

No. \_\_\_\_\_

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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PRICEWATERHOUSECOOPERS LLP,  
*Petitioner,*

Electronically Filed  
Jan 25 2021 10:33 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.*

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

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**APPENDIX TO PETITION FOR WRIT OF MANDAMUS**

**VOLUME IV**

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SNELL & WILMER L.L.P.  
Patrick G. Byrne (Nevada Bar #7636)  
pbyrne@swlaw.com  
Kelly H. Dove (Nevada Bar #10569)  
kdove@swlaw.com  
Bradley T. Austin (Nevada Bar #13064)  
baustin@swlaw.com  
3883 Howard Hughes Parkway, #1100  
Las Vegas, Nevada 89169  
Tel: 702.784.5200; Fax: 702.784.5252

BARTLIT BECK LLP  
Mark L. Levine  
(Admitted *Pro Hac Vice*)  
mark.levine@bartlitbeck.com  
Christopher D. Landgraff  
(Admitted *Pro Hac Vice*)  
chris.landgraff@bartlitbeck.com  
Katharine A. Roin  
(Admitted *Pro Hac Vice*)  
kate.roin@bartlitbeck.com  
54 West Hubbard Street, Suite 300  
Chicago, Illinois 60654  
Tel: 312.494.4400; Fax: 312.494.4440

Daniel C. Taylor  
(Admitted *Pro Hac Vice*)  
daniel.taylor@bartlitbeck.com  
1801 Wewatta Street, Suite 1200  
Denver, Colorado 80202  
Tel: 303.592.3100; Fax: 303.592.3140

*Attorneys for Petitioner*

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DATED: January 22, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove  
Patrick G. Byrne (Nevada Bar #7636)  
Kelly H. Dove (Nevada Bar #10569)  
Bradley T. Austin (Nevada Bar #13064)  
3883 Howard Hughes Parkway, #1100  
Las Vegas, Nevada 89169

BARTLIT BECK LLP

Mark L. Levine

(Admitted *Pro Hac Vice*)

Christopher D. Landgraff

(Admitted *Pro Hac Vice*)

Katharine A. Roin

(Admitted *Pro Hac Vice*)

54 West Hubbard Street, Suite 300

Chicago, Illinois 60654

Daniel C. Taylor

(Admitted *Pro Hac Vice*)

1801 Wewatta Street, Suite 1200

Denver, Colorado 80202

*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 IV** 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.

Mark A. Hutchison  
Todd L. Moody  
Todd W. Prall  
HUTCHISON & STEFFEN, LLC  
10080 West Alta Drive, Suite 200  
Las Vegas, Nevada 89145  
mhutchison@hutchlegal.com  
tmoody@hutchlegal.com  
tprall@hutchlegal.com

Scott F. Hessell (Admitted *Pro Hac Vice*)  
Thomas D. Brooks (Admitted *Pro Hac Vice*)  
SPERLING & SLATER, P.C.  
55 West Monroe, Suite 3200  
Chicago, Illinois 60603  
shessell@sperling-law.com  
tbrooks@sperling-law.com

*Attorneys for Real Party in Interest*

/s/Maricris Williams

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

<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Name of Taxpayer</b> West Side Cellular, Inc.	<b>Explanation of Items</b>	<b>Year/Period Ended</b> 12/31/2003

On March 27, 2003

- Fred Forster sent email to Steve Block, "if we are competing with MidCoast our pitch should be that we are familiar with MidCoast structure and we do use it but we also work with other Debt Collectors and various other investments which have yield high enough to mitigate tax liability". (WSC-SB-15) Per Mr. Block, this is a copy of an email relating to the West Side transaction. (WSC-SB-1)

On April 2, 2003

- As noted in the background section discussed above, West Side entered into the Memorandum of Understanding with the defendants whereby West Side will receive settlement proceeds from the defendants totaling 64,250,000. (HL 1246)

On April 4, 2003

- Donald Stevenson of MidCoast Investments sent fax to Jeffrey Folkman of HLP, "Congratulations on the case being settled. For your records, attached is an executed Confidentiality Agreement for West Side Cellular, Inc. Have a good weekend; I look forward to speaking with you next week." (HL 0021)
- Confidentiality Agreement was executed by Donald Stevenson of MidCoast with West Side Cellular. West Side Cellular is furnishing MidCoast with certain valuable and confidential information regarding the Company's properties, business, business relationships, business plan and financial affairs. MidCoast agrees that it will not disclose to any third party any Confidential Information. MidCoast may disclose to any and all persons, the tax treatment and tax structure of the transaction and all materials of any kind that are provided to MidCoast relating to such tax treatment and tax structure. (HL 0022)
- Steve Block sent email to Jeffrey Furman of Fortrend, "There are 2 others competing for this I know of. The pricing will make the difference. I'll leave it up to you to handle my job is done. I heard that it's a 40 million. I feel that this is going to cost me my relationship with Zwick that I established for over two years. This is my last introduction. I am resigning and no longer want to be associated with you or Fred." (WSC-SB-15) Per Mr. Block, this is a copy of an email relating to the WSC transaction. (WSC-SB-1)

On April 8, 2003

- Thomas Avent of KPMG sent engagement letter to Louis Bernstein. "We are pleased you have engaged KPMG to provide tax consulting services with respect to the acquisition of West Side Cellular, Inc. d/b/a Cellnet Communications by MidCoast Credit Corp. Our role in this engagement is to provide you with advice on the tax consequences of the proposed transaction...Tom Avent will have overall responsibility for this engagement...We will present MidCoast with a monthly invoice for our tax consulting services. Finally, we will require a \$20,000 retainer prior to beginning on this engagement..." Michael Bernstein signed as accepting the terms of the engagement letter. (WSC/MDC 00018)
- Thomas Avent of KPMG sent letter to Louis Bernstein regarding the engagement letter for West Side acquisition: "My managing partner asked that we include language regarding a retainer, which we set at \$20,000. If this is a real problem, let me know and I will try to revisit the matter with him. However, he has expressed some concern about all the time we have spend on CreditStar without being paid, so receiving an initial retainer on this matter would make my life a little easier. We will send you a second engagement letter regarding any opinions we end up rendering. In such case, we would agree upon a fixed fee and apply toward such sum the amounts incurred under the initial engagement letter..." (WSC/MDC 00017)

Department of the Treasury - Internal Revenue Service

**Form 886-A**

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APP0647



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<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- Per a MidCoast contact report prepared by Donald Stevenson, Notes prior to conference call were made, "Jim is Mike's brother, other brother is Tony (an audit partner @ KPMG). Jim arranged conference call for 4/10 at 2:30. Expected on call will be Tony and Jim Tricarichi along with Rich Stovsky (tax partner @ PWC). (WSC/MDC 00024)

On April 9, 2003

- Jim Tricarichi emailed Rich Stovsky and Anthony Tricarichi with information on conference call set with MidCoast Investments for Thursday, April 10 at 2:30; and, for conference call with Fortrend for Friday, April 11 @ 2:30. (PWC-WS 884)
- Attachment to email: "Tax Issues for Cellnet and Mike Tricarichi" (PWC-WS 885)
  - Engage PWC to advise on the possible sale of Mike Tricarichi's stock in Cellnet to one of two companies. The companies are MidCoast and Fortrend. We want to set up the conference calls on Thursday, April 10. The purpose of the call is so PWC can understand the transaction and advise us on the potential tax issues and associated risks to Mike Tricarichi.
  - If the stock is sold, the issue of change of residence to Nevada becomes an issue. Advise to what the requirements the State of Ohio would look at once they realize no taxes would be paid to Ohio. Examples of issues: how long does Mike need to live in Nevada; Does he need to show permanent intent to live in Nevada? Would he have to sell his home in Chesterland? Please provide a list of items the State of Ohio would scrutinize.
  - Compensation to key employees and if there are issues for excess compensation regarding deductions for wages at the corporate level...
  - If the stock is not sold and the C Corp continues to operate, what can be done to mitigate the tax liability?

On April 10, 2003

- PWC sent engagement letter with "Terms of Engagement to Provide Tax Services" to Michael Tricarichi at West Side Cellular. PWC will perform tax research and evaluation services as requested by Mr. Tricarichi. The fee for such services is not to exceed \$20,000 without prior written authorization. (PWC-WS 1206)
- Conference call with MidCoast was held. (PWC-WS 884)

On April 11, 2003

- Conference call with Fortrend was held. (PWC-WS 884)

On April 13, 2003

- Richard Stovsky of PWC prepared memo to West Side Cellular file re: the potential transaction. Inserted in the heading of the memo was, "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." (PWC-WS 600)

"West Side Cellular...has been awarded a legal verdict (Settlement?) in the amount of \$65,000,000. West Side is contemplating the following transaction:

- New shareholders borrow approximately \$36,000,000 and purchase 100% of the West Side shares...from Michael Tricarichi, the 100% shareholder. West Side's balance sheet consists of \$40,000,000 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/computer equipment.

Form 886-A	Department of the Treasury - Internal Revenue Service	Schedule No. or Exhibit
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- New shareholders contribute to West Side, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- West Side 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
- The business purpose for the acquisition of West Side 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. West Side's cash and accounts receivable will provide such needed cash (note that most of the \$40,000,000 cash in West Side will be distributed out of West Side and used by the new shareholders...to pay back the cash borrowed to purchase Tricarichi's West Side stock) [A handwritten note by this paragraph stated "but sufficient cash is to remain in the corp. to operate the business <only need 6 cents to purchase \$1 of debt>"]
- West Side 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 West Side upon the receipt of the \$65,000,000 cash from the legal verdict. As stated above, the new shareholders of West Side received from West Side cash to pay the loan from the bank used to purchase Tricarichi's shares in West Side
- West Side, 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 West Side...
  - West Side offsets the taxable income from the legal verdict with the write off of high basis property
  - West Side 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:

- Will the transaction be respected for federal income tax purposes? Tim Lohnes, WNTS partner, was integrally involved in the analysis of this transaction from Mike Tricarichi's perspective. After consulting with other members of WNTS, and researching the transaction, Lohnes concluded that the risk to Tricarichi was the IRS recharacterization of a portion of the proceeds received from the purchaser as follows:

Amount Received by Tricarichi	\$36,000,000
Amount that Tricarichi would have received had he not sold the stock, but instead liquidated West Side:	
West Side 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. Distr.	26,400,000
Compare with actual proceeds	36,000,000
Amount recharacterized as ord inc	9,600,000

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- Lohnes and Stovsky pointed out to Tricarichi that one alternative would be to file the 1040 with this ordinary income element, then immediately file a claim for refund. However, Tricarichi indicated that he would not be inclined to do so, and that the stock sale agreement would probably prohibit him from doing so. In addition, Lohnes concluded that any 269 issues would be the purchaser's problem, not Tricarichi's. Lohnes also stated that the deduction the corporation was taking for the write off of the high basis/low value property contributed to West Side (to offset the taxable income in West Side 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 no successor/transferee liability for West Side taxes).
  - Some of the handwritten notes that appeared on the page were as follows:
    - Per Folkman, "There is some risk"
    - "We stated that there is no guarantee - Jim Tricarichi understands this"
    - "All liab. remains in corp. If 269 is asserted it would apply to acquirer of loss property - it would be corp. level"
    - Lohnes: "Even if this happens (referring to the recharacterization as ord income comp), still better than not doing deal"
    - Folkman: "Only time a s/h is responsible for corp level tax - if taken out of corp making the corp insolvent"
- 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).
  - Handwritten notes by this paragraph were:
    - Folkman concurs
    - Final conclusion by WNTS - not listed or reportable
- Does Tricarichi have any liability for the federal income tax liability of West Side should the IRS challenge the write off of assets within West Side that is intended to offset the taxable income from the \$65,000,000 legal verdict (less the deductions for attorneys fees and bonuses)(assuming West Side 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 West Side. At the time Tricarichi sold West Side, it was a solvent corporation. Tricarichi was not the transferee of any West Side asset. Rocen to provide Notes message.
  - Handwritten note:
    - Folkman concurs
- Is there any federal tax provision that 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).



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- West Side is planning to pay significant bonuses (total of \$13,000,000) to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive \$2,500,000 (regular compensation \$81,000), employee B will receive \$2,000,000 (regular compensation \$80,000), employee C will receive \$1,500,000 (regular compensation \$76,000). These bonuses are, presumably, for past services during the period in which West Side was in the litigation that yielded the \$65,000,000 verdict (when West Side 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.
  - Handwritten note:
    - Folkman concurs – not family, no gift, not to a s/h – no unreasonable comp issue
- 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. (see Exhibit )
- 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.
- 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.
  - Handwritten note:
    - No installment sale will be used for state tax

On April 14, 2003

- Richard Stovsky sent email to Tim Thronson, "Ed Abahoonie suggested that you would be the appropriate person to work with me on a matter where PWC has been asked to review a proposed transaction to determine the viability and exposure of such a transaction. The attached memorandum (for PWC internal use only) summarized the transaction as I understand it. "Issues for discussion" 1, 2, and 3 are, apparently, within your area of specialization..." (PWC-WS 699)
- Tim replied to the email, "...Bill Galanis and Tim Lohnes can assist you with this transaction. It may be a bit easier for you to reach Tim as I understand that Bill is very busy at this point..." [This is referring to the memo dated April 13, 2003. Apparently, Tim Lohnes assisted with the answers]

On May 5, 2003

- Handwritten notes for Tricarichi conference call: (PWC-WS 605)
  - Lohnes: high risk to buyers ... less than 50% chance: ordinary income – would still do the transaction 10 times out of 10; Medicare tax may apply
  - Report ordinary income, then file claim for refund
  - Risk of reporting all capital gain: penalty ... substantial understatement penalty (but since there is substantial authority, taxpayer penalty is minimal)

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On May 23, 2003

- Rich Stovsky sent email to Stephanie Moss, "Here are my facts:
  - Target C Corp has taxable income
  - 100% of the stock of Target is being acquired
  - The new shareholder will be generating a taxable loss during the same taxable year, and this loss will offset the taxable income earned by Target prior to the acquisition.
  - Any issues?" (PWC-WS-0048)
- Stephanie Moss replied with a memo to Rich Stovsky, "Internal Revenue Code Section 384 states that a corporation may not use its pre-acquisition losses against the built-in gains of a company ...that becomes directly or indirectly controlled by the acquiring corporation..." Hand-written notes on the memo state, "acquirer issue anyway"; "not an issue as no corporate purchaser... (may be a corporate purchaser) - in any event, it will not be Mike Tricarichi problem". (PWC-WS 0049)

On May 28, 2003

- An "Ohio Individual Nonresident Income Taxation Capital Gain Tax Planning" document was prepared. The document listed three required steps that must be taken in order to meet the basic requirements to change the Taxpayer's domicile from Ohio to Nevada. Failure to complete these steps will result in the Taxpayer clearly being considered an Ohio resident and subject to taxation on the gain. For simplicity, all of the steps have assumed that the stock sale contract is signed. The document listed four additional steps that would build additional "facts and circumstances" evidence to support the position that his domicile has changed to Nevada prior to the stock sale in 2003. (HL 269) A court case from the Ohio Board of Tax Appeals was included in the HLP documents in which it discussed what is considered the domicile of the taxpayer. (HL 0272) Another document in the Hahn, Loeser & Parks file was a "Drivers License and Registration Tips for New Nevada Residents". (HL 287) See Exhibit for further research done by PWC on the Nevada Residency Conversion.

On June 23, 2003

- Jeffrey sent email to Steven Block, "I know MidCoast is out of CellNet that's why Louis didn't want to say anything to you. We will talk more about this transaction which we are alive in!!!! But for right now please just keep it between you and I." (WSC-SB-16) Per Mr. Block, this is a copy of an email relating to Fortrend's continued pursuit of the transaction. (WSC-SB-1)

On July 13, 2003

- Steve Block of Fortrend sent email to Jim Tricarichi, Randy Hart, "Gaz @ Ameritech", et al, with cc: to Jeffrey Furman, Chuck Klink and Alice Wendland. "I feel that this explanation is very necessary at this point. After a weekend of being frustrated, this does make sense for everyone involved. I hope that you all can understand this. Due to the increased scrutiny that the IRS is placing on these types of transactions in the last six months or more, it is quite important that one properly structure such a stock purchase deal so that there is a clear and legitimate continuing business operation of the company. It has always been true that the target companies in our transactions have been re-engineered after they are acquired. Now, even greater resources must be dedicated to the ongoing business activities of the company post-acquisition in order to ensure that they will be profitable on a "go-forward" basis. Unlike certain other groups that approach companies that have sold assets or that otherwise have significant taxable gains trapped in a corporation, the clients of Fortrend International seek to engage in business-driven transactions that also have favorable tax attributes as a side benefit. One can frequently find someone to give a lower bid on a transaction but we have built-in costs to cover and simply will not cut corners in a way that will undermine the basic structure of the deal. Taking such risks is not good for either the selling shareholders or for the clients of Fortrend. Fortrend has remained in business since 1985 by assisting its clients to engage in topnotch transactions that will withstand scrutiny and pass the test of time." (WC 397)

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

Note:

Per interview with Michael Tricarichi on November 30, 2007, Mr. Tricarichi stated that the decision to sell the stock of West Side was made based on counsel's recommendation. Jeff Folkman of Hahn Loeser brought in MidCoast who was interested in buying the stock of West Side. "Jeff Folkman, who was working with MidCoast on a couple of other deals, said he wanted us to have a meeting with them, so we met with MidCoast". MidCoast came in and made an offer to buy the stock in WSC. Mr. Tricarichi said he likes to "negotiate with people, so...I think my brother Jim brought in another person who had something to do with this company called Fortrend, and we had a couple of meetings with them, and they made us an offer. And I think their offer was a little bit higher than the MidCoast offer, so that's the one we went with." (page 24, 25 of the transcript)

On page 26 of the transcript, Fortrend "came to us and they made a proposal probably - I'm guessing probably in late April or early May of 2003. They made the proposal to us after we had the MidCoast proposal. So they were—you know, they were kind of giving us a counterproposal to MidCoast".

**4. Asset Sale**

On May 1, 2003

- Articles of Organization for LXV Group, LLC were filed with the state of Ohio. (HL 363) The Articles of Organization were signed by Michael Tricarichi. (HL 364) Michael Tricarichi was appointed Agent of LXV Group. (HL 366)

On June 11, 2003

- Asset Purchase Agreement between West Side Cellular (seller) and LXV Group, LLC (buyer) was made. LXV Group shall acquire all of the wireless business assets of West Side Cellular, including the revenue producing wireless customer base, accounts receivable and collection accounts, Trade names and Trade marks, chattels, fixtures and equipment owned by Seller and located on the premises at 23632 Mercantile Road, Beachwood, Ohio. This agreement specifically excludes any cash or cash equivalents in the possession of Seller, as well as all past, current and future liabilities of the Seller.

The Seller is the owner and operator of a revenue producing wireless subscriber base operating as a Verizon Wireless reseller in association with Cellnet Communications Inc. of Michigan and Discount Cellular of Florida. Seller agrees to sell all of the assets, including the revenue producing wireless customer base, accounts receivable and collection accounts, Trade names and Trade marks, chattels, fixtures, software and equipment located on the premises. The Seller also conveys as part of the principal consideration such good will as has been attendant upon the operation of the said business and in addition, commit themselves to do all such things as to cause a substitution of the Buyer to the existing lease at 23632 Mercantile Road. The total consideration for this sale is \$100,044. The Buyer agrees to deposit the total consideration as follows: a) Buyer shall cause to be deposited with Seller \$6,000 upon taking possession of the business on June 11, 2003. The Buyer shall deposit an additional \$94,044 with the Seller on or before September 5<sup>th</sup> 2003. Upon completion of the payment, Seller will convey to the Buyer the revenue producing wireless customer base, accounts receivable and collection accounts, Trade names and Trade marks chattels, fixtures, and software free from any and all liens or encumbrances.

Seller warrants and covenants to the Buyer that all Federal, State and local taxes of every kind and nature will be paid through the date of this transaction and that Buyer shall have no tax liability until such date as it assumes control of the business. All equipment, inventory, chattels, etc. are sold "as-is", "where-is", without warranty of any kind. The document is to be signed by Michael Tricarichi as President of West Side Cellular and Scott Ginsburg as Treasurer of LXV Group, Lawrence Dubin as Vice President of LXV Group, and Patrick Scaravilli as Secretary of LXV Group. (HL 2075 - unexecuted; HL 0027 - executed by Buyers)

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- A Bill of Sale, Assignment and Assumption Agreement was prepared. Cellular sells, contributes, assigns, et al the following assets to LXV Group: Equipment, Fixtures and other Tangible Personal Property; all Contracts; all Customer Lists, Sales and Marketing Materials; all Intellectual Property; all Goodwill; and, all Other Intangible Assets. Seller does not sell to Buyer any cash and cash equivalents. (HL 0241)

On August 14, 2003

- Assignment and Assumption of Lease was executed whereby Cellular assigned its Lease rights with Mercantile Associates on premises located at 23632 Mercantile Road, Beachwood, Ohio, to LXV Group LLC. This document was signed by Scott Ginsburg as Treasurer of West Side Cellular and as Treasurer of LXV Group, LLC. (WC 00179; WSC-CK-200)

On August 25, 2003

- A Release and Covenant Not to Sue was signed by the following employees. The Heading on the Release stated: "The Company Advises You to Consult an Attorney before you sign this Release". In consideration of the following amounts \$, to be made on September 5, 2003, the employee agrees to completely and forever release and discharge West Side Cellular from any claims, demands against West Side and to completely and irrevocably terminate any employment relationship with CellNet as of July 31, 2003. The employee agrees that the payment is in consideration of the Release and is not compensation for employment. The employee further agrees to keep the terms and circumstances relating to this Release strictly confidential. (HL 00253 - HL 00257)

<u>Employee</u>	<u>Payment Amount</u>
Lawrence Dubin	\$ 725,207.20
Scott Ginsburg	968,050.20
Patrick Scaravilli	1,210,831.20
Shari Kern	238,792.70
Rudy Mandau	50,000.00
Steven Nemec	238,715.20

On August 27, 2003

- Jennifer Garberich sent email to Jeffrey Folkman with attached copy of the Bill of Sale as revised per Liz's comments. "I see you already edited the Opinion Certificate and the Secretary certificate." (3:59pm) (HL 2488)

On September 5, 2003

- State of Ohio Certificate was prepared showing the filing and recording of a Trade Name/Assignment document for the LXV Group. (HL 0245) Cellnet trade name was assigned to the LXV Group.
- Scott Ginsburg signed an Indemnity for Car Lease. "Scott Ginsburg does hereby indemnify and hold harmless Cellular...from any loss, damage, liability or expense... incurred or suffered by WSC that arise out of or result from the automobile lease" described as "Car Lease Agreement, dated March 27, 2002 with Shaker Auto Lease, Inc, as lessor, and Cellular, Inc. as lessee and Scott Ginsburg, as co-lessee". (HL 0265)



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**Note:**

Per interview with Michael Tricarichi on November 30, 2007, Mr. Tricarichi stated that West Side really didn't sell its assets to the LXV Group. "I mean what happened was we were contracting with Nob Hill Holdings, and there were certain assets that they didn't want to buy. One of them was the cellular customer base of Cellnet, or West Side. So we needed to park that customer base someplace, so we formed LXV Group to park the customer base there. And originally Nob Hill was going to buy the receivables of West Side, but at the last minute they decided not to do that. So we put the receivables into LXV Group as well." (Page 12 of the transcript)

Again, on page 14 of the transcript, Mr. Tricarichi stated that the customer base and the accounts receivable were not sold. "There was no money received for the customer base and the accounts receivable. They were parked in a new entity. They were eventually sold to...well, they were sold once, and then that company folded, and they were sold a second time..." "We had cellular customers,...we had an ongoing business that we were prohibited from being involved with. So what we did was we formed LXV Group. LXV Group sold that customer base to a company in Michigan, which was also called Cellnet... That company folded a few months after we sold it to them, and we got the assets back. And then we wound up selling it to a company out of Florida called Discount Cellular." This all occurred in 2003.

"And when I say sell, that's a dubious work because we never really got any cash for it. We got an ongoing revenue stream for a fixed period of time ...it was not a sale...they gave us an ongoing revenue stream from the customer base....cause the customer base was producing monthly revenue. So they gave us a percentage of that, and I don't remember what it was." page 15 of the transcript). LXV Group was pretty much a holding company to get the revenue stream back. It didn't do anything else. It was formed by four equal partners: Michael Tricarichi, Scott Ginsburg, Larry Dubin and Pat Scaravilli. They were each a 25% partner. (Page 16 of the transcript).

"The terms of the sale to Discount Cellular was that they would give us a percentage of the revenue for a limited period of time. I think it was about two years. So after the two years was up, they stopped sending the revenue, and LXV had no -- had no source of revenue anymore." (page 19)

The LXV Group filed a Form 1065, Return of Partnership Income, for the year ending December 31, 2004. This was the first income tax return filed by the LXV Group. Total gross receipts reported were \$262,606. Total deductions were \$153,645.

The LXV Group filed a Form 1065, Return of Partnership Income, for the year ending December 31, 2005. Total gross receipts reported were \$2,307. Total deductions were \$241.

The LXV Group filed a Form 1065, Return of Partnership Income, for the year ending December 31, 2006. No income or expenses were reported on this return.

**5. Summary of Shareholder Loans**

Michael Tricarichi executed the following Promissory Notes with West Side Cellular after the Settlement Agreements were finalized and prior to the completion of the stock sale.

May 15, 2003	\$500,000
July 11, 2003	25,000
August 19, 2003	50,000
Total	<u>\$575,000</u>

Per interview with Mr. Tricarichi, the \$500,000 loan was used to purchase a new residence in Las Vegas.

Each of Michael's Promissory Notes were paid in full on September 9, 2003 (closing of stock purchase). Verification of payment was signed by Charles Klink.

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#### 6. Actions taken to Finalize Intent to Sale Stock in West Side to Fortrend

On July 10, 2003

- Charles Klink (Fortrend attorney) sent an email to Patrick Mullins with complete information on Randy Hart (West Side attorney). The following is the contact information for Randy Hart: (WC 00004)  
Hahn Loeser & Parks  
3300 BP Tower  
Cleveland, OH 44114-2031  
(216)274-2410 FAX: (216)274-2511  
Email: [rjhart@hahnlaw.com](mailto:rjhart@hahnlaw.com)

On July 22, 2003

- Chuck Klink sent email to Michael and Jim Tricarichi with cc to Randy Hart, "Attached please find a revised draft of the Letter of Intent setting forth the principal terms upon which Fortrend's client, Nob Hill Holdings, would be willing to acquire all of the issued and outstanding capital stock of West Side Cellular. I have also included a redline, marked to show changes made from the draft circulated to you last week. I understand that you had conversations with Jeff Furman on Friday regarding the major changes that are included in this revised draft. Please review the attached and let me know if you have any questions..." (HL 3906)
- A draft letter of intent was prepared. A letter of intent prepared in a previous transaction with Pioneer Solutions and Mabros Inc. was used as the model for the draft. (HL 2656; 3907) Another draft letter of intent was prepared on Nob Hill Holdings letterhead. (HL 3917)
- Nob Hill Holdings sent a letter of intent to Michael Tricarichi regarding the principal terms upon which it is prepared to purchase all of the issued and outstanding capital stock of West Side Cellular from its sole shareholder pursuant to a stock purchase transaction. 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 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)

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Included in the letter of intent, "Seller has simultaneously deposited herewith the sum of \$50,000 with the Purchaser's attorney's escrow account". Seller agrees to compensate Purchaser for all reasonable professional costs (including but not limited to legal and accounting costs), up to a maximum amount of \$50,000, if the transaction fails to close based on factors within Seller's control (assuming no changes in the Purchase Price and other material terms of this Letter of Intent). In addition, Purchaser agrees to compensate Seller for all reasonable professional costs (including but not limited to legal and accounting costs), up to a maximum amount of \$50,000, if the transaction fails to close based on factors within Purchaser's control (assuming no changes in the material terms of this Letter of Intent); provided that, for purposes of this sentence, if Purchaser requests any adjustments to the Stock Purchase Price or related changes to the terms of this Letter Intent as the result of information discovered during Purchaser's due diligence review of the Company and Seller refuses to agree to such changes such that the transaction fails to close, this shall not be deemed a failure to close the transaction that is based upon factors within Purchaser's control. The target date to close the transaction was August 15, 2003 or earlier. Tim Conn, as Manager of Nob Hill Holdings, was to sign the letter of intent. (HL 284)

On July 23, 2003

- Randy Hart sent email to Jeffrey Folkman, "this is the letter of intent that Fortrend wants us to sign. It appears to contemplate the local tax issue. I am going to have Jimmy contact you directly this afternoon..." (HL 3905)
- Jeffrey Folkman sent an email to Randy Hart regarding Cellnet issues. "The following are three provisions in the transaction that we did with MidCoast last year. The first provision was intended to make sure that the Company remained solvent and also had an on-going net worth that would demonstrate that the Company was capable of conducting business of a size that would justify the transaction. (The \$2,000,000 amount in Section 6.14 would be increased to reflect the fact that the Cellnet transaction is larger.) - The tax indemnification provisions that we agreed to represented a negotiated resolution of the provisions that we originally proposed." (HL 0270; 3924)

The provisions that Mr. Folkman referred to in his email included the following:

- 6.14 Post-Closing Net Worth of the Purchasers. The Purchasers shall maintain a collective net worth of not less than \$2,000,000 for a period of not less than five years following the Closing.
- 6.11 The Purchasers shall indemnify the Sellers and hold the Sellers harmless with respect to the Deferred Tax Liability... and any state, local or federal tax liability of the Company relating to tax periods after the Closing Date in accordance with Section 9.2 hereof; provided that the Purchasers shall not indemnify the Sellers relating to any tax liability where the circumstances relating to such tax liability occurred or otherwise relate to time periods prior to the Closing Date.
- 9.2 Indemnification Obligation of the Purchasers. After the Closing Date, the Purchasers and the Company will reimburse, indemnify and hold harmless the Sellers... against and in respect of any and all claims, damages, losses... incurred or suffered by any Indemnified Seller Party that results from, relates to or arises out of the business or operations of the company following the Closing, or any audit or investigation of Purchasers and the Company regarding the post-Closing activities of the Company.

The letter of intent was ultimately signed.

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**7. Formation of Fortrend Entities Used to Complete the Transaction**

On November 15, 2001

- Patrick Mullins incorporated Nob Hill Holdings in the State of Delaware. (WC 00188)
- Secretary of State of Delaware certified the Certificate of Incorporation of Nob Hill Holdings was true and correct and was filed with the State of Delaware on November 15, 2001. (WC 00187)

On August 1, 2003

- Bylaws of Nob Hill Holdings were prepared. John McNabola, as Secretary of Nob Hill Holdings, certified that the Bylaws were adopted and ratified. (WC 00202)

Per Alice Dill (Rabo-F-5522), Nob Hill was formed in 2001 as a special purpose entity, but didn't find its special purpose until this opportunity. Fortrend often sets up several companies in anticipation of transactions.

**8. Preparation for Stock Purchase/Merger**

On July 1, 2003

- A "Written Action of the Directors Without A Meeting" for West Side was executed by Michael and Barbara Tricarichi. Officers were elected as follows: Michael Tricarichi was elected as President and Secretary; Barbara Tricarichi was elected as Vice President and Treasurer; Lawrence Dubin was elected as Vice President; Patrick Scaravilli was elected as Vice President; Scott Ginsburg was elected as Treasurer. (WC 00053)

On July 31, 2003

- Jim Tricarichi prepared a draft financial income statement and balance sheet for West Side Cellular for the Seven Months ending July 31, 2003. The income statement reflected Sales-Other in the amount of \$65,000,000. This represented 97.78% of the total revenues. The balance reflected cash balances as follows: Cash - checking of \$661,465.63; Key Bank-Money Market of \$3,081,388.94; and DLJ Pershing Money Market of \$43,211,472.44 for a total cash balance of \$46,954,327. (PWC-WS 267)

On August 7, 2003

- Debra Catalano of PWC sent email to Jeffrey Folkman and Jim Tricarichi, "Per our conversation, below are the details of the conference call": Monday, August 11, 2003, 8:30a.m. Participants: Jim Tricarichi, Jeff Folkman, Rich Stovsky, Ray Turk and Tim Lohnes. (HL 286)

On August 11, 2003

- There were handwritten notes on CellNet transaction from conference call. Phone numbers for Rich and Tim were in the right hand margin. Other notes included the following comments: "A/R stays with CellNet"; Michael sold customer list, for an income stream. Must get it out of CellNet; Related company will buy out remainder of Beachwood Lease (?); will pay a minor amount for leasehold improvements; 31.8% of tax liability is premium to Fortrend; Fortrend - indemnify for all tax liability(?). (HL 0267)
- A draft of the Stock Purchase Agreement (SPA) was prepared. (HL 2256)

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On August 12, 2003

- Chuck Klink sent email to Jeffrey Folkman regarding the Stock Purchase Agreement for Cellular by Nob Hill Holdings - Attached please find an initial draft of the SPA for the Cellular (CellNet) transaction. Please note that, for the moment I have left the stock purchase price in Section 2.1 blank subject to confirmation between the parties as to the correct number. I wanted to circulate this draft as soon as possible and figured that I should not wait any longer before distributing it. - As you will note, we have a few other blanks and items that need to be confirmed by seller, including the various disclosure schedules attached to the agreement. For example, I understand that there may be some accounts receivables that may be listed as assets of the corporation if the parties can agree on a price for such A/R in the near future. I also understand that there is certain equipment, etc. held by the Company that seller is deciding how to handle. There may be a cash buyout involved for this equipment. Correct? - We also need to discuss the timing and location for the closing. We would prefer to have the closing on the West Coast, either in San Francisco or Los Angeles. - One other item we need to discuss is the Promissory Note, dated May 15, 2003, pursuant to which M Tricarichi borrowed \$500,000 from WSC. On its face, this note is due and payable on or before July 30, 2003. We need to discuss the status of this note and agree upon the manner in which this promissory note will be repaid if it has not already been repaid. - Patrick Mullins and I are in the process of preparing a Closing Document Checklist and Party Responsibility List, among other documents. We will circulate those as soon as possible. (HL 0268)
- Some of the handwritten notes on Stock Purchase Agreement draft, under Seller's Representations;
  - o Section 3.2(g) Business and Assets: "...shell has assets - s/b okay"
  - o Section 3.2(y) Absence of Certain Transactions - i.e. Listed Transaction, Confidential Transaction...Loss Transaction, a Transaction with a Significant Book-Tax Difference, et al: "may not be true...no way..." (PWC-WS 765)
- Patrick Mullins sent email to Jeffrey Folkman, Randy Hart, et al, "attached is a draft of a Closing Document Checklist for the parties to the Cellular transaction. The Closing Document Checklist indicates the documents to be provided by both Buyer's and Seller's at, or prior to, the closing. Please be advised - this document is a draft, and as such has not been agreed to and/or finalized by either Buyer's or Seller's Counsel..."(HL 3855) (6:31 pm)
- John McNabola, having a place of business at 50 Francisco Street, San Francisco, CA, appointed Patrick Mullins, having a place of business at 744 Montgomery Street, San Francisco, CA, as his Attorney-in-Fact (Agent) to execute such documents as may be required, and in the best interest of each of Nob Hill Holdings and West Side in that certain transaction between these two corporations. His Agent shall have full power and authority to act on his behalf and to manage and conduct any and all affairs of either of the above-named corporations. His Agent's powers shall include but not be limited to, the power to open, maintain or close bank accounts; conduct business with any banking or financial institution; perform any act necessary to deposit, negotiate, sell or transfer any note, security, or draft, including U.S. Treasury Securities; have access to any safe deposit box that either of the above-named corporations might own, including its contents,...This Power of Attorney was signed by John McNabola at Dublin, Ireland. (WC 235)
- Jim Tricarichi sent email to Rich Stovsky, "Attached are the agreements from Fortrend (Letter of intent and Stock Purchase) let me know what you think." Rich forwarded the email to Tim Lohnes, "I'll take a run through, but, as we discussed, given that I'll be on vacation next week, you may have to step in". (PWC-WS 63)

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On August 13, 2003

- Jeffrey Folkman sent email to Jennifer informing her that the first draft of the Stock Purchase Agreement (SPA) is iManage # 802152. Buyer has also put together a first draft of the closing checklist. He also informed her that Liz Wright will also be working on this project. (HL 3780)(8:31am) Jennifer replied back to Jeffrey Folkman that she will get started.
- Jim Tricarichi sent email to Jeffrey Folkman, et al, "Rich Stovsky of PWC has reviewed the stock purchase agreement and would like to discuss the tax issues as it relates to Mike. Rich is available for a conference call on Thursday, August 14<sup>th</sup>...Please let me know today if this works for you.....Also attached is the closing check list. (HL 3847)
- Jennifer sent email to Jeffrey Folkman, Liz Wright, "I have looked thru the two docs and have several questions..." regarding responsibility for various documents and ordering of the Articles of Incorporation and Good Standing. (HL 3843)
- Randy Hart sent email to Jeffrey Folkman, "Jeff, did you review the Fortrend Agreement. I saw where they committed to a 4 year operation of the company. After you have looked at it please give me a call on my cell phone..." (HL 3854)
- Patrick Mullins sent email to Jeffrey Folkman, Randy Hart, Michael & J Tricarichi, "Please see the attached closing Document checklist for the proposed transaction regarding CellNet. This checklist has been slightly revised from the previous version. You will note that the preparation of the Non-Confidentiality Certificate and the Cross-Receipt are not the obligation of the Seller, or Seller's counsel." (HL 3835)
- Jeffrey Folkman emailed Jennifer with copy of "CellNet-Revised Closing Document List". (HL 3834)
- Mike Tricarichi sent email to Jeffrey Folkman, "I have completed all of the required as well as the recommended steps except the filing of the statement of residency. 1) isn't that telegraphing our intent? 2) if you really want it filed, I will need a sample of it. You might want to recommend an attorney out here who is familiar with such." In response, Jeffrey Folkman sent email with attached Affidavits of Domicile for Barbara and Mike. "...I recommend that they be signed and filed, and you are right—by filing them you are telegraphing your intent – but this is exactly what you want to do. You do not want any question as to where your domicile is located...."(WC 402)

On August 14, 2003

- Jennifer emailed Jeffrey Folkman, with cc to Liz Wright, with draft documents for Incumbency Certificate of Officers, the stock power and the Form of resignation for officers and directors. She also had a list of questions regarding the checklist and who has responsibility for what. (HL 3779)
- Liz Wright emailed Jeffrey Folkman with a blacklined copy of the SPA showing the changes they had discussed. (HL 3786)
- There were handwritten notes from a conference call on Cellnet: 1. Sale of assets to be completed ASAP. 2. OCC check!! 3. Federal excise tax return – tax to 1991 - \$1,000,000; \$800,000 potential penalty. 4. 3.2(f) consolidated group issue -... (HL 322)
- Patrick Mullins sent email to Jim Tricarichi with copy of attached closing document checklist. "This checklist has been slightly revised from the previous version. You will note that the preparation of the Non-Confidentiality Certificate and the Cross-Receipt are not the obligation of the Seller, or Seller's counsel." (PWC-WS 911)

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On August 15, 2003

- Jeffrey Furman emailed Chuck Klink, "Attached is a revised version of the SPA and a black-lined copy that shows the changes made..." (HL 3683)
- Chuck Klink responded to Jeffrey Furman, "Thank you for the markup and blackline Jeff. I will take a look at this, discuss it with my client and then we will circle back to you early next week. Let us know what your client feels about closing this transaction in San Francisco. As we discussed, if that will not work we should probably try to close in Las Vegas..." (HL 3683)
- A draft of the SPA with HLP comments was prepared. One of the comments made by HLP was found under Article 6, Section 6.1(h), in which it requires the Seller to establish Company and Seller Accounts at Rabobank. Seller shall deliver to Buyer proof that is has established an account with Rabobank and that all of the ending cash balance has been transferred to such Company bank account at Rabobank. Upon confirmation of the wire transfer of the Purchase Price from Buyer to Seller, Seller shall transfer possession and control of such bank account to Buyer, as owner of Company. Such transfer of control over Company's bank account shall be evidenced by delivery of documents described in section 7.2(d). HLP's comment to this section was, "Why is this necessary? Why not permit the funds to stay where they are and buyer causes the funds to be transferred to whatever account is appropriate? Why should seller assume the risk of Rabobank being solvent?" (HL 2961)

Note: Included in the documents received from HLP, was a copy of a share purchase agreement between MidCoast Credit Corp and two shareholders of an eye surgeon company. Apparently the share purchase agreement was used as a sample to work the SPA for West Side Cellular. HLP represented the Sellers of the eye surgeon company as well. (HL 480)

- Tim Lohnes responded to Rich Stovsky with his comments on the Fortrend documents, "...one issue in particular that we need to be mindful of is that the purchasing corporation is NOT a member of a consolidated group now, and will NOT consolidate with West Side after the acquisition. If West Side was to join a consolidated return, its tax year would cut off, which would result in a short period return with a significant tax liability in it..." (PWC-WS 0062)
- Rich responded to Tim's email, "I've passed on your comments to Jeffrey Folkman, attorney for West Side, as well as Jim and Mike Tricarichi during our conference call yesterday. In addition, I voiced my insistence that the buyer indemnify the seller for all taxes (not just income taxes, but also Accumulated Earnings Tax, Personal Holding Company Tax etc.) even though we don't believe that Mike Tricarichi would be liable as a successor/transferee. Note that another company owned by Mike is buying the ancillary assets from West Side prior to the sale of West Side stock by Mike (as these assets are not wanted by the buyer), but Mike is paying fair market value. My concern here is whether Mike would be deemed to have taken value out of West Side if he didn't pay fair market value for these assets, and the open up the transferee liability issue (should it ever arise)..." (PWC-WS 0062)

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On August 17, 2003

- Rich sent an email to Tim, "To ensure we stay in the loop with regard to the West Side transaction, please give Jim Tricarichi a call on Monday at ... the more contact we have, the more we can bill for our services, and Jim pays the day he receives the invoice...Ray Turk is also staying in contact on the SALT side, and is going to call you Monday morning to review the question of whether any of the income received by West Side (punitive damages, compensatory damages, etc.) can qualify as nontaxable for any reason (we'd hate to miss an obvious issue here!) so that this sale wouldn't be necessary. Ray has discussed briefly with the attorney for West Side, and we don't think that the payments are nontaxable, but it doesn't hurt to bounce it off of WNTS. Thanks for backing me up on this. I'll be checking NOTES while out of the country on vacation". (PWC-WS 0064) *[Note this remark indicating the purpose of the stock sale transaction: If the litigation proceeds somehow qualified as nontaxable then the stock sale transaction wouldn't be necessary]*
- Rich sent a follow-up email to Ray and Rich while he was out on vacation (dated 8/21/03), "Just wanted to ensure that the two of you have spoken, and that you've spoken with Tricarichi and Folkman, to discuss any issues with the documents as well as the overall question of the taxability of the amounts received by West Side from the defendants in the case. I'll be checking NOTES later today, so please send an update." (PWC-WS 0065)

August 18, 2003

- Chuck Klink sent email to Jeffrey Folkman, "I just tried to call you back but it seems that we are playing a bit of phone tag right now. I am ready to discuss your comments to the SPA when you get free. I also want to discuss certain of the items that are listed on the Company balance sheet dated as of July 31, 2003, including the \$500K shareholder loan and the A/R that are listed on the asset side of the ledger as well as the accounts payable that are listed as liabilities in that balance sheet. I understand that we may need to have our client's respective accounting and business folks involved in that discussion. We can also discuss any other issues that you have at that time, such as timing and place of closing. As I mentioned in my voicemail, attached is a draft of the opinion from your firm that is listed as Exhibit E to the SPA. I have also attached a draft of my firm's opinion that is listed as Exhibit F to the SPA. Of course, I understand that your firm may wish to make certain changes to the assumptions and limitation contained in the draft opinion in order to better fit your firm's standard form of opinion. As I suspect you understand, what matters to us the most here is the actual items that are opined upon..." (HL 3674)

August 19, 2003

- Jim Tricarichi sent email to Ray Turk at PWC, "attached is the purchase price calculation along with the city income tax calc. The net income and the cash balances are not final. This is for discussion purposes only. Let me know what you think. (HL 3632)
- Jim Tricarichi sent email to Jeffery Folkman with copies of WSC tax returns and financial statements for the years 1998 through 2002. (HL 3600) A summary of the tax return information is listed below.

	<u>Total Income</u>	<u>Capital Gain</u>	<u>Total Deductions</u>	<u>Taxable Income</u> <u>Before NOL</u>	
1998	\$2,283,587	0	\$2,512,625	(\$ 229,038)	(HL 3601)
1999	1,550,321	0	2,677,276	(1,126,955)	(HL 3605)
2000	1,685,393	0	2,231,205	(545,812)	(HL 3617)
2001	2,065,642	0	2,348,465	(282,823)	(HL 3609)
2002	4,907,303	0	3,180,363	1,726,940	(HL 3613)

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- Jeffrey Folkman sent email to Chuck Klink, "as a follow up to a portion of our discussion today, you had mentioned that the tax indemnity that I had added to the Agreement was subject to Reg. Section 1.6011-4. The fact of the matter is that the regulation would not cover the tax indemnity as I drafted it. The focus of the contractual protection portion of the regulation comes into play if the taxpayer is entitled to the return of fees paid by the taxpayer - clearly not our situation. In this connection, the following is a portion of the preamble of the Treasury Decision through which the regulation was made final: Commentators indicated that it is inappropriate to require the reporting of a transaction for which the taxpayer obtains tax insurance. Other commentators suggested that the contractual protection factor would require the reporting of numerous non-abusive types of transactions, such as legitimate business transactions with tax indemnities or rights to terminate the transaction in the event of a change in tax law. In response to these comments, the IRS and Treasury Department changed the focus of the contractual protection factor to whether fees are refundable or contingent. However, if it comes to the attention of the IRS and Treasury Department that other types of contractual protection, including tax insurance or tax indemnities, are being used to facilitate abusive transactions, changes to the regulations will be considered." (HL 3595)

On August 20, 2003

- Alice Wendland sent letter to Michael Tricarichi on Fortrend International letterhead, "enclosed please find the account opening forms for Rabobank International. You will need to fill in the spaces pertaining to the Officers and Directors. Please sign...where indicated in six places and return the originals directly to Kate Granville at Rabobank in the enclosed FedEx envelope, with a courtesy copy to me in the enclosed FedEx envelope. If you have any questions, please feel free to contact me directly." (HL 406) The account opening forms were for West Side Cellular. (HL 407)
- Chuck Klink replied to Jeffrey Folkman's email, "just wanted to let you know that I did receive this message by email when you sent it yesterday since I saw that you were kind enough to follow up with a fax copy. I am still speaking with my client about the remaining open issues on the agreement and will get back to you as soon as we have a more definitive response on those items. As I mentioned, I may circulate an interim draft of the SPA leaving such unresolved items open for the moment but need to obtain clearance from my business people before I can release such an interim draft." (HL 3596)
- Ray Turk sent email to Jim Tricarichi, "Outside the scope of reviewing the income taxes associated with the events surrounding the stock transaction we have been discussing, I wondered if you wanted us to review any of the excise taxes that pertain to cell time charges in some states....You would probably only be concerned about it from West Side's perspective prior to the stock transaction..." (PWC-WS 923)

On August 21, 2003

- Jeffrey Furman sent email to Mike Tricarichi re: SPA for West Side by Nob Hill, "To help move the sale along, please review and respond to the following items: 1) Has the Beachwood Lease Assignment been fully signed? If so, please provide me with a copy. If not, please complete as soon as possible and then provide me with a copy. 2) In connection with the sale of the Cellnet customer list, it seems to me that Cellnet should have sold it first to a related entity and then the related entity sold it to the third party. What is the lowest purchase price that can be supported for the sale to the related party, and so that we can document the sale, who is the related party? 3) I assume that LXV Group, LLC purchased Cellnet's furniture, fixtures and equipment along with the Lease Assignment. What was the final purchase price? This sale should be reflected in the 2003 tax calculations and the Closing Balance Sheet. 4) Has the IRS check been cashed yet? 5) We should document Cellnet's loan to you. On what dates did you take

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advances and in what amounts? Have any repayments been made and, if so, on what dates and in what amounts? This loan will need to bear interest... 6) The Closing Balance Sheet that Jim has prepared will need to be updated to reflect all transactions through the closing and Cellnet's cash balances as of the closing. 7) Have Cellnet's collection actions been transferred to a related entity and what is the purchase price for this assignment and who is the related entity? 8) Who provided the \$50,000 that is being held by Buyer's attorney pursuant to the Letter of Intent? 9) What happened to the lease in Columbus? I appreciate your attention to these matters and look forward to hearing from you about them." (HL 3594)

- Mike Bittner sent email to Jim Tricarichi and cc to Alice Dill and Steve Block, "It was a pleasure speaking with you today. We appreciate the help you are providing to get this deal closed as quickly as possible. The following summarizes the issues that need to be addressed right away": 1) "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." 2) "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." 3) "Regarding the shareholder loan - as an accommodation to you, we will issue a check to Michael at closing for the amount owed; he will then immediately endorse it to the Company and give it to us, thus satisfying the loan." 4) "I have attached a side letter for your signature which amends the "Other Negotiations" clause of the letter of intent to extend the no shop provision to September 15, 2003. Please sign this letter and fax it directly to Alice..." (HL 2519)
- Patrick Mullins (Fortrend) sent email to Kate Granville, "I just wanted to check in with you, to be sure you received my email request to forward a Rabobank brochure, etc., to Jeff Folkman in Cleveland, Ohio. Please let me know if you were able to get that in today's mail." (HL 3593)
- Chuck Klink sent email to various parties, "Attached please find a clean and a redlined version of a revised draft of the SPA for the Cellular (CellNet) transaction. Although Jeff Folkman and I still have agreed that we still have some open issues to discuss and resolve, I wanted to circulate this interim draft reflecting what I believe to be matters that we have resolved or have come close to resolving so far. My view is that the following are some of the key remaining open issues to be resolved between the parties, with some commentary and suggestions from me included below: (i) "Seller's comment requesting a Buyer minimum net worth test in Section 5.2(b), which is supposed to provide a source of funds for indemnification payments to Seller. Buyer does not feel that such a requirement is appropriate or necessary. I also wonder why such a requirement would not be mutual so that Seller would also have to provide a similar designated source of funds to insure Seller's indemnification obligations to Buyer. (ii) Seller's comment requesting new covenants from Buyer and Company in Section 5.2(c) and 5.3 regarding Buyer and Company engaging in transactions subject to the new regulations (1.6011-4). One potential solution here to help alleviate concerns about the treatment of this transaction under the new regulations is for Seller to obtain a legal opinion from a counsel of their choice regarding such issues. We might be able to suggest some names of law firms to render such an opinion if you need us to do so. (iii) Seller's demand for a specific tax indemnification in a new Section 10.3(iv), for which Seller wants no dollar limit on that indemnification as per Seller's proposed new clause (ii) at the end of Section 10.4 of the Seller mark-up of the SPA dated August 15<sup>th</sup>. This is simply not acceptable to Buyer for several reasons that I have already

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discussed with Jeff Folkman. We are happy to explain in greater detail why this just will not work from our end. Please note that Buyer has agreed to satisfy and discharge this obligation of Company for taxes in calendar year 2003 as one of the ongoing obligations of Company. Failure to do so would be a breach by Buyer of the SPA as it is drafted even without the requested change; and (iv) Accounts receivable listed as assets of the Company in the July 31, 2003 balance sheet. If Seller can provide more detailed information about such A/R, Buyer is willing to discuss the possibility of purchasing those accounts receivable at a heavily discounted price to be negotiated. Feel free to contact me once you have had a chance to review the attached. We are ready to discuss these matters further so that we can come to a solution." (HL 3400) (3:06pm) Jeffrey Folkman forwarded this email to Timothy Johnes and Ray Turk at PWC, "per our discussion".

- Jeffrey Folkman sent email to Mike Tricarichi, "The red-lined version of the Stock Purchase Agreement that Klink circulated earlier this afternoon compared his revised version of the Agreement with his original version. Accordingly, I can not tell how he dealt with the changes we suggested. Attached is a red-lined version that compares Klink's revised version to our version. I look forward to any comments you may have." (HL 3350)

The redlined version had the following items noted by examiner. Section 6.1(h) (dealing with the establishment of Company and Seller accounts at Rabobank) had a comment prepared by HLP: Why is this necessary? Why not permit the funds to stay where they are - any buyer causes the funds to be transferred to whatever account is appropriate - why should seller assume the risk of Rabobank being solvent. This comment was crossed out and replaced with the following comment, "To discuss mechanics of this with seller". (HL 3369)

The redlined version also contained a section 5.2(c) that stated, "After the Closing, Buyer shall not cause Company to engage in or be a party to any transaction subject to Reg. 1.6011-4" (requirement of statement disclosing participation in certain transactions by taxpayers) Also, a section 5.3, "After the Closing, Company shall not engage in or be a party to any transaction subject to Reg. 1.6011-4". Both of these sections were crossed out. (HL 3368)

The redline version also contained a Section 10.3 (Indemnifications by Buyer) (iv) that stated, "any and all income and franchise taxes, interest and penalties, assessed against Seller or his spouse or any of Seller's affiliates that in any way relate to, or are computed by reference to, directly or indirectly, the operations, taxable income or assets of Company during 2003". This statement was crossed out. (HL 3374)

- Ray Turk sent email to Rich with update, "Below is an updated version of the Tricarichi stock agreement. We received it from Jeff today as part of following up with him as you had asked. Jeff indicated that the deal is moving along a little slower than anticipated, but it isn't due to lack of effort on anyone's side. It is just that both sides are asking each other questions. Jeff asked that we let him know whether we have any agreement changes or not. He knows you do not come back until Monday..."

"Here is an update on items that Tim and I covered:

- Tim also felt the settlement was taxable income, and we revisited this topic with Jeff. Jeff will also double check with Randy Hart, but was confident Randy would conclude taxable as well. He'll let us know if Randy feels differently, and I left a message with Jim Tricarichi so he knows the conclusion hasn't changed, and told him to call me if he had any questions on anything.

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- With Jeff, we revisited Tim's point re: a provision that prevents a consolidated tax year cut off, and your point that Mike should be indemnified against all taxes. Jeff indicated that a consolidated return cut off point is in the agreement, and that he feels Mike is clearly covered/indemnified against any taxes which are presale related, and which West Side has disclosed to the buyer. The only taxes he would not be indemnified for would be those which are a real and proper presale liability and exceed those expressed. Tim and Jeff also discussed that the buyer seems to be hesitant on providing certain assurances regarding "listed transactions". Knowing that Mike is properly indemnified, it did not seem that this hesitation should become a deal breaker.
- I reminded Jeff that Mike should be expressed as a NV resident in any documents coming out of the purchase agreement process..." (PWC-WS 0066)
- Some of the handwritten notes on Stock Purchase Agreement draft dated 8/21/03,:
  - Section 8.2: Seller shall provide to Buyer....reasonable cooperation and assistance in connection with the preparation of financial statements, tax returns and annual reports: "Why do we want to do this, when they are doing an aggressive transaction?" (PWC-WS 793)

On August 22, 2003

- Rich responded to email from Ray & Tim, "Thanks for the update. My concern about Mike's protection re: taxes: If the IRS assesses a tax relative to the '03 year (income, accumulated earnings, personal holding, etc.) (and associated penalties and interest), would this be a "post sale" tax as defined in the agreement? In other words, would an '03 tax be assessed at a point in time post sale? Or would it be assessed for the entire year? I'm not sure of the technical interpretation. I just want to ensure that the agreement is clear that any tax related to '03 ...is clearly the responsibility of the corporation/new owners, and not Mike." (PWC-WS 0215)
- Jeffrey Folkman sent an email to Chuck Klink, we revised the draft of our opinion that you gave to me. The revised version and a black-lined copy are attached. Your opinion is fine. (HL 3337)
- Chuck Klink responded to Jeffrey Folkman's email, "Thanks I will take a look at your revised opinion and let you know if I have any comments or questions." (HL 3337) In Section K of the draft, "...we expressly disclaim any opinion as to the federal, state, local or foreign tax consequences of the transactions provided for in the SPA and related documents...we understand that all parties to the SPA and their respective related parties have sought and obtained independent advice regarding the federal, state, local or foreign tax consequences of the transactions provided for in the SPA and related documents..." (HL 3341)
- Randy Hart sent an email to Chuck Klink, "If you are ready to discuss the Agreement, let me know when would be a good time on Monday. Jeff and I have spoken with the client and we believe that we are ready to discuss any remaining issues and get this thing done." (HL 2596) Chuck Klink responded on August 25<sup>th</sup> that he should be able to do a call on Tuesday, August 26<sup>th</sup>. He was in jury duty on Monday and is "on-call" for jury duty for the next few days.
- Chuck Klink sent an email to Randy Hart and Jeffrey Folkman, "Thanks Randy. Sorry that I did not respond earlier to you and Jeff since I know that he also left me a voicemail earlier today. It has been a bit hectic for me today on other matters. As for timing of closing, I suspect that we are looking at early September due to the availability of key people at Rabobank on the financing side. I actually have to report to jury duty on Monday morning the 25<sup>th</sup>, which I hope I will be able to get out of in one shot that day...Maybe we can try a call on Tuesday afternoon. ..."

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On August 22, 2003

- Written Consent of Sole Director of Nob Hill Holdings adopted resolution to authorize and approve the Stock Purchase Agreement to purchase all the issued and outstanding shares of stock of West Side Cellular. (WC 00205)
- John McNabola executed the consent as Director.
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution to negotiate, execute and deliver the Promissory Note in favor of Utrecht-American Finance Co in an amount sufficient to satisfy the obligations under the Stock Purchase Agreement, along with a Security and Assignment Agreement, pursuant to which the Company pledges certain collateral to UAFC as security for the Note. (WC 00208) John McNabola executed the consent as Director.
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution for Company to open an account at Rabobank in New York and to designate the Bank as a depository of funds of the Company and to appoint authorized representatives with respect to the account: John McNabola and Alice Dill Wendland. (WC 00211)
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution for Company to open an account at Business Bank of California in San Francisco and to designate the Bank as a depository of certain and specific securities and/or funds of the Company and to appoint authorized representatives with respect to the account: Sean McNabola and Alice Dill Wendland. (WC 00211)

On August 24, 2003

- Ray Turk sent email to Rich and Tim, "I had a chance to review the updated agreement which Jeff Folkman sent to Mike late last week. I have made some comments and suggested changes within the document to address Rich's point below, as well as some other items I thought were worthwhile. I thought it made sense to run these by the two of you for discussion tomorrow, and if they have merit we can take them forward with your thoughts....Two questions that I have are related to Tim's earlier consolidation cut-off risk point, which section 4.1(m) addresses. My first question is whether the fact that a corporation purchases the stock of West Side automatically creates a cut-off and consolidation event because it is the first time West Side has had a parent? I assume not, but since I was not sure from experience I thought I would ask. In my previous experience, any time a parent of one consolidated group purchased the parent or a corporation within another consolidated group, there was a cut-off at that purchase date. The other question was do we really care if there is a consolidated cut-off, especially if Mike is indemnified as he is under Article 10 of the agreement. I think it would be in everyone's best interest if there weren't a cut-off, but it seems to me they should be more concerned with this point, and Mike Indemnified." (PWC-WS 216)

On August 25, 2003

- Tim Lohnes sent email to Ray and Rich re the conference call with Jim Tricarichi at 4:00. "A few issues on the agreements for you to think about before the 4pm call: (PWC-WS 706)
  - o Section 3.1(i): Are we sure that there is no possibility that the income to be reported by West Side during 2003 was "earned" by West Side prior to 2003? Based upon the facts as I know them, I don't think so, but wanted to make sure we had at least considered the possibility.
  - o Section 3.1(t): West Side will probably be an investment company under the IRC rules relating to 351 transactions because most or all of its assets will be cash. Does this have an adverse impact on this representation?

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- Section 3.1(y): Are we sure we want to make this representation "through the Closing Date?" I am concerned that the Company could participate in one of the type of transactions listed in the representation on the Closing Date, but after closing itself. Also in this section, can this be read to include our knowledge of the transaction the Buyer plans to undertake outside of the four corners of the agreement we are reviewing? If it can, I am concerned that there could be a "Loss Transaction" or a "Transaction with a Significant Book Tax Difference" that could be undertaken pursuant to this overall plan.
- Section 4.1(m): Should we ask for a Buyer representation that they will not amend, adjust, or carryback into any of the prior West Side tax returns while the Seller was the owner. In other words, what would happen if the Buyer reported the income as earned while Mike was the shareholder, and then reported the Company as liquidated? Unlikely, but possible.
- Section 8.2: Why do we want to do this on a go forward basis when we believe they may be undertaking a very aggressive tax motivated transaction?"

On August 26, 2003

- Randy Hart sent email to Jeffrey Folkman, Bob Markus and Josh Knerly, "Here's where we stand. I have physically searched every file cabinet and drawer in our suite. I have gone through the room with the corporate record books. I have gone through the Cellnet files that we have both here and off-site. I have not come up with the book. In the next few days I will try four more places: Carla's office, Charlie's files, Cellnet's Beachwood office and Mike's house in Chesterland. The only one of those that looks of interest is Mike's house. Apparently, corporate record books for some of Mike's other businesses have recently been found there, including VCI Communications. I am not that optimistic though. Mike tells me that the only thing that would be there, if it is there at all, would be the stock certificate, he highly doubts whether there would be a corporate record book because he doesn't recall seeing one. He also doubts that the stock certificate is there, but he does have some recall of having all of his stock certificates for all of his various entities in one place. He thinks that it is worth the chance." (HL 2594)
- Jennifer Garberich sent email to Bob Markus with attached draft of a Lost Record Book Affidavit. "Jeffrey asked me to draft a Lost Record Book Affidavit and present it to you for review, as it would be of interest to you as you deal with the approval of our Opinion for the upcoming West Side Cellular transaction". (HL 2591)
- Jennifer Garberich sent email to Jeffrey Folkman, Lizbeth Wright with revised Secretary Cert and a "pretty rough" draft of the Opinion Certificate for them to look at and complete. (HL 2583)
- Ray Turk sent email to Rich Stovsky, "Tim and I spoke with Jim today to primarily get an update from his end. His main thrust was a frustration that the Buyer has indicated that they can not close for a couple of weeks due to not being able to get the financing set until then.... (PWC-WS 273)

On August 27, 2003

- Jennifer Garberich sent email to Jeffrey Folkman, Lizbeth Wright and Bob Markus with attachment: Lost Record Book Affidavit. (HL 2564)
- Jim Tricarichi sent email to Mike Tricarichi and cc: to Jeffrey Folkman and Randy Hart with copy of latest Sales Calculation and message, "This is the latest calculation - Fortrend does not have these numbers". (HL 2504)



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- Jeffrey Folkman sent email to Jim Tricarichi, "Have you put together a draft of the closing balance sheet?" (HL 2501)
- Jim Tricarichi sent email to Jeffrey Folkman with copy of balance sheet and message, "This is not final". (HL 2501)
- Steve Block sent email to Jim Tricarichi, "Can you let me know when the extension letter is being sent in to Alice at fax #415-986-5511. I will also call you later in the day to let you know about the closing date." (HL 2499)
- Jeffrey Folkman sent email to Jennifer Garberich, "Please prepare resignations for Mike and Barbara (if you have not already done so). Also, please commence to prepare (if you have not already done so) the various exhibits to the SPA. You should email Mike and Jim Tricarichi for information if Randy or I do not have it". (HL 2491)
- Jeffrey sent email to Jennifer Garberich and Randy Hart, "I have a signed copy of the Assignment and Assumption of Lease dated August 14, 2003, pursuant to which CellNet assigned its interest in the 23432 Mercantile Road premises to LXV Group LLC. The document was signed by Scott Ginsburg, Treasurer. Seems to me that we need a resolution confirming that Scott was the Treasurer. Randy—do you know anything about this?" (HL 2494)
- Jennifer Garberich sent email to Jeffrey Folkman, "I don't know anything about Cellnet's record book. If he has been elected, do we need another resolution to confirm it or would an incumbency certificate be better?" (HL 2494)
- Jennifer Garberich sent email to Jeffrey Folkman with copy of the resignations. "Looks like the only exhibits we are responsible for are proforma calculations and tax return. Should I just ask the guys to send them or what???" (HL 2491)
- Lizbeth Wright emailed Jeffrey Folkman in response to email questions from Jeffrey on what searches should be done on M Tricarichi. "Typically when we are representing the Seller, we order UCC, tax and judgment lien searches to make sure our client can make the required reps (or in most cases, so we can schedule the exceptions to them). There are not searches, per se, that will tell you if there are legal restrictions on or impediments to the closing of the deal. Only searches that go to title of a company's assets. Buyers close around liens all the time, and often assume the debt related thereto, therefore, liens of records do not necessarily impede closing. I see no need to search Tricarichi. He would know if there were any title impediments or challenges to his ownership of the stock, and that's the only searchable issue underlying a rep that he makes." (HL 2486)

On August 28, 2003

- Randy Hart sent an email to M Tricarichi, "I heard from Fortrend today. The call was actually to find out where Mike's signature was on the extension. They are really nervous. Anyway, I was informed that Rabobank has approved the financing. So we are good to go on the 8<sup>th</sup> and 9<sup>th</sup>. (HL 2485)
- A First Amendment to the Letter of Intent was executed. The letter referenced the Letter of Intent dated July 22, 2003 between Nob Hill Holdings and West Side Cellular. This letter shall serve to amend the paragraph entitled "Other Negotiations" of the Letter of Intent by extending the "exclusivity period referred to therein through and including September 15, 2003." All other conditions and provisions of the Letter of Intent shall not be amended or otherwise modified and shall remain in full force and effect. (HL 0057)

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- Jeffrey Furman sent email to Chuck Klink, "Randy and I would like to speak with you tomorrow afternoon to discuss open items". He also hopes to send by tomorrow morning a revised draft of the Agreement that will respond to a few of our open items and raise additional minor items. (HL 2484)
- Ray Turk sent email to Jim Tricarichi, "Since you were out of the office this afternoon, I wanted to leave you an email update relative to the agreement discussion points we discussed with Jeff Folkman today. There were a few points that we made that Jeff felt were worth considering, and he would add those to the next version of the agreement after he thought thru them. I do not think it is anything significant that you would need me to put into detail in this note, and more effective/efficient for you just to see any change he actually makes. There were two points from the discussion though, that are worth mentioning in this note, and if you need to discuss these further, please just call. First, the interest expense incurred on the federal excise tax assessment should be deductible. We are comfortable with that conclusion without doing research. Let us know if you would like us to document our conclusion or research it at all. Second, I thought there was a 2002 Dublin city net profits return technically still due for West Side that you would want to file to be in compliance with the Seller provision section 3.2(i). You may have already done that, or were planning on it, but if not it would be prudent to do so. We did not have knowledge of any other back year returns, which had not been filed, but if you would want us to review any of that matter for you let us know." (HL 344)
- Jennifer Garberich sent Jeffrey Folkman an email with attachments of resolutions drafted for West Side Cellular: Approval of Lease Assignment; Approval of Bill of Sale with LXV; and Instruction for officers to cooperate with SPA Approval of Code of Regulations. She also stated, "By the way, I have heard more sordid details about Randy and the history of this record book and I am concerned that Carla will not be willing to sign the affidavit we prepared." (HL 2476)
- Chuck Klink sent email to Jeffrey Folkman, "I will be here in the SF office of Fortrend tomorrow and will make myself available for a call about anything that you wish to talk about...I have a few answers from our end too so that I think we are getting pretty close to final on things overall." (HL 2314)
- Patrick Mullins sent email to Jeffrey Folkman with revised closing document checklist. (HL 2316)

On August 29, 2003

- Jeffrey Folkman sent email to Chuck Klink with a revised version of the SPA and a black-lined copy that shows the changes made from your prior version. (HL 2312)

In section 3.1(y) of the black-lined version, the following statement was marked out, "Neither Company nor Seller has been advised by their respective professional advisors that the transactions contemplated by this Agreement (separately or in combination) constitute direct or indirect participation by them in a Listed Transaction, ..." The statement was replaced with, "During the period commencing on January 1, 2003, and continuing through the Closing Date, Company has not directly or indirectly participated in any Listed Transaction, ..." (HL 2335)

Section 4.1(n) was added, "Buyer has no intention to cause Company to, directly or indirectly, engage in or be a party to any Listed Transaction, ..." (HL 2337) Statements about the Seller's and Buyer's net worth were added. (HL 2339) A statement was added, "Company shall not amend its tax returns for any period that ends on or prior to the Closing Date if the effect of any such amendment shall result in Tax being imposed on Seller". (HL 2340)

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ADMIN\_TRI01344

TRICAR-NV0009500

APP0670



<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- Scott Ginsburg (Cellnet) faxed cover sheet to Randy Hart, "I found these documents last night while I was packing some of Mike T's files for storage. I thought you might be interested in them". The documents faxed included: Receipt from State of Ohio for filing fee for West Side Cellular dated 3/18/83; State of Ohio certification of Records of Incorporation filed on 3/14/88; Articles of Incorporation; Appointment of Statutory Agent dated March 10, 1988; Stock Certificate for 100 shares of stock dated March 31, 1988. (HL 314)
- Scott Ginsburg emailed Randy Hart with message, "Even though I found the original corporate records that I faxed to you this morning, I have not found the corporate record book." (HL 2311)
- Randy Hart emailed Jeffrey Folkman with attachment of the Corporate record book. (HL 2310)
- Handwritten notes from PWC in regards to draft SPA
  - Folkman to decide if PWC needs to review any further drafts - told Jim Tricarichi
  - The 8/29 draft was the last we rec'd. Folkman took our comment under consideration but we had no further involvement with later drafts (PWC-WS 650)

On August 31, 2003

- The balance sheet dated August 31, 2003 reflects the following assets and liabilities (WC 00102). Also provided as a comparison are the assets and liabilities from the tax return balance sheets for years ending 12/31/1997 through 12/31/2002. (WC 00115; HL 3612)

	199712	199812	199912	200012	200112	200212	8/31/2003 *
<b>Assets:</b>							
Money Mark-DLJ Pershing							39,949,373.12
Cash	107,600	44,160	-161,844	-99,438	142,655	42,074	
Accounts Receivables, net	1,362,963	1,575,255	863,899	752,157	647,926	577,202	
Notes Receivable				0			577,777.77
Receivable - Escrow Acct				0			50,000.00
Inventories	96,824	121,930	131,081	161,030	95,990	46,656	
Buildings	277,445	284,445	290,695	290,695	297,021	299,682	
Less accumulated depr	-109,708	-148,526	-171,840	-192,302	-210,921	-222,983	
Other Assets	1,069,653	859,057	647,985	435,188	279,930	250	
<b>Total Assets</b>	<b>2,804,777</b>	<b>2,736,321</b>	<b>1,599,976</b>	<b>1,347,330</b>	<b>1,252,601</b>	<b>742,881</b>	<b>40,577,150.89</b>
<b>Liabilities:</b>							
Accounts Payable	3,482,653	3,702,046	3,689,916	4,057,409	4,221,989	2,031,277	
Notes Payable	165,443	91,178	36,111	12,365	12,365		
Other current liabilities	71,923	59,956	78,482	36,731			
Accrued Taxes					46,194	26,009	
Employee Withholdings					24,421	23,286	
Accrued Workers Comp							2,133.94
Accr'd Personal Prop Taxes							3,645.81
<b>Total Liabilities</b>	<b>3,720,019</b>	<b>3,853,180</b>	<b>3,804,509</b>	<b>4,106,505</b>	<b>4,304,969</b>	<b>2,080,572</b>	<b>5,779.75</b>
<b>Capital:</b>							
Capital Stock	5,000	5,000	5,000	5,000	5,000	5,000	5,000.00
Retained Earnings	-920,252	-1,121,859	-2,209,533	-2,764,175	-3,057,368	-1,342,691	-1,342,691.42
Net Income							41,909,062.56
<b>Total Capital</b>	<b>-915,252</b>	<b>-1,116,859</b>	<b>-2,204,533</b>	<b>-2,759,175</b>	<b>-3,052,368</b>	<b>-1,337,691</b>	<b>40,571,371.14</b>
<b>Total Liabilities &amp; Capital</b>	<b>2,294,767</b>	<b>2,736,321</b>	<b>1,599,976</b>	<b>1,347,330</b>	<b>1,252,601</b>	<b>742,881</b>	<b>40,577,150.89</b>

\*Except for cash and cash equivalents, all business assets and related liabilities were sold to LXV Group on June 11, 2003.

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ADMIN\_TRI01345

TRICAR-NV0009501

APP0671

<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- Alice Dill Wendland executed a power of attorney for Tim Conn to be her Attorney-in-Fact, to execute such documents and to make such transfers of funds and to effectuate such other financial transactions as he may deem necessary or appropriate with respect to any and all bank accounts of West Side Cellular or Nob Hill Holdings. (WSC-CK-28)

On September 1, 2003

- Chuck Klink sent email to Jeffrey Folkman and Randy Hart with cc: to Alice Dill and Jeffrey Furman with copy of "revised (and near final?) Stock purchase agreement for West Side Cellular Transaction". "I believe that we only have a few numbers to confirm now, including the required net worth for buyer and seller, the Purchase Price, the Company cash and the obligations of the Company to be assumed by LXV Group on or before closing. We also need seller to complete the various disclosure schedules, even if some of the schedules will merely say nothing or none on them." (HL 2213)

On September 2, 2003

- Secretary of State for the State of Ohio certified that West Side Cellular was incorporated on March 14, 1988 and is currently in good standing. (WC 00161)
- Jeffrey Folkman sent email to Jim Tricarichi and Mike Tricarichi with an attached "revised version of the SPA as prepared by Klink along with a black-lined version that shows the changes made from the most recent version prepared by me. There is only one issue of any significance that is open and I believe that it will be resolved with a day or two. The issue relates to the minimum net worth of the buyer for 5 years after the closing. Buyer has offered \$1 million and stated that it offered this during the negotiations. This is actually a bankruptcy issue and I will be discussing it with a bankruptcy partner of mine later today. Over the next several days we will be putting together the schedules attached to the Agreement. Also, I will need to speak with Jim later today to review the details of the closing balance sheet." (HL 2111)
- Jeffrey Folkman sent email to Jim Tricarichi and Mike Tricarichi with a list of questions on matters regarding the Stock Purchase Agreement that were raised by Jennifer Garberich. The questions included such items as wire instructions for the account where the sales proceeds will be deposited; updated Closing Date balance sheet and statement of operations; complete copies of Cellnet's 2002 Federal and Ohio income tax returns, etc. One of the items included a request for a copy of the Agreement pursuant to which CellNet sold its tangible personal property, trade name registration and accounts receivable to LXV. "Has the purchase price been paid to CellNet yet? What was the purchase price?" (HL 2016)
- Mike Tricarichi responded back to Jeffrey Folkman with answers to his questions. The balance of the purchase price for the assets of Cellnet will be paid on Friday. (HL 2080)
- Larry Dubin sent email to Jeffrey Folkman with copy of a Termination and Release that they previously used for the other employees terminated on June 10, 2003. (HL 2082) The sample Release had the following heading: "The Company advises you to consult an attorney before you sign this release - Release and Covenant not to sue - Scott M. Ginsburg". In consideration of \$968,050.20, to be made on September 5, 2003, the employee agrees to completely and forever release and discharge West Side Cellular from any claims, demands against West Side and to completely and irrevocably terminate any employment relationship with CellNet as of July 31, 2003. The employee agrees that the payment is in consideration of the Release and is not compensation for employment. (HL 2083)

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ADMIN\_TRI01346

TRICAR-NV0009502

APP0672



<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- Jeffrey Furman sent email to Jennifer Garberich and Liz – the lost share certificate was found. However, we still need the lost recordbook affidavits. He also sent copy of the latest Closing Checklist as prepared by the Buyer and asked them to prepare the schedules and closing items that Seller is responsible for. The closing is set for next Tuesday with a pre-closing next Monday...we need to complete everything by this Friday. (HL 2103)
- Jennifer Garberich sent email to Jeffrey Folkman with results from the UCC searches for West Side Cellular. "In addition to the one that matches up with the OH SOS lien we already saw, there are several others that refer to a security agreement which is not attached...They appear to be expired (filed in 1996) but I've made inquiry with the service company to see why we were given copies. There are also printouts about filings from 1990 (Cellulease) and 1993 (Mitsubishi Electronic). Again, I think expired. Just wanted to let you know in case you would want to ask the client about it while I wait for info from CSC. (HL 2101)

On September 3, 2003

- Included as an Exhibit to the Stock Purchase Agreement was a schedule reflecting the cash balance as of 9/3/2003 and the net cash payout to Mike Tricarichi. (WC 00104) The computation is as reflected below:

	PWC-WS 822	WC 00104	HL 2882
Net Income per Books	43,030,786.94	41,909,062.56	41,909,061.56
50% Entertainment Expense		316.03	316.03
Depreciation		4,204.05	4,204.05
Bad Debt		-20,000.00	-20,000.00
Total M-1 Adjustments to Income		-15,479.92	-15,479.92
Taxable Income before NOL		41,893,582.64	41,893,581.64
NOL Carryforward	-1,257,638	-1,257,638	-1,257,638
Net Taxable Income	41,733,148.94	40,635,944.64	40,635,943.64
Federal Tax (35%)	14,620,602.13	14,222,580.62	14,222,580.27
State Tax – First \$50,000 (.51%)		255.00	255.00
Over \$50,000 (8.50%)	3,550,717.66	3,449,805.29	3,449,805.21
Local Tax	613,715.88	597,321.26	597,321.24
State & Local Tax reduction	-1,457,551.74	-1,416,583.54	-1,416,583.51
Net Taxes	17,327,483.93	16,853,378.63	16,853,378.21
Fortrend premium (31.88%)	5,523,135.50	5,372,014.44	5,372,014.31
Cash balance as of 9/3/03	40,445,755.32	40,571,371.14	40,571,386.14
Net cash payout to Mike Tricarichi	34,922,619.82	35,199,356.70	35,199,371.83

- Jeffrey Folkman sent email to Larry Dubin thanking him for sharing the Release with him. "However, what we need is much simpler. Please see the attached Resignations. Please have them signed and dated on Friday and faxed and messengered to me." (HL 2071) There were three resignations attached – for Lawrence Dubin, Scott Ginsburg, and Patrick Scaravilli. They stated "I hereby resign as an officer of West Side Cellular, Inc."

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- Jennifer Garberich sent an email to Jeffrey Folkman with questions, "What is this about??? These guys are not officers of West Side Cellular, according to the record book. Which is wrong?? This or the record book????? This affects the lost record book affidavit that says Barb and Mike have been the only officers for the history of the corporation." (HL 2065)
- Jim Tricarichi sent email to Jeffrey Folkman with spreadsheet showing the financial information as of 9/3/03. The only item that will change is the interest on the DLJ account from 9/3/03 to 9/9/03. (HL 2052)
- Jeffrey Folkman sent email to Chuck Klink with spreadsheet showing the purchase price calculation (estimated), closing balance sheet (estimated) and income statement through closing (estimated). Please note that interest income earned through the closing date will change. (HL 2044) In the margin of the purchase price spreadsheet was the following note: (HL 2045)

16,000,000	Original tax calc
5,100,000	Fortrend premium
31.88%	Fortrend's premium %

- Chuck Klink sent email to Jeffrey Folkman. "Thanks for the spreadsheet with the numbers. I have forwarded it to Jeff Furman and Mike Bittner for their review and comment. I will let you know what they say. One question that I think that they will have is why the first item, Net Income, dropped from \$ 43 MM and change to about \$41.9MM." He also attached the Non-Confidentiality Certificate prepared by Rabobank that everyone has to sign, "both clients and counsel, as per Rabobank's normal procedures on these deals". Chuck said he would call Jeff on Thursday, as they had discussed, to go through the Stock Purchase Agreement again. Jeff forwarded Chuck's email message to Mike and Jim Tricarichi to answer his question on the drop in net income. (HL 2034)

On September 4, 2003

- Secretary of State for State of Delaware certified that Nob Hill Holdings was duly incorporated and is in good standing as of September 4, 2003. Secretary further certified that Nob Hill Holdings was incorporated on the 15th day of November, that the franchise taxes have been paid to date, and that the annual reports have been filed to date. (WC 00204)
- Randy Hart sent email to Chuck Klink regarding the upcoming visit to San Francisco for the closing. "Let me know whether you anticipate that you and the Fortrend people will be dressed in suits or whether you will be business casual." Chuck responded that it is indeed business casual. "Also, when you show up, just go to Bittner & Company in Suite 1520 at 388 Market Street. Mike's assistant Elaine will tell you which suite the conference room is in for the closing". (HL 1893)
- Chuck Klink sent email to Jeffrey Folkman and Randy Hart with a slightly revised draft of the Stock Purchase Agreement for the West Side Cellular transaction. The document "essentially contains a few corrections and changes that Jeff Folkman and I discussed this morning as well as some rough numbers based upon Jim Tricarichi's latest spreadsheet. The items that remain open are: 1) "We still need to confirm the final numbers for the Cash at Closing, Purchase Price and the Seller Loan amount, all of which I expect to change slightly based upon relatively small amounts of accrued interest up to the Closing Date but we should be pretty close now on those numbers"; 2) "We also need a few bits of information for the disclosure schedules and confirmation as to the amounts and treatment of the Assigned Company Liabilities..."; 3) "As soon as possible, Andrew Sherman at Rabobank needs Seller's and Hahn Loeser's signed copy of the Non-Confidentiality Certificate as well as the resignations of the directors and officers of West Side Cellular. As per express agreement with Rabobank, the resignations shall be strictly held in "escrow" by Andrew Sherman as counsel to Rabobank and shall only be released once the Purchase Price wire goes out to Seller." (HL 1894)

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ADMIN\_TRI01348

TRICAR-NV0009504

APP0674



<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Name of Taxpayer</b> West Side Cellular, Inc.	<b>Explanation of Items</b>	<b>Year/Period Ended</b> 12/31/2003

- Jennifer Garbrick sent email to Jeffrey Folkman and Lizbeth Wright regarding meeting this afternoon and other miscellaneous questions. Lizbeth responded that she had put a call into Larry Dubin. "If for some reason he is unreachable today and tomorrow, we may have difficulties filing the trade name transfer before Monday." Jeffrey responded that the Pre-closing is on Monday, actual closing on Tuesday. (HL 2031)
- Jennifer Garbrick sent email to Jeffrey Folkman with three closing documents "which probably need to be reviewed by opposing counsel today so we can make revisions and copies before you leave town". (HL 2024)
- Jennifer Garbrick sent email to Larry Dubin of Cellnet with form for the Assignment of Trade Name "Cellnet" by West Side Cellular to LXV Group. She requested it be signed on page 2 and returned to her by fax as soon as possible so she can get it filed with the Ohio Secretary of State. (HL 2020)
- Jennifer Garberich sent email to Jeffrey Folkman with questions on information for the schedules she was trying to complete. "Also, the bracketed sentence in the Schedule says 'plus accrued interest of \$\_\_\_\_\_'. I don't usually see such references in schedules. Since I know you're worried about that issue anyway, should I omit it?" (HL 2014)
- Jennifer Garberich sent email to Akime Pearson, "Jane Ossege gave me your name as her substitute for coordinating filings at the Secretary of State. I have a Trade Name Assignment which I will send to you tonight in the interoffice mail. I have a check for the filing fee as well. I will include an extra copy which I want the State to date-stamp and return to your courier at the time of filing. Please send that date-stamp and return it to your courier at the time of filing. (HL 1226)

On September 5, 2003

- Jeffrey Folkman emailed Chuck Klink with attached documents for his review in connection with the closing. The Company's two bank accounts are the DLJ/Pershing Money Market account #31V001900 and the Key Money Market account #351521007663. "Mike is the only signer on the Pershing acct. Scott Ginsburg and Mike are the signers on the Key account." He also gave him the wire instructions for the sales proceeds. They are to be deposited into the Pershing account. (HL 1878)
- Scott Ginsburg emailed Jennifer Garberich with "the addresses that you needed from Jim Tricarichi". He provided addresses for Key Bank in Beachwood, Ohio and DLJ Pershing in Jersey City, NJ. (HL 997)
- Jeffrey Folkman emailed Chuck Klink with the bank addresses for Key Bank and DLJ Pershing. (HL 3325)
- Chuck Klink sent email to Jeffrey Folkman, "Thanks Jeff. One other item that I believe I need you to confirm is the total interest accrued on the shareholder loan's principal balance of \$575,000. We need that amount to be able to cut the check from Nob Hill to Michael Tricarichi. I see that Chris sent you the two documents we discussed. Just so you know, Chris Kortlandt's direct dial is ... in case you or your client has any further questions that you need him to answer or need additional information from Rabobank. I was also slightly confused about the wiring information that you gave me since I was not certain whether your client had also opened his own account (separate from West Side Cellular's account) at Rabobank as required by Section 6.1(h) of the Stock Purchase Agreement. Rather than assuming that I understand and being wrong, I would rather ask what may seem like a dumb question about the proposed flow of funds. Are we not having the wire for this purchase price sent to Michael Tricarichi's account at Rabobank and then wired out to his DLJ Pershing Account listed in your earlier email? Let me know." (HL 3325)

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ADMIN\_TRI01349

TRICAR-NV0009505

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<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Name of Taxpayer</b> West Side Cellular, Inc.	<b>Explanation of Items</b>	<b>Year/Period Ended</b> 12/31/2003

- Randy Hart emailed Chuck Klink requesting his cell phone number and the number for Bittner's office in San Francisco. (HL 3311)
- Chuck Klink emailed Randy Hart and Jeffrey Folkman with his cell phone number, Mike Bittner's office number and the main number in Fortrend's San Francisco office. He also stated he would be staying at the Park Hyatt in downtown SF starting tomorrow night. (HL 3311)
- Jennifer Garberich sent email to Jeffrey Folkman, "Here is the date-stamp of the TN Assignment filed today with the OH SOS." (HL 3317) Assignment of the registered name Cellnet was transferred to LXV Group, LLC. The name registration update was filed with the State at 11:36 on September 5, 2003. (HL 3320)
- Jennifer Garberich emailed Jane Ossege, "Attached please find a UCC Termination Statement which must be hand-filed with the Ohio Secretary of State as soon as possible on Monday. I have included in this document an extra page which I want to have date stamped ... There should be no filing fee since it's a termination." (HL3313) The UCC Termination Statement was prepared for West Side Cellular, d/b/a Cellnet. (HL 3314)
- Jennifer Garberich emailed Jeffrey Folkman and Liz Wright, "I just looked at my datebook and realized my OB appointment is right in the middle of the day on Monday, and worse yet, I have to have some lab work too.....Now that Randy has given me the go-ahead on that UCC Termination, I cannot think of anything for the closing that I cannot do from home, so I think I will bring other work home to do in between these appointments and save myself the senseless commute...I will leave my copy of the closing files here on my desk (I copied the record book, too, by the way). I will check my messages and e-mail frequently, including keeping track of that UCC filing." (HL 3312)
- Chuck Klink emailed Jeffrey Folkman and Randy Hart (cc: to Alice Dill, Patrick Mullins, Jeffrey Furman) with a new draft of the SPA with "certain minor changes based upon discussions between Jeff Folkman and I earlier today." He also presented his "short list of some key open items, tasks to be completed before we can close the deal." "1) We still need to obtain the accrued interest on the shareholder loan and to finalize the Purchase Price and the Company Cash amounts based upon the last few days of interest earned on the balance of Company Cash. 2) We need a brief description of the two settlement agreements from Seller in order to be able to complete Schedule 3.2(j)-Material Contracts. 3) Seller is going to have another entity that he owns ("Seller Wire Recipient") open up an additional bank account at Rabobank to which the Cash Portion of the Purchase Price will be sent by Buyer via wire transfer. Chris Kortlandt has already sent the account opening forms to Randy Hart for this purpose. 4) Seller needs to deliver the resignations of officers and directors to Andrew Sherman/Chris Kortlandt at Rabobank, via facsimile, with the express agreement that such resignations will be held in escrow by Rabobank and not be deemed effective until Rabobank effectuates the transfer of the Purchase Price to the Rabobank account of Seller Wire Recipient... 5) Buyer needs that account information for Seller Wire Recipient in order to create the necessary wire transfer instructions from Buyer telling Rabobank to effectuate the wire transfer for the Cash Portion of the Purchase Price." (HL 3213)
- Patrick Mullins sent email to Jeffrey Folkman with copies of closing checklist for Buyer's and Seller's. (HL 3208)

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**ADMIN\_TRI01350**

TRICAR-NV0009506

**APP0676**



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

- Jennifer Garberich sent email to M Tricarichi regarding questions on closing details. She asked for confirmation that he was working on the pro-forma financial calculations and the final tax return. Also, she asked for confirmation for the final amount of closing assets – cash and accounts receivable, material contracts and any other bank accounts. (HL 2102)
- Lawrence Dubin, Scott Ginsburg and Patrick Scaravilli all resigned as officers of West Side. (HL 0250 – HL 0252)
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution to negotiate, execute and deliver the Promissory Note in favor of Moffat International Corp in an amount of \$5,000,000, along with a Security and Assignment Agreement, pursuant to which the Company pledges certain collateral to Moffat as security for the Note. (WC 00238) John McNabola executed the consent as Director.
- Written Consent of Sole Director of Moffat International adopted resolution to authorize, negotiate and execute the request from Nob Hill Holdings for a short-term loan of \$5,000,000. (WC 00250) John McNabola executed the consent as Director of Moffat.
- Rabobank bank account opening forms were completed for West Side Cellular by John McNabola. Mr. McNabola had signature authority pursuant to these forms. (WC 00266)

On September 8, 2003

- A Written Action of the Directors without a Meeting for West Side Cellular was executed. The Corporation's Sole Shareholder is in negotiations with Nob Hill Holdings to enter into a Stock Purchase Agreement. It is resolved that the officers of the Corporation are authorized to take all necessary actions and to execute and deliver all necessary documents to carry out the transaction. (draft - HL 1884)
- John McNabola, as President of Nob Hill Holdings, sent a letter to Michael Tricarichi regarding post-closing items on the purchase of stock of West Side Cellular. (WC 00058) Nob Hill confirmed that subsequent to the consummation of the Stock Purchase, the following amounts will promptly be paid to the Seller: 1) interest accrued in the amount of \$1,076.41 on the balance on deposit in bank account number [Redacted] at Rabobank for the day of September 8, 2003; 2) interest accrued through September 9, 2003 on any deposits in bank account number [Redacted] at Chase NYC, DLJ Pershing Division; and, 3) interest accrued through September 9, 2003 on any deposits in bank account number [Redacted] at Key Bank, N.A.
- A Secured Nonrecourse Promissory Note was executed by Nob Hill Holdings in favor of Moffat International, with an office at 50 Francisco Street, San Francisco Ca, in the amount of \$5,000,000. (WC 00241) Interest shall accrue at the rate of 10% per year. Additionally, Nob Hill (Debtor) shall pay Moffat International (Secured Party) an irrevocable Facility Fee within 5 days of the date hereof in the amount of \$10,000. The Note is secured by the issued and outstanding shares of West Side Cellular (WC 00245) pursuant to the Security and Assignment Agreement executed on same date. The Note and the Security Agreement were executed by John McNabola as President of Nob Hill.
- An outgoing wire transfer request was prepared at First Bank whereby \$5,000,000 was transferred from the Moffat account #7461104043 to Nob Hill's account #21568 at Rabobank. (WC 00256)

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TRICAR-NV0009507

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

# **9. Closing of Stock Purchase Agreement/Merger**

On September 9, 2003

- Stock Purchase Agreement between Nob Hill Holdings, Inc. (Buyer) and Michael Tricarichi (Seller) was executed. Michael Tricarichi was the sole shareholder of West Side Cellular and desired to sell to Nob Hill Holdings all of the authorized, issued and outstanding shares of capital stock of West Side Cellular for a purchase price of \$35,199,371.83. (WC 00069) According to section 2.1, the Buyer will pay to Seller: (1) cash in the amount of \$34,621,594.06 in immediately available funds by wire transfer; and (2) a check in the amount of \$577,777.77 made payable to Seller as an advance to repay the Seller Loan.

Section 3.2(g) (Representations of Seller as to Seller and Company), as of the Closing Date, Company is not engaged in any material business or material business activity; the sole assets of the Company is cash in the amount of \$39,949,373, and the \$50,000 that has previously been deposited by Seller in Buyer's attorney's trust account; and Seller Loan in the principal amount of \$575,000 plus accrued interest of \$2,777.77. (WC 00131) Material Contracts were listed in Schedule 3.2(j) as (1) Settlement Agreement with Verizon Wireless, and (2) Settlement Agreement with Cingular Wireless. (WC 00132) Schedule 3.2(n) listed the bank accounts of Michael Tricarichi. The bank accounts consisted of Rabobank, account # 21577; Chase NYC, DLJ Pershing Division, in Jersey City, New Jersey - account #31V001900; and, Key Bank, N.A. in Beachwood, Ohio - account #35152100753. Rabobank and Chase NYC signatories on account consisted solely of Michael Tricarichi. Key Bank signatories on account consisted of Michael Tricarichi and Scott Ginsberg. (WC 00133)

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(l) (Representations of Buyer), 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 ....

Under 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 5.1(f)(Seller's Covenants), Seller shall cause Company to prepare all United States federal, state and local income, payroll and other tax returns for all periods ending prior to the Closing Date that Company is obligated to file prior to the Closing Date, and to pay all Taxes shown as due on such returns. Seller shall, at the appropriate time subsequent to the Closing Date, prepare and file on behalf of Company all necessary Form W-2's, Form 1099s, payroll tax returns, etc. with respect to each and every individual that was an employee of Company prior to the Closing Date for periods that end on or prior to the Closing Date.

Section 5.1(h), Seller shall cooperate with UAFC, Buyer's financing source, for the purchase of the Shares, with respect to all of UAFC's commercially reasonable requests, including, but not limited to, the execution of a non-confidentiality certificate prepared by UAFC....



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Section 5.1(i) of the Agreement the Seller covenants that he shall provide Buyer with a fully executed copy of the "Beachwood Lease Assumption Agreement" entered into between West Side and LXV Group pursuant to which LXV shall agree to become the new tenant under that certain lease of the Beachwood Premises. LXV will also assume and become fully responsible for all outstanding liabilities.

Section 5.1(j), Seller shall maintain a net worth of not less than \$1,000,000 during the five-year period following the Closing Date.

Section 5.2(a) (Buyer's Covenants), Buyer shall cause Company to prepare and timely file all returns and to satisfy all federal, state and local taxes attributable to income earned during the tax year commencing on January 1, 2003 and for all years thereafter.

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. Buyer shall not cause Company to amend its Tax returns for any period that ends on or prior to the Closing Date if the effect of any such amendment shall result in Tax being imposed on Seller.

Section 6.1(h)(Conditions to Closing): Seller shall deliver to Buyer proof that it has established an account with Rabobank and that all of the ending cash balance (other than the \$50,000 deposit being held in Buyer's attorney's trust account) has been transferred to such Company bank account at Rabobank. Upon confirmation of the wire transfer of the Purchase Price from Buyer to Seller, Seller shall transfer possession and control of such bank account to Buyer, as owner of Company. Such transfer of control over Company's bank account shall be evidenced by delivery of documents described in section 7.2(d).

Section 6.1(j), Buyer shall have been provided a duly authorized and executed copy of the Beachwood Lease Assumption Agreement and documentation reasonably satisfactory to buyer regarding the complete and absolute assignment to, and assumption by, LXV of the Assigned Company Liabilities.

Section 6.1(k), immediately subsequent to Seller's receipt of the cash portion of the purchase price, Seller shall endorse over to the Company, the Seller Loan Advance Check delivered by Buyer to Seller. (WC 86)

Section 7.1, the closing shall take place on September 9, 2003 at the office of Bittner & Company in San Francisco, California. (WC 00087).

Section 8.1: (Pre and Post-Closing Covenants) Seller shall have caused Company to prepare and timely file all tax returns required on or prior to the Closing Date. Seller shall also cause Company to pay all Taxes required to be paid by Company before the Closing Date except taxes required to be paid by Company attributable to income earned during the tax year commencing on January 1, 2003. The Agreement goes into further detail of responsibilities of any tax proceedings, correspondence etc. that might be received attributable to that time period.

Section 8.6: Upon receipt of the Purchase Price, Seller shall immediately repay the Seller Loan to the Company.

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- Acknowledgments were signed by John McNabola on behalf of Nob Hill Holdings in which he acknowledged receipt of the following Settlement Agreement and Releases in the case of *West Side Cellular d/b/a Cellnet of Ohio v. new par, et al.*: (WC 002310)  
Cellular d/b/a Cellnet and Cincinnati SMSA Limited Partnership  
Cellular d/b/a Cellnet and New Par, Cello Partnership and Vodafone Americas, Inc.  
  
Mr. McNabola agreed to abide by the "Confidentiality" provisions contained in the above agreements.
- John McNabola executed "Certificate of Incumbency of Nob Hill Holdings" in which he certified that the Company's Certificate of Incorporation was true and correct; that the Company's Bylaws were true and correct; that the Resolution adopted by the Board of Directors on August 22, 2003 remained in full force; and, that John McNabola was duly elected to the office of President, Treasurer and Secretary. (WC 00203)
- An Opinion Certificate of Michael Tricarichi was issued to Hahn Loeser & Parks. Mr. Tricarichi certified that he was the sole shareholder, President and Secretary of West Side Cellular and that this Opinion Certificate, together with a true copy of the Secretary's and Incumbency Certificate, were being provided to HLP to induce it to deliver its legal opinion in relation the Stock Purchase Agreement dated as of September 9, 2003. Mr. Tricarichi certified that all statements made in the Secretary's and Incumbency Certificate are true, correct and complete; that as the sole shareholder of the Company, he has the requisite power and authority to execute and deliver the SPA and to perform all obligations under the SPA; that he is not obligated to provide any notice to any governmental authority in connection with his execution and delivery of the SPA; and that the authorized capital stock of the Company consists of 750 shares of voting common stock of which 100 shares are outstanding as of the date of this opinion, etc... (HL 0188)
- Hahn Loeser & Parks issued an opinion letter to Nob Hill Holdings, attention John McNabola, regarding the sale of all the issued and outstanding shares of West Side Cellular, Inc. (WC 00005) They have acted as special counsel to West Side Cellular, Inc., an Ohio corporation, and Michael Tricarichi, as the sole shareholder of West Side Cellular in connection with the transactions that are the subject of the Stock Purchase Agreement dated September 9, 2003 between Mr. Tricarichi and Nob Hill Holdings, Inc. Based upon listed assumptions and qualifications, they are of the opinion that West Side Cellular is in good standing and that the seller has the power and authority to execute and deliver the Stock Purchase Agreement, et al.
- Klink & Associates issued an opinion letter to Michael Tricarichi regarding the Purchase of all of the issued and outstanding shares of West Side Cellular, Inc. (WC 00137) They have acted as special counsel to Nob Hill Holdings in connection with the transactions that are the subject of the Stock Purchase Agreement dated September 9, 2003 between Mr. Tricarichi and Nob Hill Holdings, Inc. Based upon listed assumptions and qualifications, they are of the opinion that Nob Hill is in good standing and that Nob Hill has the power and authority to execute and deliver the Stock Purchase Agreement, et al.
- A Cross-Receipt document was signed by Buyer (John McNabola as President of Nob Hill) and Seller (Michael Tricarichi) acknowledging that the required documents have been delivered to each other and that all agreements, obligations and conditions contained in the Stock Purchase Agreement that are required to be performed or complied with on or before closing Date have been performed or complied with. The Seller further acknowledged receipt from Buyer of a wire transfer of immediately available funds in the amount of \$34,621,594.06 and a check made payable to Michael Tricarichi in the amount of \$577,777.77, representing full payment for the stock shares. (WC 00176) The check was drawn from the Business Bank of California - account #65800136 and dated September 9, 2003. (WC 00178) Michael Tricarichi endorsed the check over to West Side Cellular. (HL 1101)

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- Non-confidentiality Certificate was executed by Nob Hill Holdings, Rabobank, Utrecht-America Finance Co, West Side Cellular, Fortrend, Klink & Associates and Hahn Loeser & Parks stating that each party certifies that their disclosure of the structure or tax aspects of the Transactions has not been limited in any way by an express or implied understanding or agreement with or for the benefit of any third party. (WC 00121; 00359)
- Michael Tricarichi executed Irrevocable Stock Power stating that he has sold and transferred to Nob Hill Holdings 100 percent of the non-voting common stock of West Side Cellular. (WC 00186)
- Barbara Tricarichi executed resignation letter in which she resigned from her positions as Director, Vice President and Treasurer of West Side Cellular. (WC 00164) Michael Tricarichi also executed resignation letter in which he resigned from his positions as Director, President and Secretary of West Side Cellular. (WC 00165)
- Written Consent of Sole Shareholder of West Side Cellular adopted resolution for Company to replace all incumbent directors. John McNabola was appointed as director. John McNabola executed the consent as Director of Millennium Recovery Fund. (WC 00218)
- Written Consent of Sole Director of West Side Cellular adopted resolution for Company to replace all incumbent officers and to appoint new officers in their place. John McNabola was elected President, Treasurer and Secretary. John McNabola executed the consent as Director. (WC 00216)
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution to repay the Promissory Note in favor of Moffat International Corp in an amount of \$5,000,000, along with a Security and Assignment Agreement, pursuant to which the Company pledged certain collateral to Moffat as security for the Note. (WC 00253) John McNabola executed the consent as Director.
- Jennifer Garberich sent an email to Jeffrey Folkman and Lizbeth Wright, "The SOS website shows the assignment of TN "CellNet" as of 9/5. See attached. UCC termination does not show yet. I have the date stamp though." (HL 2906)

**Note:**

Per the testimony of Michael Tricarichi on November 30, 2003, Mr. Tricarichi had never heard of Nob Hill Holdings until they went to San Francisco to close the deal with Fortrend. "...the papers that were signed said Nob Hill Holdings. So I didn't ...hear about Nob Hill Holdings until right before we signed the deal. That was the name on the paper." (page 25 of the transcript)

It was Mr. Tricarichi's understanding that "the party we were dealing with was Fortrend". His understanding of Fortrend's principal business activities was that "they were buying companies that had a lot of cash". (page 26 of the transcript).

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On September 10, 2003

- A Secretary's and Incumbency Certificate was prepared for West Side Cellular. Michael Tricarichi certified that he was the duly elected, qualified and acting President and Secretary of West Side Cellular and that the Articles of Incorporation, the Code of Regulations, the resolutions adopted by the Board on September 8, 2003 and the corporate minute book were all true and correct. He also certified that Michael Tricarichi held the offices of President and Secretary and that Barbara Tricarichi held the office of Vice President. (HL 1996)
- Written Consent of Sole Director of Nob Hill Holdings adopted resolution that it was in the best interests of the Company to merge with and into West Side Cellular, with West Side Cellular being the Surviving Corporation. John McNabola executed the consent as Director. (WC 00366)
- Written Consent of Sole Shareholder of Nob Hill Holdings adopted resolution that it was in the best interests of the Company to merge with and into West Side Cellular, with West Side Cellular being the Surviving Corporation. John McNabola executed the consent as Sole Shareholder. (WC 00368)
- Written Consent of Sole Director of West Side Cellular adopted resolution that it was in the best interests of the Company to merge Nob Hill Holdings with and into the Company, with the Company being the Surviving Corporation. John McNabola executed the consent as Sole Director. (WC 00372)
- Written Consent of Sole Shareholder of West Side Cellular adopted resolution that it was in the best interests of the Company to merge Nob Hill Holdings with and into the Company, with the Company being the Surviving Corporation. John McNabola executed the consent as Sole Shareholder. (WC 00370)
- Agreement and Plan of Merger was entered into between West Side Cellular and Nob Hill Holdings. At the Effective Time of the Merger, Nob Hill shall be merged with and into West Side, with West Side as the Surviving Corporation and the separate corporate existence of Nob Hill shall cease. The merger shall become effective at the time and date specified in the Certificate of Merger filed with the Secretary of State of Delaware. The Agreement was signed by John McNabola as President of Nob Hill and John McNabola as president of West Side Cellular. (WC 00374) Mr. McNabola also executed a Certificate of the Secretary of Nob Hill Holdings and a Certificate of the Secretary of West Side Cellular certifying that the Agreement and Plan of Merger was duly signed, approved and adopted by each Company. (WC 00378, 00379)
- The State of Delaware certified that the Certificate of Merger was filed in their office. (WC 00380)
- State of Ohio certified that a copy of the Merger was filed in their office (WC 00383).

On September 19, 2003

- Patrick Mullins sent Jeff a handwritten note stating, "Please review the enclosed closing binder, and give Chuck Klink or myself a call if you have any questions or comments." (HL 0023)
- A Closing Binder Index listed all the documents. The documents are grouped in the following four categories: Stock Purchase Agreement, Seller's Documents, Buyer's Documents, and Rabobank UAFC Account Documents. (HL 0026) For detailed list of documents, see Exhibit H.

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#### 10. The Loans and Flow of Money for Stock Purchase

On August 13, 2003

- Alice Dill of Fortrend sent email to Chris Kortlandt of Rabobank attaching the Term Sheet for the CellNet transaction that was discussed yesterday. "Our client, Nob Hill, will have \$5M to deposit with Rabo, bringing our loan request to \$29.9M. (Rabo-F-5522)
- The Term Sheet was a letter sent to Chris Kortlandt from Alice Dill. The letter was on Fortrend International letterhead. The letter set forth basic information concerning the acquisition of West Side Cellular 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 intends to continue various investment strategies through this corporation for a number of years. CellNet will be re-engineered to enter into the business of investing in, collecting and reinventing in distressed receivables, including certain cellular phone receivables currently held by CellNet. CellNet will purchase suitable debt instruments and engage in various related aspects of the asset recovery business. Nob Hill's analysis indicates that the new business shall be profitable and is expected to show a positive cumulative internal rate of return over an extended period of time. Accordingly, both Nob Hill and CellNet believe that the new line of business will result in economic profitability for both Nob Hill and CellNet. In order to acquire CellNet and pursue this business strategy, 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. West Side Cellular was formed March 14, 1988. Michael Tricarichi was 100% shareholder. Hahn Loeser & Parks was listed as Counsel for West Side. (Rabo-F-5526)

On August 14, 2003

- Chris Kortlandt emailed Alice Dill requesting financials on Nob Hill Holdings. Alice replied that there were no financials. "It hasn't done anything until now. It was formed in 2001 as a special purpose entity, but didn't find its special purpose until now. We often set up several companies in anticipation of transactions." (Rabo-F-5522)

On August 19, 2003

- Rabobank account opening forms and signature card for West Side Cellular were executed by Michael Tricarichi as President and Director. Mr. Tricarichi had signature authority. (Rabo-F-5369) (Signature cards for same account were executed by John McNabola on September 5<sup>th</sup> to become effective after the transfer of purchase price)
- Rabobank account opening forms and signature card for Nob Hill Holdings were executed by John McNabola. Mr. McNabola had signature authority. (Rabo-F-5502)

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On August 29, 2003

- George Henrich (Rabobank) sent an email to Chris Kortlandt (Rabobank) confirming that the following CIF and DDA accounts were opened per Mr. Kortlandt's request - for Nob Hill Holdings and West Side Cellular. (RABO-F-5368)
- A credit application was completed for Nob Hill Holdings to approve an up to 30 day \$29.9mm secured loan to Nob Hill to complete a Stock Purchase Agreement between Nob Hill and the shareholders of West Side Cellular. 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)

Under the protection sections it was stated, "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). Alternatively, we will receive irrevocable payment instructions from an acceptable financial institution to transfer cash balances of USD 38 mm to our borrower, which funds will be immediately used to pay-off our loan (also by way of irrevocable payment instructions.) in full." (Rabo-F-5528) If the irrevocable payment instruction option is used, and funds are not deposited with Rabobank, we will obtain, separately, a limit allocation to cover the bank risk." (Rabo-F-5530) 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) The Legal Department in New York will adequately address the documentation and reputation risk. All the Know-Your-Customer guidelines will be followed.

Under the Summary section, "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)

Under the Client Information section, the purpose of the loan is, "to allow Nob Hill to purchase the stock "CellNet". 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-F-5530)

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"The transaction is contemplated as follows: A Delaware company, Nob Hill, borrows from Rabobank an amount of up to USD 29.9mm. Together with \$5 mm in cash deposited in the Nob Hill account at Rabobank, our client will use the total amount to purchase the shares of West Side Cellular, Inc. Prior to Rabobank advancing the loan, West Side Cellular has either (i) placed an amount of USD 38 mm in an account held at Rabobank, and has provided us with irrevocable payment instructions to transfer the funds to Nob Hill, or (ii) has provided us with irrevocable payment instructions, accepted and agreed, by an acceptable financial institution, to transfer an amount of USD 38 mm to Rabobank. The instructions are to pay the USD 38 mm to Rabobank as lender. The amount of USD 38 mm in the CellNet account or the irrevocable wire instructions will be used to repay our loan in full. West Side Cellular, Inc., is an Ohio company owned by Michael Tricarichi, a US individual." (Rabo-F-5531)

"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)

- A Rabobank internal memo was sent to Distribution with the approval for the loan to Nob Hill. "NYCC asked that the "Know Your Customer" policy and compliance with the Dutch Central Bank ruling on back-to-back transactions should be addressed in all future applications for this type of transaction". (Rabo-F-5540)

On September 5, 2003

- Rabobank account opening forms and signature card for West Side Cellular were executed by John McNabola as President and Director. (Rabo-F-5369)
- Chris Kortlandt sent a set of Rabobank account opening forms to Randy Hart with instructions on how to prepare transfer instructions. (Rabo-F-5466)
- Michael Tricarichi emailed Jeffrey Folkman, "I still need the wire instructions to wire the money in the Pershing account to Rabobank on Monday (the funds in the KEY account have been sent to Pershing today). I need them today to give to my money manager, to insure that it happens on Monday. (HL 01877)
- Chris Kortlandt emailed Jeffrey Folkman (Hahn Loeser & Parks) with wire instructions on how to transfer funds to the client's account at Rabobank, and a suggested format for informing Rabobank about investing the funds. (HL 01873)
- Jeffrey Folkman forwarded Chris's email to M Tricarichi, "Attached are the wire instructions. Also attached is a sample letter that we can use on Monday to instruct Rabobank to invest your funds overnight." (HL 3322)

On September 8, 2003

- Chuck Klink from Bittner & Company faxed a letter to Chris Kortlandt of Rabobank requesting the balance in West Side Cellular account #21577 be invested on an overnight basis. Michael Tricarichi signed the letter. (Rabo-F-5443)
- Chris Kortlandt sent an internal memorandum to place the balance in West Side Cellular account #21577 of \$39,949,373.12 in an overnight time deposit. (Rabo-F-5446) It earned interest of \$1,076.41. (Rabo-F-5535)

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- Chris Kortlandt sent an internal memorandum to place the balance in Nob Hill account #21568 of \$5,000,000 in an overnight time deposit. (Rabo-F-5447) It earned interest of \$134.72. (Rabo-F-5535)
- Rabobank account opening forms and signature card for M. Tricarichi Escrow account #21595 were executed by Michael Tricarichi. (Rabo-F-5476) The account was opened by Rabobank. (Rabo-F-5475) Rabobank comments on the account opening forms: "Rabobank's standard account opening documentation - Part of Nob Hill acquisition financing".

Chris Kortlandt prepared an internal memorandum to file regarding the Nob Hill closing. Nob Hill has to transfer the purchase price to the Sellers of West Side. However, in order for Rabobank to execute the wire transfer (financed by Rabobank), we want to make sure that the Sellers of West Side resign their positions in West Side, including the West Side account signatories. West Side is only willing to resign upon their confirmation of receipt of the purchase price. Rabobank is only willing to release funds upon Rabo's execution of the transfer (not receipt by the other party). In order to accommodate the closing, which works for all parties involved, client will set up an escrow account at Rabobank. The purchase price will go into that account first, and then the Sellers of West Side Cellular will resign their positions in West Side Cellular including the West Side Cellular account signatories. After that Rabobank will receive an instruction to transfer the funds out of this escrow account. (Rabo-F-5479)

On September 9, 2003

- Nob Hill executed a Secured Promissory Note with Utrecht America Finance Co (a division of Rabobank) for \$29,900,000. (WC 00282) UAFC will not make the Advance until a list of conditions has been satisfied. Included in the conditions are 1) the Borrower has executed and delivered to UAFC the Security and Assignment Agreement, the Control Agreement and the Pledge Agreement; 2) the Borrower and West Side Cellular shall have on deposit in one or more accounts with Rabobank deposits in a total amount not to be less than the sum of the principal amount of the Advance plus \$1,000,000 (the "Required Amount"); UAFC shall have received an upfront fee of \$150,000; etc. On page 3 of the Promissory Note, the Borrower represents and warrants various statements including the following statement: "The Transaction (and any component thereof) is not a "tax shelter" as defined in Internal Revenue Code sections 6111(c) or (d), is not subject to the registration provisions of Internal Revenue Code section 6111(a)(1), is not a listed transaction as defined in Treasury Regulation section 301.6111-2T(b)(2), is not a reportable transaction..." (WC 00282)
- A letter was sent to Utrecht America Finance and Rabobank signed by Fortrend and Nob Hill. The letter is in reference to the Promissory Note, the Transaction Documents and the Transaction. "Nob Hill is known to, and represented by, Fortrend International LLC (Fortrend) and Fortrend will derive investment banking fees from the Transactions. As a condition to UAFC's agreement to provide the Advance and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, Fortrend and Nob Hill hereby make the following representations": 1) That the Transaction (and any component thereof) is not a tax shelter, is not subject to the registration provisions of the IRS Code, is not a listed transaction and is not a reportable transaction; and 2) Nob Hill has received a "should" level opinion from a nationally recognized counsel as to the matters previously mentioned. In the event that these representations are not true and correct, Fortrend will provide UAFC with the information necessary to timely register the Transaction in accordance with IRC Section 6111(a) and Fortrend will provide UAFC the necessary information to allow UAFC to perform the list maintenance requirements. Further, Fortrend will indemnify UAFC against any losses, claims, damages, liabilities and related expenses incurred by or asserted against any Indemnitee arising out of, in connection with, or as a result of any failure of Fortrend to comply with the terms of this letter agreement. (WC 00363) Jeffrey Furman signed on behalf of Fortrend. John McNabola signed on behalf of Nob Hill Holdings. (WSC-CK-388)

Department of the Treasury - Internal Revenue Service

**Form 886-A**

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ADMIN\_TRI01360

TRICAR-NV0009516

APP0686



<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Name of Taxpayer</b> West Side Cellular, Inc.	<b>Explanation of Items</b>	<b>Year/Period Ended</b> 12/31/2003

- A Pledge Agreement was made by Nob Hill in favor of Utrecht-America Finance Co. The Borrower is, or upon the application of the Advance as provided in the Note, will be, the legal and beneficial owner of the Pledged Stock issued by West Side Cellular. In order to induce UAFC to make the Advance, the Borrower delivers to UAFC, all the Pledged Stock and grants to UAFC a first priority security interest in the Collateral. "Collateral" is defined as the Pledged Stock and all Proceeds. "Collateral Account" is defined as any account established to hold money Proceeds, maintained under the sole dominion and control of UAFC. (WC 00307)
- A Security and Assignment Agreement was executed by Nob Hill Holdings in favor of Utrecht America Finance Co (UAFC). In order to secure the obligation of the Borrower under the Note, Borrower pledges and assigns to UAFC, and grants to UAFC a first priority security interest in the Collateral Accounts. (WC 00292)
- An Acknowledgment and Consent was executed by John McNabola acknowledging receipt of a copy of the Pledge Agreement and consenting to the pledge and security interest granted pursuant to the Pledge Agreement. (WC 00318)
- Control Agreement was made between Nob Hill Holdings, Utrecht America Finance Co and Rabobank to perfect and to confirm the priority of UAFC's security interest in the Collateral. The Bank acknowledges that this Control Agreement constitutes written notification to the Bank of UAFC's security interest in the Collateral and that it will make all necessary entries or notations in its books and records to reflect UAFC's security interest in the Collateral. (WC 00319)
- A Guaranty was executed by West Side Cellular in favor of Utrecht America Finance Co. UAFC has made the advance to the Borrower pursuant to the Promissory Note upon the terms and subject to the conditions as set forth: The Borrower owns 100% of the capital stock of the Guarantor and the Guarantor will derive substantial direct and indirect benefits from UAFC making the advance; as additional consideration for the execution and delivery of this Guaranty, the Borrower has paid to the Guarantor the Guaranty Fee in an amount equal to the product of the amount of the Advance and .50%. In consideration of these premises, the Guarantor unconditionally guarantees the punctual payment of all obligations and liabilities of the Borrower to UAFC. (WC 00331)
- An opinion letter was issued by Klink & Associates of Los Angeles to Utrecht-America Finance Co as special counsel to Nob Hill Holdings in connection with the Promissory Note, the Security and Assignment Agreement, the Pledge Agreement and the Control Agreement. They issued an opinion that Nob Hill is a valid corporation and that it has the authority to execute and deliver each of the referenced documents and that the documents constitute a legal, valid and binding obligation of Nob Hill. (WC 00337)
- A Security and Assignment Agreement was executed by West Side Cellular in favor of Utrecht America Finance Co (UAFC). The Guarantor has executed and delivered to UAFC the Guaranty; the Borrower owns 100% of the capital stock of the Guarantor and the Guarantor will derive substantial direct and indirect benefits from UAFC making the advance; as additional consideration for the execution and delivery of this Agreement and the Guaranty, the Borrower has paid to the Guarantor the Guaranty Fee; in order to secure the obligation of the Guarantor under the Guaranty, Guarantor pledges and assigns to UAFC, and grants to UAFC a first priority security interest in the Collateral Accounts. (WC 00299) John McNabola executed the agreement as President of West Side Cellular.

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ADMIN\_TRI01361

TRICAR-NV0009517

APP0687

<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- Control Agreement was made between West Side Cellular, Utrecht America Finance Co and Rabobank to perfect and to confirm the priority of UAFC's security interest in the Collateral. The Bank acknowledges that this Control Agreement constitutes written notification to the Bank of UAFC's security interest in the Collateral and that it will make all necessary entries or notations in its books and records to reflect UAFC's security interest in the Collateral. (WC 00319)
- An opinion letter was issued by Klink & Associates to Utrecht-America Finance Co as special counsel to West Side Cellular in connection with the Security and Assignment Agreement, the Guaranty Agreement and the Control Agreement. They issued an opinion that West Side Cellular is a valid corporation and that it has the authority to execute and deliver each of the referenced documents and that the documents constitute a legal, valid and binding obligation of West Side Cellular. (WC 00343).
- Michael Tricarichi sent letter to Chris Kortlandt providing copies of Resignations pursuant to which Barbara Tricarichi and Michael resign from their positions as directors and officers of West Side Cellular. As stated in the letter, "please be advised that these Resignations are not effective, and may not be relied upon by Rabobank, until such time as Rabobank has credited an amount no less than \$34,621,594 to Rabobank account #21595 in the name of Michael Tricarichi, Escrow Account. (Rabo-F-5376)
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to request a drawdown of \$29,900,000 under the Promissory Note and asked that the proceeds of the loan be deposited to Nob Hill account #21568 at Rabobank. In addition, he authorized Rabobank to debit the Nob Hill account for an upfront fee of \$150,000. Any amount remaining in the account at the end of the day should be invested overnight. (WC 00349).
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to execute a wire transfer of \$150,000 representing the Guarantee fee. The amount was to be deposited into the West Side Cellular account #21577 and debited from Nob Hill account #21568. (WC 00350)
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to execute a wire transfer in the amount of \$34,621,594.06 representing the stock purchase price. The amount was to be deposited into the Michael Tricarichi Escrow Account #21595 and debited from Nob Hill account #21568. (WC00351)
- Chris Kortlandt faxed Michael Tricarichi a confirmation that funds have been credited to the M Tricarichi Escrow Account at Rabobank. (Rabo-F-5490)
- John McNabola of West Side Cellular sent letter to Chris Kortlandt of Rabobank to execute a wire transfer in the amount of \$35,000,000. The amount was to be deposited into the Nob Hill Account #21568 and debited from West Side Cellular account #21577. The letter was signed by John McNabola as President of West Side Cellular. The reference on the request said "loan". (WC00352)
- Chris Kortlandt of Rabobank sent fax to Funds Transfer Department with message, "Book transfer West Side Cellular". (Rabo-F-5450)
- Michael Tricarichi sent letter to Chris Kortlandt of Rabobank to wire all funds in M. Tricarichi Escrow Account #21595 to Chase NYC ABA [Redaction] - DLJ Pershing Division [Redaction] - F/C Michael Tricarichi [Redaction]. The amount in the account should be approximately \$34,621,594. (Rabo-F-5489)

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ADMIN\_TRI01362

TRICAR-NV0009518

APP0688



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

- Chris Kortlandt of Rabobank sent fax to Funds Transfer Department with message, "Ok to pay outgoing wire from the M. Tricarichi Escrow account. Funds have been credited to the account this morning (as part of closing)." (Rabo-F-5488)
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to authorize the pre-payment of their loan in the amount of \$29,900,000 plus interest. The loan repayment was to be debited from Nob Hill account #21568. (WC 00353)
- Chris Kortlandt sent internal memorandum to Winnie Ng to please recognize the Nob Hill loan fee as income on UAFC's books, as Rabobank has received prepayment instructions from their client. (Rabo-F-5571)
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to execute a wire transfer of \$5,000,000 to Moffat International Account #746-1104-043 at First Bank. The amount was to be debited from the West Side Cellular account #21577. (WC 00354)
- Per Rabobank Manual Input Form, \$5,000,000 was debited from Nob Hill and credited to West Side Cellular. "Correction, as the West Side Cellular account was debited instead of the Nob Hill account, Nob Hill provided Rabobank with a wire transfer instruction. (Rabo-F-5573)
- Chris Kortlandt sent internal fax to Funds Transfer with message, "Ok to pay book transfer". (Rabo-F-5560)
- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to invest the end-of-the-day account balance for Nob Hill account #21568 in a Rabobank time deposit account, pending further instruction. (WC 00355)
- Chris Kortlandt sent an internal memorandum to place the balance in Nob Hill account #21568 of \$79,040.66 in an overnight time deposit. (Rabo-F-5447)
- John McNabola of West Side Cellular sent letter to Chris Kortlandt of Rabobank to invest the end-of-the-day account balance for West Side Cellular account #21577 in a Rabobank time deposit account, pending further instruction. (WC 00356)
- Chris Kortlandt sent an internal memorandum to place the balance in West Side Cellular account #21577 of \$5,099,949.53 in an overnight time deposit. (Rabo-F-5445)

On September 10, 2003

- John McNabola of Nob Hill sent letter to Chris Kortlandt of Rabobank to execute a wire transfer of all funds remaining - \$78,542.64 to Nob Hill Account #65800136 at Business Bank of California. The amount was to be debited to the Nob Hill account #21568. Further, the Nob Hill account #21568 was to be closed. (WC 00357)
- John McNabola of West Side Cellular sent letter to Chris Kortlandt of Rabobank to execute a wire transfer of all funds remaining - \$5,100,577.03 to West Side Cellular Account #65800144 at Business Bank of California. The amount was to be debited to the West Side Cellular account #21577. Further, the West Side Cellular account #21577 was to be closed. (WC 00358)

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

On November 3, 2003

- Rabobank account closing forms were completed for the Tricarichi Escrow account #21595, Nob Hill Holdings account #21568, and West Side Cellular account #21577. (Rabo-F-5458)

Undated

On an undated paper the following description of the transactions was written: "On September 8<sup>th</sup>, 2003, all of the stock of West Side Cellular Inc. was sold to Nob Hill Holdings, Inc., a Delaware corporation. In order to facilitate the transaction, on September 8<sup>th</sup>, all of the assets of West Side 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 9<sup>th</sup>, 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 #31001918). 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." (HL 2874)

To summarize the circular money flow that occurred beginning on 09/08/2003 and ending on 09/09/2003, West Side Cellular account #31v001900 at Pershing Bank transferred \$39,949,373.12 to West Side Cellular account #21577 at Rabobank and invested in an overnight time deposit, where it earned interest of \$1,076.41. The \$39,949,373.12 was the amount of cash on hand for West Side Cellular, per the balance sheet dated 8/30/2003. On 9/09/2003, the loan proceeds of \$29,900,000 were credited to the Rabobank Nob Hill Holdings account #21568 on 9/09/2003. A \$5,000,000 short-term loan was also credited to this account from Moffat International. From this account, \$34,621,594.06 (purchase price of West Side Cellular's stock) was transferred to the Rabobank-Tricarichi Escrow account #21595 and then to the Pershing-Michael Tricarichi account #310091918. After transfer of funds to Tricarichi, \$39,949,373.12 was released to the new owners and transferred from the Rabobank account #21577 to the Nob Hill Holdings account #21568. This money was used to repay the loan proceeds of \$29,900,000 and the loan fee of \$150,000. There was no interest paid on the loan as the loan was repaid the same day the proceeds were credited.

*Government's Comments*

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.

It is also noted that 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 (34,621,594 cash plus check of 577,777.77) for the West Side Cellular stock (exchanging cash for cash). The profit (or "spread" or "arbitrage profit") retained by the Buyer for the West Side Cellular transaction was \$5,377,778.94.



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# 11. Post-Closing Matters and Fee Payments

Based on analysis of bank accounts at Business Bank of California for Nob Hill Holdings and West Side Cellular, and correspondence with POA Randall Dick, examiner identified the following fees paid after completion of the intermediary transaction:

9/10/2003	20,000	Moffat	Financing fee for \$5,000,000 loan
9/11/2003	50,000	Michael Bittner	Accounting Fee
9/12/2003	50,000	Baguette Holdings	Paralegal fees
9/26/2003	15,000	Baguette Holdings	Paralegal fees
9/12/2003	455,000	Steve Block	Finders Fee
9/23/2003	1,180,000	MidCoast	Finders Fee
Total	1,770,000		

The balance of the funds retained by Fortrend went in and out of various Fortrend investments. See Exhibit G for copies of detailed bank analysis for the two accounts at Business Bank of California that ultimately received the "spread" retained by Fortrend.

The following is a summary of various emails and correspondence that occurred subsequent to closing.

## On September 16, 2003

- Lizbeth Wright sent email to Jeffrey Folkman to congratulate him on the Cellnet closing and to advise him of the California blue sky law that they have reviewed in regards to the sale of Cellnet's outstanding stock to a California resident. See email below for status of their findings. (HL2905)
- Jeffrey Folkman sent email to Chuck Klink with cc: to Randy Hart. "One of the items we examined in connection with the Cellnet transaction is California blue sky law. While the transfer clearly is not an issuance of new stock, there is a slight chance that the California blue sky administrators could view it as such (as the SEC would) because of the affiliate status of the seller. Accordingly, as buyer is clearly an accredited investor, and out of an abundance of caution, I believe it would be worthwhile for WSC ("Cellnet") to file a Form D with the SEC and the California Securities Commission claiming the Rule 506 exemption. The Form D is a notice filing and requires no approval or response from either governmental entity. It is due within 15 days of the first "sale." The closing, of course, would be deemed the sale, and for the purpose of the Form D, Cellnet is presumed to be the seller. I realize that this is a fiction; in fact Cellnet did not issue any stock and was not a party to the transaction. None the less, the filing of a Form D would remove any possibility that the California securities division (whose policies and personnel are unfamiliar to me) could claim a violation of the blue sky act. Due to the nature of the questions on the Form D, I believe buyer would be best situated to complete and file the Form D, if it desires to have the filing completed. Assuming that the Form is filed, please send me a copy for my records. (HL 2904)

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In September, 2003

- Mr. Block created a Microsoft Word file to document events surrounding the transaction. "The first entry is a journal-style entry created to document a conversation with Jeffrey Furman and Fred Forster of Fortrend. The second entry is the beginning of a letter drafted by Mr. Block to Jeffrey Furman and Fred Forster of Fortrend in connection with a dispute over the commission promised to Mr. Block in connection with the transaction". (WSC-SB-2)
  1. September 8, 2003 at 10:50 am: "My conversation with Jeff Furman cochairman & Fred Forster: Jeff called me to say that the CellNet transaction has closed via fax and that there was no sense to travel to San Francisco CA. Jeff went on to say that Fred Forster the other Co Chairman was flying today to meet with Jeff for dinner. Jeff said the paper work /invoice for my commission will be drawn up later in the day. He went on to say that I should receive my commission by September 11, 2003.-- Never happened, repeated calls after repeated calls".
  2. "Gentlemen: I realize you didn't get the price originally but we got the deal and you are making money. You know it's bad enough to do this to me but honestly you are not just effecting me but 10% of this money was earmarked for GOD'S work it's his money. I can explain it to him can you?" (WSC-SB-17)

In September, 2003

- Charles Klink delivered copy of his legal bill for services rendered from the period beginning July 24, 2003 thru September 10, 2003. He spent a total of 254 hours on legal services rendered for the purchase of stock of West Side Cellular by Nob Hill Holdings. "Hourly bill would be \$57,150 at a billing rate of \$225 per hour. Hourly fee discounted to a flat fee of \$50,000 per discussions with A. Dill Wendland. \$50,000 previously paid into Klink & Associates Attorney Trust Account applied to pay time portion of outstanding bill." Mr. Klink also provided an expense summary for total expenses incurred in connection with the transaction, totaling \$1,779.43. (WSC-CK-2 thru WSC-CK-7) Beginning July 24<sup>th</sup>, Chuck Klink devoted time each day towards the transaction until closing date. [As stated in Mr. Klink's letter to the IRS, he served as outside corporate legal counsel to the Buyer for the stock purchase.]

On September 17, 2003

- Carolyn SESCO of MidCoast sent email to Tim Conn, "Louis spoke with Jeff yesterday regarding the MidCoast fee for last week's acquisition (Cellnet). Jeff indicated that Fortrend was prepared to wire the funds today. The amount to be wired is \$1,180,000 (\$1,200,000 less \$20,000 in extra costs). Could you please provide the target name and address for this invoice. I will then fax it to your attention." (WSC/MDC 0003)
- Tim responded to Carolyn's email with the name of the company - West Side Cellular at 50 Francisco Street. He asked that the invoice be sent directly to him via email.
- A copy of the invoice was faxed to Tim Conn at TC Capital Management. The invoice was dated September 17, 2003 in the amount of \$1,180,000. The invoice stated, "Fee for resolution of Servicing and Management Agreement". Payment was to be remitted by wire transfer to MidCoast Credit Corp, SunTrust Bank, Miami, Florida. (WSC/MDC 0006)
- Carolyn sent another email to Tim Conn asking when the wire will be initiated so she could look for it on their end.  
Tim responded that "the wire will not go out until Alice gets back from vacation. She is the only signer on the account. I will let you know what Fred and Jeff say about the estimated time that it will go out." (WSC/MDC 00010)

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TRICAR-NV0009522

APP0692



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

On September 23, 2003

- Carolyn SESCO sent email to Tim Conn, "As of 10:15 a.m. EST, we have not received the wire for \$1,180,000. Please verify the time this wire was sent and provide a fed reference number. Also, please check your wiring instructions..." (WSC/MDC 00015) Tim responded back with the fed reference number. Carolyn responded back at 3:00 pm that the wire had been received.

Undated

A summary transaction sheet was completed by MDC Credit Corp (fka MidCoast Credit Corp). West Side Cellular was listed as the Acquired Company. Fortrend or its designee was listed as the Presumed Stock Purchaser. MidCoast was listed as having received Resolution Fee. MDC was in the asset recovery business, which involves the acquisition of charged-off credit card receivables at a discount with the intent to collect on those receivables and make a profit on the spread. Unknowningly, MDC and Fortrend International (as well as another competitor) were competing to acquire West Side Cellular. MDC was looking at WSC as a potential target to set up in the asset recovery business, and it made a bid to acquire WSC but was rejected. MDC thereafter agreed to accept a fee to step away from the acquisition. The fee was paid after Fortrend or a Fortrend related entity acquired it. MDC does not know (because it does not have any relation to) of any taxable gains or losses related to WSC. (MDC 525)

On October 8, 2003

- Jeffrey Folkman sent email to Charles Klink, "Congratulations on your new governor! According to Section 5.1(f) of the SPA, Seller is required to "prepare and file on behalf of Company any and all necessary Form W-2's, Form 1099's, payroll tax returns and related documentation with respect to each and every individual that was an employee of the Company prior to the Closing Date for periods that end on or prior to the Closing Date." Payroll returns and the like are due at the end of the month and have been or are about to be prepared. No one on Seller's side has the authority to sign these returns on behalf of Cellnet. Where should we send them for signing and filing?" (HL 2903)
- Chuck Klink responded to Jeffrey Folkman's email, "Sean McNabola, the new director and president of West Side Cellular will sign any such documents. Please send them to the attention of Patrick Mullins in our SF office and he will get the documents to Sean for his signature and filing." (HL 2903)

On October 10, 2003

- Jennifer Garberich sent email to Jeffrey Folkman stating that she revised the West Side Cellular Bible index and is sending it for his review. "As we discussed, I included the LXV documents after the Stock Sale documents." (HL 0044) On the attached index draft, the following terms are identified: Buyer - Nob Hill Holdings; CGK - Charles G. Klink, counsel to Buyer; Closing Date - September 9, 2003; Company - West Side Cellular; HLP - Hahn Loeser & Parks, counsel to Seller; LXV - LXV Group, LLC, purchaser of the assets of the Company; MRF - Millennium Recovery Fund (45% member of Buyer); Seller - Michael Tricarichi; Willow - Willow Trust (20% member of Buyer). A Letter of Intent was listed under Pre-Closing documents with a handwritten note to find it. (HL 0046)

On October 15, 2003

- Jeffrey Folkman sent email to Scott Ginsburg of Cellnet with the address for Nob Hill Holdings: 50 Francisco Street, San Francisco, CA 94133, attn: John McNabola, President. "Also attached is a copy of the Agreement between Cellnet and LXV." (HL 3327)

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TRICAR-NV0009523

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<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
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On October 16, 2003

- Scott Ginsburg of Cellnet sent letter to John McNabola at Nob Hill Holdings, "enclosed are West Side Cellular's 941 (Employer's Quarterly Federal Tax Return) and UCO-2QRS (Employer's Report of Wages) for the 3<sup>rd</sup> quarter". The address of Cellnet is still reflected as 23632 Mercantile Road, Beachwood, Ohio. The address for Nob Hill was reflected as 50 Francisco Street, San Francisco, CA 94133. (WSC-PMB-70) Total employees for the quarter were 8. Six of the eight listed were employees that signed the Release and Covenants Not to Sue in exchange for lump sum payment. The lump sum payments were reflected in the Employer's Report of Wages. (WSC-PMB-72)

On October 21, 2003

- Jennifer Garberich sent email to Jeffrey Folkman. She stated that she has 2 originals of the LXV agreement - neither has Michael's signature. She has sorted thru the pile of originals in his working file and did not find his "sig page". (HL 0032)
- Jennifer Garberich sent fax to Scott Ginsburg of CellNet. "I have been unable to locate a copy in our files of Mr. Tricarichi's signature page for the attached Asset Purchase Agreement. At Jeffrey Folkman's request, I am contacting you to inform you that we will obtain another copy of his signature and forward it to you as soon as possible." (HL 0050)

On October 22, 2003

- Jennifer Garberich sent email to Jeffrey Folkman. "I was just preparing the letter to M Tricarichi to get his signature on the APA and remembered there were other signatures missing from the bible, so I wanted to run it by you before I sent this package. As marked in the index attached, there are several resolutions missing sigs—I assume they were signed and put in the record book and we just didn't get a copy. Is it worth asking him to sign them again for our bible? Also, the Bill of Sale to LXV is not a signed copy. Who has such a copy?" (HL 0049)
- Jennifer Garberich of HLP sent Michael Tricarichi a letter. "Upon review of our files while preparing a transaction binder for the sale of assets and stock of West Side Cellular, we discovered we are missing your signature on a few documents. We know you signed them, but we did not get copies. Instead of trying to get copies from opposing counsel, we thought it would be simpler to ask you to sign them again." (HL 001)

On October 30, 2003

- David Cook sent email to Jim Tricarichi with information on filing Ohio Composite Returns. "In addition, Rich wanted me to remind you that we still need 2003 withholding information for Mike so that we can complete his federal individual income tax projections. Along the same lines, we should also pick a time to finalize his 2003 Ohio liability computations for the fourth quarter estimates..." (PWC-WS 1180)

On October 31, 2003

- Randy Hart sent an invoice to Michael Tricarichi at VCI Communications in Las Vegas. The cover letter reference for the invoice was "Tax Planning conversion change 7/29/03". Summary of invoice charges as follows:

Total Current Fees	81,878.00
Less Courtesy Discount	-6,000.00
Net Current Fees	75,878.00
Total Current Costs	1,656.61
Total Amount Due	77,534.61

Summary of services rendered were listed from 9/12/02 through 9/22/03 and were summarized under previous section. (HL 1855)

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ADMIN\_TRI01368

TRICAR-NV0009524

APP0694



<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

On November 10, 2003

- Rich Stovsky emailed Tim Lohnes re: Updated list of listed transactions, Notice 2003-76. "Please take a look at the items below re: the West Side Cellular transaction. It looks like there is no item that requires action by the selling shareholder (the items that related would be the loss on a 351 transaction and 3<sup>rd</sup> party asset sale). Please advise." (PWC-WS 276)

On November 14, 2003

- Tim responded back to Rich's email, "I have reviewed this list for West Side Cellular, and confirm that it contains no items that would impact their transaction, other than the items we discussed previously, namely the Midco listed transaction. However, we concluded that the transaction undertaken by West Side was not substantially similar to the Midco listed transaction." (PWC-WS 276)

On December 29, 2003

- Jim Tricarichi sent Scott Ginsburg an email with copy of the final sales calculation spreadsheet. (HL 2881)
- Scott Ginsburg sent Jeffrey Folkman a forwarded copy of the email with the final sales calculation spreadsheet. (HL 2881).

On December 30, 2003

- Jeffrey Folkman sent email to Scott Ginsburg with the buyer's attorney's name, address and fax number. (for Charles Klink) "As soon as I can locate his telephone number I will forward it to you." (HL 2880)

On January 6, 2004

- Scott Ginsburg of Cellnet sent email to Jeffrey Folkman, "I still need the phone number for Charles Klink so I can send out the personal Property tax bills and the Worker's Comp report. When I prepared the WC report, the amount due was \$800.46 less than accrued in the final Sales Calc worksheet due to a rate reduction and a premium discount of 20%. Is Michael entitled to any of that money or should we just let it go? Please get back to me ASAP since the PP tax bills are due in 14 days". (HL 2876)

On January 8, 2004

- Jeffrey Folkman replied to Scott Ginsburg's email. "I suggest that you call Klink's assistant, Patrick Mullins, who is located in San Francisco, which is where the buyer is located. (Klink is located in Los Angeles.) Pat can be reached at.....As to the excess WC accrual, I recommend that you ask for it - why leave money on the table?" (HL 2876)

On January 28, 2004

- Olson Lemons PC issued an opinion letter to Nob Hill Holdings regarding any potential disclosure obligations that the parties may have under Treas. Reg. 1.6011-4, 1.6111-2 and Section 6111(c) to disclose the acquisition of West Side Cellular on their federal income tax return. After detailed discussion and analysis by Olson Lemons, they concluded that neither Nob Hill Holdings nor West Side Cellular should be required to disclose the Transactions under the Disclosure Regulations. The opinion letter was provided to IRS from Olson Lemons. The letter was redacted to remove the names of their clients. (OL 471)

As explained in a letter from James Whitmire to the IRS dated March 12, 2007, Olson Lemons was contacted and requested to issue opinions regarding the registration and disclosure obligations of the acquiring entity, after the transactions were engaged in and completed. Olson Lemons was not involved in the actual transactions.

<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
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As stated in an attachment to the letter from James Whitmire, Olson Lemons was referred to the investor by a mutual contact. Olson Lemons was retained by the investor to author opinions<sup>1</sup> relating to the obligations of the investor with respect to the disclosure and tax shelter registrations rules of Former Sections 6011 and 6111. Olson Lemons was, in each circumstance, retained by the investor after the completion of the transactions addressed in the opinions. Olson Lemons had no contact with the investor relating to the substantive tax consequences of the transactions prior to the investor engaging in the transaction.

"Generally, in each transaction described in the opinions, the investor acquired 100% of the stock of an entity that either owned, or was a corporation taxable under Subchapter C of the Internal Revenue Code. The investor then generally contributed certain debt portfolios to the C Corporation (either directly or indirectly). At some point subsequent to the contribution, the C Corporation ascertained that the debt portfolios were worthless, and wrote off a bad debt deduction under Section 166." As detailed in the opinions, it is the opinion of Olson Lemons that the transactions are, more likely than not, not substantially similar to any listed transaction. James Whitmire, while an employee of Olson Lemons, assisted in preparing the opinion letters.

On September 23, 2004

- Olson Lemons sent an invoice to Tim Conn at Empire One, LLC for services rendered in connection with the Millennium Recovery Fund Opinion, in the amount of \$20,000. (OL - Exhibit F)

On September 24, 2004

- Randy Hart sent an invoice to Michael Tricarichi at VCI Communications in Las Vegas. The cover letter reference for the invoice was "Tax Planning conversion change 7/29/03". Summary of invoice charges as follows:

Total Current Fees	2,683.50
Total Current Costs	1,428.45
Total Fees and Costs	4,111.95
Previous Due	37,534.61
Total Amount Due	41,636.56

Summary of Previous Due:

<u>Invoice</u>	<u>Invoice</u>	<u>Fees</u>	<u>Costs</u>	<u>Total</u>	<u>Credits</u>	<u>Balance</u>
<u>Date</u>	<u>Number</u>	<u>Billed</u>	<u>Billed</u>	<u>Billed</u>		<u>Due</u>
10/31/2003	305269	75,878	1,656.61	77,534.61	40,000	37,534.61

On June 1, 2007

- Davis Graham & Stubbs sent letter to examiner on behalf of summons issued to Steven Block in the matter of West Side Cellular. Mr. Block provided 5 documents in response to the summons. "The attached documents primarily come in the form of Microsoft Word files saved onto Mr. Block's computer in anticipation of a potential dispute relating to the West Side transaction and the promised commissions paid by Fortrend in connection with said transaction. No other documents or emails were retained." The first document provided was a copy of a Fortrend brochure similar to the one provided to Mr. Tricarichi in connection with a reference provided to Mr. Tricarichi by Mr. Block. (WSC-SB-1)

\* \* \* \*

<sup>1</sup> They offered opinion letters to ECRU, North Point, SMI, Empire One, Essex, as well as, Nob Hill. All of which were similar transactions.



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

## 12. Actions of West Side Cellular: Contribution of Gain Offset Asset, Return Preparation

On October 28, 2003

- A Trust Agreement by and between Millennium Recovery Fund (MRF), a Cayman Islands company, as both grantor and initial beneficiary, and John McNabola was executed. John McNabola, as Trustee, and MRF, as Grantor, entered into the Trust Agreement for the administration of a business trust named Prime Asset Business Trust (PABT) for the benefit of Beneficiary. Section 1.3 of the Agreement states the purpose of the Trust is to conserve and protect the assets conveyed by the Grantor to the Trustee. Specifically, the Trustee shall receive to hold in the Trust Grantor's 100% ownership interest of that certain and specific portfolio of Japanese loans held by Grantor ("Debt Portfolio"). Section 1.4: The Beneficiary may, from time to time, contribute or direct other parties to contribute to the Trust additional Trust assets. (WSC-CK-34)

Section 3.1, the Trustee shall establish one or more sub-trusts of the Trust under this Agreement and shall allocate the Trust Assets identified by the Beneficiaries to each such Sub-Trust...

John McNabola signed the Trust Agreement as President of Millennium Recovery Fund and in his individual capacity as Trustee. (WSC-CK-54)

### Note:

#### Asset Protection Trust Limited

John McNabola is senior partner in the Asset Protection Trust. (Rabo-F-5515) The Asset Protection Trust Limited is a subsidiary of Earls Fort Trust Limited which is part of the Professional Practice of Joy, McNabola, Murray & Co. Chartered Accountants, located at 17 Earlsfort Terrace, Dublin 2. The firm was established in 1949 and practices in the centre of Dublin, Ireland. (Rabo-F-5516) They provide expert advice in various investment matters and how to legally protect your assets. Under the area of taxation, "It is a well-established principle of U.S. law that citizens are permitted to organize their affairs so that they pay the minimum amount of tax. It is surprising how many people do not follow this principle. In so far as the United States is concerned it is intended that all Asset Protection Trusts will be tax neutral. However, Ireland has, unlike other offshore jurisdictions, a Double Tax Agreement with the United States. Funds invested in the I.F.S.C. will be subject to a tax rate of either zero or no more than 20%. Indeed by utilizing the treaty network it is possible to move funds anywhere in the world without having to deduct withholding taxes. This significant advantage must not be overlooked. It is an advantage Ireland has and traditional offshore centres do not have.

On November 6, 2003

- A 2003-A Supplement to Trust Agreement was executed. The initial Beneficiary directs the Trustee to establish separate Sub-Trust of the Trust to be designated as the "2003-A Sub-Trust" for the benefit of, as the 2003-A Beneficiary. The 2003-A Trust Assets allocated to the 2003-A Sub-Trust shall consist of, "all right title and interest in and to that certain loan identified on the books and records of the Trust as the "Aoyama building, Kaihatsu 2" and the "Aoyama Building, Kaihatsu 5" loans." Pursuant to Section 3.1 of the Basic Trust Agreement, the Trustee hereby creates the 2003-A Sub-Trust and shall promptly issue the Series 2003-A Certificate to the 2003-A Beneficiary. (WSC-CK-62)
- A Series 2003-A Certificate was prepared. This Certificate certifies that West Side Cellular is the registered owner of a nonassessable, fully-paid, undivided interest in the 2003-A Sub-Trust and the 2003-A Trust Assets of Prime Asset Business Trust. West Side has an undivided Beneficial Interest Certificate, as provided in the 2003-A Trust Agreement and a corresponding right to distributions by the Trustee pursuant to the terms of the Trust Agreement as more particularly set forth therein. (WSC-CK-60)

Department of the Treasury - Internal Revenue Service

**Form 886-A**

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<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

- A 2003-A Servicing and Management Agreement was entered into by and between Prime Asset Business Trust and West Side Cellular. PABT will provide certain professional services in connection with its purpose to conserve and protect the trust assets. The term of this Agreement shall commence as of the date of this Agreement and continue until November 6, 2008. This Agreement shall terminate on November 6, 2008, unless extended by the written agreement of the PABT and Client. The 2003-A Beneficiary assets shall be used during the term of this Agreement only to pay any tax liability of the 2003-A Beneficiary. PABT shall deliver the following professional services to the 2003-A Beneficiary: 1) PABT shall provide administrative and collection services, where applicable; PABT shall manage the portfolios to maximize collection and recovery of Accounts comprising said portfolios; PABT shall provide the 2003-A Beneficiary with summary collection and expense reports no less frequently than once every six months. PABT shall also provide such additional reports as the 2003-A Beneficiary shall reasonably request; and PABT shall from time to time evaluate the potential sale of all or any portion of Accounts, shall present recommendations to the 2003-A Beneficiary as to the value of Accounts and shall negotiate the sale price and other terms of the sale of all or any portion of Accounts. (WSC-CK-73)

#### Corporate Return - 2003

- Michael Bittner prepared the 2003 corporate return for West Side Cellular. The return reflected the cellular business activities from January 1, 2003 through September 5, 2003 (the date the assets were conveyed to LXV Group). In addition to the cellular activities, the return reported Other Income of \$65,050.141. This consisted of the proceeds from the litigation settlements.

Also reflected on the corporate return was a section 351 transfer of Japanese Notes Receivables from Millennium Recovery Fund (100% shareholder). The tax basis and fair market value of securities transferred were reflected at \$43,323,069. This transfer occurred on November 6, 2003.

By year-end, West Side either sold or determined that the Notes Receivables were worthless and claimed a bad debt deduction in the amount of \$42,480.622. This bad debt loss in combination with other operating deductions completely offset the litigation proceeds resulting in negative taxable income of (\$1,723,813).

- On January 9, 2006, Noel McNabola filed an amended return for West Side Cellular with prior examiner. An investment of \$1,000,000 in Lido Investments was originally reported and deducted as legal and professional fees. The amended return changed this treatment and reported the \$1,000,000 investment as an asset. This change resulted in an amended taxable income of (\$742,175). Taxable income is still negative, thus, no tax was due. (WSC-PMB-11)

#### Corporate Return - 2004

- The Form 1120 for West Side for 2004 was received by the IRS on March 23, 2005 and was signed by Tim Conn as Asst Secretary and manager of West Side. The return was prepared by W. Noel McNabola of Pohl, McNabola, Berg & Company LLP in San Francisco. The 100% shareholder is shown as MRF.
- The 2004 return reflects interest income of \$2,272. Deductions were claimed for taxes and licenses of \$12,750, legal and professional fees of \$20,000, Net Loss-Prof Services Reserves of \$73,872 and office expense of \$449. These items resulted in a net operating loss of (\$104,799) for the year.



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

On December 13, 2005

- PMB + Helin Donovan, LLP (address: 50 Francisco Street, Suite 120, San Francisco, CA 94133) sent invoice to West Side Cellular (address: 1155 W. Fourth Street, Suite 225, Reno, NV 89503) for services rendered in preparation of West Side's amended federal income tax return for the year 2003 and its amended Ohio corporate franchise tax report for the tax year 2004. Total invoice was for \$1,250. (WSC-PMB-1) Per letter from Noel McNabola, dated May 18, 2007, "the first period that we provided professional services to West Side Cellular was in the preparation of the amended corporate tax return Form 1120 for the year ended December 31, 2003. (WSC-PMB-0)

## H. CONCLUSION

### Net Cash Benefit From Transaction

#### 1. to Michael Tricarichi:

	<u>W/O Fortrend</u>	<u>W/ Fortrend</u>	<u>Net Savings</u>
*Net Taxable Income (after reported litigation proceeds)	40,635,945	40,635,945	
*Federal Tax (35%)	14,222,581	N/A	
*State Tax (first 50,000 - .51%)	255		
*State Tax (over 50,000 - 8.50%)	3,449,805		
*Local Tax	597,321		
*State & local tax reduction	-1,416,584		
Total Corporate Taxes Paid	16,853,378	0	
Net After-Tax Cash for S/H Liquidation	23,782,567		
**Ending Cash Balance		40,577,150	
Less Fortrend premium		5,377,779	
Net pay-out to S/H		35,199,371	
Benefit to S/H			11,416,804

#### 2. to Fortrend (Intermediary):

	<u>W/O Tax Savings</u>	<u>W/ Tax Savings</u>
Value of Assets Received:		
Cash	39,949,373	39,949,373
Notes Receivable - S/H loan	577,778	577,778
Receivable - Escrow Deposit	50,000	50,000
Less outstanding liabilities	0	0
*Less anticipated federal tax liability	-16,853,378	0
Net value of assets received	23,723,773	40,577,151
Stock Purchase Price paid - cash portion	34,621,594	34,621,594
Check for S/H loan	577,778	577,778
Total stock purchase price paid	35,199,372	35,199,372
Profit Earned by Fortrend	-11,465,600	5,377,779

\* based on document WC 00104; \*\* based on document WC00102

Department of the Treasury - Internal Revenue Service

**Form 886-A**

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<b>Form 886-A</b>	Department of the Treasury - Internal Revenue Service	<b>Schedule No. or Exhibit</b>
<b>Explanation of Items</b>		
<b>Name of Taxpayer</b> West Side Cellular, Inc.		<b>Year/Period Ended</b> 12/31/2003

#### Conclusion

In summary, the sale of stock in West Side to Fortrend was, in substance, a diversionary tactic, lacking economic substance, to disguise the distribution of assets (litigation proceeds) to the shareholder. By engaging in the intermediary transaction with Fortrend, Michael Tricarichi received additional cash proceeds of \$11,416,804 as computed above. Fortrend received a premium of \$5,377,779 for participating in the transaction. The only way this transaction would have been profitable to the shareholder and the intermediary was to eliminate the corporate tax on the settlement proceeds.

Fortrend did not acquire equity in a business, nor did it assume risks of a business. West Side, at the time of the stock sale, had cash (the litigation proceeds) as its only asset with no liabilities, which freed up the cash for immediate distribution. West Side had ceased all business operations – there was no business activity for Fortrend to assume. West Side was a mere shell corporation. The stock sale transaction was simply an exchange of cash for cash; it served no legitimate business purpose.



## West Side Cellular Transaction Exhibit Index

Entity Relationship Flowchart	Exhibit A
Transaction Flowchart	Exhibit B
Intermediary Cash Flow Spreadsheet	Exhibit C
Flow of Funds Between Bank Accounts	Exhibit D
Economic Benefit to Fortrend	Exhibit E
Economic Benefit to Shareholder	Exhibit F
Bank Account Analysis for the following accounts: Business Bank of CA – West Side Cellular Business Bank of CA – Nob Hill Holdings	Exhibit G
Closing Binder Index for West Side Cellular Transaction	Exhibit H
Nevada Residency Conversion Notes	Exhibit I

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

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APP0701

## Exhibit A

### Entity Relationship Flowchart

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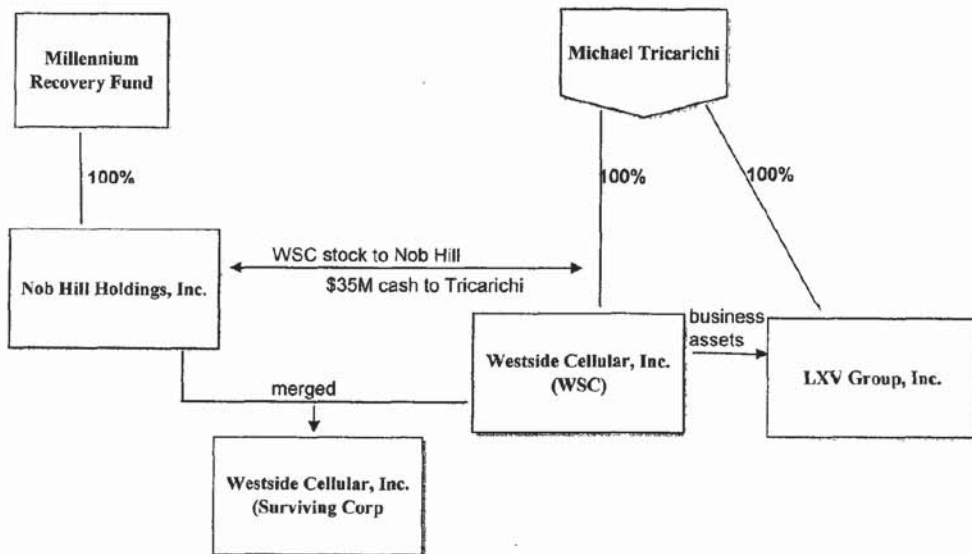
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# ENTITY RELATIONSHIP FLOWCHART



## Exhibit B

### West Side Cellular Transaction Flowchart

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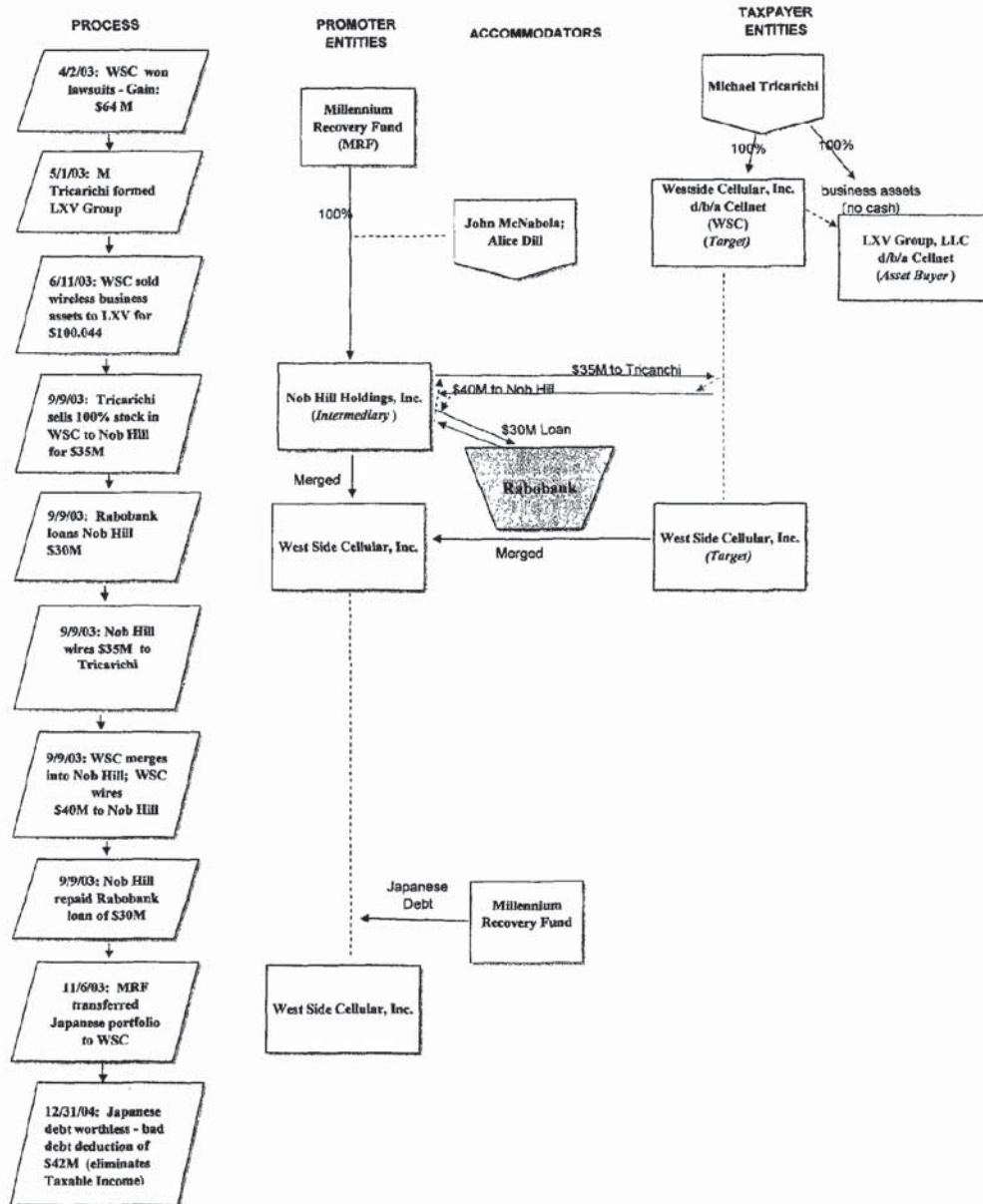
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# TRANSACTION FLOWCHART



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APP0705

## Exhibit C

### Intermediary Cash Flow Spreadsheet



Bank  
Account Num 310001900  
Name West Side Cellular  
Signature Authority Michael Truanch

Date	Description	Deposits	Transfers	Wire
8/5/2003	Ending cash balance at 8/5/2003	39,949,373.12		
9/10/03	Ending cash balance wire transfers to Westside Cellular #21577 at Rabobank		39,949,373.12	

Bank  
Account Num 310001900  
Name West Side Cellular  
Signature Authority Michael Truanch

Date	Description	Deposits	Transfers	Wire
8/5/2003	Rec'd from Nod Hill Holdings (Stock)	34,621,594.06		
9/10/03	Transferred to Truanch's acct at Firsting		34,621,594.06	

Bank  
Account Num 310001900  
Name West Side Cellular  
Signature Authority Michael Truanch

Date	Description	Deposits	Transfers	Wire
9/10/2003	Rec'd from Truanch Escrow at	34,621,594.06		
	Rabobank			

Bank  
Account Num 00021577  
Name West Side Cellular  
Signature Authority Michael Truanch transfers to John McChabola

Date	Description	Deposits	Transfers	Balance
8/10/03	Ending cash balance received from Westside Cellular - business account	39,949,373.12		
9/10/03	Interest earned on overnight time deposit	1,076.41		
9/10/03	Disbursement to where?		5,099,946.53	
9/10/03	Rec'd from Nod Hill Holdings	150,000.00		
9/10/03	Transferred to Nod Hill Holdings		38,000,000.00	
9/10/03	Transferred to unknown	5,100,077.03	5,000,000.00	
9/10/03	Deposit from ?	5,000,000.00		
9/10/03	Transferred to unknown		5,100,577.03	
	Ending Balance	50,200,520.50	50,200,520.50	0.00

Bank  
Account Num 460021568  
Name Nod Hill Holdings  
Signature Authority John McChabola

Date	Description	Deposits	Transfers	Balance
8/10/03	Rec'd from McFall at First Bank	5,000,000.00		
8/10/03	Interest earned on overnight time deposit	134.72		
8/10/03	Loan	29,900,000.00		
8/10/03	Rec'd from Westside Cellular #21577 at	35,000,000.00		
8/10/03	Disbursement to where? (Bank Fee %)		150,000.00	
8/10/03	Transferred to WSC #21577 (Guarantee)		150,000.00	
8/10/03	Disbursement of Loan		28,900,000.00	
8/10/03	Transfer to Truanch Escrow #21596		34,621,594.06	
8/10/03	Interest earned on overnight time deposit	1.98		
9/10/03	Transfer back to McFall at First Bank (?)		5,000,000.00	
9/10/03	Transfer to WSC at Business Bank of CA		78,542.84	
	Ending Balance	69,800,136.70	69,800,136.70	0.00

Bank  
Account Num #65900144  
Name West Side Cellular  
Signature Authority John McChabola, Timothy Conn, Alice Dill

Date	Description	Deposits	Transfers	Balance
9/10/03	Received from WSC Acct #21577 at Rabobank	5,100,577.03	payment of fees, misc	

Bank  
Account Num #65900136  
Name Nod Hill Holdings  
Signature Authority John McChabola, Timothy Conn

Date	Description	Deposits	Transfers	Balance
9/10/03	Received from Nod Hill Acct	78,542.84		
11/6/03	Transferred ending balance to WSC #65900144		78,542.84	0

Cash Balance Rec'd by Forend  
Stock Purchase Price paid out by Forend  
Profit to Forend at Closing  
Payroll to Forend owned accounts  
Guarantee Fee

39,949,373.00  
34,621,594.00  
5,327,779.00  
5,179,119.00  
150,000.00  
5,328,119.00

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TRICAR-NV0009537

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## Exhibit D

Flow of Funds Between Bank Accounts

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# FLOW OF FUNDS BETWEEN BANK ACCOUNTS

West Side Cellular, Inc.  
1120 - 12/31/2003

DATE: 10/29/2007  
RA: dm

Bank: Rabobank  
Account # 21577  
Name: Westside Cellular

Date	Description	Deposits	Checks/Wire Transfers	Balance
0/0/0	Beginning Balance			0
9/8/03	Ending Cash Balance rec'd from WSC business acct #31v001900 - Pershing	39,949,373	0	39,949,373
9/9/03	Interest earned on overnight time deposit	1,076	0	39,950,450
9/9/03	disbursement to?	0	(5,099,950)	34,850,500
9/9/03	Rec'd from Nob Hill Holding acct #21568	150,000	0	35,000,500
9/9/03	Transferred to Nob Hill Holding acct #21568	0	(35,000,000)	500
9/9/03	transferred to ?	0	(5,000,000)	(4,999,500)
9/10/03	deposit from ?	5,100,077	0	100,577
9/10/03	deposit from ?	5,000,000	0	5,100,577
9/10/03	transferred to Westside Cellular acct#65800144 at Business Bank of CA		(5,100,577)	(0)

Bank: Rabobank  
Account # 21568  
Name: Nob Hill Holdings

Date	Description	Deposits	Checks/Wire Transfers	Balance
1/1/00	Beginning Balance			0
9/8/03	Rec'd from Moffat at First Bank	5,000,000	0	5,000,000
9/8/03	interest earned on overnight time deposit	135	0	5,000,135
9/9/03	Loan proceeds from Rabobank	29,900,000	0	34,900,135
9/9/03	Rec'd from Westside Cellular #21577	35,000,000	0	69,900,135
9/9/03	Bank Fee	0	(150,000)	69,750,135
9/9/03	Transferred to WSC #21577 (Guarantee Fee)	0	(150,000)	69,600,135
9/9/03	Repayment of loan from Rabobank	0	(29,900,000)	39,700,135
9/9/03	Transfer to Tricarichi Escrow #21595 (stock purchase price)	0	(34,621,594)	5,078,541
9/10/03	interest earned on overnight time deposit	2	0	5,078,543
9/10/03	Transfer back to Moffat at First Bank	0	(5,000,000)	78,543
9/10/03	Transfer to Nob Hills acct #65800136 at Business Bank of CA	0	(78,543)	(0)

Bank: Rabobank  
Account # 21595  
Name: Tricarichi Escrow Account

Date	Description	Deposits	Checks/Wire Transfers	Balance
01/01/00	Beginning Balance			0
9/9/03	Transfer of funds from Nob Hill Holdings (Intermediary)	34,621,594	0	34,621,594
9/9/03	Transferred to Tricarichi acct #310091918 at Pershing	0	(34,621,594)	0

Bank: Business Bank of California  
Account# 65800144  
Name: West Side Cellular

Date	Description	Deposits	Checks/Wire Transfers	Balance
	Beginning Balance			0
09/10/03	Transfer Balance from Rabobank - Westside Cellular account used for payment of fees relating to transaction & misc; acct ongoing until 4/2004	5,100,577		5,100,577

Bank: Business Bank of California  
Account# 65800136  
Name: Nob Hill Holdings

Date	Description	Deposits	Checks/Wire Transfers	Balance
	Beginning Balance			0
09/10/03	Transfer Balance from Rabobank - Nob Hill Holdings account			78,543
09/30/03	interest earned on acct; service charge		(13)	78,566
10/31/03	interest earned on acct			78,620
11/6/03	transfer balance to Westside Cellular acct#65800144 at Business Bank of CA		(78,620)	0

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ADMIN\_TRI01383

TRICAR-NV0009539

APP0709

## Exhibit E

Economic Benefit to Fortrend

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ADMIN\_TRI01384

TRICAR-NV0009540

APP0710



Would Fortrend have realized any economic benefit in the stock purchase transaction without the tax savings it received from the contribution of debt?

**Westside Cellular Stock Transaction**

	<u>With Tax Savings</u>	<u>Without Tax Savings</u>
Value of Assets Received:		
Cash	39,949,373	39,949,373
Notes Receivable	<u>577,778</u>	<u>577,778</u>
Receivable - Escrow Account	50,000	50,000
Less outstanding liabilities	0	0
Less anticipated federal tax liability	0	16,853,378 (a)
Net value of assets received	<u>40,577,151</u>	<u>23,723,773</u>
Stock Purchase Price paid	34,621,594	34,621,594
Check for S/H Loan	<u>577,778</u>	<u>577,778</u>
Total Stock Purchase Price Paid	<u>35,199,372</u>	<u>35,199,372</u>
Economic Benefit to Fortrend	<u>5,377,779</u>	<u>-11,475,600</u>

(a) Estimated federal tax liability per taxpayer's computation in document HL 2882.

## Exhibit F

Economic Benefit to Shareholder

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ADMIN\_TRI01386

TRICAR-NV0009542

APP0712



**Economic Benefit to Shareholder**

	<i>With Fortrend</i>	<i>Without Fortrend</i>
Net Income per books *	41,909,062.56	41,909,062.56
50% entertainment expense	316.03	316.03
Depreciation	4,204.05	4,204.05
Bad Debt	-20,000.00	-20,000.00
Total M-1 adjustments to income	<u>-15,479.92</u>	<u>-15,479.92</u>
TI before NOL	41,893,582.64	41,893,582.64
NOL Carryforward	<u>-1,257,638</u>	<u>-1,257,638</u>
Net Taxable Income	40,635,944.64	40,635,944.64
Federal Tax (35%)	14,222,580.62	14,222,580.62
State Tax (first 50,000 - 51%)	255	255
State Tax (over 50,000 - 8.50%)	3,449,805.29	3,449,805.29
Local Tax	597,321.26	597,321.26
State & local tax reduction	<u>-1,416,583.54</u>	<u>-1,416,583.54</u>
Net Taxes	16,853,378.63	16,853,378.63
Fortend premium (31.88%)	5,372,014.44	
Cash balance as of 9/3/03	<u>40,571,371.14</u>	
Net cash payout to M Tricarichi	35,199,356.70	<u>23,782,566.01</u>
Premium to M Tricarichi for using Fortrend	11,416,790.69	

\* based on document WC 00104

## Exhibit G

Bank Account Analyses for the following accounts:

Business Bank of California	Acct #65800144	West Side Cellular
Business Bank of California	Acct #65800136	Nob Hill Holdings



**Business Bank of California**

West Side Cellular

Flex Checking #65800144 Signature Authority: John McNabola, Timothy Conn, Alice Dill

Date Opened: 9/10/03

Date Closed: 11/6/03

<u>Date</u>	<u>Deposit Amount</u>	<u>Disburs. Amount</u>	<u>Balance</u>	<u>Description</u>
9/10/2003	5,100,577.03			wire transfer
9/10/2003		20,000.00		wire transfer - Moffat Int'l financing fee
9/11/2003		50,000.00		check#1 - Michael Bither fee (L&P)
9/11/2003		6,000.00		misc debit - cash
9/12/2003		50,000.00		check #2 - Baguette Holdings fee (L&P)
9/12/2003		455,000.00		wire transfer - Steve Block fee (L&P)
9/18/2003		1,000,000.00		wire transfer - El Rio (Furman) investment
<b>9/23/2003</b>		<b>1,180,000.00</b>		<b>wire transfer- Midcoast fee for Tim Conn</b>
9/26/2003		15,000.00		check#204 - Baguette Holdings - fee
9/29/2003	704,000.00			wire transfer - El Rio - reverse 9/18 wire
9/29/2003		270.00		check#203 - Corp. Ofc. Cntr (rental)
9/29/2003		540.60		check#202 - Randy Bae (cell phone reimb)
9/30/2003		1,000,000.00		wire transfer - Lido investment
9/30/2003	2,024.44			interest
9/30/2003		429.80		service charge
10/6/2003		575,000.00		wire transfer-Regency Resources - fee
10/9/2003		1,779.43		check#201 (Chuck Klink - Inv reimb)
10/29/2003	429.80			misc credit
10/31/2003	296,000.00			*Coles-\$185,000; PLC - 50,000; Noba - 34,000; Copper - 27,000
				(ck register show El Rio - reverse 9/18/ wire)
10/31/2003	1,321.58			interest
11/5/2003		98.38		check#206 - C. Baclet (Nob Hill)
11/5/2003		908.68		check#207 - C. Baclet (Westside-merger)
11/5/2003		1,054.30		check#205 - Fedex
11/6/2003	78,619.54			misc credit-balance transfer from acct #65800136 (Nob Hill closed acct)

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Date	Deposit Amount	Disburs. Amount	Balance	Description
11/17/2003		350,000.00		telephone transfer - Empire One - loan
11/17/2003		1,000,000.00		telephone transfer (Diablo, Inc - loan for Sandstone)
11/20/2003		350,000.00		telephone transfer - Empire One - loan
11/25/2003	1,000,000.00			telephone transfer - Diablo - loan repay
11/28/2003	965.33			interest
12/5/2003	700,000.00			telephone transfer - Empire One - loan repay
12/31/2003	1,538.15			interest
1/8/2004		1,410,000.00		wire transfer - Millennium Fund at Bank of Bermuda LTD acct #20004738
1/30/2004	592.44			interest
2/12/2004		2,620.38		check - Cuyahoga County Treasurer
2/19/2004		1,333.48		check #209 - CWC - payroll taxes #1058003-0
2/20/2004		1,038.66		check #208 - Richard Cordeal, Franklin County Treasurer
2/20/2004		20,000.00		check - Olson Lemons PC
2/25/2004		296.86		check
2/27/2004	231.67			interest
3/30/2004		5,000.00		telephone transfer
3/31/2004		51.93		check
3/31/2004	249.83			interest
4/12/2004		390,127.31		closing withdrawal - cashier's check to Chase Account
	7,886,549.81	7,886,549.81	0.00	

\* Cole Street Realty Corporation, PLC Peninsula, Inc., Noba, Inc., Copperhill Development Corp.

Check Register provided additional information as to transactions. See document WSC-PMB-58



Business Bank of California

Nob Hill Holdings, Inc.  
c/o Phil McNabola, Berg & Co

Flex Checking #65800136

Signature Authority: John McNabola, Timothy Conn  
Date Opened: 9/10/03  
Date Closed: 11/6/03

Date	Interest Earned	Deposit Amount	Disburs Amount	Balance	Description
9/10/2003		78,542 64			wire transfer from Rabobank
9/30/2003	36 16				
9/30/2003			12 66	78,566 14	service charge
10/31/2003	53 40			78,619 54	

11/6/2003 78,619 54 closing w/d (transfer funds to acct #65800144: Westside Cellular) - Tim Conn  
0.00

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TRICAR-NV0009547

APP0717

(WC 000010 thru 000014)

## Exhibit H

Closing Binder Index for West Side Cellular Transaction



West Side Cellular, Inc.

Closing Binder Index

BUYER = Nob Hill Holdings, Inc. a Delaware corporation  
MRF = Millennium Recovery Fund (100% Shareholder of BUYER)  
COMPANY = West Side Cellular, Inc., an Ohio corporation (corp. to be acquired)  
SELLER = Michael Tricarichi (100% Shareholder of corp. to be acquired)  
CGK = Charles G. Klink (Buyer's counsel)  
HLP = Hahn Loeser & Parks (Seller's counsel)

Tab #	Document Title
1	<b>Stock Purchase Agreement</b> , including Exhibits and Schedules (listed below), dated September 9, 2003, between SELLER and BUYER
	SPOUSAL CONSENT COMPANY JOINDER EXHIBIT A - Wire Instructions EXHIBIT B - Pro-forma Calculations EXHIBIT C - Final Tax Return EXHIBIT D - Form of Non-Confidentiality Certificate EXHIBIT E - Form of Legal Opinion of Counsel to Seller EXHIBIT F - Form of Legal Opinion of Counsel to Buyer SCHEDULE 3.2(b) - Capital Stock of Companies SCHEDULE 3.2(g) - Closing Assets SCHEDULE 3.2(j) - Material Contracts SCHEDULE 3.2(n) - Companies Bank Accounts and Powers of Attorney SCHEDULE 3.2(p) - Subsidiaries SCHEDULE 11.2 - Notices SIDE LETTER re: Interest Payments post-closing
	<b>Seller's Docs</b>
2	Articles of Incorporation of COMPANY.

West Side Cellular, Inc.

3	Code of Regulations of COMPANY.
4	Organizational Minutes (Initial) of COMPANY, dated March 13, 1988.
5	Incumbency Certificate of the Officers of COMPANY, executed by the President and Secretary, dated September 9, 2003.
6	Certificate of Good Standing of COMPANY from the Ohio Secretary of State, dated September 2, 2003.
7	The stock books, stock ledgers and minute books of COMPANY. <i>[to be sent directly to John P. McNabola post-closing]</i>
8	All of COMPANY's contracts and written agreements, originals or copies of its books and records and all other data relating to the business of COMPANY. <i>[to be sent directly to John P. McNabola post-closing]</i>
9	Resignation of all of the Officers of COMPANY, dated as of the date of the Stock Purchase Agreement.
10	Resignation of all of the Directors of COMPANY, dated as of the date of the Stock Purchase Agreement.
11	The financial statements of COMPANY and Statements of Account for the COMPANY bank account, dated through September 9, 2003.
12	Non-Confidentiality Certificate (Seller's Signature)
13	Cross-Receipt executed by Buyer and Seller (Seller's Signature)
14	A check for \$577,777.77, properly endorsed to the Company to repay the Shareholder Loan of \$575K together with the required \$2,777.77 interest.
15	Assumption of Lease Agreement between Beechwood Premises and LXV, LLC
16	Legal opinion of Counsel to SELLER substantially in the form contemplated by Exhibit E of the SPA
17	Irrevocable Stock Power, dated September 9, 2003
	<b>Buyer's Documents</b>
18	Certificate of Incorporation of BUYER.
19	Bylaws of BUYER.
20	Incumbency Certificate of the President of BUYER, executed by the President, dated September 9, 2003.



West Side Cellular, Inc.

21	Certificate of Good Standing of BUYER from the Delaware Secretary of State, dated September 4, 2003.
22	Written Consent of the Directors of BUYER authorizing the execution and delivery of the Stock Purchase Agreement, dated August 22, 2003.
23	Written Consent of the Directors of BUYER authorizing the loan from Rabobank, dated August 22, 2003.
24	Written Consent of the Directors of BUYER authorizing opening of Rabobank account, dated August 22, 2003.
25	Written Consent of the Directors of BUYER authorizing opening of Business Bank of California account, dated August 22, 2003.
26	Written Consent by the Sole Director of COMPANY (new) accepting Resignations of the Officers and appointing new Officers, dated September 9, 2003
27	Written Consent of the Shareholder of COMPANY, (new) accepting Resignations of the Directors and appointing new Director, dated September 9, 2003
28	Non-Confidentiality Certificate (Buyer's Signature)
29	Wire Instructions for purchase price to be wired from BUYER to SELLER.
30	A check from Buyer to Seller for \$577,777.77 to be used as a partial stock purchase price.
31	Cross-Receipt executed by Buyer and Seller. (Buyer's Signature)
32	Acknowledgement of receipt of Settlement Agreement re: West Side Cellular, Inc., d/b/a Cellnet and Cincinnati SMSA Limited Partnership, Ameritech Mobile Communications LLC
33	Acknowledgement of receipt of Settlement Agreement re: West Side Cellular, Inc., d/b/a Cellnet and New Par, Cellco Partnership and Vodafone Americas, Inc.
34	Legal opinion of Counsel to BUYER substantially in the form contemplated by Exhibit F of the SPA
	<b>Rabobank UAFC Account Docs</b>
35	UAFC account opening forms for COMPANY.

## Exhibit I

### Notes on Nevada Residency Conversion



On May 5, 2003

David Cook sent email to Ray Turk regarding Nevada Residency Conversion. "Attached is a revised document based upon our conversation this afternoon. I have adjusted several additional items since we have gotten the new facts, basically to eliminate references to 1/1/04 and make them more to the "date of gain recognition". Also see the discussion of the installment sale gain...."

- Nevada Residency Conversion Discussion Points – Best Case Scenario: Under the best case scenario, the change from Ohio residency to Nevada residency is clearly completed prior to the gain being triggered, and there is minimal potential for Ohio to argue that any of the gain is taxable: (PWC-WS 0002)
  - Nevada home is completed
  - Husband, wife and family have physically moved to Nevada prior to the gain being triggered
  - Ohio house has been sold (or is on the market as of 12/31/03)
  - New ties being established in Nevada, and old tie to Ohio being broken (bank accounts, club memberships, auto registrations, etc.)
  - Minimal or no "contact periods" in Ohio during 2004
- Key Points – memo includes one page worth of discussions including such items as:
  - The gain will be triggered for federal purposes on a installment basis, with gain being included in income over several tax years. Ohio case law indicates that if the gain is recognized in a year in which the owner is a resident, it will be taxable. However, if gain is recognized in a period after the owner has changed his residency, Ohio is not able to subject the gain to taxation.
  - The contract signing (likely to occur July 1, 2003) should not have an impact upon the taxation of the gain. As long as there are contingencies that prevent the gain from being recognized for federal purposes, the date of the contract does not matter. The determining factor is the state of residency when the gain is triggered, not whether there were earlier intentions to sell the stock.
  - There will be one year for which Husband (and likely Wife) will be considered a part-year resident. This is the year in which the transition occurs, and Ohio will have the ability to tax the part-year resident...It is imperative that the residency conversion occur prior to the gain being recognized in order to prevent Ohio taxation of the gain.
  - Statutes and Case law dictate that a new domicile must be established before the old domicile is considered abandoned. Therefore, for Ohio to consider Husband to no longer be domiciled in Ohio, he must have obtained a new Nevada domicile...
  - If all of the facts laid out in the Best Case Scenario can not be met, it is best to do as much as possible to stack the actual "facts and circumstances" in our favor. The more evidence that can be provided that the domicile has been changed, the better the chances of success. See the attached Residency Conversion Checklist for a listing of the facts and circumstances-type items that should be completed.
  - When it comes to facts and circumstances tests, the more ties back to the old domicile, the greater the risk that Ohio will determine that residency has not been changed.
- Potential Variables and Possible Impact
  - Ohio home not sold by year-end: This is not critical, especially if the home will definitely be sold within the next year or so. As long as the home is eventually sold, the intentions to abandon the old domicile are clear.

- Desire to retain Ohio home as a second home – This begins to weaken the argument and leaves Ohio with a possible position that domicile and residence has not been changed...If the Ohio home is retained, care should be taken to assure that:
  - The Nevada home is larger and more expensive
  - More time is spent at the Nevada home
  - The Nevada home is more elaborately furnished, and all important furnishings (such as family heirlooms, etc.) are kept in Nevada
- Desire to spend portions of year in Ohio (after move) – Similar to above, this begins to weaken the argument.... For all future years, time in Ohio should be kept under 120 contact periods in order to avoid the presumption of Ohio residency.
- New Nevada home not completed by gain recognition date – It is not absolutely critical that the new house be completed by the date of gain recognition. However, it would be very helpful if the family could actually physically move to Nevada, even if it is to a temporary apartment.
- Inability to physically move entire family prior to gain recognition – It is not absolutely critical that the entire family be moved prior to gain recognition, although it would be very helpful. If they can not be moved, a good reason for why the Husband had to move prior to the gain being triggered needs to be constructed. Furthermore, the remainder of the family should definitely be moved as soon after as possible. It would also help if the Ohio home is ultimately sold, as the actual move and actual abandonment of the Ohio home provide clear indicia of intentions. In the event that the family is not moved until after the gain is triggered and the Ohio home is not sold, the residency status of the Husband on the gain date becomes very questionable
- Critical Task
  - Sign contract to lease or purchase new Nevada home prior to stock gain being triggered
  - Husband must move to Nevada prior to the gain being triggered
  - See Residency Conversion Checklist for other steps to complete. Complete as many as possible to build best facts and circumstances evidence.

On May 15, 2003

David Cook of PWC sent email to Ray Turk regarding Ohio Residency Memo. "Attached is a draft version of the memo so far....There are three sections to the memo, with the first section being the critical one for tomorrow. The write-up is pretty much complete on this portion....The second section (position if move after 7/1/03) is not yet completed. I think that after discussing it further and thinking it through, I am tending to agree with you and DVK that there is NOT a position (at least a winning one). It seems that while the "taxable event" is indeed the recognition of the gain upon receipt of the installment payment, this only is relevant to the timing of the tax liability...the ultimate taxation of the gain, is in fact dictated by the statute itself which is based upon the domicile "at the time of such sale". So I think we are all on the same page, but I just need to revise the memo to say this. The third issue (taxation of recharacterized gain) is also pretty much concluded, but I just need to beef up Andy's memo on this discussion...." (PWC-WS 0006)

- The Facts per the draft memo were represented as follows: "The taxpayer is a 100% owner of a C corporation that has operations primarily in Ohio. The Taxpayer will be selling the stock of the C corporation, which will result in a significant gain of



approximately \$50,000,000. The sales contract will most likely be signed on July 1, 2003. The sale of stock will be made on an installment sale basis with a sell portion of the gain being recognized in 2003 and the remainder of the gain being recognized in 2004. The taxpayer is currently an Ohio resident, and owns a home in Ohio where he lives with his wife and two children. The Taxpayer recently purchased a house in Nevada and plans to move his family into that house at some future date in 2003. The Taxpayer will not sell the Ohio house, but will maintain it as a second home or vacation home." (PWC-WS 0007)

- The issues to determine were as follows:
  - What steps does Taxpayer need to take to change residency and assure that the gain will not be taxable in the State of Ohio?
  - Is there a position that the 2004 installment portion of the gain will not be taxable if the Taxpayer and his family complete their move to Nevada after the sales contract is signed but before 12/31/03?
  - If a portion of the federal gain is recharacterized as ordinary income related to services performed, what is the Ohio taxation impact?
- The conclusion in the draft memo is "That gain described ...above will be recognized for federal purposes on an installment basis, with gain being partially recognized in 2003 and the remainder in 2004. Taxpayer is expected to recognize gain from the sale of stock at or around the date the sales contract is signed (likely to be July 1, 2003). Therefore, it is imperative that the residency conversion occurs prior to the gain being recognized in order to prevent Ohio taxation of the gain....." (PWC-WS 0012)

On May 16, 2003

David Cook sent final version of the memo to Richard Stovsky and Ray Turk.

- The Facts per the final version were represented as follows: "The taxpayer is a 100% owner of a C corporation that has operations primarily in Ohio. The Taxpayer will be selling the stock of the C corporation, which will result in a significant gain of approximately \$50,000,000. The sales contract will most likely be signed on July 1, 2003. The sale of stock may be made on an installment sale basis with a sell portion of the gain being recognized in 2003 and the remainder of the gain being recognized in 2004. The taxpayer is currently an Ohio resident, and owns a home in Ohio where he lives with his wife and two children. The Taxpayer recently purchased a house in Nevada and plans to move his family into that house at some future date in 2003. The Taxpayer will not sell the Ohio house, but will maintain it as a second home or vacation home. The taxpayer also owns other S corporations with business operations in Ohio. Additionally, the Taxpayer may start a new real estate investment business, with operations likely to be in Ohio, with some of the proceeds from the sale" (PWC-WS 00015)

Determinations made in the final version include: (PWC-WS 0021)

- Timing of the Move – "As indicated above, it is absolutely critical that the Taxpayer at a minimum has physically moved to Nevada prior to the sales contract being signed. In addition, it is beneficial, but not critical, if the Taxpayer's family also physically moves into the Nevada residence prior to the sale date. The timing is critical for the Taxpayer since the Ohio statutes indicate that capital gains are allocated to the domicile of the Taxpayer at the time of the sale. Therefore, the Taxpayer needs to assure that he has changed his domicile prior to signing the sales contract. It should be relatively obvious that the optics of the residency conversion will improve to the extent that more time elapses between the move to Nevada and the sale of the stock...it would be recommended



that the Taxpayer and his family physically move to Nevada as far in advance of the sale date as possible...."

- Installment Sale Considerations – "As the above analysis indicates, the taxation of the gain is entirely dependent upon the domicile of the Taxpayer on the date of the sale...the manner in which the stock sale is completed has no bearing upon the domicile determination, and hence does not have any impact upon its ultimate taxability by Ohio, other than the timing of the liability...Therefore, it would appear that the use of the installment sales method does not provide any real benefit with respect to the Ohio tax treatment of the gain. On the other hand, it does significantly complicate the transaction, as it defers the receipt of the sale proceeds, creates a federal interest cost, and creates additional legal complexities. Accordingly, there is not reason to recommend the use of an installment sale for state taxation purposes."

On August 12, 2003

- David Cook sent email to Jim Tricarichi regarding the Residency issues. "As discussed on the conference call yesterday, attached is another copy of the key items that Michael should get completed to strengthen his Nevada residency position. The first list highlights the required steps, which have all been completed. The second list documents several beneficial steps, and refers to a separate Residency Conversion Checklist, which I have also attached. Michael should be in the process of working on completing all of the items on the checklist. The document indicates that most of these should be completed prior to the stock sale, although there is not a hard and fast deadline. At the very least, all of the items should be completed by the end of 2003 to provide as much facts and circumstances type evidence as possible to support his Nevada residency..." (PWC-WS 899)
- Required Steps:
  - Taxpayer must acquire a new Nevada residence (home) before the sale of the stock.
  - Taxpayer must physically move from Ohio to the new Nevada residence before the sale of the stock.
  - Taxpayer must have less than 120 contact periods with Ohio during 2004. This will prevent the Taxpayer from being presumed to be an Ohio resident during 2004 as a result of greater than 120 contact periods.
- Beneficial Steps:
  - Taxpayer's family should physically move from Ohio to the new Nevada residence before the sale of the stock. If not possible by the date of the stock sale, the family should move as soon as possible after that date (but no later than December 31, 2003), and a reasonable argument constructed for why it was important for the Taxpayer to move to Nevada ahead of his family.
  - Any legal documents associated with the stock sale transaction should refer to the Taxpayer as a Nevada resident and provide the Nevada address and phone number as his place of residence.
  - Assure that the Nevada residence is more expensive and elaborately decorated than the Ohio residence to support the position that the Ohio home is not the primary residence. Keep all-important furnishings (such as family heirlooms, etc.) in the Nevada residence.
  - Establish as many ties to Nevada and sever as many Ohio ties as possible (bank accounts, voter registration, driver's license, club memberships, etc.). Please refer to the attached Residency Conversion Checklist for a complete listing and description of additional steps to support the Nevada domicile change.

On August 20, 2003

- Ray Turk set email to Jim Tricarichi, "Thank you for talking thru the residency checklist items last week. Just a quick recap for you to close the loop on the supporting NV residency topic: (PWC-WS 924)

Required Steps:

- For 2003, Mike has completed "required" steps 1 and 2 (i.e. NV home established and he moved prior to stock transaction), and has completed "beneficial" step 1 and 3 (i.e. the family moved and the NV home was substantively furnished), and step 2 (i.e. stating Mike as a resident of NV) should be addressed as part of finalizing the legal documents. "Beneficial" step 4 was discussed with Mike pointing out that he does not have significant organizations to consider changing.
- For 2004 and future tax years, keeping Mike's OH contact days under 120 days will require monitoring throughout the year. It is best supported with keeping a diary of some sort, otherwise they will require receipts and other detail supporting his presence outside OH.

NV Residency Conversion Checklist:

- Mike has completed all of these items prior to the stock transaction, except he still needs to finalize the address change with the social security administration. As part of the preceding, you will use his NV address for purposes of filing his future tax returns, and he will have his new domicile recited in the next update done to any estate planning (i.e. wills, etc.) documents.

It would be prudent to revisit these items near the end of each year to make sure they are addressed and to see if any changes occur that may impact supporting his NV residency status. In the meantime, if you have any questions, please let me know.



# **Exhibit 17**

**To:** mtricarichi@aol.com[mtricarichi@aol.com]; Randy Hart[randyjhart@gmail.com]; Miller, Glenn S.[Glenn.Miller@bingham.com]; michael.desmond@bingham.com[michael.desmond@bingham.com]  
**Cc:** Corn, Richard M.[cornr@sullcrom.com]; Gadwood, James R.[gadwoodj@sullcrom.com]; Korb, Don[Korbd@sullcrom.com]  
**From:** Korb, Don[Korbd@sullcrom.com]  
**Sent:** Wed 6/9/2010 12:19:44 PM (UTC)  
**Subject:** Draft Slides for Appeals Presentation  
NY12529-#440745-v5A-Tricarichi - Appeals Presentation.PPT

Attached for your review is a set of slides that we would use at the initial meeting with the Appeals Officer. These slides were designed to (1) lay out the key facts and (2) walk through the three IRS arguments. In addition to this set of slides, we are preparing a set which deal with the transferee liability argument (basically, taking our "stand alone" memo and turning it into slides) and also a set which lay out the steps Mike took in his tax planning beginning in the Fall of 2002 to (1) illustrate that what was done here was Cumberland Power type of tax planning (i.e., before the fact) and not Court Holding type of tax planning (i.e., after the fact) and (2) buttress the time line to for our argument that this is not a "conduit" case (i.e., see slides 33-50 of the attached set of slides).

I assume that we have complete silence so far from the Appeals Officer in Cleveland?

DLK

PS--Mike note that on slide 4, there is a "placeholder" for you to add, as we discussed at our meeting on April 29, background fact on your business over the years.

Donald L. Korb  
Sullivan & Cromwell LLP  
1701 Pennsylvania Ave., N.W.  
Washington, DC 20006  
202-956-7675  
[korbd@sullcrom.com](mailto:korbd@sullcrom.com)

\*\*\*\*\*

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\*\*\*\*\*

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EXHIBIT  
PwC Dep Ex. No.

**117**

A-16-735910-B

TRICAR-NV0123530  
**APP0729**



# **Michael Tricarichi Appeals Presentation**

*Last Updated: June 8, 2010*

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# **I. Facts**



## **I. Facts**

- West Side Cellular Inc. (“**West Side**”) is an Ohio corporation.
- From 1988 to 2003, West Side engaged in the business of reselling cellular telecommunications services.
- **[Tricarichi to provide more background facts]**
- During this time, Mr. Michael Tricarichi (the “**Taxpayer**”) was the sole shareholder of West Side.

## **I. Facts**

- In 1993, West Side filed complaints against wholesale cellular service providers alleging that the providers engaged in discriminatory and illegal business practices against West Side.

- By late 2002, West Side expected a large settlement with respect to this litigation, and so by 2002 Taxpayer and his advisors were aware that a large amount of potentially taxable income could be received in the near future.

## **I. Facts**

- In April 2003, a settlement agreement with respect to the dispute was entered into between the parties whereby West Side would receive \$64,250,000 in exchange for dropping the complaint and exiting the cellular telecommunications business.
- After the settlement was entered into, West Side received the cash payment of \$64,250,000.
- After paying approximately \$25,000,000 in professional fees and employee bonuses, West Side was left with cash of approximately \$40,000,000.



## **I. Facts**

- After the settlement, Taxpayer met with Fortrend International, LLC (“**Fortrend**”) to negotiate a sale of West Side.
- Fortrend and Taxpayer negotiated as to the price, and Fortrend reviewed the balance sheets and financial records of West Side as part of its due diligence.
- During the course of negotiating the deal, Fortrend made clear that it did not want to retain West Side’s cellular business.

## **I. Facts**

- On June 11, 2003, West Side sold certain of its business assets, including its customer base and various receivables, to LXV Group, Inc. (“LXV”), in response to Fortrend’s desire not to retain West Side’s cellular business.
- The sale of the business assets to LXV was intended as a temporary step in the eventual sale of these assets to another buyer. The cellular business of LXV was eventually sold to Cellnet Michigan, Inc., a buyer unrelated to Taxpayer.
- After the sale to LXV, the assets remaining in West Side included cash, a \$577,000 note and federal excise tax causes of action.

## I. Facts

- On July 23, 2003, a letter of intent setting forth the key terms of the planned sale of West Side stock was executed by Fortrend and Taxpayer.
- On September 9, 2003, Taxpayer sold all of the West Side stock to Nob Hill Holdings, Inc. (“**Nob Hill**”), an unrelated company owned by Fortrend and organized by Fortrend as an acquisition vehicle for the transaction, for approximately \$35,000,000 (the “**Stock Sale**”).
- Nob Hill financed a portion of the purchase price with a \$29,900,000 loan from Rabobank Nederland (“**Rabobank**”).



## **I. Facts**

- After the Stock Sale, Nob Hill caused West Side to distribute approximately \$40,000,000 in cash, which Nob Hill used to repay the loan from Rabobank.
- Thereafter, West Side and its new owner (Nob Hill) continued to actively manage and pursue certain excise tax causes of action for more than five years after the Stock Sale.
- One of those excise tax causes of action remains active to this day.

## **I. Facts**

•On August 11, 2009, the Examination team issued a Transferee Report asserting the following:

1. The Stock Sale was part of a transaction that was substantially similar to the intermediary transaction tax shelter described in Notice 2001-16.
2. Nob Hill served as a mere conduit in a transaction between West Side and the Taxpayer, resulting in a liquidating distribution to the Taxpayer.
3. The Stock Sale 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.

## **II. Intermediary Transaction**



## II. Intermediary Transaction

- The Transferee Report asserts that the Taxpayer engaged in a transaction that is “substantially similar” to the intermediary transaction tax shelter described in Notice 2001-16.
- Notice 2008-111 clarified Notice 2001-16 and made clear that “[t]here 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 Notice 2001-16” (emphasis added).
- The Taxpayer’s transaction only has *one* of the four components described in Notice 2008-111, thus it cannot be “the same as or substantially similar to” the intermediary transaction tax shelter described in Notice 2001-16.

## **II. Intermediary Transaction**

- Intermediary transactions generally involve four parties:

**T:** a corporation with low basis assets

**S:** a seller who wants to sell T stock

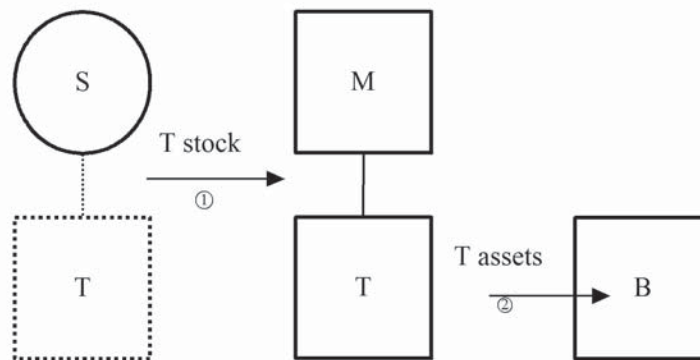
**B:** a buyer who wants to purchase T's assets

**M:** an intermediary corporation

## II. Intermediary Transaction

- Notice 2001-16 describes an intermediary transaction as follows:

“Pursuant to a plan, the parties undertake the following steps. S purports to sell the stock of T to M. T then purports to sell some or all of its assets to B. B claims a basis in the T assets equal to B’s purchase price.”

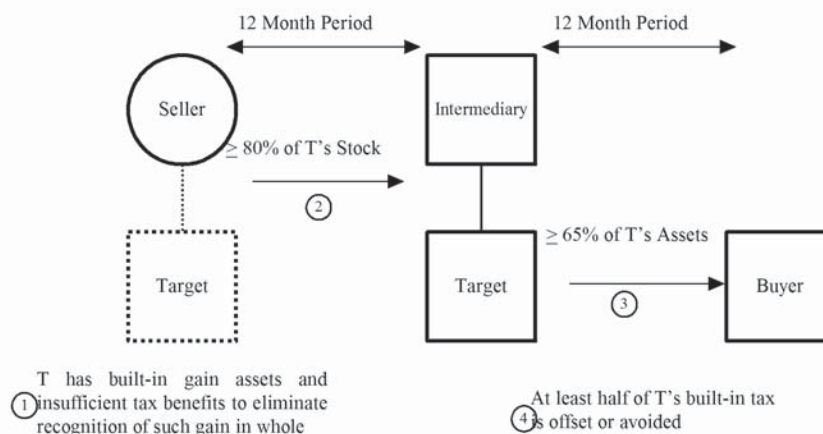




## II. Intermediary Transaction

• Notice 2008-111 clarifies Notice 2001-16 by setting forth more objective standards for identifying intermediary transactions:

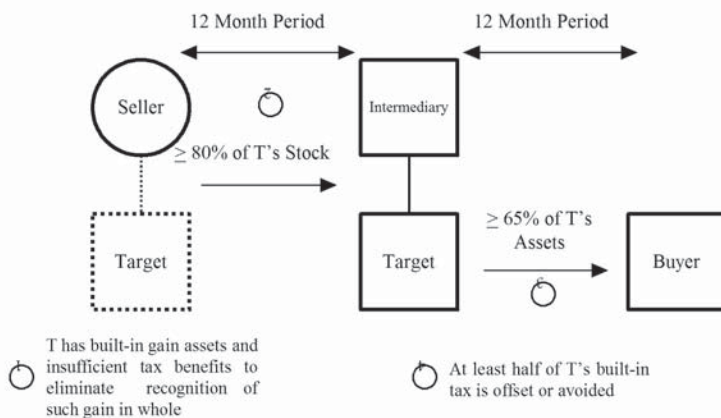
1. T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale;
2. At least 80% of T's stock is disposed of by S within a 12 month period;
3. Within 12 months before or after the stock sale, at least 65% of T's built-in gain assets are sold to B; and
4. At least half of the tax resulting from T's built-in gain assets is offset or avoided.



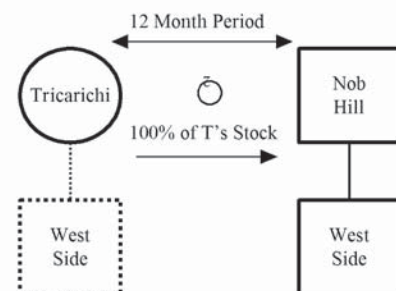
## II. Intermediary Transaction

- Under Notice 2008-111, a transaction must have all four objective components in order to be the same as, or substantially similar to, the intermediary transaction described in Notice 2001-16.
- The Taxpayer's transaction does not have components (1), (3) or (4).

### Intermediary Transaction



### Taxpayer's Transaction



## **II. Intermediary Transaction**

**Component #1: T owns built-in gain assets and has insufficient tax benefits to completely eliminate recognition of such gain upon a sale.**

•The Taxpayer's transaction does not satisfy Component #1 because West Side did not own any relevant built-in gain assets. Rather, at the time of the Stock Sale, West Side's assets consisted of cash, accounts receivable and certain excise tax causes of action.



## **II. Intermediary Transaction**

**Component #2: At least 80% of T's stock is sold within a 12 month period.**

- The Taxpayer's transaction does satisfy Component #2 because the Taxpayer sold 100% of the West Side stock to Nob Hill in a single day.

## **II. Intermediary Transaction**

**Component #3: Within a 12 month period before or after the stock sale, at least 65% of T's built-in gain assets are sold.**

•The Taxpayer's transaction does not satisfy Component #3 because, as discussed in connection with Component #1, West Side did not own any built-in gain assets.

## **II. Intermediary Transaction**

**Component #4: At least half of the tax resulting from T's built-in gain assets is offset or avoided.**

- The transaction at issue here does not satisfy Component #4 because, as discussed in connection with Component #1, West Side did not own any built-in gain assets.



## **II. Intermediary Transaction**

- Finally, the policy premise behind the intermediary transaction described in Notice 2001-16 and Notice 2008-111 is absent from the Taxpayer's transaction.

- The notices target transactions whereby an asset buyer obtains a step-up in asset basis while the target corporation ends up paying no tax on the asset sale due to an intermediary with certain tax attributes that interposes itself between the seller and the buyer.

## **II. Intermediary Transaction**

•Notice 2001-16 and Notice 2008-111 do *not* address the much more mundane and acceptable situation whereby a buyer might have favorable tax attributes or other features that make a straight purchase of target stock (such as the Taxpayer's transaction) beneficial.

# III. Conduit



### **III. Conduit**

- The Transferee Report asserts that Nob Hill served as a mere conduit in a transaction between West Side and the Taxpayer and concludes that the sales proceeds should be recharacterized as a liquidating distribution from West Side. This conclusion is without merit.
- The Transferee Report attempts to use the “mere conduit” cases not only to disregard a step in the Taxpayer’s transaction, but to manufacture an event that never occurred, *i.e.*, the liquidation of West Side.
- As acknowledged 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. Here, the Taxpayer did just that by engaging in a bona fide sale of West Side stock to Nob Hill, an unrelated third party.

### III. Conduit

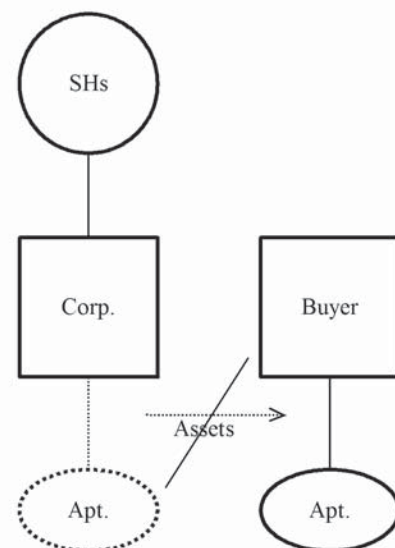
- The “mere conduit” cases generally stand for the proposition that a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title.
- The two seminal cases in this area are *Commissioner v. Court Holding*, 324 U.S. 331 (1945), and *United States v. Cumberland Public Service*, 338 U.S. 451 (1950).
- The United States Supreme Court applied the “mere conduit” theory and rejected the form of the transaction in *Court Holding* but respected the form of the transaction in *Cumberland Public Service*.
- Because the Taxpayer’s transaction is substantially more similar to the facts in *Cumberland Public Service* than to the facts in *Court Holding*, the form of the Taxpayer’s transaction should be respected.

# III. Conduit

## Court Holding v. Commissioner

- The taxpayer, a corporation whose only asset was an apartment building, began negotiating a sale of the apartment building and reached an oral agreement.

- Before the agreement was put into writing, the corporation was advised by its tax advisors that an asset sale would result in significant income tax and so withdrew from the proposed transaction.



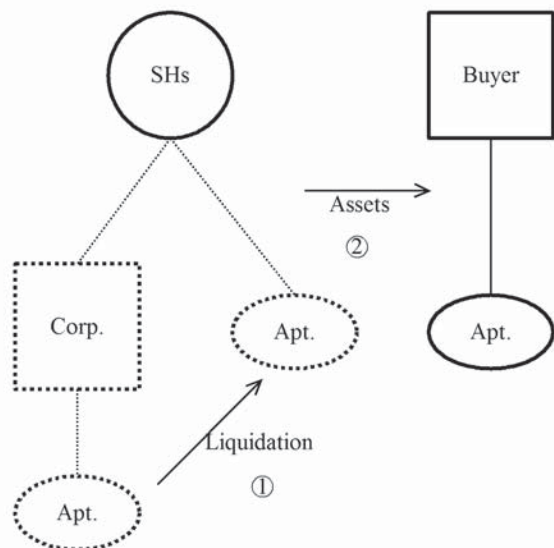


# III. Conduit

## Court Holding v. Commissioner (cont'd)

•The next day, the corporation distributed the apartment building to its shareholders by way of a liquidating distribution.

•The shareholders then sold the apartment building to the original buyer on substantially the same terms and conditions previously agreed upon.



## III. Conduit

### *Court Holding v. Commissioner* (cont'd)

- The Supreme Court held that the shareholders acted as a mere conduit such that the executed sale was in substance a sale from the corporation to the buyer.
- As shown on the next slide, the facts of *Court Holding* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Court Holding* does not apply to the present case.

### III. Conduit

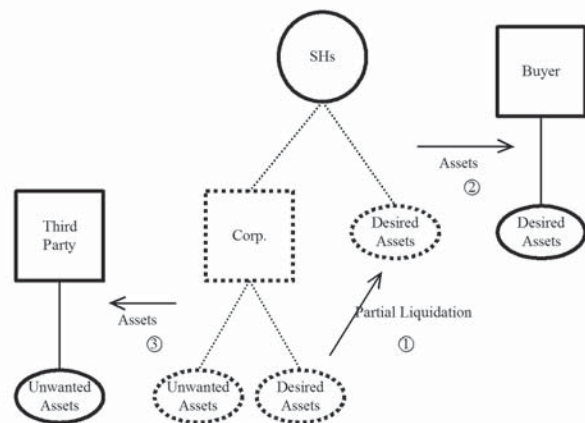
<b>FACTOR</b>	<b><i>COURT HOLDING</i></b>	<b>TRICARICHI</b>
<b>Corporation's Historic Business Operations</b>	Corporation passively held an apartment building	West Side actively engaged in reselling cellular telecommunications services
<b>Corporation's Assets</b>	Corporation's sole asset was an apartment building	West Side's assets included cash and an excise tax cause of action
<b>Motivation for Sale</b>	Not discussed	West Side had to leave the cellular business as a term of a settlement agreement
<b>Original Agreement</b>	Asset sale between corporation and buyer	Stock sale between Tricarichi and Nob Hill
<b>Original Agreement Abandoned?</b>	Yes	No
<b>Complete Liquidation vs. Partial Liquidation of Corporation</b>	Complete liquidation	West Side never liquidated and continues to exist today
<b>Subsequent Agreement</b>	Asset sale between shareholders and buyer (same terms as original agreement)	None
<b>Other Facts</b>	Prior payment from buyer to corporation was applied towards the purchase price	None
<b>Form of Transaction Respected?</b>	No	<b>YES</b>



# III. Conduit

## Cumberland Public Service v. Commissioner

- A corporation was engaged in the business of generating and distributing electric power. In 1936, the corporation decided to leave the power business when a local cooperative began competing with it.
- The corporation's shareholders offered to sell their stock to the cooperative but it refused. The cooperative then offered to buy certain assets from the corporation but the corporation refused.
- Finally, the parties agreed that the corporation would transfer the desired assets to the shareholders in partial liquidation and then the shareholders would on-sell the distributed assets to the cooperative.
- Thereafter, the corporation sold its remaining assets to an unrelated third party and dissolved.



## III. Conduit

### *Cumberland Public Service v. Commissioner* (cont'd)

- The Supreme 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 the sale from the corporation to the third party.
- As shown on the next slide, the facts of *Cumberland Public Service* are substantially similar to the facts of the Taxpayer's transaction. Accordingly, *Cumberland Public Service* applies to the present case.

## III. Conduit

FACTOR	CUMBERLAND	TRICARICHI
Corporation's Historic Business Operations	Corporation actively engaged in generating and distributing electric power	West Side actively engaged in reselling cellular telecommunications services
Corporation's Assets	Corporation had significant business assets, including transmission and distribution equipment	West Side's assets included cash and an excise tax cause of action
Motivation for Sale	Corporation couldn't compete with a new competitor and left the power business	West Side had to leave the cellular business as a term of a settlement agreement
Original Agreement	Asset sale between shareholders and buyer	Stock sale between Tricarichi and Nob Hill
Original Agreement Abandoned?	No	No
Complete Liquidation vs. Partial Liquidation	Partial liquidation	West Side never liquidated and continues to exist today
Subsequent Agreement	None	None
Other Facts	None	None
Form of Transaction Respected?	YES	<b>YES</b>



### III. Conduit

- The IRS's proposed recharacterization of the Taxpayer's transaction as a liquidating distribution under the "mere conduit" theory is without support.
- Unlike *Court Holding*, the Taxpayer's transaction was not part of a pre-negotiated transaction that was called off or altered to avoid tax liability. Rather, the facts demonstrate that, from the very beginning, the object of the Taxpayer's transaction was always a sale of the stock of West Side by the Taxpayer to Nob Hill.
- Furthermore, as discussed on the next slide, there is no evidence the Taxpayer ever had any direct or indirect intention of liquidating West Side.

### **III. Conduit**

•In the absence of a formally adopted a plan of liquidation, a court may only find that a plan of liquidation has nevertheless been adopted if there is (1) a manifest intention to liquidate, (2) a continuing purpose to terminate the company's affairs and dissolve and (3) evidence that the company's activities are directed and confined to furthering the liquidation.

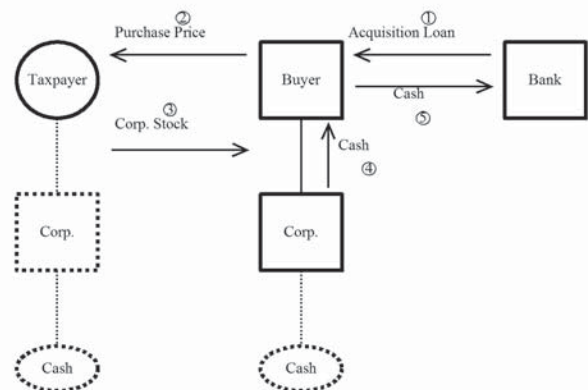
•None of those three requirements is satisfied here. Not only did the Taxpayer not intend to liquidate West Side, he actually took affirmative steps to prevent a liquidation from happening by requiring Nob Hill to agree to continue operating West Side for at least five years. Moreover, West Side's actions, including continuing to prosecute two excise tax causes of action, were not done with a continuing purpose to, or directed toward, liquidation.

•Other "conduit" cases are also easily distinguishable from the Taxpayer's transaction.

# III. Conduit

## Owens v. Commissioner

- Taxpayer was the sole shareholder of a corporation whose sole asset was cash (the corporation had previously sold off its active assets and operations).
- Taxpayer sold 100% of the corporation's stock to an unrelated buyer.
- On the same day as the stock sale, the buyer withdrew all of the cash from the corporation's bank account and used the proceeds to repay a bank loan that was used to fund the stock acquisition.
- Three days later, the corporation adopted a formal resolution of liquidation.





## **III. Conduit**

### **Owens v. Commissioner (cont'd)**

- The Court of Appeals found that the stock sale did not constitute a bona fide sale but was actually a disguised liquidating distribution of the corporation's assets to the taxpayer.

- As shown on the next slide, the facts of *Owens* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Owens* does not apply to the present case.

## **III. Conduit**

<b>FACTOR</b>	<b><i>OWENS</i></b>	<b>TRICARICHI</b>
<b>Corporation's Assets</b>	Corporation's only asset was cash	West Side's assets consisted of cash and excise tax causes of action
<b>Corporation's Liabilities</b>	There were no debts or claims, contingent or otherwise, against the corporation	West Side had a potential excise tax penalty liability
<b>Corporation's Business Activity at Time of Sale</b>	Corporation carried on no business activity and was a lifeless shell at time of stock sale	West Side was actively pursuing excise tax causes of action at time of stock sale
<b>Post- Acquisition Liquidation</b>	Corporation adopted a formal resolution of liquidation three days after the stock sale	West Side continues to exist to this day
<b>Form of Transaction Respected?</b>	No	<b>YES</b>

## **III. Conduit**

### **Lowndes v. United States**

- Seller decided to sell four subsidiaries it had not operated for several years. The subsidiaries' assets were reduced to cash and their liabilities were satisfied. However, seller had a loss in each of the subsidiaries that it could not use unless the subsidiaries were sold.
- Taxpayer emerged as a buyer and bought the stock of the four subsidiaries for cash. The purchase was financed by a six-month bank loan bearing interest at 4.5% and secured by the stock.
- Taxpayer caused the subsidiaries to invest their cash in deposit accounts bearing interest at 2.5% for a six-month period.



## III. Conduit

### *Lowndes v. United States* (cont'd)

- After six months, the subsidiaries liquidated and distributed their assets to the taxpayer, who in turn used the proceeds to repay the bank loans. Taxpayer reported the excess of the distributions over her cost basis in the stock as long-term capital gain rather than ordinary income.
- The district court found that the corporate entities lacked business purpose and should be disregarded such that the taxpayer actually purchased cash rather than stock.
- As shown on the next slide, the facts of *Lowndes* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Lowndes* does not apply to the present case.

## III. Conduit

FACTOR	<i>LOWNDES</i>	TRICARICHI
Corporation's Assets	Corporations' only asset was cash	West Side's assets consisted of cash and excise tax causes of action
Corporation's Liabilities	Corporation had no liabilities	West Side had a potential excise tax penalty liability
Corporation's Business Activity at Time of Sale	Corporation carried on no business activity and had been a lifeless shell for a number of years	West Side had recently ceased its business of reselling cellular telecommunications services but continued to pursue excise tax causes of action
Business Purpose After Sale?	Corporation invested in interest-bearing time deposit certificates	West Side continued to actively pursue excise tax causes of action
Form of Transaction Respected?	No	<b>YES</b>

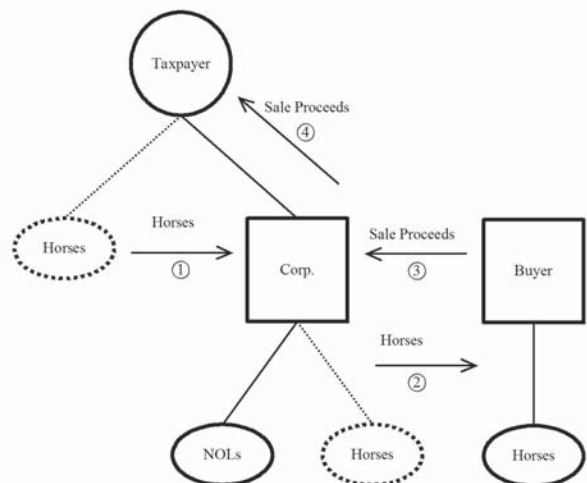
# III. Conduit

## Estate of Kluener v. United States

- Taxpayer owned real estate and thoroughbred horses and was the sole shareholder of a corporation with significant net operating losses.

- Taxpayer decided to sell his horses. Rather than selling them directly, he contributed the horses to his wholly-owned corporation which then sold them at auction. The corporation used its net operating losses to offset the gain realized on the sale.

- Eleven months later, the corporation distributed the sale proceeds to the taxpayer.





## **III. Conduit**

### ***Estate of Kluener v. United States* (cont'd)**

- The court of appeals found that the taxpayer lacked a business purpose for contributing his horses to the corporation. As a result, the court disregarded the contribution to the corporation and held that the taxpayer, rather than the corporation, sold the horses.

- As shown on the next slide, the facts of *Kluener* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Kluener* does not apply to the present case.

## III. Conduit

FACTOR	<i>KLUENER</i>	TRICARICHI
Corporation's Historic Business Operations	Taxpayer transferred the horses to a newly-created division of the corporation that had no historic business operations	West Side actively engaged in reselling cellular telecommunications services
Conduit's Use of Transferred Property	Corporation never used any of the sales proceeds in its own activities (taxpayer never told the corporation's management about the contribution or sales proceeds)	Nob Hill used the cash in West Side to repay an acquisition finance loan and retained the rest for its own (and its shareholder's) purposes
Control Over Conduit	Taxpayer manipulated the corporation and caused it to make special distributions of the sales proceeds to him	Tricarichi had no control or influence over West Side or Nob Hill after the Stock Sale
Other Factors	Taxpayer continued to finance the horse operations after the transfer to the corporation	Tricarichi had no formal relationship with either West Side or Nob Hill after the Stock Sale
Form of Transaction Respected?	No	<b>YES</b>

# III. Conduit

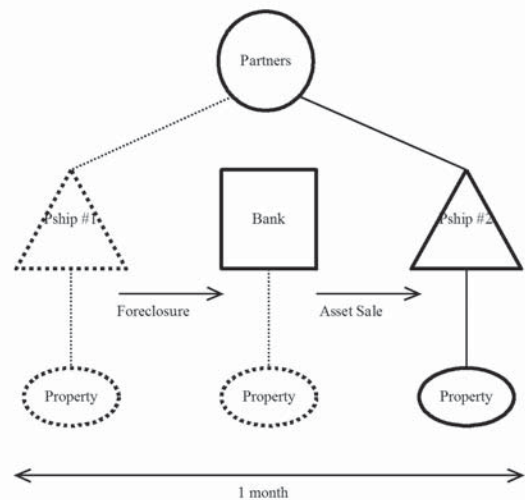
## *Davis v. Commissioner*

- Taxpayer was a partner in a partnership that allowed real property to go into foreclosure.

- Before the bank foreclosed, the partners and the bank reached an understanding that, after the foreclosure, the bank would sell the property to a newly-formed partnership owned (directly and indirectly) by the same partners.

- One month after the foreclosure, the bank sold the property to the newly formed partnership.

- As a result of the foreclosure, the original partnership terminated and the taxpayer claimed a loss.





## **III. Conduit**

### ***Davis v. Commissioner* (cont'd)**

- The court found that there was an indirect transfer between the two partnerships and, accordingly, disallowed the taxpayer's loss under Section 707(b)(1)(A) (disallowing losses arising from an indirect sale between two partnerships in which the same persons owned, directly or indirectly, more than 50% of the capital and profits interest).

- As shown on the next slide, the facts of *Davis* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Davis* does not apply to the present case.

## III. Conduit

FACTOR	DAVIS	TRICARICHI
Step One	Bank foreclosed on partnership's <i>asset</i>	Tricarichi sold West Side's <i>stock</i>
Step Two	Bank sold the asset back to effectively the same partnership	No second step
Prearranged Second Step?	Before the foreclosure occurred, a plan existed for the bank to resell the property to the taxpayer's new partnership	No second step and so no prearranged plan
Form of Transaction Respected?	No	<b>YES</b>

# III. Conduit

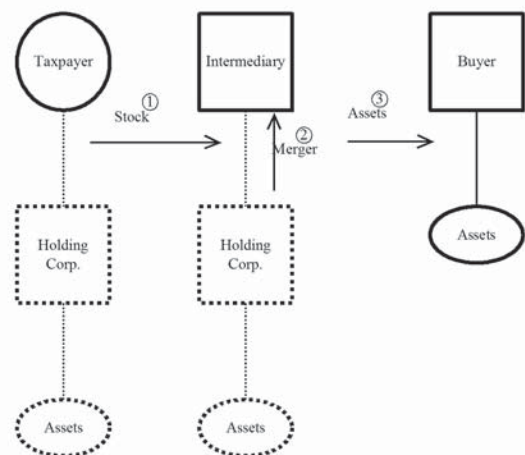
## Enbridge Energy Co. v. United States

- Taxpayer was the sole shareholder of a holding corporation that owned and operated natural gas pipelines.

- In early 1999, the taxpayer decided to sell the corporation's stock. A buyer emerged but wanted to purchase assets rather than the stock. The parties engaged an intermediary to participate in the transaction to bridge the divide.

- In October 1999, the intermediary purchased all of the stock of the holding corporation from the taxpayer and then merged into the holding corporation. The next day, most of the holding corporation's assets were sold to the buyer.

- The stock purchase was financed with a bank loan secured entirely by funds the holding corporation deposited in escrow.





## **III. Conduit**

### ***Enbridge Energy Co. v. United States* (cont'd)**

- The Court of Appeals found that the transaction was a sham conduit transaction and recharacterized the transaction as a direct stock sale from the taxpayer to the buyer.
- As shown on the next slide, the facts of *Enbridge* are substantially different from the facts of the Taxpayer's transaction. Accordingly, *Enbridge* does not apply to the present case.

## III. Conduit

FACTOR	<i>ENBRIDGE</i>	TRICARICHI
Corporation's Business Activity at Time of Stock Sale	Corporation owned and operated natural gas pipelines	West Side was actively pursuing excise tax causes of action.
Time Between Stock Sale and Asset Sale	Less than twenty-four hours	No asset sale
Security for Acquisition Financing	Financing was wholly secured by the holding corporation's funds	Nob Hill's financing was unsecured
Corporation's Business Activity After Stock Sale	Holding corporation conducted no business activity after the stock sale	West Side continued to actively pursue excise tax causes of action (one of which remains ongoing today)
Form of Transaction Respected?	No	<b>YES</b>

# IV. Step Transaction



## **IV. Step Transaction**

- As an alternative to the “mere conduit” theory, the Transferee Report also 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 Transferee Report outlined three alternative tests for determining whether to apply the step-transaction doctrine: (1) the binding commitment test, (2) the end result test and (3) the interdependence test. The Transferee Report does not address the binding commitment test but does assert that the Taxpayer’s transaction meets both the end result test and the interdependence test.

## **IV. Step Transaction**

•The step-transaction doctrine is inapplicable to the Taxpayer's transaction because:

1. Neither the end result test nor the interdependence test is satisfied, and
2. The proposed recharacterization of the sales proceeds as a liquidating distribution from West Side requires fictitious additional steps that do not reflect the substance of the Taxpayer's transaction any more accurately than would giving effect to its form.

## **IV. Step Transaction**

### **End Result Test**

- The end result 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.
- The Transferee Report asserts that the end result test is satisfied because the Taxpayer's transaction was a pre-planned liquidating distribution of the assets in West Side to the Taxpayer.
- The end result test cannot apply to the Taxpayer's transaction because West Side never adopted a plan of liquidation and, therefore, the alleged "end result" (*i.e.*, liquidation of West Side) never occurred.



## **IV. Step Transaction**

### **End Result Test (cont'd)**

- The Transferee Report cites *Packard v. Commissioner*, where the court applied the end result test to a series of transactions that resulted in the taxpayers conducting a cattle-feeding operation through a partnership.
- The taxpayers obtained certain tax benefits by first forming an S corporation and then, shortly thereafter, liquidating the S corporation into a partnership which ultimately conducted the entire feeding operation.
- In contrast to *Packard*, where the taxpayer actually conducted the feeding operation through a partnership (the “end result”), the Taxpayer never liquidated West Side. As a result, the step-transaction doctrine cannot apply to the Taxpayer’s transaction on the basis of the end result test.

## **IV. Step Transaction**

### **Interdependence Test**

- The interdependence test focuses on whether steps are so interdependent that the legal relationships created by one transaction would have been fruitless without completion of the series.
- The Transferee Report asserts that the steps taken in the Taxpayer's transaction were so interdependent that they lead to a liquidating distribution to the Taxpayer.
- The interdependence test cannot apply to the Taxpayer's transaction because the sale of assets to LXV, the sale of stock to Nob Hill and the repayment of the loan to Rabobank are all independent steps, none of which would be fruitless without completion of the others.
  - The sale of assets to LXV was necessary as a result of the terms of West Side's settlement agreement and was neither related to nor required by the terms of the Stock Sale.
  - Nob Hill's repayment of the loan proceeds with the cash in West Side was a decision made by the principals of Nob Hill, independent of any discussions with the Taxpayer.

## **IV. Step Transaction**

### **Interdependence Test (cont'd)**

- The Transferee Report cites *Redding v. Commissioner* where the court refused to apply the step-transaction doctrine. In *Redding*, shareholders argued that a series of transactions involving a distribution of warrants followed by an exercise of those warrants for stock of the distributing corporation's subsidiary should be collapsed under the step-transaction doctrine to result in a Section 355 spin-off.
- The court found that the interdependence test was not satisfied because the warrants were not indispensable to achieving a Section 355 spin-off (*i.e.*, the result that would be achieved by operation of the step-transaction doctrine).
- Applying the reasoning in *Redding*, there a number of steps in the Taxpayer's transaction that are not indispensable to achieving a liquidation of West Side (*i.e.*, the result the IRS argues would be reached by operation of the step-transaction doctrine). For instance, neither the asset sale to LXV nor the Stock Sale to Nob Hill was an indispensable step in liquidating West Side.
- Accordingly, like in *Redding*, the interdependence test cannot apply to the Taxpayer's transaction.



## **IV. Step Transaction**

### **Fictitious Steps**

•Finally, the step-transaction doctrine is also inapplicable to the Taxpayer's transaction because the proposed recharacterization of the sales proceeds as a liquidating distribution from West Side requires fictitious additional steps that do not better explain the substance of the Taxpayer's transaction.

•The step-transaction doctrine does not explain how Nob Hill came to own the stock of West Side or why it is that Nob Hill (through West Side) has continued to actively pursue West Side's excise tax causes of action.

•Such an explanation would require the IRS to create the following fictitious steps: (1) West Side liquidated, (2) Mr. Tricarichi assigned West Side's excise tax causes of action to Nob Hill, (3) Nob Hill incorporated a corporation called West Side Cellular, Inc. and (4) Nob Hill contributed the excise tax causes of action to the newly formed corporation.

## IV. Step Transaction

### Fictitious Steps (cont'd)

- Courts reject the creation of fictitious additional steps in the context of the step-transaction doctrine.

- “Of course, the [step-transaction] doctrine cannot manufacture facts that never occurred to create an otherwise nonexistent tax liability.” *Greene v. United States*, 13 F.3d 577, 583 (2d Cir. 1994).

- “Useful as the step transaction doctrine may be in the interpretation of equivocal contracts and ambiguous events, it cannot generate events which never took place just so an additional tax liability may be asserted.” *Sheppard v. United States*, 361 F.2d 972, 978 (Ct. Cl. 1966).

- See also *Esmark, Inc. and Affiliated Cos. v. Comm’r*, 90 T.C. 171 (1988), *aff’d*, 886 F.2d 1318 (7th Cir. 1989); *Tracinda Corp. v. Comm’r*, 111 T.C. 315 (1998).

- Moreover, the proposed recharacterization under the step-transaction doctrine does not reflect the substance of the Taxpayer’s transaction any more accurately than would giving effect to its form.

# **Exhibit 18**



## Part III - Administrative, Procedural, and Miscellaneous

### Intermediary Transaction Tax Shelters

Notice 2008-111

#### SECTION 1. PURPOSE AND BACKGROUND

This Notice clarifies Notice 2001-16, 2001-1 C.B. 730, and supersedes Notice 2008-20, 2008-6 I.R.B. 406, regarding Intermediary Transaction Tax Shelters. Notice 2001-16 identified the Intermediary Transaction Tax Shelter (hereafter, an "Intermediary Transaction") as a listed transaction under § 1.6011-4(b)(2) of the Income Tax Regulations. For purposes of this Notice, an Intermediary Transaction is defined in terms of its plan and in terms of more objective components. Under this Notice, a transaction is treated as an Intermediary Transaction with respect to a particular person only if that person engages in the transaction pursuant to the Plan (as defined in sections 2 and 4), the transaction contains the four objective components indicative of an Intermediary Transaction set forth in section 3, and no safe harbor exception in section 5 applies to that person. A transaction may be an Intermediary Transaction with respect to one person and not be an Intermediary Transaction with respect to another person. This Notice does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such person is liable, at law or in equity, as a transferee of property in respect of the unpaid tax obligation described in section 3.

#### SECTION 2. DEFINITION OF THE PLAN

An Intermediary Transaction involves a corporation (T) that would have a Federal

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income tax obligation with respect to the disposition of assets the sale of which would result in taxable gain (Built-in Gain Assets) in a transaction that would afford the acquiror or acquirors (Y) a cost or fair market value basis in the assets. An Intermediary Transaction is structured to cause the tax obligation for the taxable disposition of the Built-in Gain Assets to arise, in connection with the disposition by shareholders of T (X) of all or a controlling interest in T's stock, under circumstances where the person or persons primarily liable for any Federal income tax obligation with respect to the disposition of the Built-in Gain Assets will not pay that tax (hereafter, the Plan). This plan can be effectuated regardless of the order in which T's stock or assets are disposed. A transaction is not an Intermediary Transaction for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

### SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of 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 Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain (T's Built-in Gain Assets) and, as of the Stock Disposition Date (as defined in component two), T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole. The tax that would result from such sale is hereinafter referred to as T's Built-

in Tax. However, for purposes of this component, T will not be considered to have any Built-in Tax if, on the Stock Disposition Date, such amount is less than five percent of the value of the T stock disposed of in the Stock Disposition (as defined in component two). In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under § 1.6011-4(b)(2), and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before any Stock Disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) 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 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to



dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid.

#### SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

A transaction that has all four components described in section 3 is only an Intermediary Transaction with respect to a person that engages in the transaction pursuant to the Plan. A person engages in the transaction pursuant to the Plan if the person knows or has reason to know the transaction is structured to effectuate the Plan. Additionally, any X that is at least a 5% shareholder of T (by vote or value), or any X that is an officer or director of T, engages in the transaction pursuant to the Plan if any of the following knows or has reason to know the transaction is structured to effectuate the Plan: (i) any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect to the transaction; or (iii) any advisor of that X engaged by that X to advise it with respect to the transaction. For purposes of this section, if T has more than five officers then the term "officer" shall be limited to the chief executive officer of T (or an individual acting in such capacity) and the four highest compensated officers for the taxable year (other than the chief executive officer or an individual acting in such capacity). A person can engage in the transaction pursuant to the Plan even if it does not understand the mechanics of how the tax liability purportedly might be offset or avoided, or the specific financial arrangements, or relationships of other parties or of T after the Stock Disposition.

A person will not be treated as engaging in the transaction pursuant to the Plan merely because it has been offered attractive pricing terms by the opposite party to a transaction.

Thus, a transaction may be an Intermediary Transaction with respect to X but not Y, or with respect to Y but not X, in situations where one party engages in the transaction pursuant to the Plan and the other does not. A transaction may also be an Intermediary Transaction with respect to some but not all Xs and/or some but not all Ys, depending on whether they engage in the transaction pursuant to the Plan. A transaction will not be an Intermediary Transaction with respect to any person that does not engage in the transaction pursuant to the Plan regardless of the amounts reported on any return.

## SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS; PARTICIPATION GENERALLY

### 01. Safe Harbor Exceptions for Certain Persons

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

- Any X, if the only T stock it disposes of is traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and prior to the disposition X (including related persons described in section 267(b) or 707(b)) did not hold five percent (or more) by vote or value of any class of T stock disposed of by X.
- Any X, T, or M, if, after the acquisition of the T stock, the acquiror of the T stock is the issuer of stock or securities that are publicly traded on an established securities market in the United States, or is consolidated for financial reporting