the terms of the Stock Purchase Agreement, Nob Hill was required to maintain the existence of the company for at least five (5) years following the closing and West Side was required to be engaged in an active trade or business at all times. Moreover, West Side continued to carry on an active business of managing and overseeing two claims for recovery of both federal telecommunications excise taxes and related penalties, each of which involved more than one million dollars. Therefore, the fact that West Side continued an active business is evidence that a liquidation did not occur and Owens is inapplicable.

The 6th Circuit in Owens disregarded the sale of the taxpayer's stock because the taxpayer did not prove that he actually sold stock. The case largely hinged on evidence the taxpayer did not present. In the opinion, the court discussed certain circumstances that it found persuasive in determining that the taxpayer engaged in a liquidating distribution rather than a stock sale. First, the only asset owned by the target corporation (Mid-Western) in Owens was cash. In our case, West Side held not only cash but also an asset consisting of a multi-million dollar claim for a refund from overpaid federal telecommunications excise taxes that it was required to actively manage, as well as a \$1,061,999.06 potential liability for penalties that it also was required to actively manage. In each case, "active management" consisted of hiring, consulting with, overseeing, and paying outside legal consultants and interacting with the Service and the federal courts regarding the issues. Second, in Owens, Mid-Western carried no business activity and was a lifeless shell at the time of the stock sale. West Side, on the other hand, was transferred to Nob Hill with cash and two tax disputes -- one a claim for a refund, and the other the potential defense of a claim by the Service for penalties. As noted above, both causes of action required active management and the engagement, oversight of, and payment of consultants by West Side. Moreover, in Owens, an important fact in the case was that Mid-Western immediately liquidated post-acquisition. In this case, West Side never liquidated.

West Side was not a lifeless shell when sold to Nob Hill, unlike the company in Owens. Moreover, as noted in Association Cable and Macquire (discussed below), courts will not find an intent to liquidate if the facts and circumstances of a case indicate that the taxpayer intends to continue business. The facts in this case present a clear intention on the part of West Side and the Taxpayer for West Side to remain in business. Therefore, the Stock Sale should be respected as a true sale.

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3. There was Never any Intent to Liquidate West Side

The Service asserts that the Taxpayer intended to cease business operations and liquidate the company. This claim is completely incorrect and without merit. A review of the facts clearly demonstrate that the Taxpayer never intended a liquidation of West Side and that, had no buyer come along, he would have continued to operate West Side as an active business. HLP made clear to the Taxpayer that a liquidation of West Side or a dividend of the cash from West Side to the Taxpayer would produce negative tax consequences and the Taxpayer avoided doing so based upon this advice, a decision which was fully within his rights.

The Service correctly cites <u>Wood v. Comm'r</u>, 27 BTA 162 (1932) for guidance on when a plan of liquidation is adopted. Whether or not the Taxpayer had an intention to liquidate West Side is a question of fact. Generally, where a company has not formally adopted a plan of liquidation, the court must find an unambiguous intent to liquidate and actions which are clearly directed towards the purpose of the liquidation. As outlined in <u>Woods</u>, in order to prove an intent to liquidate there must be (i) a manifest intention to liquidate, (ii) a continuing purposes to terminate its affairs and dissolve the corporation and (iii) evidence that the company's activities are directed and confined to furthering the liquidation. In our case, there was never an intention to liquidate West Side -- in fact, there was an unambiguous intent that West Side remain in existence.

First, there was no manifest intention to liquidate. West Side never adopted a plan of liquidation. Neither the board, nor the Taxpayer ever voted to liquidate the company. As discussed in George L. Riggs, Inc. v. Comm'r, 64 T.C. 474 (1975) and Virginia Ice Corp. v. Comm'r, 30 T.C. 1251 (1958), a plan of liquidation generally is not found to exist by the courts until the plan has been adopted by either the shareholders or the board of a corporation. Furthermore, the Taxpayer did not take any informal steps to liquidate the company, in fact, he took steps to keep it alive. The Taxpayer sold his stock in West Side to a company that planned to keep West Side in business. Moreover, the Taxpayer sold the company with valuable assets remaining in West Side and with claims that were required to be actively managed.

Second, there was no continuing purpose to terminate the affairs and dissolve the company. As discussed above, West Side continued to prosecute two causes of action (each over one million dollars) involving federal telecommunications excise taxes post-acquisition. Not only was West Side not liquidated in the hands of the Taxpayer, it continued in business and was not liquidated in the hands Nob Hill, and the company remains in existence to date. Even if the Taxpayer considered liquidating West Side at some point (which he did not), the Tax Court's decision in Macquire v. Comm'r, 50 T.C. 130 (1968) (which was cited in the Transferee Report) is instructive as to how to analyze an abandoned intent to liquidate. The Macquire Court acknowledged that if an intent to liquidate is shown, but subsequent events reveal a clear lack of intent to terminate completely the affairs of the company, then there is no such intent continuing. The facts in our case demonstrate that the main focus and intent of the transaction was a stock sale from inception and for the business of the company to continue. West Side's active management of its litigation claims for more than five (5) years after the Stock Sale is evidence that it did not have a continuing purpose to terminate its affairs and dissolve.

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The Tax Court held in Association Cable TV, Inc. v. Comm'r, TC Memo 1995-596 (December 18, 1995), that a company will not be deemed to have adopted an informal plan of liquidation if the company has an intent to continue a line of business. In Association Cable, the shareholders of the corporation discussed a liquidation, but did not immediately adopt a formal plan. Two months after selling certain company assets, the shareholders adopted a plan of liquidation. Faced with the corporate level tax on the asset sale, the shareholders attempted to argue that the corporation had adopted an informal plan of liquidation prior to the asset sale. The Service found that no plan of liquidation (either formal or informal) had been adopted by the company prior to the asset sale because the shareholders had evidenced an intent to continue a specific line of business after the asset sale. In the shareholder meetings, they discussed a noncompetition agreement that would be required in the asset sale and they specified which areas of business would be excluded from the noncompetition agreement. Furthermore, the shareholders made certain statements that the company would remain alive after the asset sale and would retain certain franchises. The Service ultimately held that the Association Cable shareholders were required to recognize gain on the sale of assets and they were ineligible to take advantage of the nonrecognition provisions of Section 337 of the Code. In our case, West Side did not adopt a formal or informal plan of liquidation and it continued to carry on an active business of managing and overseeing two large claims after the Stock Sale was completed which required active management and the engagement, oversight and payment of consultants, further evidencing that the corporation had no intention to liquidate.

In Leroy C. Griffith, TC Memo 1989-70 (February 15, 1989), the Tax Court held that a corporation's cessation of business alone does not rise to the level of an intent to liquidate. In Griffith, the taxpayer challenged the Service's characterization of income he received from the corporation as a dividend (taxed to the extent the corporation has earnings and profits) rather than a distribution in liquidation (recovery of basis first, then taxed as the disposition of a capital asset). The taxpayer argued that because the Service found in a lower court case that the company had ceased doing business in the relevant tax year, the income he received from the corporation in that year was necessarily part of a liquidating distribution. In its decision, the Tax Court noted that the "decisive elements of a corporate liquidation are an intent to liquidate combined with acts done to effectuate that purpose." The Court found that, "[t]he fact that we determined [the company] ceased doing business does not translate into an intent... to liquidate." Absent an intent to liquidate, the Court could not determine that the income received by the taxpayer was part of a liquidating distribution. Because the Service has previously held in Griffith that even a complete cessation of business does not amount to an intent to liquidate, the Service cannot now assert that West Side, which clearly did not cease business (actively managing the federal excise tax causes of action post-acquisition) and which has given no other indication of an intent to liquidate, has made a liquidating distribution. The Griffith case strongly supports our position that there was no liquidation here.

Third, there is no evidence that West Side's activities were directed and confined to termination and dissolution. West Side had business activity when purchased, it continued to actively manage the federal excise tax refund claims. As evidenced by the Stock Purchase Agreement, the business was to be kept alive. West Side was therefore free to enter into other businesses and, pursuant to the Stock Purchase Agreement, was

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required to do so which directly contradicts the idea that West Side's activities were directed toward a liquidation.

The Taxpayer sold his Stock in West Side to Nob Hill. He never planned to liquidate the company, nor was there an intention to liquidate that was accomplished through a restructured transaction. The fact that the Taxpayer's after-tax proceeds were increased by entering into the Stock Sale does not condemn this transaction. On the contrary, the Supreme Court in <u>Gregory</u> acknowledged (and continues to acknowledge to date) the principle that each taxpayer has the legal right "to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits...".

Based on the facts and the analysis above, it is clear that Nob Hill did not act as a conduit. The Taxpayer intended to sell (and sold) his Stock to Nob Hill, West Side did not (and did not intend to) liquidate and the Taxpayer never received a liquidating distribution.

iii. Response to the Transferee Report's Alternative Position:
The Sale of West Side Stock can be Collapsed Under the Step
Transaction Doctrine into a Transaction in which West Side
Directly Acquired its own Shares From the Taxpayer as Part
of a Liquidation

As an alternative position, the Transferee Report asserts that the Stock Sale should be collapsed under the step transaction doctrine and recharacterized as a transaction in which West Side directly acquired its own shares from the Taxpayer as part of a liquidation. The step transaction doctrine is wholly inapplicable in this case.

In <u>Penrod v. Comm'r</u>, 88 T.C. 1415 (1987), the Tax Court states that the purpose of the step-transaction doctrine is to treat a series of formally separate steps as a single transaction where the steps are in substance integrated, interdependent and focused toward a particular result. In the Transferee Report, the Service outlined the three alternative tests for step transaction: the binding commitment test; the end result test; and the interdependence test. The Service presumably did not address the binding commitment test in the Transferee Report because it is obviously inapplicable. The binding commitment test mandates that a series of transactions be collapsed if at the time the first step is entered into, there was a binding commitment to undertake the later step. This test cannot be applied to our case. The Service stated in the Transferee Report that the first step in the series of the Stock Sale was the transfer of certain assets relating to the cellular business to LXV by West Side. Both the Taxpayer and the Service acknowledge that assets sold to LXV were sold on June 11, 2003 and that West Side did

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^{5 293} U.S. at 469.

not receive and sign Fortrend's letter of intent representing a binding commitment to purchase the Stock until July 22, 2003, a month after the assets were sold. Therefore, it is clear that a binding commitment to enter into the Stock Sale did not exist until after the "first step" occurred.

In the Transferee Report, the Service attempted to apply the end result test and the interdependent test in order to recharacterize the Stock Sale as a liquidating distribution. The Transferee Report lists various steps involved in the Stock Sale as proof that they should be stepped together. However, the steps listed by the Service are similar to steps taken in any stock acquisition including: forming an acquisition company, transferring loan proceeds, transferring the stock purchase price, repaying loan proceeds, and disbursing assets. These typical steps cannot be viewed as fraudulent under either the end result test or the interdependence test of the step transaction doctrine. Moreover, as discussed above, the facts and case law do not support a finding that West Side should be deemed to have liquidated.

The end result test is amorphous and inapplicable. The test applies if it appears that a series of formally separate steps are really pre-arranged as part of a single transaction intended from the outset to reach an ultimate result. As noted in <u>Penrod</u>, the test is intended to be based on the actual intent of the parties as of the time of the transaction. The Service contends that the "transaction" was a pre-planned liquidating distribution of the assets in West Side to the Taxpayer because (as the Service asserts) (i) Fortrend and the Taxpayer used the cash in West Side to obtain a loan and the loan was used to purchase the stock of West Side from the Taxpayer and (ii) numerous similar transactions involving other acquired corporations were completed by the "promoters" prior to the Stock Sale, involving similar steps and entities. These contentions are flawed.

First, the Service attempts to infer from Fortrend's use of debt financing, and the immediate repayment of the loan, that the Stock Sale should not be treated as a stock sale. This conclusion is inappropriate. There are no prohibitions against funding a corporate acquisition using debt financing. It is generally expected (and a common practice) for acquirers to use some form of financing in making an acquisition. It is also common practice for acquirers, especially, for example, private equity firms, to use assets of the acquired corporation to repay the debt incurred in the acquisition. To highlight the legitimate and accepted practice of financing or debt repayment in an attempt to reclassify the Stock Sale as something else is baseless. At the time of the acquisition, West Side was a viable business entity and the Stock represented an interest in a going concern. Control of the assets in West Side was not released until the Stock Sale was consummated. Therefore, the assets did not serve as a guaranty for the financing. The Service states that the loan to Nob Hill was a short-term loan to be repaid within thirty (30) days, therefore, the loan was not required to be repaid that same day. It would have been entirely possible for Nob Hill to treat the financing as a bridge loan and then to refinance the loan within thirty (30) days in order to extend its term. This sale should not be recast as a distribution to the Taxpayer based on Nob Hill's unilateral decision to repay the loan to Rabobank. That result would be inequitable. Second, the Service asserts that the end result test should apply because Fortrend engaged in "numerous similar transactions". Neither the Taxpayer nor West Side has any knowledge of any

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"similar transactions" previously engaged in by Fortrend and the Service has not offered any evidence to support this contention. Fortrend's unrelated behavior should have no bearing on the Taxpayer's tax position. Furthermore, notwithstanding the arguments above, the Service cannot use the end result test to characterize the Stock Sale as a liquidating distribution to the Taxpayer because West Side never adopted a formal or informal plan of liquidation and, therefore, the "end result" (the liquidation) never occurred.

The interdependent test focuses on whether "the steps are so interdependent that the legal relationships created by one transaction would have been fruitless without a completion of the series."6 In our case, the Service concludes that the steps taken in the transactions were so interdependent that they lead to a liquidating distribution to the Taxpayer. However, the sale of assets to LXV, the sale of the Stock to Nob Hill and the repayment of the loan to Rabobank were all independent steps determined separately by the relevant parties and because West Side never liquidated, the Service does not have just cause for stepping the transactions together to result in a liquidating distribution to the Taxpayer. The sale of assets to LXV was necessary as a result of the terms of the Settlement Agreement. The transfer to LXV was neither related to nor required by the terms of the Stock Sale to Fortrend. The Asset Sale was consummated over a month prior to the date on which the letter of intent for the Stock Sale was signed. Therefore, the Stock Sale did not center around the Asset Sale or vice versa. After the Stock Sale, West Side not only contained cash, but it held certain federal telecommunications excise tax causes of action and the company continued to actively manage these claims for over five (5) years thereafter. Furthermore, Nob Hill's repayment of the loan proceeds with the cash acquired was a decision made by the principals of Fortrend. That decision was presumably made based on their business needs at the time, and was made independent of any discussions with the Taxpayer. Furthermore, notwithstanding the forgoing arguments, it is clear from the facts outlined and discussed throughout this protest that West Side never liquidated and it did not have an intent to liquidate. Therefore, because West Side was never liquidated, the transactions did not create a relationship (a liquidating distribution to the Taxpayer) that would have been fruitless without a completion of the Asset Sale, the Stock Sale and the repayment of the loan and the application of the interdependence test fails.

The Stock Sale cannot be recast using the step transaction doctrine because West Side was never liquidated and neither the binding commitment test, the end result test nor the interdependent test is applicable to this case. All of the facts of this case indicate that the sale was a sale of stock to Nob Hill which should be so respected.

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⁶ Redding v. Comm'r, 630 F.2d 1169, 1177 (7th Cir. 1980).

iv. Response to the Transferee Report's Conclusion: Transferee Liability May Be Asserted Against The Taxpayer

In the Transferee Report, the Service attempts to hold the Taxpayer liable for West Side's purported tax deficiency by finding the Taxpayer liable as a transferee of the assets of West Side. However, because there was never any payment made (either directly or indirectly) from West Side to the Taxpayer via a liquidation of West Side (for the reasons discussed in Sections 6B.ii and iii above) or otherwise, a transferee liability claim cannot survive against the Taxpayer.

Furthermore, it is well settled law that the purchaser, not the seller, of stock generally has transferee liability for the transferor corporation's tax liabilities. In <u>Vendig v. Comm'r</u>, 229 F.2d 93 (1956), the Second Circuit stated that:

[I]t is ... clear that when a stockholder sells his stock he is not liable in equity to a creditor of the corporation or subject to transferee liability for unpaid taxes of the corporation...there is no "transferee" liability [in these cases] because the assets of the corporation have not been affected or diminished. The corporation retains the initial capital paid in by the stockholders, the only change being that the bundle of rights created by the stockholder's initial contribution of capital to the corporation now belongs to the purchasing stockholder rather than to the original stockholder.

In Lester L. Robinson v. Comm'r, 22 BTA 395 (1935), the court confirmed that that the mere sale of stock by a stockholder in a corporation does not make him a transferee of the assets of the corporation. In the Stock Sale, the Taxpayer was paid for the value of his stock and he sold West Side and its remaining assets intact, including the remaining cash in the corporation and the federal telecommunications excise tax causes of action. Under the terms of the Stock Purchase Agreement, Nob Hill (the "Buyer" in the Stock Sale) assumed all liability for West Side's tax liabilities in tax year 2003 and beyond. In Section 5.2 of the Stock Purchase Agreement, Buyer covenants as follows:

... Buyer shall cause Company to satisfy fully all United States federal, state and local income and franchise taxes, penalties and interest required to be paid by Company attributable to income earned during the tax year commencing on January 1, 2003 and for all tax years thereafter.

Section 8.1 (Tax Returns and Payments) of the Stock Purchase Agreement further outlines the return filing and tax payment obligations of parties stating that:

Schler shall also cause Company to pay all Taxes (in each case, including penalties and interest) required to be paid by Company before the Closing Date (except all United States federal, state and local income and franchise taxes required to be paid by Company attributable to income earned during the tax year commencing on January 1, 2003).

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Therefore, it is clear that the responsibility for the taxes of West Side for tax year 2003 rests with West Side and Fortrend, and not with the Taxpayer as a transferee. Moreover, at the time of the Stock Sale, the company was solvent. West Side held enough cash to pay its tax liabilities when the Stock Sale was negotiated and consummated and the company was acquired by Fortrend. It was Fortend's unilateral decision to repay its bank loan from Rabobank that left West Side without enough cash post-acquisition to pay its potential tax liabilities. This decision could not and did not involve the Taxpayer. Fortrend was a independent company wholly unrelated to the Taxpayer and that company and its principals made a business decision to repay a business loan instead of retaining the cash to repay West Side's potential tax liabilities. Therefore, Fortrend took the gamble that left the company and, as a result, the government short handed, not the Taxpayer. The Taxpayer fully and timely paid his tax on the gain he received from the Stock Sale. The decision to take cash from the company was not made with the Taxpayer's knowledge and that decision was entirely unrelated to West Side's business operations prior to the consummation of the Stock Sale. West Side was neither insolvent before the Stock Sale, nor when the company was sold to Fortrend. West Side became insolvent post-acquisition solely and directly as a result of the actions of Fortrend, Nob Hill and their principals, the then owners of the company. Accordingly, if a valid action for transferee liability exists in this case, it must fall at the feet of Fortrend and Nob Hill. It was their business decisions, use of company cash, and failure to pay the taxes and liabilities of West Side that caused the company to be unable to fulfill its tax obligations.

7. Conclusion

Under a proper application of existing case law, the person with transferee liability in this case is Nob Hill. Assuming for purposes of this Protest that the Service's case against West Side is correct, it was Nob Hill that took money from West Side and failed to pay the taxes owed. As the Service admits in the Transferee Report, however, it has been unsuccessful in collecting any money from Nob Hill. In essence, the Service would like to hold the Taxpayer responsible for West Side's tax liability on the theory that he should have known that Fortrend was a tax shelter promoter and would not pay West Side's tax liability, even though he never received any cash directly from West Side.

The premise that the Taxpayer should be held responsible for West Side's tax liability or Nob Hill's transferee liability merely because he was enriched by being paid what the Service has described as a "premium price" for the stock of his company, is simply unsupported by the case law. Such a finding would effectively subject all stock sales negotiated at a premium to similar scrutiny, and set a bad precedent based on incorrect, vague and arbitrary legal principles. The Stock Sale was a bona fide transaction between West Side and the Taxpayer. The Service cannot properly treat the Stock Sale as a liquidating distribution under any alternate theory of liability because the facts of this case do not support such a recharacterization. The mere conduit theory is wholly inapplicable because it seeks to restrict the transfer of assets between related parties in order to avoid a tax liability on the sale of those assets to a third party. It does not seek to penalize the sale of stock between a buyer and seller. Furthermore, application of the step transaction doctrine is improper because West Side was never

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liquidated and, thus, there is no transaction in which money was transferred from West Side to the Taxpayer that can be collapsed into a direct transfer to the Taxpayer by West Side

For the foregoing reasons, the Stock Sale should not be disregarded under either the mere conduit theory or the step transaction doctrine and, accordingly, there the Service has no basis to find the Taxpayer liable as a transferee for the unpaid income tax deficiencies of West Side for its taxable year ending on December 31, 2003.

8. <u>Procedural Statements</u>

This protest is limited to what the Taxpayer considers to be basic and fundamental contentions of law, substantiated by sufficient factual documentation and evidence. The Taxpayer expressly reserves the right to make additional arguments of law on these and other facts, if the facts turn out to warrant such a protest.

9. Statement of Law

We have prepared the foregoing protest for the Taxpayer, Michael Tricarichi, but we do not know personally that the statements of fact contained in the protest are true and correct.

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Internal Revenue Service October 9, 2009

If additional information is necessary or desirable, please contact the undersigned.

Sincerely yours,

1

Glenn S. Miller

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PENALTY OF PERJURY STATEMENT

Under penalties of perjury, I declare that I have examined this protest, including any accompanying documents, and, to the best of my knowledge and belief, the facts presented in this protest are true, correct, and complete.

MICHAEL TRICARICHI

Date: October 9, 2009

West Side Cellular, Inc. 1120 - 200312 Index for Revenue Agent's Report

Form 4549-A	Page(s) 1 - 3
Penalty Calculation	4
Bad Debts	5 – 16
Tax Shelter - Analysis of Facts	17 - 73
Exhibits to Tax Shelter - Analysis of Facts	74 - 94
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Penalties	98 - 102

Note: Documents referenced by bate number in narrative may be secured from examiner.

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orm 4549-A Department of the Treasury - Internal Revenue Service Rev. 3-2005) Income Tax Examination Changes			Page 1	of	102			
	me and Address of Taxpayer Taxpayer Identification Number 34-1685059		mber	Return Form No		m No.		
West Side Cellular, 1155 W. Fourth St. * Reno, NV		whom exa	Person with whom examination changes were discussed POA Name and Title					
1. Adjustments to In	come		Year:	2/2003	Year:	Year	:	
a. Per RAR - Form	4549-B's		45,	114,009			-	
2. Total Adjustments 3. Taxable Income Pe	r Return or as Previously	Adjusted		114,009 723,813			-12	
4. Corrected Taxable	Income		43,	390, 196				
Tax Method Filing Status 5. Tax 6. Additional Taxes/	Alternative Minimum		15,	. 186, 569 0				
7. Corrected Tax Lia	bility		15,	186,569				
8. Less Credits: a. Foreign Tax Cr b. Other Subpart c. General Busine d. Minimum Tax Cr	B Credits ss Credit			0				
9. Balance (Line 7 1	ess total of 8a-8d)		15,	186,569				
10. Plus Other Taxes a. Miscellaneous b. Alternative M c. Environmental d. Other Taxes	Tax/Recapture inimum Tax (Before 2000)			0 N/A N/A N/A				
11. Total Corrected (Line 9 plus	Income Tax Liability Lines 10a-10d)		15,	186,569				
12. Total Tax Shown 13. Adjustments to: a. b. c. d.	on Return or as Previously	Adjusted		0 0 0				
	rease in Tax or - Decrease in Tax) nes 12 & 13a-13d)		15,	186,569				
15. Adjustment to Pro	epayment Credits - incr (de	ecr)		0				
	Overpayment) (Line 14 less est and penalties)	Line 15)	15,	186,569				
Catalog Number 23110	r ww	w.irs.gov			CG For	m 4549-A (Re	v. 3-	2005)

001

Form 4549-A Department of the Treasury - Internal Revenue Service (Rev. 3-2005) Income Tax Examination Changes			Page 2 of	
Name of Taxpayer West Side Cellular, Inc.	Taxpayer Identification Number 34-1685059		Return Form No.	
17. Penalties Code Section	Year: 12/2003	Year:	Year:	
a. IRC 6662 Accuracy Related Penalty - 20% b. IRC 6662 Accuracy Related Penalty - 40% c. d. e. f. g. h. i. j. k.	61,851 5,950,926 0 0 0 0 0 0 0			
18. Total Penalties	6,012,777		+	
Underpayment attributable to negligence: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed.	0			
Underpayment attributable to fraud: (1981-1987) A tax addition of 50 percent of the interest due on underpayment will accrue until paid or assessed.	0			
Underpayment attributable to Tax Motivated Transactions (TMT). The interest will accrue and be assessed at 120% of underpayment rate in accordance with IRC Sec. 6621(c)	0			
19. Summary of Taxes Penalties and Interest: a. Balance Due/(Overpayment) (Line 15) b. Penalties (Line 18) computed to c. Interest (IRC 6601) computed to d. TMT Interest computed to on TMT Underpayment e. Amount due (refund) - (sum of Lines a-d)	15,186,569 6,012,777 0 0 21,199,346			

Other Information:

Examiner's Signature		1	
Name: Denise McCaskill	75-11917 Employee ID	Fort Worth, Texas	S48 Date 1-29-08

The Internal Revenue Service has agreements with state tax agencies under which information about federal tax, including increases or decreases, is shared with the states. If this change affects the amount of your state income tax, you should amend your state return by filing the necessary forms.

You may be subject to backup withholding if you underreport your interest, dividend, or patronage dividend income you earned and do not pay the required tax. The IRS may order backup withholding (withholding of a percentage of your dividend and/or interest payments) if the tax remains unpaid after it has been assessed and four notices have been issued to you over a 120-day period.

Catalog Number 23110T

www.irs.gov

CG Form 4549-A (Rev. 3-2005)

002

ANNAMARIA NA LEO LEO LEO LEO LEO CONTRACTO			Page 1	
1155 W. Fourth St. #225-18 Reno, NV 89503-	Entity:			
Adjustments to Income - Increase (Decr)	Year: 12/2003	Year:	Year:	
000002 Legal & Professional	2,633,387			
000001 Bad Debts	42,480,622			
			_	
				
	_			
Total Adjustments This Page	45,114,009			
ncome Adjustments Including Previous Page(s)	45.114.009			

Form CG-4549-B

003

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200312 Tax Year Penalty Calculation In Accordance with the Penalty Ordering Rules of Treas. Reg. §1.6664–3

Step 1: Determine the portion, if any, of the underpayment on which the 20% penalty is imposed:

(742,175)
1,651,749
909,574
309,255
309,255

20% Penalty 61,851

Step 2: Determine the portion, if any, of the underpayment on which a penalty of 40% is imposed:

Adjusted Taxable Income From Step 1:	909,574	
Adjustment - Bad Debts	42,480,622	
Adjusted Taxable Income:	43,390,196	
Tax on Adjusted Taxable Income: (BNA)	15,186,569	
Tax on Adjusted Taxable Income From Step 1	309,255	
Portion of Underpayment on Which 40% Penalty is Imposed	14,877,314	
40% Penalty	5,950,926	5,950,926
Total Penalties		6.012.777

004

REPORT TR	ANSMITTAL	not to be mailed to taxpayer
Name and Address of Taxpayer: Michael Tricarichi, Transferee of West Side Cellular, Inc. 341 Arbour Garden Las Vegas, Nevada 89148		Related or Key Return: Transferor's return was previously closed.
Return Form No: 1040	Years or Periods 200312	Tax Shelter PromoterYes Subsequent Year Examined No(explain below)
Return Form No:	Years or Periods	Investor Returns Require 8271YesNo(explain below)
Agreement Full Partial	None_X_	Supervisory Conference OfferedYes _X_ No(explain below)
TE	EFRA	Non TEFRA

Other information (unagreed issues and important information not covered in workpapers or report)

Taxpayer is involved in an intermediary transaction that follows a factual pattern similar to that described in Notice 2001-16. West Side Cellular is the intermediary and transferor. Leonard L. Getz is the Appeals ISP Coordinator for these tax shelter issues. Upon receipt of this case, please contact Leonard at 215-597-2177 #164.

The original transferor case was closed to Appeals on March 11, 2008. The transferoe case was held in suspense until the transferor case was resolved.

Attached to this Form 4665 is a detailed Analysis of Facts on the Shelter Transaction, plus related exhibits, from the transferor examination file. (This would be very helpful in getting the details of the transaction down.) Also attached is document PWC-WS 600, which is a letter dated April 13, 2003 from PWC analyzing the planned transaction.

Note: The original documents received throughout the exams are being kept by examiner as they are too voluminous to forward with the case file. Additionally, the original transcript of the interview conducted remains with the examiner. To obtain original records or interview transcript, please contact examiner at (817)232-6383.

envelope at book of File 1012

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Examiner: [Denise McCaskill, 75-11917 (817)759-2900 #6102	Date: December 7, 2009	Appr. By (signature of Reviewer) Robert M. Gil One Company of the Company of th
Form 4665 Hour 917 (817) 257-6343 > 561-1892)	Sow 3	J Bouquet, 6M 30-490-5773



To: / Location:

Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower

From: / Location:

Richard P. Stovsky

Date:

April 13, 2003 (Uprotus >

Subject:

Potential transaction

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.

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:

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

PWC-WS 0600

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- 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)
- 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
- 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:

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:

1. Will the transaction be respected for federal income tax purposes? TIME 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 PORQTION OF THE PROCEEDS RECEIVED FROM THE PURCHASER AS FOLLOWS:

PWC-WS 0601

(2)

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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

LOHNES AND STOVSKY POINTED OUT TO TRICHARICHI THAT 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 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/TRANSFERREE LIABILITY FOR WESTSIDE TAXES)

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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).

- 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.
- 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 nonshareholder 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.

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.

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- 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.
- 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;

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Analysis of Facts on Shelter Transaction, Form 886-A Plus related Exhibits

Note: The attached pages are from related transferor examination file.

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Form 886-A	Department of the Treasury - Internal Revenue Service Lanation of Items	Sedule No. or Exhibit
Name of Taxpayer	4.0	Year/Period Ended
West Side Cellular,	Inc.	12/31/2003

INTERMEDIARY TAX SHELTER TRANSACTION - ANALYSIS OF FACTS

Source of Documents

This issue was developed based upon documents provided by:

West Side Cellular, Inc.
Rabobank Nederland NY
Hahn Locser & Parks LLP
Pohl, McNabola, Berg & Company
Michael Tricarichi
Charles Klink
Steven Block
Olson Lemons PC
MidCoast Credit

Price, Waterhouse, Coopers

Interviews, recorded by means of a court reporter, were held with the following individuals:

Michael Tricarichi

(Copies of the interview transcripts can be found in document files).

The following topics will be discussed:

- A. Background on Intermediary Transactions
- B. Background of MidCoast
- C. Background of Fortrend International
- D. Individuals and Firms Involved in the West Side Cellular Transaction
- E. Brief Overview of the Transaction
- F. Timeline/Transaction Steps Overview
- G. Analysis of 2003 West Side Cellular transaction
 - 1. Background of West Side Cellular
 - 2. Research on Tax Issues regarding Settlement Proceeds
 - 3. Negotiations for Sale of Stock in West Side Cellular
 - 4. Asset Sale
 - 5. Summary of S/H Loans
 - 6. Actions taken to finalize Intent to Sale Stock in West Side Cellular to Fortrend
 - 7. Formation of Fortrend Entities Used to Complete the Transaction
 - 8. Preparation for Stock Purchase/Merger
 - 9. Closing of Stock Purchase/Merger
 - 10. Loans and Flow of Money for Stock Purchase
 - 11. Post-Closing Matters & Fee Payments
 - 12. Actions of West Side Cellular: Contribution of Inflated Basis Asset, Return Preparation

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H. Conclusion

Note: See Exhibit Index for exhibits to supplement narrative.

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Name of Taxpayer		Year/Period Ended
West Side Cellular	, Inc.	12/31/2003

A. BACKGROUND ON INTERMEDIARY TRANSACTIONS:

Intermediary Transaction tax shelters ("Intermediary Transactions") are listed transactions under Notice 2001-16, 2001-1 C.B. 730. An Intermediary Transaction is a method of avoiding corporate level taxes in the disposal of a corporation and its assets. In a typical Intermediary Transaction either the shareholder of the target corporation or a buyer interested in acquiring the corporate assets arranges for a third party to acquire the stock and then sell the assets out of the acquired corporation. The stock seller generally obtains a premium price for the stock, and the asset buyer may obtain a basis step-up in the corporate assets it would not enjoy if it purchased stock instead of assets.

While the order of the steps in an Intermediary Transaction may vary, all such transactions involve the use of one or more entities controlled by the third party, who is also the tax shelter promoter. The entity is referred to as "the Intermediary" or as "Midco" and generally acts as the middleman for the seller of the corporate stock and the buyer of the corporate assets.

In some instances, the target corporation sells the assets before the shareholder sells the stock to the Intermediary. In these cases, the corporation will contain only cash when the promoter acquires it. This variation of the Intermediary tax shelter is often used for situations where the target corporation holds appreciated real estate or marketable securities. In these transactions the asset purchaser is generally not involved in the tax shelter, and the shelter will be arranged between the stock seller and the promoter.

Regardless of when the assets are sold, once it owns the target corporation, the Intermediary will use one or more methods of offsetting the gain from the sale of the corporate assets. Frequently, the gain offset is through the use of high-basis, low-fair-market-value assets ("inflated basis assets"). In addition to creating and controlling the Intermediary, the promoter provides the inflated basis assets for the Intermediary to use. It generally also provides a buyer for the inflated basis assets if they are not readily marketable.

For its services, the promoter receives a fee. Depending upon the specific structure of the transaction, this fee may be stated as a percentage of the tax savings to the stock seller or as a percentage of the basis step-up obtained by the asset purchaser. In essence, the promoter receives the difference between the stock purchase price and the asset sale price. This amount is commonly referred to as "the spread".

Because the promoter has purportedly offset all gain from the sale of the target corporation's assets with the inflated basis assets or another loss generating shelter, the target corporation allegedly owes no tax. The promoter causes the cash remaining in the target corporation (the spread) to be paid to itself, its principals and/or its copromoters purportedly as fees for services provided to the target corporation in implementing the stock purchase/asset sale transaction.

Because of the payments from the target corporation, the target corporation is typically left insolvent, unable to pay its corporate level taxes.

B. Background of MidCoast

MidCoast Credit Corp., formerly known as MidCoast Mortgage Corporation, was formed in 1958 and quickly became a leader in the financial services industry. In 1995, MidCoast was purchased by Shorewood Associates, Inc. Beginning in 1998, Honora Shapiro and Michael Bernstein owned the Shorewood stock fifty-fifty. In 1998 MidCoast made a strategic decision to re-engineer its operations into the asset recovery business. The Asset Recovery Division was established for the purpose of purchasing, collecting and selling defaulted debt for MidCoast, its affiliates and for third party investors. In order to enhance the success of the Asset Recovery Division, MidCoast formed MidCoast Investments, Inc., a wholly owned subsidiary, to identify potential corporate targets whose businesses are suitable for conversion into the asset recovery business.

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Name of Taxpayer West Side Cellular, Inc.		Year/Period Ended

B. Background of MidCoast (Cont'd)

Pulled from "ABA-Tax archives" (ABA-0001 thru ABA-0003), examiner reviewed correspondence among taxpayers regarding MidCoast Credit and built in C corp gains. As stated in an email dated June 3, 2003, MidCoast purports to help owners of closely-held C corporations sell assets without the full impact of recognizing gain at the corporate level on an appreciated asset. As described in the email, MidCoast purchases the stock with a concurrent sale of the target appreciated asset to a buyer, thus recognizing gain at the corporate level. MidCoast then uses the corporation as a vehicle to acquire new assets – accounts receivable – on which it knows it will incur certain losses, evidently within the taxable year. These losses are then used to offset the gain from sale of the target asset. In another email dated November 20, 2001, the sender references some literature that MidCoast sent to him. MidCoast purports to buy leftover corporate shells after the owner of a corporation engages in a taxable asset sale. MidCoast purports to use them for its "asset recovery" business (ABA-0003).

MidCoast was involved in the promotion and implementation of Intermediary transactions between 1999 and 2004. About 50 companies were acquired in connection with MidCoast's tax shelter activities. Michael Bernstein's father, Louis Bernstein, directed the tax shelter transaction by MidCoast. Honora Shapiro provided financing for the purchase of the target stock in many of the transactions. For the larger transactions, MidCoast worked with other promoters of intermediary deals.

C. Background of Fortrend International

Fortrend began as a group of professionals who decided to implement financial strategies rather than continue to act as advisors. Fortrend now manages its business from offices in New York, San Francisco, Miami and Melbourne, Australia. Since its inception, Fortrend has worked closely with owners and shareholders in merger and acquisition transactions to maximize values for their clients. "Clients of Fortrend have benefited from our ability to structure transactions that minimize shareholder and corporate liabilities resulting from the sale of the corporation or its assets. Fortrend is prepared to finance the acquisition of the selling corporation, manage the negotiations, oversee the preparation of documents, and close the transaction. Fortrend's two founding principals are Fred Forster and Jeffrey Furman. They are described as having over 30 years of combined experience managing "leading-edge transaction structuring". The Fortrend brochure lists firms with which Fortrend has particularly strong relationships with. They include Shearman and Sterling of New York; Graham and Jones of New York; Pricewaterhouse Coopers of New York; Leboeuf, Lamb, Greene & MacRae of San Francisco; and Chamberlain, Hrdlicka, White of Houston. In conclusion, it is stated in the brochure that "our creativity and innovation have added significant value to our clients' net proceeds in transactions we have managedFortrend's strategies are applicable to most merger and acquisition scenarios". (WSC-SB-4) Note: A brochure similar to this was provided to James Tricarichi from Steven Block. (WSC-SB-1)

The typical Fortrend transaction, as described by Michael Bittner in his testimony on June 9, 2005: "They (Fortrend) were buying a box of cash at a discount....along with that cash comes a tax liability....you would buy the target company with cash and the tax liability and then you were required to file the returns and satisfy the tax liability....it was more of an arbitrage type of thing....somebody had assets that had a tax benefit that could be contributed to a target company to reduce, eliminate, whatever, the tax liability and then your making your money on that spread." (Page 0036 of the transcript)

From 1996 to 2003, Fortrend was active in the promotion and implementation of abusive tax shelters similar to those described in Notice 2001-16, Intermediary Transaction. In all, Fortrend promoted in excess of 120 transactions, ranging in size from \$5 million to \$1.5 billion. Fred Forster and Jeffrey Furman directed the tax shelter transactions of Fortrend, with the assistance of Fortrend employees and with services provided by accountants, attorneys and others. Fortrend worked closely with Rabobank Nederland in New York to secure financing for the purchase of the target stock in many of the transactions.

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Name of Taxpayer		Year/Period Ended
West Side Cellular, Inc.		12/31/2003

D. Individuals and Firms Involved in the West Side Intermediary Transaction

Target

West Side Cellular, Inc. (West Side)

Michael Tricarichi

Target Corporation (T) - Entity whose stock was sold. Former Stockholder of West Side Cellular/ Seller of stock

Price Waterhouse Coopers (PWC)

Tim Lohnes, Ray Turk, Rich Stovsky

Accounting Firm that advised West Side; also has strong relationship with For Accountants for PWC

Hahn Loeser & Parks (HLP)

JB Sims Randy Hart Jeffrey Folkman Jennifer Garberich Law firm/ Counsel for Michael Tricarichi/ West Side Cellular (Seller's couns

Attorney for Hahn Loeser & Parks Attorney for Hahn Loeser & Parks Attorney for Hahn Loeser & Parks Paralegal for Hahn Loeser & Parks

Intermediary

Nob Hill Holdings, Inc.

John McNabola or Sean McNabola

Tim Conn

Millennium Recovery Fund (MRF)

John McNabola Klink & Associates

Charles Klink

A shell corporation formed to acquire West Side Cellular. (Stock Buyer/Midca

President of Nob Hill Holdings Manager of Nob Hill Holdings

100 % shareholder of Nob Hill Holdings (Buyer)

President of MRF

Counsel for Nob Hill Holdings (Buyer's counsel)

Attorney for Klink & Associates

Asset Purchaser

LXV Group, LLC

Scott Ginsburg

Lawrence Dubin Patrick Scaravilli

Michael Tricarichi

Acquired all of the wireless business assets of West Side

Treasurer of LXV Group & former Treasurer of West Side

Vice President of LXV Group & former Vice President of West Side Secretary of LXV Group and former Vice President of West Side

President of LXV Group and former shareholder and President of West Sid

Promoter

Fortrend

Jeffrey Furman Fredrick Forster

John McNabola

Alice Dill Wendland

Mike Bittner Steve Block Promoter (P); founded in 1985 by Fred Forster and Jeffrey Furman

Principal of Fortrend Principal of Fortrend

Co-venturer that works closely with Fortrend

Employee of Fortrend

Accountant for Fortrend and related parties Co-venturer that works closely with Fortrend

MidCoast Investments

Donald Stevenson Louis Bernstein Michael Bernstein Another promoter of Intermediary Transactions, competed against Fortrend or

Chief Acquisition Officer of MidCoast

Works for MidCoast - heads up tax shelter activities

President of MDC Credit Corp

Rabobank

Chris Kortlandt

Financier (F)

Accommodating officer at Rabobank; has strong working relationship with I

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West Side Cellular, Inc.		12/31/2003

E. Overview of the Transaction

Target Corporation: West Side Cellular (also known as Cellnet) was the owner and operator of a revenue producing wireless subscriber base operating as a Verizon Wireless reseller. West Side Cellular (West Side) was incorporated in 1988. Michael and Barbara Tricarichi were elected to serve as the original Directors and officers. In 1993, West Side filed a discrimination complaint against a couple of wholesale cellular service providers. In 2003, the legal disputes were settled resulting in settlement payments totaling \$64,250,000 being paid to West Side. The address for West Side prior to the stock sale was 23632 Mercantile Road, Beachwood, Ohio. As part of the settlement, Cellnet had to terminate all business relations with Verizon.

Stock Seller: Michael Tricarichi was the sole stockholder of West Side from the date of its incorporation until the 2003 stock sale to Nob Hill Holdings.

Asset Purchaser: LXV Group, LLC. This entity was formed by Michael Tricarichi to receive all of the wireless business assets of West Side Cellular. This entity then sold the "customer base" to Cellnet in Michigan for an income stream. The address for the new LXV Group would be at the 23632 Mercantile Road, Beachwood, Ohio location. The officers of the new entity would be the same as the prior officers of West Side.

Intermediary: Nob Hill Holdings, Inc. The promoter, Fortrend, created an intermediary entity called Nob Hill Holdings, Inc. ("Nob Hill") to acquire the stock of West Side. After acquiring the stock, Nob Hill merged into West Side, with West Side being the surviving entity. Millennium Recovery Fund (MRF) was the 100% owner of Nob Hill and the source of large Japanese debt that was contributed to West Side and found worthless, thereby creating a bad debt deduction to offset the gain from the settlement proceeds. John McNabola is President of MRF.

F. TIMELINE/TRANSACTION STEPS OVERVIEW

The following is a brief overview of the transaction steps that took place between the respective key players in executing the West Side Intermediary Transaction.

Step#	ep# Date	Explanation of Transaction	
1	4/2/2003	Memorandum of Understanding was entered into between West Side (Plaintiff) and Air Touch (also known as Verizon Wireless) and Ameritech (defendants) whereby West Side would be receiving settlement proceeds totaling \$64,250,000. In exchange, the business relationship between West Side and AirTouch would terminate on June 10, 2003.	
2	4/4/2003	MidCoast (a promoter of Intermediary transactions) entered into a Confidentiality Agreement with West Side to begin Stock Purchase negotiations. (MidCoast initially negotiated the stock purchase with WSC and then Fortrend paid MidCoast a fee to step out of the negotiations). MidCoast has been a co-promoter with Fortrend on similar transactions. However, MidCoast was competing against Fortrend on this transaction.	
3	5/1/2003	Michael Tricarichi formed LXV Group to receive the wireless assets of West Side.	
4	6/10/2003	Business relationship between West Side and AirTouch terminated, as required per the settlement.	
5	6/11/2003	LXV Group entered into Asset Purchase Agreement with West Side to acquire all of the wireless business assets of West Side.	

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West Side Cellular, Inc.		12/31/2003

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	6	7/23/2003	Nob Hill (a Fortrend entity) sent letter of intent to Michael Tricarichi regarding the purchase of stock in West Side for \$34,900,000. The assets shall consist of cash after all liabilities have been paid (other than local, state and federal income tax liabilities for the current fiscal year) in the sum of approximately \$40,000,000.
	7	8/29/03	Nob Hill submitted a loan request to Rabobank for a \$29.9 million secured loan to complete the Stock Purchase Agreement between Nob Hill and West Side Cellular. (Nob Hill also borrowed \$5,000,000 from a related entity)
	8	9/5/2003	Rabobank accounts were opened by West Side Cellular, Nob Hill Holdings and Tricarichi Escrow in order to facilitate the stock purchase.
9 9/8/2003 West Side transferred ending cash balance o West Side account opened up at Rabobank 10 9/9/2003 Stock Purchase Agreement between Nob executed. The final purchase price was \$33 paid as a wire transfer and \$577,777.77 wi The final cash balance in West Side at time		9/8/2003	West Side transferred ending cash balance of \$39,949,373 from its operating account to the West Side account opened up at Rabobank
		9/9/2003	Stock Purchase Agreement between Nob Hill Holdings and Michael Tricarichi was executed. The final purchase price was \$35,199,371.83, of which \$34,621,594.06 will be paid as a wire transfer and \$577,777.77 will be issued in check to repay the Seller loan. The final cash balance in West Side at time of sale was \$39,949,373 plus \$50,000 that was previously deposited.
	11	9/9/2003	Rabobank credited loan proceeds of \$29,900,000 to Nob Hill Holdings account. Nob Hill transferred cash of \$34,621,594.06 to the Tricarichi – Escrow account at Rabobank. The West Side cash balance of \$39,949,373 was transferred to the Nob Hill Holdings account. The \$29,900,000 loan from Rabobank plus a loan fee of \$150,000 was repaid to Rabobank.
			Fortrend via Nob Hill received cash of \$40,577,150.77 (\$39,949,373 plus previous \$50,000 deposit plus the \$577,777.77 check for repayment of shareholder loan) while "paying" only \$35,199,371.83 for the West Side Cellular stock (exchanging cash for cash). The spread retained by Fortrend for the West Side Cellular deal was \$5,377,778.94.
ſ	12	10/28/2003	Millennium Recovery Fund entered into a Trust Agreement with John McNabola to manage a specific portfolio of Japanese loans.
	13	11/6/2003	The Japanese portfolio was transferred to West Side. The notes receivable had a fair market value/tax basis of \$43,323,069.
	14	12/31/2003	Michael Bittner prepared the 2003 return for West Side. In addition to the ordinary business activities of its previous cellular business, West Side reported as other income, "proceeds from litigation settlement" in the amount of \$65,050,141.
			West Side either sold or determined that the Japanese debt portfolios it had received from Millennium Recovery Fund were worthless and claimed a bad debt deduction in the amount of \$42,480,622.
			West Side's reported taxable income on its 2003 tax return was negative \$742,175.

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West Side Cellular, Inc.		12/31/2003

G. ANALYSIS OF 2003 WEST SIDE CELLULAR TRANSACTION

1. Background of WSC

On March 13, 1988

- Carla Tricarichi incorporated West Side Cellular, Inc. in the State of Ohio. (WC 00026) One hundred shares of stock were issued to Michael Tricarichi. (WC 00040; WC 00056) A Code of Regulations of West Side Cellular was also prepared. (WC 00034)
- Michael Tricarichi and Barbara Tricarichi were elected to serve as Directors. (WC 00041)
- The Directors elected the officers of the Corporation. Michael Tricarichi was to serve as President and Secretary. Barbara Tricarichi was to serve as Vice President and Treasurer. (WC 00043; WC 00157)

On March 14, 1988

Articles of Incorporation were filed for West Side Cellular. Incorporators were listed as Charles Tricarichi
and Carla Tricarichi. (WC 000029) Charles and Carla Tricarichi (parents of Michael Tricarichi) own a
law firm in Cleveland, Ohio. (PUCO website)

On October 18, 1993

West Side Cellular (doing business as Cellnet) filed a complaint with Public Utilities Commission of Ohio (PUCO), commission case No. 93-1758-RC-CSS against wholesale cellular service providers, including Ameritech. The complaint asserted that Ameritech discriminated against Cellnet. (Rabo-F-5430)

On January 18, 2001

 The commission generally agreed with Cellnet's assertions and held that Ameritech unlawfully discriminated against Cellnet. (Rabo-F-5430)

On November 13, 2002

- Ameritech submitted an Appeal against the decision made by the Public Utilities Commission of Ohio. (Rabo-F-5430)
- West Side Cellular (Cellnet) submitted an Appeal against the Public Utilities Commission of Ohio's decision in regards to the time period over which Ameritech discriminated against Cellnet. In its January 18, 2001 opinion in case No. 93-1758-RC-CSS, the Commission broadly agreed with Cellnet's assertions of unlawful discriminatory practices. The extent of the damages to Cellnet caused by Ameritech's violations will be established in the lawsuit for damages that has been brought in the Cuyohoga County Court of Common Pleas. A central issue in that calculation is the time period over which Ameritech discriminated against Cellnet. The commission found that the relevant time frame was 1995 to 1998. Cellnet asserts that the appropriate time frame was 1993 to 1998. (Rabo-F-5434)

On December 26, 2002

 Cellnet's appeal was decided by the Supreme Court of Ohio. The Court reversed the Commission and held that the applicable time frame commenced on October 18, 1993. (Rabo-F-5437)

On December 30, 2002

 Ameritech's appeal was decided by the Supreme Court of Ohio. The Court affirmed the decision of the Commission. (Rabo-F-5432)

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West Side Cellular	inc.	12/31/2003

On April 2, 2003

West Side Cellular, d/b/a Cellnet of Ohio, (Plaintiff) and "AirTouch" and "Ameritech" (defendants) entered into a Memorandum of Understanding. "AirTouch" collectively refers to NewPar, Verizon Wireless, AirTouch Cellular, Cellco Partnership d/b/a Verizon Wireless, and Vodafone Americas, Inc. "Ameritech" collectively refers to Cincinnati SMSA and Ameritech Mobile Communications. Plaintiff and Defendants hereby settle all disputes between them and all pending proceedings will be dismissed. On the 30th day following the execution of this agreement, Ameritech will pay plaintiff \$22,000,000. The business relationship between plaintiff and AirTouch will terminate at 11:59pm on June 10, 2003. AirTouch shall provide plaintiff with Cellnet's reseller tape by June 25, 2003. Any disputes between plaintiff and AirTouch arising out of their business relationship between April 1, 2003 and June 10, 2003 shall be submitted to Niki Schwartz for mediation and binding arbitration. Plaintiff will pay AirTouch for all services from April 1, 2003 through June 10, 2003 at the rates invoiced for the preceding months in 2003. On June 10, 2003, Vodafone will pay plaintiff \$42,250,000. In addition, Vodafone will deposit \$750,000 with Niki Schwartz to be held in his IOLTA account pending the reconciliation of the account between plaintiff and AirTouch which shall be completed on before June 30, 2003. Upon such reconciliation Schwartz will promptly remit to Vodafone all amounts due for services provided to plaintiff during the period April 1, 2003 through June 10, 2003. Any balance remaining from the escrowed funds shall be promptly remitted to plaintiff. If the escrow is insufficient to cover all amounts due Vodafone, plaintiff will promptly remit the balance due. The parties will negotiate and execute separate Settlement Agreements to formally implement the terms of this Agreement. In the event that they are unable to agree upon the terms of the Settlement Agreements or the implementation or enforcement of such agreements, the issues in dispute shall be submitted to Schwartz for mediation. The parties will use their best efforts to complete the Settlement Agreements by April 5, 2003. Schwartz will use his best efforts to resolve any disputed issues before May 1, 2003. Hahn, Loeser & Parks was the attorney firm representing West Side Cellular in the legal proceedings. (HL 1246)

On April 7, 2003

A Settlement Agreement and Release was entered into between West Side and "AirTouch" (also referred to as New Par or Vodafone). Cellnet and AirTouch desire to enter into the Agreement in order to provide for certain payments in exchange for termination of their business relationship, and in full and complete discharge and settlement of the Lawsuit, the PUCO II Proceeding, the Appeal, the Counterclaims, and all other past, present and futures claims that have been or could be asserted. The business relationship, and any and all business dealings, between Cellnet and the AirTouch Defendants, including without limitation New Par, shall terminate effective June 10, 2003, and the AirTouch Defendants, including without limitation New Par, shall be under no obligation to provide cellular network or any other form or type of goods or services to Cellnet, Michael Tricarichi, or any entity under common ownership or control, after 11:59 p.m. on June 10, 2003. New Par shall continue providing cellular service to Cellnet through 11:59 p.m. on June 10, 2003, and Cellnet shall pay for all services from April 1, 2003 through June 10, 2003. In consideration of the dismissals and termination of the business relationship, Vodafone shall make a cash payment on June 10, 2003 in the amount of \$42,250,000 payable to "Hahn, Loeser & Parks", Trustee, by wire to Huntington National Bank. In addition, on June 10, 2003, Vodafone will deposit \$750,000 with Niki Schwartz to be held in his IOLTA account pending the reconciliation of the account between Cellnet and New Par with respect to service provided from April 1, 2003 through June 10, 2003. On or before June 25, 2003, New Par shall provide Cellnet with Cellnet's reseller tape and a final statement of account. The charges incurred by Cellnet between April 1, 2003 and June 10, 2003, shall be paid to AirTouch from the IOLTA account of Niki Schwartz, and any balance in the escrow account shall be remitted to Cellnet. In the event that Cellnet and Cellco Partnership or one of its affiliates reach an agreement with Cellnet whereby Cellco Partnership or one of its affiliates acquires Cellnet's customers, Cellnet and Mr. Tricarichi each agree that they will not discuss the Lawsuit with the listed resellers. (HL 1229)

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Form 886-A	Department of the Treasury - Internal Revenue Service Example 1	Sedule No. or Exhibit
Name of Taxpayer		Year/Period Ended
West Side Cellular, Inc.		12/31/2003

On April 17, 2003

• A Settlement Agreement was entered into between West Side (Cellnet) and Cincinnati SMSA Limited Partnership, Ameritech Mobile Communications, Inc., and Ameritech Mobile Communications LLC (collectively, "Cincinnati"). West Side and Cincinnati desire to settle the Lawsuit and all other claims and disputes between them. In consideration of the mutual covenants, by May 2, 2003, Cincinnati shall pay, by wire transfer, the sum of \$22,000,000, payable to Hahn, Loeser & Parks, Trustee, by wire transfer to Huntington National Bank. Within three days of the transfer of the Settlement funds by Cincinnati into the Settlement Account, Cellnet will file papers dismissing the Lawsuit with Cincinnati. Nothing in this Settlement Agreement shall release the foregoing parties from any claims, obligations or payments relating to amounts owed to Cingular Wireless, if any, for accounts relating to voice or data services. (HL 1252)

2. Research on Tax Issues regarding settlement proceeds

Detailed billing records received from the law firm of Hahn, Loeser & Parks (HLP) contained several references to research being done in connection with income tax issues regarding the taxation of settlement proceeds and ultimately on the tax shelter transaction. References to income tax issues in the HLP billing records are summarized below. (HL 1856 – HL 1861)

Date	Description
9/12/2002	JB Sims researched issues relating to the taxation of settlements and judgments
9/16/2002	JB Sims researched law on merger of C-Corp into LLC for tax purposes; research and analyze law relating to S-Corps; follow up to RJ Hart
9/18/2002	JB Sims met with attorney DC Carlson regarding tax matters; researched and analyzed tax law on settlement and judgment awards; research timing of S-election and liquidation rules
9/20/2002	JB Sims met with attorney NH Koblenz regarding timing of accrual of settlement of judgment income; research and analyze law on taxability of settlements and judgments, including structured settlement and the impact of an appeal
9/23/2002	JB Sims, RJ Hart and DC Carlson met regarding tax issues; research and analyzed the effect of the termination of a partnership to IRC 708 and issues relating to the taxability of settlements and judgments
10/1/2002	DC Carlson reviewed tax returns and filings regarding structure of ownership, merger transactions and tax status; review IRS regulations on tax status of entities
1/28/2003	JB Sims met with JM Folkman on collapsible corporation issue; reviewed and analyzed treatise on same issue
1/31/2003	JB Sims reviewed treatise on collapsible corporations in connection with taxation issues related to the settlement of the case
2/3/2003	JB Sims met with JM Folkman regarding tax issues relating to Cellnet; reviewed JM Folkman's memo and research issues.
2/8/2003	JB Sims researched and analyzed law related to collapsible corporations and tax- free reorganizations; reviewed memo by JM Folkman; researched and analyzed law relating to reportable transactions, Sham transactions and substance over form; consider potential structuring options
2/10/2003	JB Sims, JM Folkman, DC Carlson met regarding tax structuring of entities for potential settlement; researched and analyzed law relating to tax-free spin-offs and collapsible corporations; reviewed certain listed transactions; reviewed substance over form issues and the Sham Transaction Doctrine

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Name of Taxpayer	L Janation of Items	V /2 1 17 1 1		
West Side Cellu	r Lui fai	Year/Period Ended		
west side Cellu	ar, Inc.	12/31/2003		
2/11/2003	IR Simo reviewed and analysed Nation 2001 16 - 14			
2/11/2003	JB Sims reviewed and analyzed Notice 2001-16 relationship to the state of the state	ng to transaction involving a		
	shareholder who wants to sell stock of a target, an inte	ermediary corporation, and a		
	buyer who wants to buy the assets of the corporation;	telephone call to V. Papallo,		
2/12/2003	Technical Advisor, regarding the same			
2/13/2003	JB Sims researched and analyzed issues relating to lis	ted transactions		
2/14/2003	JB Sims researched and analyzed issues relating to lis	ted transactions		
2/14/2003	JB Sims researched and analyzed provisions relating to	o tax-iree spin-offs, including		
	information relating to the Device Test, the Active Tra and the Business Purpose Test	ade or Business Requirement		
2/18/2003				
2/10/2003	JB Sims finalized research and notes for oral presental	tion to JM Folkman prior to		
	the February 19 meeting with JB Sims, JM Folkman, I	G Hart, M Tricarichi, D.		
	Stephenson and L. Bernstein; deliver oral presentation to JM Folkman; follow			
2/19/2003	on additional issues per JM Folkman's request	1 11010		
2/19/2003	JB Sims, JM Folkman, RJ Hart met with Cellnet person	nnel and MidCoast personnel		
	regarding tax structuring issues relating to the resolutions	on of the Cellnet lawsuits; JB		
	Sims researched and analyzed issues relating to Notice	2001-16 and the		
2/20/2003	applicability of those provisions on the resolution of the	file pending lawsuits		
2/24/2003	JM Folkman had telephone call with D Stevenson of M	AidCoast re: tax indemnity		
- 3/9/2003	JB Sims followed-up on research issues relating to col	lapsible corporations and		
- 31912003	The state of the s	ion of Section 341 property;		
researched additional issues related to device factors; memorandum to JM Folkman		worked on drafting		
3/10/2003	JB Sims finalized memo to JM Folkman. Note: Examiner did not receive copy of			
5/10/2005	this memo from the summons non was it claimed as an	iner ala not receive copy of		
this memo from the summons nor was it claimed as privileged. 3/13/2003 JM Folkman had telephone call with L. Bernstein of MidCoast regarding.		Side and the state of the state		
3/25/2003	JB Sims reviewed memo regarding issues relating to p	ndCoast regarding status		
3/31/2003	JB Sims followed-up with JM Folkman on tax implications	tions on Settlement options		
3/31/2003	review collapsible corporation provisions	tions on Settlement issues;		
4/4/2003	JM Folkman reviewed tax calculations; had telephone	call with D. Stavenson and I		
11 11 2003	Tricarichi. JB Sims reviewed provisions of Cellnet me	call with D. Stevenson and J.		
4/10/2003	JM Folkman had telephone call with MidCoast, J. Tric	ano		
4/10/2003	issues	arichi, et al regarding tax		
4/21/2003	attorney JM Folkman had telephone call with D. Steve	noon good-ding status		
4/22/2003	JM Folkman reviewed listed transaction issues	nson regarding status		
4/29/2003	JM Folkman had conference with R. Hart regarding sta			
4/30/2003	IM Followen had talanhana call with M. Tricovial:	itus		
5/16/2003	JM Folkman had telephone call with M. Tricarichi regi	arding receipt of proceeds		
5/27/2003	JM Folkman had telephone call with D Stevenson rega			
3/2/1/2003	JM Folkman had telephone call with D Stevenson and regarding tax issues	conference with KJ Hart		
5/28/2003				
6/25/2003	JM Folkman had conference with M Tricarichi, et al re	garding tax analysis		
7/1/2003	JM Folkman had telephone call w/ D Stevenson (MidCo	east) re: status of negotiations		
1/1/2003	JB Sims researched and analyzed tax provisions relating	g to failure to remit and pay		
7/22/2003	certain trust fund taxes; follow-up with MD Griffin; pe	riorm additional research		
112212003	JM Folkman had telephone call with L Bernstein (Mide	Coast) regarding transaction		
9/12/2002	pricing and issues to consider			
8/13/2003	JM Folkman reviewed SPA; researched reportable table	e transaction issue; reviewed		
	tax planning issues			

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3. Negotiations for Sale of Stock in West Side Cellular On February 19, 2003

As noted in the billing records summarized above, Cellnet personnel and attorneys from HLP first
met with MidCoast personnel to discuss tax structuring issues relating to the resolution of the
lawsuits. HLP attorneys specifically analyzed Notice 2001-16 pertaining to intermediary tax
shelters.

On February 24, 2003

Steven Block of Fortrend sent a letter to James (Jim) Tricarichi of SoftFlex in Ohio. [James is a brother to Michael Tricarichi] "At the request of Mr. Donald Jesko CPA and Mr. Gary Zwick Esq., enclosed you will find two copies of Fortrend International LLC company brochures and a listing of professional references. Please let me know when you might be calling the references so I may alert them to expect your call. Fortrend specializes in specific transactions to solve corporate tax problems primarily arising out of the sale of assets by a 'C' corporation wherein the tax basis of such seller's appreciated assets is very low while the assets fair market value is substantially higher. Usually in that situation, the seller, in order to minimize its tax liability, wishes to sell stock in the 'C' corporation while the buyer wants to purchase the assets in order to obtain the step-up in the basis of the assets. Fortrend was founded in 1985 as an investment banking group with expertise in tax advantaged transactions. Fortrend's principals have many years of management and financial experience in the implementation of financial and tax structures intended to address specific business and individual tax objectives, provide for sound economic yields, increase after-tax sale proceeds, minimize corporate tax and close acquisitions by eliminating the economic and structural gaps between sellers and buyers in stock versus asset transactions. Fortrend has completed over 120 transactions in fifteen years (on transactions ranging in size from \$5 Million to \$1.5 Billion with total transactions completed have over \$9 Billion) with clients of such firms as: Shearman & Sterling; LeBoeuf, Lamb, Greene & MacRae, LLP; Manatt, Phelps & Phillips P.C.; Chamberlain, Hrdlicka, White, Williams & Martin, Gibson Dunn & Crutcher." (WSC-SB-13) "The Stock v. Asset Transaction: Many of these transactions involved the sale of appreciated private and/or closely held 'C' corporations in a variety of industries ranging from manufacturing, real estate, media (TV & radio), oil & gas and timber to defense contractors, funeral homes, pipelines and others. Quite often, in those situations, shareholders ("Seller") would prefer to sell their stock in the target 'C' corporation ("Target") rather than the assets of the Target, to avoid double taxation. However, buyers ("Buyer") usually prefer to purchase assets to obtain a step-up in the tax basis of the assets and the ability to recover the full purchase price through depreciation or amortization deductions. As such, many transactions come to an impasse and neither party is willing to consummate the transaction. When this impasse occurs, Fortrend's clients would be interested in purchasing the stock of the Target after such an asset sale to the Buyer. The Fortrend structured transaction affords the Seller maximum economic benefit and minimum tax exposure. In addition, Fortrend is continuously working on new strategies to assist its business and individual clientele with their ongoing concerns." (WSC-SB-13)

On February 28, 2003

• Louis Bernstein of MidCoast sent letter to Michael Tricarichi, "During our meeting on Tuesday, February 18th, I indicated that MidCoast Investments, Inc. has been a client of KPMG since approximately 1991. Yesterday I met with Thomas W. Avent, Jr., who is the Southeast Partner-in-Charge, Mergers and Acquisition Tax Service for KPMG. I discussed the transaction with Tom. Should you determine to proceed with MidCoast, MidCoast will likely retain KPMG and Tom to work on the transaction. You may contact Tom as a reference at (404)222-3000.... MidCoast looks forward to consummating this transaction with you. (WSC/MDC 00016)

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