No. ____________________

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 25 2021 10:35 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

v.

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

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

APPENDIX TO PETITION FOR WRIT OF MANDAMUS

VOLUME VII

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Docket 82371 Document 2021-02184

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Demand for Jury Trial	05/17/2016	I	APP0042-APP0044
Order Denying Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment and Motion to Strike Jury Demand	01/05/2021	VII	APP1306-APP1307
Plaintiff's Opposition to Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment	04/10/2017	II	APP0162-APP0187
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Third Amended Order Setting Civil Jury Trial, Calendar Call and Pre-Trial Conference	12/8/2020	VII	APP1302-APP1305

DATED: January 22, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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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 VII** by the method indicated:

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

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

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

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4816-4909-6920.1

Statement on Standards for Tax Services No. 6, Knowledge of Error: Return Preparation

Introduction

1. This Statement sets forth the applicable standards for a member who becomes aware of an error in a taxpayer's previously filed tax return or of a taxpayer's failure to file a required tax return. As used herein, the term error includes any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in Statement on Standards for Tax Services (SSTS) No. 1, *Tax Return Positions*. The term *error* also includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect. However, an error does not include an item that has an insignificant effect on the taxpayer's tax liability.

2. This Statement applies whether or not the member prepared or signed the return that contains the error.

Statement

3. A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return. A member should recommend the corrective measures to be taken. Such recommendation may be given orally. The member is not obligated to inform the taxing authority, and a member may not do so without the taxpayer's permission, except when required by law.

4. If a member is requested to prepare the current year's return and the taxpayer has not taken appropriate action to correct an error in a prior year's return, the member should consider whether to withdraw from preparing the return and whether to continue a professional or employment relationship with the taxpayer. If the member does prepare such current year's return, the member should take reasonable steps to ensure that the error is not repeated.

Explanation

5. While performing services for a taxpayer, a member may become aware of an error in a previously filed return or may become aware that the taxpayer failed to file a required return. The member should advise the taxpayer of the error and the measures to be taken. Such recommendation may be given orally. If the member believes that the taxpayer could be charged with fraud or other criminal misconduct, the taxpayer should be advised to consult legal counsel before taking any action.

6. It is the taxpayer's responsibility to decide whether to correct the error. If the taxpayer does not correct an error, a member should consider whether to continue a professional or employment relationship with the taxpayer. While recognizing that the taxpayer may not be required by statute to correct an error by filing an amended return, a member should consider whether a taxpayer's decision not to file an amended return may predict future behavior that might require termination of the relationship. The potential for violating Code of Professional Conduct rule 301 (relating to the member's confidential client relationship), the tax law and regulations, or laws on privileged communications, and other considerations may create a conflict between the member's interests and those of the taxpayer. Therefore, a member should consider consulting with his or her own legal counsel before deciding upon recommendations to the taxpayer and whether to continue a professional or employment relationship with the taxpayer.

7. If a member decides to continue a professional or employment relationship with the taxpayer and is requested to prepare a tax return for a year subsequent to that in which the error occurred, the member should take reasonable steps to ensure that the error is not repeated. If the subsequent year's tax return cannot be prepared without perpetuating the error, the member should consider withdrawal from the return preparation. If a member learns that the taxpayer is using an erroneous method of accounting and it is past the due date to request permission to change to a method meeting the standards of SSTS No. 1, the member may sign a tax return for the current year, providing the tax return includes appropriate disclosure of the use of the erroneous method.

8. Whether an error has no more than an insignificant effect on the taxpayer's tax liability is left to the professional judgment of the member based on all the facts and circumstances known to the member. In judging whether an erroneous method of accounting has more than an insignificant effect, a member should consider the method's cumulative effect and its effect on the current year's tax return.

9. If a member becomes aware of the error while performing services for a taxpayer that do not involve tax return preparation, the member's responsibility is to advise the taxpayer of the existence of the error and to recommend that the error be discussed with the taxpayer's tax return preparer. Such recommendation may be given orally.

Statement on Standards for Tax Services No. 7, Knowledge of Error: Administrative Proceedings

Introduction

1. This Statement sets forth the applicable standards for a member who becomes aware of an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority or an appeals conference. The term *administrative proceeding* does not include a criminal proceeding. As used herein, the term *error* includes any position, omission, or method of accounting that, at the time the return is filed, fails to meet the standards set out in Statement on Standards for Tax Services (SSTS) No. 1, *Tax Return Positions.* The term *error* also includes a position taken on a prior year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect. However, an error does not include an item that has an insignificant effect on the taxpayer's tax liability.

2. This Statement applies whether or not the member prepared or signed the return that contains the error. Special considerations may apply when a member has been engaged by legal counsel to provide assistance in a matter relating to the counsel's client.

Statement

3. If a member is representing a taxpayer in an administrative proceeding with respect to a return that contains an error of which the member is aware, the member should inform the taxpayer promptly upon becoming aware of the error. The member should recommend the corrective measures to be taken. Such recommendation may be given orally. A member is neither obligated to inform the taxing authority nor allowed to do so without the taxpayer's permission, except where required by law.

4. A member should request the taxpayer's agreement to disclose the error to the taxing authority. Lacking such agreement, the member should consider whether to withdraw from representing

the taxpayer in the administrative proceeding and whether to continue a professional or employment relationship with the taxpayer.

Explanation

5. When the member is engaged to represent the taxpayer before a taxing authority in an administrative proceeding with respect to a return containing an error of which the member is aware, the member should advise the taxpayer to disclose the error to the taxing authority. Such recommendation may be given orally. If the member believes that the taxpayer could be charged with fraud or other criminal misconduct, the taxpayer should be advised to consult legal counsel before taking any action.

6. It is the taxpayer's responsibility to decide whether to correct the error. If the taxpayer does not correct an error, a member should consider whether to withdraw from representing the taxpayer in the administrative proceeding and whether to continue a professional or employment relationship with the taxpayer. While recognizing that the taxpayer may not be required by statute to correct an error by filing an amended return, a member should consider whether a taxpayer's decision not to file an amended return may predict future behavior that might require termination of the relationship. Moreover, a member should consider consulting with his or her own legal counsel before deciding on recommendations to the taxpayer and whether to continue a professional or employment relationship with the taxpayer. The potential for violating Code of Professional Conduct rule 301 (relating to the member's confidential client relationship), the tax law and regulations, laws on privileged communications, potential adverse impact on a taxpayer of a member's withdrawal, and other considerations may create a conflict between the member's interests and those of the taxpayer.

7. Once disclosure is agreed on, it should not be delayed to such a degree that the taxpayer or member might be considered to have failed to act in good faith or to have, in effect, provided misleading information. In any event, disclosure should be made before the conclusion of the administrative proceeding.

8. Whether an error has an insignificant effect on the taxpayer's tax liability is left to the professional judgment of the member based on all the facts and circumstances known to the member. In judging whether an erroneous method of accounting has more than an insignificant effect, a member should consider the method's cumulative effect and its effect on the return that is the subject of the administrative proceeding.

Statement on Standards for Tax Services No. 8, Form and Content of Advice to Taxpayers

Introduction

1. This Statement sets forth the applicable standards for members concerning certain aspects of providing advice to a taxpayer and considers the circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided. The Statement does not, however, cover a member's responsibilities when the expectation is that the advice rendered is likely to be relied on by parties other than the taxpayer.

Statement

2. A member should use judgment to ensure that tax advice provided to a taxpayer reflects professional competence and appropriately serves the taxpayer's needs. A member is not required to follow a standard format or guidelines in communicating written or oral advice to a taxpayer.

3. A member should assume that tax advice provided to a taxpayer will affect the manner in which the matters or transactions considered would be reported on the taxpayer's tax returns. Thus, for all tax advice given to a taxpayer, a member should follow the standards in Statement on Standards for Tax Services (SSTS) No. 1, *Tax Return Positions*.

4. A member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement.

Explanation

5. Tax advice is recognized as a valuable service provided by members. The form of advice may be oral or written and the subject matter may range from routine to complex. Because the range of advice is so extensive and because advice should meet the specific needs of a taxpayer, neither a standard format nor guidelines for communicating or documenting advice to the taxpayer can be established to cover all situations.

6. Although oral advice may serve a taxpayer's needs appropriately in routine matters or in well-defined areas, written communications are recommended in important, unusual, or complicated transactions. The member may use professional judgment about whether, subsequently, to document oral advice in writing.

7. In deciding on the form of advice provided to a taxpayer, a member should exercise professional judgment and should consider such factors as the following:

a. The importance of the transaction and amounts involved

b. The specific or general nature of the taxpayer's inquiry

c. The time available for development and submission of the advice

d. The technical complications presented

e. The existence of authorities and precedents

f. The tax sophistication of the taxpayer

g. The need to seek other professional advice

8. A member may assist a taxpayer in implementing procedures or plans associated with the advice offered. When providing such assistance, the member should review and revise such advice as warranted by new developments and factors affecting the transaction.

9. Sometimes a member is requested to provide tax advice but does not assist in implementing the plans adopted. Although such developments as legislative or administrative changes or future judicial interpretations may affect the advice previously provided, a member cannot be expected to communicate subsequent developments that affect such advice unless the member undertakes this obligation by specific agreement with the taxpayer.

10. Taxpayers should be informed that advice reflects professional judgment based on an existing situation and that subsequent developments could affect previous professional advice. Members may use precautionary language to the effect that their advice is based on facts as stated and authorities that are subject to change.

11. In providing tax advice, a member should be cognizant of applicable confidentiality privileges.

These Statements on Standards for Tax Services and Interpretation were unanimously adopted by the assenting votes of the twenty voting members of the twenty-one-member Tax Executive Committee.

Tax Executive Committee (1999-2000)

David A. Lifson, *Chair*
Pamela J. Pecarich, *Vice Chair*
Ward M. Bukofsky
Joseph Cammarata
Stephen R. Corrick
Anna C. Fowler
Jill Gansler
Diane P. Herndon
Ronald S. Katch
Allan I. Kruger
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Jeffrey A. Porter
Thomas J. Purcell, III
Jeffrey L. Raymon
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Barry D. Roy
Jane T. Rubin
Douglas P. Stives
Philip J. Wiesner
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Robert A. Zarzar

SRTP Enforceability Task Force

J. Edward Swails, *Chair*
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John C. Gardner
Ronald S. Katch
Michael E. Mares
Dan L. Mendelson
Daniel A. Noakes
William C. Potter

AICPA Staff

Gerald W. Padwe
Vice President
Taxation

Edward S. Karl
Director
Taxation

The AICPA gratefully acknowledges the contributions of William A. Tate, Jean L. Rothbarth, and Leonard Podolin, former chairs of the Responsibilities in Tax Practice Committee; A. M. (Tony) Komlyn and Wilber Van Scoik, former members of the Committee; and Carol B. Ferguson, AICPA Technical Manager.

Note: *Statements on Standards for Tax Services are issued by the Tax Executive Committee, the senior technical body of the Institute designated to promulgate standards of tax practice. Rules 201 and 202 of the Institute's Code of Professional Conduct require compliance with these standards.*

Exhibit 34

DISTRICT COURT

CLARK COUNTY, NEVADA

\- - - - - - - - - - - - - x

MICHAEL A. TRICARICHI, :

Plaintiff, :

v. : Civil Action No.

PRICEWATERHOUSECOOPERS : A-16-735-910-B

LLP, COOPERATIVE : Department No. XI

RABOBANK U.A., :

UTRECHT-AMERICA FINANCE :

CO., SEYFARTH SHAW LLP, :

and GRAHAM R. TAYLOR, :

Defendants. :

\- - - - - - - - - - - - - x

REMOTE DEPOSITION of BRIAN MEIGHAN

Friday, October 9, 2020

8:10 a.m.

Job No.: 326324

Pages: 1 - 271

Reported By: Michelle M. Yohler, CSR, RMR, CRR

Deposition of BRIAN MEIGHAN, held remotely pursuant to notice before Michelle M. Yohler, CSR, RMR, CRR, a certified shorthand reporter in and for the County of Will, State of Illinois.

A P P E A R A N C E S.

ON BEHALF OF THE PLAINTIFF:

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ALSO PRESENT:

Mr. Geoffrey Ezgar, PwC In-House Counsel
Mr. Michael Pietanza, Videographer
Mr. Kevin Offett, Technician

E X A M I N A T I O N S

E X H I B I T S

APP1168

was no longer a client?
A I think the standard itself is -- is quite clear that while you're performing services for a client, if you discover an error, you should report it.
So if you're not performing services or they're not a client, I don't believe there's any obligation under the standard. And I believe our contractual arrangements explicitly disclaim having to advise clients of future changes to the law.
Q Isn't the nature of correcting incorrect advice that the services performed are always complete? I mean, isn't it that PwC would have given advice, that advice would have been incorrect and incomplete? So given that understanding, when would PwC have to correct its advice to a client under SSTS No. 6?
MR. LEVINE: Objection to form of the question. Multiple questions there.
BY MR. SERCYE:
Q Yeah, strike that. I'll -- I'll ask it this way.
The incorrect advice that PwC had given to a client would always have to have occurred in the

past; is -- is that correct? 09:47:38
A I'm sorry, say that -- if what -- I'm sorry, I missed -- it broke up at the very beginning. 09:47:41 09:47:44 09:47:46
Q What I'm trying to understand in particular is this thought of while performing services. If -- if PwC performs a service for a client and gives that client incorrect advice, when do we know that PwC is no longer performing services for that client? 09:47:47 09:47:49 09:47:53 09:47:59 09:48:04 09:48:08
A Well, as I -- as I stated earlier, I believe that the services we're -- under the engagement letter we are -- we are engaged to perform services. And once those services have been performed and the billing is done and collection hopefully is made or written off, the services have ended at that point. 09:48:10 09:48:16 09:48:21 09:48:22 09:48:24 09:48:26 09:48:29
Q If PwC provides a client with advice on multiple topics in an engagement letter and PwC temporally first provides a client with advice on one topic and then proceeds to others, is PwC's engagement of that client considered to be over as to that first piece of advice at the time in which that first piece of advice is given? 09:48:34 09:48:38 09:48:48 09:48:52 09:48:56 09:49:00 09:49:04
MR. LEVINE: Objection to form. 09:49:07

BY THE WITNESS: 09:49:13
    A Yeah, I -- I -- I'd like to -- so I just would state I believe our engagement letter here was to provide advice on the -- on the sale of the stock, which we performed in 2003, as I understand, and completed and billed in 2003 and the engagement terminated at that point. 09:49:14 09:49:16 09:49:19 09:49:26 09:49:29 09:49:32
        That -- that then would no longer -- the client relationship would end under the terms of the engagement when we completed that -- that analysis for the client. 09:49:34 09:49:37 09:49:39 09:49:42
BY MR. SERCYE: 09:49:55
    Q What do you mean when you say completed that analysis? 09:49:55 09:49:58
    A We rendered our advice, in my view, in 2003 on the sale of the stock, we then billed the client for that advice, and that completed the engagement. 09:49:59 09:50:04 09:50:07 09:50:11
    Q So completing the analysis includes billing the client for the advice given; is that correct? 09:50:15 09:50:17 09:50:22
    A No, it's not what I'm saying. I'm just saying that -- you asked me if we had a specific standard on what a client is, and I -- and I answered that we do not have a specific standard. 09:50:22 09:50:25 09:50:27 09:50:30

I said that in general how we would view a client, a client is somebody who we are performing services for. And when we complete those services, that relationship ends. 09:50:33 09:50:37 09:50:39 09:50:43

Q Does PwC understand SSTS No. 6 in stating that an accountant who becomes aware of an error in a taxpayer's previously filed return -- or strike that. 09:51:04 09:51:11 09:51:19 09:51:19

Does PwC understand SSTS No. 6 in stating that an accountant, when that accountant becomes aware of an error in previously offered advice -- strike that. 09:51:26 09:51:29 09:51:32 09:51:45

Does SSTS No. 6 in PwC's understanding in or around 2008 or later set a specific time in which a PwC accountant does not have to update incorrect advice that it provided to a client? 09:51:54 09:51:59 09:52:04 09:52:09

A I'm sorry, repeat that again, the question. I just want to make sure I got it. 09:52:19 09:52:21

Q Does SSTS No. 6 in PwC's understanding in or around 2008 or later set a specific time in which a PwC accountant does not have to update incorrect advice that it provided to a client? 09:52:23 09:52:27 09:52:31 09:52:34

A I don't believe the standard sets a specific time, but what it does specifically state is that you have a -- you should notify a client 09:52:39 09:52:40 09:52:42

C E R T I F I C A T E O F R E P O R T E R

I, MICHELLE M. YOHLER, a Certified Shorthand Reporter within and for the County of Cook, State of Illinois, do hereby certify:

That previous to the commencement of the examination of the witness, the witness was duly sworn to testify the whole truth concerning the matters herein;

That the foregoing deposition transcript was reported stenographically by me, was thereafter reduced to typewriting under my personal direction and constitutes a true record of the testimony given and the proceedings had;

That the said deposition was taken remotely before me at the time and place specified;

That I am not a relative or employee or attorney or counsel, nor a relative or employee of such attorney or counsel for any of the parties hereto, nor interested directly or indirectly in the outcome of this action.

IN WITNESS WHEREOF, I do hereunto set my hand and affix my seal of office at Chicago, Illinois, this 21st day of October, 2020.

Michelle M. Yohler

____

Michelle M. Yohler, CSR, RMR, CRR
Certified Shorthand Reporter
CSR No.: 84-4531

Exhibit 35

DISTRICT COURT

CLARK COUNTY, NEVADA

------------------------------x

MICHAEL A. TRICARICHI, :

Plaintiff, :

v. : Case No. A-16-735910-B

PRICEWATERHOUSECOOPERS, :

LLP, COOPERATIEVE RABOBANK :

U.A., UTRECHT-AMERICA :

FINANCE CO., SEYFARTH SHAW :

LLP, and GRAHAM R. :

TAYLOR, :

Defendants. :

------------------------------x

Videotaped Virtual Deposition of KENNETH HARRIS

Thursday, October 1, 2020

9:04 a.m. CST

Job No.: 320730

Pages: 1 - 241

Reported by: Tiffany M. Pietrzyk, CSR RPR CRR

Videotaped virtual deposition of KENNETH HARRIS, pursuant to notice, before Tiffany M. Pietrzyk, a Certified Shorthand Reporter, Registered Professional Reporter, Certified Realtime Reporter, and a Notary Public in and for the State of Illinois.

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ALSO PRESENT:

Michael Pietanza, Planet Depos Remote Technician
Joel Coriat, Planet Depos Videographer

C O N T E N T S

E X H I B I T S

(Attached to transcript.)

A. Yes, yes, I do see it. 10:45:08
Q. So the reference here to SSTS Number 6 is to 10:45:09
the SSTS Number 6 that was effective in both 2003 10:45:17
and 2008; is that correct? 10:45:22
A. Correct. Correct. 10:45:24
Q. And for the reference to the SSTS Number 10:45:30
1 -- just so we're clear, the references to the SSTS 10:45:31
Number 1, that was effective in 2003 and 2008; is 10:45:34
that correct? 10:45:38
A. That's correct also. 10:45:38
Q. And I know that we've discussed 10:45:55
Mr. Tricarichi's sale of West Side Cellular, so I 10:45:57
take it from that discussion and your expert report, 10:46:00
that you generally understand that Mr. Tricarichi 10:46:04
sought advice from PwC in 2003 related to the sale 10:46:07
of West Side Cellular; is that correct? 10:46:10
A. Yes, generally that is correct. 10:46:13
Q. And in your expert report, you conclude that 10:46:16
IRS Notice 2008-111 did not place a duty on PwC to 10:46:23
update its 2003 advice to Mr. Tricarichi -- or 10:46:31
strike that. 10:46:31
And as related to Mr. Tricarichi's sale of 10:46:40
West Side Cellular, you conclude in your expert 10:46:42
report that PwC, at least in part, did not have a 10:46:46
duty to update its 2003 advice to Mr. Tricarichi 10:46:50

because IRS Notice -- sorry. I'm sorry. Give me a second. Strike that.

I promise you I'm going to ask a good question. Give me a second.

A. No, it's fine. It's fine.

Q. Forgive me.

Okay. In your expert report, you include that PwC did not have a duty to update its 2003 advice to Mr. Tricarichi, at least in part because it no longer represented him in 2008; is that correct?

A. Well, I think -- I think that is correct. I mean, what I concluded was that PwC did not have an obligation to update the advice under what was then Statement Number 8 because they didn't have a duty to inform Mr. Tricarichi of subsequent developments.

And then I also concluded that PwC didn't have a duty to update its advice based on the issuance of Notice 2008-111 because the notice did not create an error that required disclosure by PwC to Mr. Tricarichi.

Q. What is it that led you to conclude that PwC stopped representing Mr. Tricarichi in 2003?

A. Well, I looked at the engagement letter. I understood what the scope of the engagement was, which I understood to be providing tax research and evaluation with respect to the transaction. It was a -- it was a discrete assignment. The transaction was consummated in the fall of '03. 10:48:37 10:48:42 10:48:47 10:48:51

PwC sent out a bill that included an invoice for its services, which I think were completed in September on the federal side and maybe slightly later on the state side. 10:48:59 10:49:03 10:49:07 10:49:10

And so as a -- as a discrete assignment that had been completed where there was no future service being performed and nothing more to do with respect to the transaction, it -- you know, I reached a conclusion that the engagement had ended. 10:49:15 10:49:23 10:49:26 10:49:31 10:49:33

Q. And so from my understanding, at least in part, you relied on Mr. Tricarichi's engagement letter with PwC in concluding that Mr. Tricarichi's engagement with PwC ended in 2003; is that correct? 10:49:37 10:49:42 10:49:44 10:49:48

A. Well, the engagement letter was certainly one -- yeah, one piece of evidence that I considered. 10:49:51 10:49:56 10:49:59

I mean, the conduct of the parties was also relevant because there was no service that was being billed for from the -- basically, the end of the transaction when it closed until -- for that -- you know, until -- for five, six, you know, many years 10:49:59 10:50:02 10:50:05 10:50:11 10:50:16

after. Services were never billed for after that. 10:50:21
Q. And as part of your expert opinions today -- 10:50:24
or strike that. 10:50:24
As part of your engagement in this matter, 10:50:32
do you render any expert opinions as to the end of 10:50:47
engagements between accountants and their clients? 10:50:43
A. Well, I've considered -- I've considered 10:50:49
when the engagement ends, as you know, because 10:50:52
that's relevant in part, as you said, to whether or 10:50:58
not there was any duty on the part of PwC to notify 10:51:04
Mr. Tricarichi. And so I have an understanding of 10:51:07
when the accountant-client relationship terminates, 10:51:12
which I've applied to understanding the facts here. 10:51:18
Q. Do you have any expertise -- or strike that. 10:51:22
Have you previously written any scholarly 10:51:32
articles about termination of accountant-client 10:51:35
relationships? 10:51:39
A. Dealing solely with that topic, no. 10:51:39
Q. Have you rendered an expert opinion in any 10:51:42
matter related to the termination of 10:51:56
accountant-client relationships? 10:51:59
A. I believe in one matter I considered in 10:52:00
the -- in analyzing the duties of the accounting 10:52:02
firm, whether or not -- certainly, whether or not a 10:52:05
part of the engagement continued. 10:52:13

CERTIFICATE OF SHORTHAND REPORTER-NOTARY PUBLIC

I, Tiffany M. Pietrzyk, CSR RPR CRR, the officer before whom the foregoing deposition was taken, do hereby certify that the foregoing transcript is a true and correct record of the testimony given; that said testimony was taken by me stenographically and thereafter reduced to typewriting under my direction; that reading and signing was requested; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 7th day of October, 2020.

Tiffany M. Pietrzyk
____

My commission expires:
February 28th, 2024

Exhibit 36

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS LLP, COÖPERATIVE RABOBANK U.A., UTRECT-AMERICA FINANCE CO., SEYFARTH SHAW LLP, and GRAHAM R. TAYLOR, Defendants.	CASE NO: A-16-735910-B DEPT. NO.: XI

EXPERT REPORT

KENNETH L. HARRIS
HARRIS WINICK HARRIS LLP

May 23, 2020

EXPERT BACKGROUND

I. Qualifications

1. Bartlit Beck LLP retained me as an expert witness on behalf of PricewaterhouseCoopers LLP ("PwC"). I am being compensated at my current hourly rate of $775. My compensation is not contingent on the conclusions I reach or the opinions that I express, and is due and payable regardless of the outcome of these proceedings. This report reflects the opinions and testimony that I expect to present at trial if asked. These opinions and testimony may be modified and/or supplemented based on further discovery in this case, my review of expert reports submitted on behalf of Plaintiff, and other events and information that I become aware of hereafter.

2. Briefly summarized, my background and experience that is relevant to my qualification as an expert witness in this case is as follows:

3. I am presently a named partner in the law firm of Harris Winick Harris LLP in Chicago, Illinois, where I represent public and privately-held companies in federal tax controversy matters and also advise corporate and individual clients on the federal income tax aspects of business operations and structuring mergers and acquisitions, cross-border transactions and related tax planning matters. Prior to joining Harris Winick Harris in July of 2014, I had been a partner for fourteen years at the law firm of Neal, Gerber & Eisenberg LLP in Chicago, Illinois, where I served as chair of the firm's tax department and was a member of the firm's executive committee. My practice at Neal, Gerber & Eisenberg focused on a broad range of transactional tax matters, including tax planning for corporations and high net worth individuals, divestitures and acquisitions, and international tax planning, as well as representation of clients in tax controversies. I began my legal career in 1985 at the law firm of Jenner & Block LLP in Chicago, Illinois, where I became a partner in 1992 and practiced until early 2000, when I joined Neal Gerber & Eisenberg. My practice at Jenner & Block involved representation of public and privately held companies and high net worth individuals in domestic and international tax planning matters and tax controversy representation.

4. I graduated *summa cum laude* with a B.A. in philosophy from Hamilton College in 1982. I then attended the University of Chicago Law School, from which I graduated with a J.D. degree in 1985. In 1988, I obtained a master's degree (LL.M.) in taxation from NYU School of Law, where I served as a graduate editor of the *Tax Law Review*.

5. Throughout the nearly 35 years that I have practiced in the Federal tax area, I have written and lectured extensively in the field of tax ethics and the standards of practice governing accountants, lawyers and others practicing in the Federal tax area. Among other publications, I co-authored a treatise with Bernard Wolfman, the late professor emeritus of Harvard Law School, and James Holden (formerly with Steptoe & Johnson), entitled <u>Standards of Tax Practice</u>. The treatise, originally written in 1989, is presently in its 6th edition and addresses the professional duties and obligations of accountants, lawyers and others practicing in the Federal tax area. My *curriculum vitae*, attached as Exhibit A, lists publications that I have authored or co-authored.

6. Since 2004, I have taught as an adjunct professor of law at Northwestern University Law School, where I teach a course entitled Tax Ethics, Opinions and Penalties. The course focuses on the professional duties and obligations of accountants, lawyers and others who

practice in the Federal tax area. I also have lectured extensively during my career on Federal tax topics, most notably in the area of the professional obligations of accountants, lawyers and others practicing in the Federal tax area, including by serving as Chair of the NYU Institute on Federal Taxation Session on Tax Ethics.

7. I have served as an expert witness and provided testimony by deposition and/or at trial during the past four years in 4 court cases and in 2 confidential arbitration proceedings. A list of the non-confidential proceedings in which I testified during that period is included in Exhibit A.

8. My opinions are based on my understanding of the facts and on my expertise in the standards of Federal tax practice and in Federal income taxation that I have acquired through nearly 35 years of practice, teaching, and scholarship.

II. Materials Considered

9. I have obtained information regarding this matter from my review of documents, pleadings and other information produced by the parties in this case. A list of the documents, pleadings and other information that I have considered is attached as Exhibit B. In addition to my review of the materials produced by the parties, I have also reviewed those documents cited within this report. Additionally, I have spoken to Richard Stovsky of PwC regarding certain of the events at issue in this case.[1]

10. In considering the matters addressed in this report, I have reviewed the American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct (the "AICPA Code"), the AICPA Statements on Standards for Tax Services (the "SSTSs"), other AICPA interpretations, pronouncements and related materials; Treasury Department standards of conduct (commonly known as "Circular 230") and related materials; and tax law materials, including provisions of the Internal Revenue Code of 1986, as amended (the "Code"), legislative history, proposed, temporary and final Treasury regulations ("Treasury Regulations" or "Treas. Reg."), administrative rulings, notices, announcements and other administrative pronouncements of the Internal Revenue Service ("IRS" or "Service"), judicial decisions, and commentaries. My nearly 35 years of experience as a tax practitioner also informs my consideration of the matters addressed in this report.

SUMMARY OF OPINIONS

11. Michael A. Tricarichi ("Plaintiff") maintains in his Amended Complaint dated December 10, 2018 ("Amended Complaint") that PwC breached its professional duties and obligations to Plaintiff by, among other things, failing to inform Plaintiff (i) of the IRS's issuance of Notice 2008-111[2] in December of 2008 and (ii) that, in light of the issuance of that notice, PwC's prior advice regarding the federal income tax consequences of Plaintiff's transaction with Fortrend International LLC ("Fortrend") in 2003 (the "Transaction"[3]) was mistaken (resulting in

[1] Telephone call with Richard Stovsky on May 7, 2020 ("Stovsky Call").
[2] 2008-2 C.B. 1299.
[3] See Factual Background, Section V.

errors on Plaintiff's tax return(s)).[4] Plaintiff also alleges in the Amended Complaint that PwC breached its professional duties and obligations to Plaintiff by failing to inform him in 2003 about the significance of IRS Notice 2001-16[5] and its potential application to the Transaction, and instead improperly advised him "that the transaction proposed by Fortrend was legal and proper and in compliance with the tax laws."[6] These latter allegations—relating to PwC's advice to Plaintiff in 2003—pertain to claims that were dismissed by the Court's Order Granting Summary Judgment, dated October 22, 2018. Plaintiff restated these claims in the Amended Complaint "in order to preserve his appellate rights with respect thereto."[7]

12. I have been asked to consider whether PwC satisfied its professional duties and obligations in performing tax services for Plaintiff in connection with his participation in the Transaction. In particular, my opinions have been requested with respect to the following issues:

> (A) Whether PwC had a duty under the applicable professional standards, upon learning of the IRS's issuance of Notice 2008-111, to update its prior tax advice provided to Plaintiff in 2003;
>
> (B) Whether PwC had a duty under the applicable professional standards, upon learning of the IRS's issuance of Notice 2008-111, to inform Plaintiff that PwC had discovered an alleged material error on Plaintiff's 2003 federal income tax return and/or Plaintiff's alleged lack of compliance with the tax law;
>
> (C) Whether PwC's alleged failure to raise with Plaintiff the issuance of Notice 2008-111 resulted in Plaintiff's inability to avoid litigation with the IRS and thereby to avoid interest expense and related professional fees that were "substantial."[8]

13. Based on my review of the materials identified above, I have reached the following principal conclusions (the basis and reasoning of which are set forth in the section entitled "Opinions and Basis for Opinions" below):

> (A) PwC had no duty under the applicable professional standards, after learning of the IRS's issuance of Notice 2008-111, to update its prior tax advice provided to Plaintiff in 2003. PwC was no longer providing services to Plaintiff at the time of issuance of Notice 2008-111, and had not been providing services to him for more than five years. Accordingly, the firm owed no professional duty or obligation to inform Plaintiff, a former client, of any developments in the tax law. Indeed, even if PwC had been continuing to provide services to Plaintiff at such time (which is not the case), the professional standards make clear that a tax professional has no obligation to communicate subsequent developments to a client that affect advice previously provided to the client except where the tax professional has undertaken

[4] Amended Complaint ¶ 116.
[5] 2001-1 C.B. 730.
[6] Amended Complaint ¶ 101(b).
[7] *Id.* at FN 1.
[8] *Id.* ¶ 119.

the obligation by specific agreement.[9] PwC not only did not undertake any obligation to update its advice to Plaintiff by specific agreement; quite to the contrary, Plaintiff agreed in his engagement agreement with PwC that PwC did not have any obligation to inform Plaintiff of subsequent changes in the tax law.

Moreover, even if PwC had undertaken to communicate subsequent developments in the tax law to Plaintiff (which it did not), PwC reasonably concluded that Plaintiff's transaction was not the same as or substantially similar to the transaction described in Notice 2008-111 and, thus, the Notice did not impact its prior advice to Plaintiff. The inapplicability of Notice 2008-111 (and the earlier Notice 2001-16) to Plaintiff's transaction was a conclusion shared by Plaintiff's subsequent tax counsel, including both a former and a future IRS Chief Counsel, in numerous pleadings they filed with the IRS and Tax Court.

Lastly, wholly apart from the question of whether Plaintiff's transaction was covered by Notice 2008-111 (which, as noted above, PwC reasonably concluded it was not), because the issuance of Notice 2008-111 did not purport to affect "whether [a] person is liable, at law or in equity, as a transferee,"[10] or to impose new disclosure obligations for the period prior to December 1, 2008,[11] the issuance of the Notice did not cause PwC's prior advice (which was reasonable when provided in 2003) to be mistaken and in need of update.

(B) PwC had no duty under the applicable professional standards (namely, SSTS No. 6, SSTS No. 7 or Treasury Department Circular 230) to disclose to Plaintiff that PwC had discovered an alleged error on Plaintiff's tax return (or Plaintiff's alleged lack of compliance with the tax law).

First, the issuance of Notice 2008-111 did <u>not</u> reveal an error on Plaintiff's 2003 tax return[12] or with respect to PwC's prior advice to Plaintiff. Notice 2008-111 required the prospective disclosure to the IRS of transactions covered by the Notice; it did not purport to change the substantive law regarding transferee liability. The Notice itself states that it "does not affect the legal determination of whether a person's treatment of the transaction is proper or whether such a person is liable, at law or in equity, as a transferee…."[13]

[9] A tax professional who has provided tax advice to a client may also have an obligation to inform the client of a subsequent development in the law where the tax professional is continuing to assist the client in implementing a plan or transaction based on the tax professional's prior advice. SSTS No. 7 at Statement, ¶ 4. Of course, in the present case, PwC could not have been assisting Plaintiff in implementing the Transaction at the time of issuance of IRS Notice 2008-111, as the Transaction had closed more than five years earlier.

[10] IRS Notice 2008-111, Section 1.

[11] *Id.*, Section 6.

[12] As discussed below, a taxpayer's liability as a transferee for the unpaid taxes of another is not a position reflected on the taxpayer's return, and thus even if PwC's advice regarding Plaintiff's potential transferee liability was mistaken, it would not represent an error on the taxpayer's 2003 return.

[13] *Id.*, Section 1.

Second, even if the issuance of Notice 2008-111 revealed an error on Plaintiff's prior tax return or lack of compliance with the tax law (which it did not), PwC had no duty to disclose the error or lack of compliance to Plaintiff in the absence of actual knowledge by PwC. Neither SSTS No. 6 nor Circular 230 (§ 10.21) extends the practitioner's disclosure obligation to situations in which the practitioner *reasonably should know* of an error or lack of compliance. As previously noted, PwC did not believe that the issuance of Notice 2008-111 resulted in an error on Plaintiff's 2003 tax return (or lack of compliance with the tax law).

Finally, even if PwC believed that Notice 2008-111 resulted in an error on Plaintiff's tax return or lack of compliance with the tax law (which it did not), the practitioner's disclosure obligations under SSTS No. 6 and Circular 230 are limited to circumstances involving discovery of an error when the practitioner is continuing to represent the client. Nothing in SSTS No. 6 or Circular 230 suggests any duty on the part of a tax practitioner to disclose an error or lack of compliance with the tax law to a former client of the practitioner. As noted above, PwC had concluded its professional services to Plaintiff in the fall of 2003, more than five years prior to the IRS's release of Notice 2008-111.

(C) Even assuming, *arguendo*, that PwC had a duty to notify Plaintiff of the issuance of Notice 2008-111 and that PwC breached that duty, such breach did not result in the damages (interest expense and professional fees related to Plaintiff's litigation with the IRS)[14] which Plaintiff now seeks to recover.

Plaintiff did not request PwC's assistance in defending against the IRS claim of transferee liability; instead he chose to be represented by experienced and reputable tax counsel (including both a former and a future IRS Chief Counsel) throughout his prolonged battle with the IRS. Based on my review of the record, it is apparent that Plaintiff relied on his experienced tax counsel (who were well aware of Notice 2008-111), and not PwC's failure to notify him of Notice 2008-111, in continuing to challenge the IRS's position administratively and before the Tax Court, the Ninth Circuit and in a certiorari petition filed with the U.S. Supreme Court.

Moreover, in my view, there is nothing that PwC could have reasonably advised Plaintiff with respect to the impact, if any, of Notice 2008-111 on Plaintiff's 2003 tax reporting, or with respect to his defense against the IRS's claim of transferee liability, that Plaintiff did not learn (or could not have learned) from the many experienced tax lawyers he retained to represent him, the first of whom (lawyers at Bingham McCutchen LLP ("Bingham")) he engaged less than three months after Notice 2008-111 was issued. The IRS was already aware of

[14] Plaintiff's Amended NRCP 16.1(A)(1) Disclosures dated September 23, 2019 at 6 (disclosing the categories of damage computation as: (i) pre-notice interest (notice date June 25, 2012) of $13,887,090; (ii) post-notice interest (current estimate) of $10,900,000; and (iii) fees and expenses in IRS and Tax Court proceedings (approximate) of $3,000,000, for total damages in excess of (approximate) $27,787,090).

Plaintiff's participation in the Transaction at the time of issuance of Notice 2008-111 (and had already substantially completed a draft report asserting transferee liability against Plaintiff); the filing of a reportable transaction disclosure form would not have alerted the IRS to information that it did not already possess. In this regard, the government at no point in time sought to impose penalties against Plaintiff for any alleged failure to disclose his participation in the Transaction under the reportable transaction disclosure rules.

Finally, Plaintiff's claim ignores the fact that, while represented by experienced tax counsel, Plaintiff (without seeking PwC's input) rejected settlement offers made by the government in 2010, 2011, and 2014. Each of the foregoing settlement offers, if reasonably considered and accepted by Plaintiff, would have substantially reduced the amounts Plaintiff ultimately owed to the IRS and the damages which Plaintiff now seeks to recover from PwC in this proceeding.

14. My opinions also include any additional opinions reflected in the body of this report. I reserve the right to amend and supplement these opinions based on the production of new evidence, my review of opinions of Plaintiff's experts, and additional testimony or information submitted in this matter.

FACTUAL BACKGROUND

15. Below is a brief summary of my understanding of certain facts as alleged in pleadings, reflected in documents produced in discovery and recited by courts. It is not intended as an exhaustive description of the facts upon which my analysis is based (many of which are set forth in the "Opinions and Basis for Opinions" section of the report) but instead as background to the issues discussed herein.

I. The Parties

A. Michael A. Tricarichi

16. Michael A. Tricarichi ("Plaintiff") is an individual who, at the time the Transaction was negotiated, resided in Ohio. By the time the transaction was implemented, he had moved to the City of Las Vegas, Clark County, Nevada, where he presently resides.[15] Mr. Tricarichi was engaged in the cellular telephone business, which he conducted through West Side Cellular, Inc., also doing business as Cellnet ("Westside").[16] From the date of Westside's incorporation in 1988 until Mr. Tricarichi's sale of the stock of Westside to a Fortrend affiliate in 2003, Mr. Tricarichi was the sole stockholder and president of Westside.[17] Westside was engaged in various telecommunications related activities, including, among others, the purchase of cellular network

[15] Amended Complaint ¶ 10. See also Tax Court, Stipulation of Facts ("Tax Ct. Stip."), TRICAR-NV0046579-0046618, ¶ 7, TRICAR-NV0046585.
[16] *Id.* ¶ 1 a.-b., TRICAR-NV0046581.
[17] *Id.* ¶¶ 1b. and 6, TRICAR-NV0046581, 0046585. Mr. Tricarichi and his wife Barbara Tricarichi also served as directors of Westside from 1988 until 2003. *Id.* ¶ 6, TRICAR-NV0046585.

access from third-party wholesale providers such as Verizon and the resale of cellular services to Westside's individual customers.[18] Westside was a C corporation for federal income tax purposes.[19]

B. PwC

17. PwC is a global network of firms delivering multiple services in the United States and across the world. PwC has a department within its U.S practice known as Washington National Tax ("WNT"). The individuals in WNT are specialists in particular areas of taxation and serve as a resource providing specialized tax advice on discrete subjects to PwC tax professionals in the field.

18. During Mr. Tricarichi's engagement of PwC, Plaintiff's principal contact at PwC was Richard Stovsky ("Stovsky"), a tax partner in the firm's Cleveland office. Mr. Stovsky worked with other tax professionals at PwC in rendering services to Plaintiff, including Timothy Lohnes ("Lohnes"), a partner in WNT with extensive mergers and acquisitions experience, and Ray Turk, a partner in the Cleveland office specializing in state and local taxation. Mr. Turk assisted in providing state income tax planning advice to Mr. Tricarichi in connection with his desire to move his residency from Ohio to a lower tax jurisdiction.

C. Former Parties

19. Plaintiff originally brought suit against Coöperative Rabobank U.A. ("Rabobank"), Utrecht-America Finance Co. ("Utrecht"), Seyfarth Shaw LLP ("Seyfarth") and Graham R. Taylor in the above-captioned litigation. The Court found that there was no personal jurisdiction over Rabobank, Utrecht or Seyfarth in Nevada.

II. Westside's Cellular Litigation and Settlement

20. In October of 1993, Plaintiff engaged the Cleveland law firm of Hahn Loeser & Parks, LLP ("Hahn Loeser") to file a complaint with the Public Utilities Commission of Ohio ("PUCO") alleging, among other things, that wholesale cellular providers had engaged in illegal business practices in an effort to prevent Westside from fairly competing against them for cellular customers.[20] On January 18, 2001, the PUCO ruled in favor of Westside, and, on December 30, 2002, the Ohio Supreme Court affirmed that decision.[21]

21. Notwithstanding the Ohio Supreme Court decision, the defendant wholesale cellular providers continued to dispute the nature and amount of their liability to Westside.[22] In April of 2003, Westside entered into settlement agreements with the defendant cellular service

[18] *Id.* ¶ 12-13, TRICAR-NV0046586.
[19] Amended Complaint ¶ 30.
[20] Amended Complaint ¶ 28.
[21] Tax Ct. Stip. ¶ 16, TRICAR-NV0046587.
[22] *Id.* ¶ 18, TRICAR-NV0046587.

providers, pursuant to which Plaintiff received cash settlements in the total amount of approximately $65 million.[23] After payment of approximately $25 million in employee bonuses and legal fees, Westside was left with approximately $40 million in cash. In exchange for the cash settlement payments, Westside agreed to terminate its business as a retail provider of cellular telephone services.[24]

III. Plaintiff's Pursuit of a Tax Planning Strategy

22. In the fall of 2002, even before the Ohio Supreme Court's decision, Plaintiff asked his attorneys at Hahn Loeser to look for ways to minimize the tax impact of Westside's anticipated receipt of a large judgment or settlement from its ongoing litigation.[25] Plaintiff understood that, because Westside was a C corporation, the proceeds received from the litigation could be subject to double taxation (*i.e.*, once at the corporate level, and a second time on distribution to Plaintiff as shareholder).[26] Randy Hart ("Hart"), the then-Hahn Loeser partner who led the PUCO litigation, solicited the help of his tax partner, Jeffrey Folkman ("Folkman") and others at the Hahn Loeser firm (including Jud Sims ("Sims"), a tax associate at the firm) to determine what planning could be done to maximize the after-tax proceeds received by Plaintiff from the litigation.[27]

23. The September and October 2002 time entries on Hahn Loeser's invoice to Mr. Tricarichi dated October 31, 2003 (reflecting time for the period from September 2002 to early September 2003) indicate that Mr. Sims and others at the firm performed research and analysis during the fall 2002 time frame relating to the taxation of settlements and judgments, the tax consequences of a potential merger of Westside into a partnership entity and the tax consequences of making an S election for Westside.[28] Ultimately the tax lawyers at Hahn Loeser concluded that none of the foregoing options would achieve the objective of reducing Plaintiff's tax burden on receipt of the settlement proceeds from the PUCO litigation.[29]

24. Sometime prior to February 19, 2003, Mr. Folkman raised with Plaintiff the possibility of a stock sale tax strategy involving Midcoast Credit Corporation ("Midcoast") as a potential solution for Plaintiff's tax situation.[30] Mr. Folkman, who had become familiar with the Midcoast strategy while working on a sale transaction for a client a year earlier, arranged a meeting between Midcoast representatives, Plaintiff and Hahn Loeser attorneys for February 19, 2003.[31] The time entries on the HL Invoice indicate that attorneys at Hahn Loeser spent several days before the meeting researching and evaluating, among other issues, the listed transaction

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[23] *See id.* ¶ 23, TRICAR-NV000046588.
[24] *Id.* ¶ 24, TRICAR-NV000046588.
[25] See Amended Complaint ¶ 30; see also Hahn Loeser's invoice dated October 31, 2003 ("HL Invoice"), TRICAR-NV0001343-1356, at 3, TRICAR-NV0001345.
[26] Amended Complaint ¶ 30.
[27] See Deposition of Jeffrey Marc Folkman, dated December 6, 2013 ("Folkman 2013 Deposition"), TRICAR-NV0028060-0028119, at 18-20, TRICAR-NV0028065. See also HL Invoice at 12, TRICAR-NV0001354.
[28] HL Invoice, at 3, TRICAR-NV0001345. See also Folkman 2013 Deposition at 20-21, TRICAR-NV0028065.
[29] Folkman 2013 Deposition at 22, TRICAR-NV0028066.
[30] Amended Complaint ¶ 30.
[31] Folkman 2013 Deposition at 23-25, TRICAR-NV0028066-28067; Amended Complaint ¶ 30.

rules, substance over form issues, the sham transaction doctrine, and the potential applicability of IRS Notice 2001-16,[32] all in apparent preparation for the meeting.

25. On February 19, 2003, Midcoast representatives met with Plaintiff and his lawyers from Hahn Loeser to discuss the Midcoast strategy.[33] The basic steps of the proposed transaction involved Plaintiff's sale of the stock of Westside to an affiliate of Midcoast that was represented to be in the receivables collection business.[34] At the time of the proposed stock sale, Westside's remaining assets would largely consist of $40 million net cash proceeds from the settlement of Plaintiff's lawsuit (*i.e.*, after payment of employee bonuses and legal fees). In addition to the cash on hand, Westside would retain liability for any federal or state income tax resulting from receipt of the settlement amounts.[35] It is apparent from the record that Mr. Folkman understood from his prior interactions with Midcoast that the strategy would involve offsetting Westside's taxable income post-closing with losses and/or expense from "charging off" receivables acquired by the Midcoast affiliate in its collection business.[36]

26. About a month following the Midcoast meeting, Plaintiff learned from his brother, Jim Tricarichi (a businessman with a background in M &A and accounting) about a stock sale strategy that was being offered by Fortrend and was similar to the Midcoast strategy.[37] Plaintiff was introduced to Fortrend through a third party acquaintance of his brother. During the following weeks, Plaintiff and his lawyers at Hahn Loeser negotiated with both Midcoast and Fortrend in the hopes of starting a bidding war and driving up the price for Plaintiff's Westside stock.[38]

IV. Plaintiff's Engagement of PwC

A. The Engagement Agreement

27. On April 8, 2003, Jim Tricarichi, on behalf of Plaintiff, reached out by email to Richard Stovsky, a tax partner in PwC's Cleveland office, to solicit PwC's assistance in evaluating and advising on "potential tax issues and associated risks" from a sale of Plaintiff's stock of Westside to Midcoast or Fortrend.[39] One day later, Jim Tricarichi sent a follow-up email to Mr. Stovsky seeking to confirm Mr. Stovsky's availability to participate in separate conference

[32] HL Invoice at 4-5, TRICAR-NV0001346-1347.
[33] Amended Complaint ¶ 31.
[34] *Id.*, ¶ 33.
[35] *Id.*.
[36] Folkman 2013 Deposition at 36-37, TRICAR-NV0028069.
[37] See letter (with attached brochure) from Fortrend (S. Block) to Jim Tricarichi dated February 24, 2003, TRICAR-NV0076281-0072692.
[38] Amended Complaint ¶ 36.
[39] TRICAR-NV0034421-34422(attachment to email dated 04/08/2003 from Jim Tricarichi to Richard Stovsky, cc: Anthony Tricarichi). The attachment to the email was titled "Tax Issues for Cellnet and Mike Tricarichi" and referenced PwC's advice on the following items: (1) the potential tax issues and the associated risks to Mike Tricarichi in connection with his proposed sale of stock to Midcoast or Fortrend, (2) the state income tax consequences and requirements of a change by Mr. Tricarichi of his residence from Ohio to Nevada, (3) any excess compensation issues arising from contemplated bonus payments to certain key employees, and (4) planning strategies to mitigate tax liability in the event the proposed sale of stock did not occur.

calls with Midcoast and Fortrend scheduled for April 10th and 11th, respectively, to discuss a potential transaction.[40] Mr. Stovsky participated in both calls.[41]

28. On or around April 10, 2003, Mr. Stovsky sent an engagement letter to Plaintiff describing the terms of PwC's engagement by Plaintiff and Westside.[42] The engagement letter, together with the Terms of Engagement to Provide Tax Services ("Terms of Engagement") attached to and directly referenced by the letter (collectively, the "Engagement Agreement"), set forth, among other things, the nature and scope of services to be performed by PwC and the responsibilities of PwC in performing those services. The first page of the engagement letter described the services to be provided by PwC as "tax research and evaluation services."[43] The first page also stated that the "engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this 'Agreement')" govern the services PwC would provide.[44] Paragraph 3 of the Terms of Engagement made clear that PwC, in providing its agreed upon services, would consider the applicable tax laws "as of the date the services [were] provided."[45] Notably, the language of paragraph 3 of the Terms of Engagement continued:

> Tax laws and regulations are subject to change at any time, and such changes may be retroactive in effect and may be applicable to advice given or other services rendered before their effective dates. *We do not assume responsibility for such changes occurring after the date we have completed our services.*[46] (emphasis added).

29. On or around April 25, 2003, the engagement letter was executed by Mr. Tricarichi and Westside and returned to PwC.[47] The returned letter contained two hand-written changes that Mr. Tricarichi attempted to add. The first change deleted a sentence requiring Plaintiff to "advise [PwC] if [Plaintiff] determine[s] that any matter covered by this Agreement is a reportable transaction required to be disclosed under section 1.6011-4."[48] The second change added language to the fees section providing that "Total cost of services is not to exceed $20,000 without prior written authorization."[49] Neither of these changes was accepted by PwC. The file copy of the engagement letter retained by PwC contained an inserted page with a handwritten note indicating that Mr. Tricarichi agreed to preserve the language requiring him to notify PwC if he learned that the proposed transaction was a reportable transaction requiring disclosure to the IRS (and agreed that PwC's fees may exceed $20,000, but PwC would bill on a monthly basis so

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[40] TRICAR-NV0076293.
[41] Deposition of Richard Stovsky dated August 6th, 2013 ("Stovsky 2013 Deposition"), TRICAR-NV0065847-66024, at 20-24, TRICAR-NV0065867-65871.
[42] TRICAR-NV0072970-72977.
[43] TRICAR-NV0072970.
[44] *Id.*
[45] TRICAR-NV0072975.
[46] *Id.*
[47] TRICAR-NV0072974.
[48] TRICAR-NV0072971.
[49] TRICAR-NV0072973.

that Mr. Tricarichi would be up-to-date on fees incurred).[50] PwC executed the engagement letter subject to these two stipulations.[51]

B. PwC's Analysis and Internal Memorandum

30. Beginning in April, 2003, PwC researched and evaluated the federal income tax aspects of the proposed stock transaction. Mr. Stovsky was the principal PwC contact person for Plaintiff and his attorneys at Hahn Loeser (and Plaintiff's brother Jim); however, early on in the engagement, Mr. Stovsky sought the assistance of PwC's firm experts to assist him in analyzing the material federal income tax issues presented by the transaction. On or around April 14th, 2003, Mr. Stovsky emailed WNT requesting assistance in evaluating the proposed transaction. Mr. Stovsky was referred to Tim Lohnes, a partner in WNT who had extensive experience in mergers and acquisition.[52] Mr. Lohnes became the primary PwC tax professional responsible for analyzing the federal income tax issues; however, as noted below, Mr. Lohnes himself sought out the advice of another WNT partner, Don Rocen, a senior partner with tax controversy expertise, in evaluating Plaintiff's potential transferee liability for any unpaid corporate income taxes of Westside following the stock sale.

31. Mr. Stovsky prepared and regularly updated a memorandum to file ("Stovsky memorandum") which was intended to memorialize the issues considered, and the analysis and conclusions reached, by PwC with respect to Plaintiff's transaction. Mr. Stovsky prepared the initial draft of the memorandum on or around April 13, 2013 (shortly following the telephone conference calls with Midcoast and Fortrend).[53] The initial draft reflected Mr. Stovsky's understanding of the facts of the proposed transaction and identified several issues to consider. As noted above, the memorandum was a working copy which Mr. Stovsky periodically updated[54] to incorporate conversations he had with Mr. Lohnes and other PwC tax professionals regarding analysis of the proposed transaction. Mr. Stovsky also made handwritten notes on the memorandum.[55]

32. Mr. Stovsky's understanding of the facts of the proposed transaction, as reflected in the memo, was largely derived from communications Mr. Stovsky had with Plaintiff's lawyers at Hahn Loeser. Mr. Stovsky was also informed about certain aspects of the proposed transaction on the April 2003 conference call with Fortrend, Plaintiff and his other advisors.

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[50] TRICAR-NV0072972.

[51] Stovsky 2013 Deposition at 86, TRICAR-NV0065933.

[52] TRICAR-NV0076299.

[53] Stovsky 2013 Deposition at 35, TRICAR-NV0065882. See also TRICAR-NV0065972-65974 (initial draft of memo attached as exhibit to deposition).

[54] Stovsky 2013 Deposition at 35-36 and 50-51, TRICAR-NV0065882-65883 and TRICAR-NV0065897-65898. While Mr. Stovsky's internal memorandum was periodically updated, the date of the memorandum was not changed, *i.e.*, the memorandum remained dated April 13, 2003.

[55] TRICAR-NV0065952-65956. One set of notes (apparently marked in red) reflect comments from a telephone call on 8/11/03 with Mr. Lohnes, Mr. Folkman, Jim Tricarichi, Ray Turk and Mr. Stovsky. The other set of notes (apparently marked in pencil) reflect comments from an earlier meeting at PwC which included the telephone call participants and Plaintiff and Scott Ginsburg (an employee and director of Westside).

33. As set forth in a separate section of Mr. Stovsky's memorandum, the facts on which PwC relied included the following:[56]

- Purchaser would borrow approximately $36 million and purchase 100% of the Westside shares from Michael Tricarichi. Westside's balance sheet would consist of $40 million cash ($65 million of cash from the cellular litigation less bonus payments to employees of $13 million and attorney's fees of $12 million) and other minor assets.

- The purchaser would contribute high basis/low fair market value properties (assumed to be delinquent receivables) to Westside in a transaction intended to qualify as tax-free under Code § 351.

- Following the stock sale, Westside would be engaged in the business of purchasing "distressed/charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on the debt.

- The business purpose for the acquisition of Westside was based on the new business' need for cash to purchase the charged off credit card debt given that commercial financing for those purchases was apparently difficult to obtain. Westside's cash and accounts receivable would not be available because those amounts would be distributed by Westside to purchaser so that it could pay back the cash borrowed to fund the acquisition of Plaintiff's stock.[57]

- Following the stock sale, Westside would write off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by purchaser to the new business. The deduction would offset the taxable income of Westside recognized on its receipt of the $65,000,000 settlement.

34. The final updated version of Mr. Stovsky's memorandum addressed a number of issues raised by Plaintiff's proposed transaction, including the following three principal issues: (1) whether the proposed stock sale transaction would be respected for federal income tax purposes, (2) whether the transaction was a listed transaction or other reportable transaction requiring disclosure to the IRS, and (3) whether Mr. Tricarichi would have liability for the federal income tax liability of Westside in the event the IRS successfully challenged the loss deductions claimed by Westside on its 2003 tax return and Westside failed to pay the resulting corporate tax liability.[58]

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[56] TRICAR-NV0065952-65956.
[57] A handwritten note on the memorandum indicated that, despite Westside's distribution of cash to purchaser to pay off the loans borrowed to purchase Plaintiff' stock, "sufficient cash remains in the corp. to operate the business…." TRICAR-NV0065953.
[58] TRICAR-NV0065953-65955.

35. PwC did not analyze in detail, nor did the firm express a "more likely than not" opinion to Plaintiff regarding, the purchaser's Code § 351 strategy involving the contemplated contribution of high basis/low fair market value property to Westside.[59]

36. The final updated version of Mr. Stovsky's memorandum contained language in all capital letters on the first page stating that all of the conclusions in the memorandum had been discussed with Plaintiff and his brother, Jim Tricarichi, and the conclusions had been clearly qualified as "more likely than not."[60] A "more likely than not" conclusion is commonly understood by practitioners as reflecting a determination that, if the item in question is challenged by the IRS, the taxpayer has a 50.1% or greater likelihood of prevailing. The highlighted language on the first page of the Stovsky memorandum also made clear that PwC had not provided its conclusions in writing to Plaintiff.[61]

37. With respect to the issue of whether the proposed stock sale would be respected for federal income tax purposes, the Stovsky memorandum concluded, based on Mr. Lohnes' research and consultation with other members of WNT, that it was more likely than not that the transaction would be respected as a stock sale, noting, however, that there was some risk that the IRS could seek to re-characterize a portion of the proceeds received on sale as ordinary income and not capital gain.[62] Based on prior case law,[63] Mr. Lohnes reasoned that the difference between the amount Plaintiff received on the proposed stock sale and the amount Plaintiff would have received if the company had instead been liquidated (which difference he computed to be approximately $9.6 million) could be challenged by the IRS as similar to a fee payment (taxable as ordinary income) and not proceeds from the sale of stock (taxable as capital gain). While it appears that Mr. Lohnes believed the chance of this re-characterization was less than 50%,[64] the memorandum indicates that PwC pointed out this risk to Plaintiff and also discussed with Plaintiff the option of filing his individual income tax return reporting this portion of the stock sale proceeds as ordinary income—and subsequently filing a refund claim treating all proceeds as long term capital gain. Mr. Tricarichi was not in favor of this approach.

38. On the issue of whether the transaction was a listed transaction or otherwise a reportable transaction requiring disclosure to the IRS, the Stovsky memorandum concluded that "a position can be taken that this is not a reportable transaction."[65] Mr. Stovsky's handwritten notes on the memorandum indicate that Plaintiff's tax lawyer at Hahn Loeser, Mr. Folkman, concurred with PwC's conclusion.[66] The memorandum distinguished Plaintiff's transaction from

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[59] The Tax Court stated in its opinion that "PwC specifically declined to give 'more likely than not' assurance" regarding "the 'high basis/low value' debt strategy that Fortrend proposed for eliminating West Side's tax liabilities." Tricarichi v. Comm'r, T.C. Memo 2015-201 at 1452, *aff'd*, 752 Fed. App'x. 455 (9th Cir. 2018).
[60] TRICAR-NV0065952.
[61] *Id.*
[62] TRICAR-NV0065952-65954.
[63] TRICAR-NV0001740 (Lohnes' handwritten notation of "Lowndes 258 F. Supp. 193," to his copy of the Stovsky memorandum). *See also* PwC-000722 (Lowndes v. U.S., 66-2 USTC ¶ 9673 (Dist. Md. 1966), *aff'd*, 384 F.2d 635 (4th Cir. 1967)).
[64] TRICAR-NV0076310.
[65] TRICAR-NV0065955.
[66] *Id.*

a "Midco" transaction (which Mr. Lohnes understood to be described in IRS Notice 2001-16[67]) on the basis that Plaintiff's transaction (unlike the typical "Midco" transaction) did not involve a purchase of assets through an intermediary where the purchaser would receive a stepped-up basis and corresponding increased depreciation and amortization deductions. Mr. Lohnes testified at Plaintiff's Tax Court trial that he reached the conclusion that Plaintiff's stock sale transaction was not the same as or substantially similar to the transaction described in IRS Notice 2001-16.[68]

39. Finally, on the issue of transferee liability, PwC concluded in the memorandum that it was "more likely than not" that Plaintiff would not be liable as a successor or transferee for any corporate level tax liability incurred, and not paid, by Westside.[69] This conclusion (apparently based on Mr. Lohnes' conversations with Don Rocen, a tax controversy partner in the WNT office and a former senior IRS official) was premised on a factual understanding that Westside was a solvent corporation at the time of Plaintiff's stock sale and Plaintiff did not receive any cash or other assets from Westside. Mr. Stovsky's handwritten notes on the memorandum indicate that Plaintiff's tax lawyer, Mr. Folkman, concurred with PwC's conclusion on transferee liability.[70]

V. The Transaction

40. As noted, Plaintiff negotiated with both Fortrend and Midcoast in an attempt to start a bidding war and drive up the price paid for his Westside stock. Plaintiff decided to proceed with a sale of his Westside stock to Fortrend.

41. Plaintiff and Fortrend actively negotiated the purchase price for Plaintiff's Westside stock.[71] PwC did not participate in the negotiation.[72] The parties determined that Fortrend would pay Plaintiff an amount equal to the cash remaining in Westside at closing <u>less</u> a percentage of Westside's estimated federal and state tax liability for the 2003 tax year ("2003 accrued tax liability").[73] It was ultimately agreed that the percentage of the 2003 accrued tax liability deducted from Westside's remaining cash at closing would be 31.875%. This meant that Plaintiff would receive a premium on the net asset value of Westside equal to 68.125% of its estimated 2003 accrued tax liability, *i.e.*, an amount the parties calculated to be approximately \$9.6 million.[74] In his trial before the Tax Court, Plaintiff testified that he did not understand that the purchase price "premium" he received in the transaction had any correlation to Westside's tax liabilities.[75] Plaintiff's testimony was rejected by the Tax Court.[76]

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[67] TRICAR-NV0001740 (Lohnes' handwritten comments to his copy of the Stovsky memorandum).
[68] TRICAR-NV0089680.
[69] TRICAR-NV0065952, 65955.
[70] TRICAR-NV0065955.
[71] Tricarichi v. Comm'r, T.C. Memo 2015-201 at 1441.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* (stating that "[t]he Court did not find [his] testimony credible.").

42. On July 22, 2003, Fortrend's affiliate, Nob Hill,[77] sent Plaintiff a letter of intent setting forth the principal terms of its proposed acquisition of 100% of the stock of Westside for cash in the amount of $34,900,000.[78] The letter stated, among other things, that Westside's assets at closing would consist of cash held by Westside after payment of all liabilities (other than local, state and federal income tax liabilities for the year ending December 31, 2003) of $40,000,000.[79]

43. Fortrend made clear to Plaintiff that it did not want to acquire Westside's accounts receivable or other operating assets.[80] Accordingly, prior to, and in anticipation of, Plaintiff's sale of stock, Westside sold its remaining business assets, consisting largely of customer base and other non-cash operating assets, to the LXV Group LLC ("LXV") for a cash purchase price of approximately $100,000.[81] LXV had been formed by Plaintiff and three former employee/directors of Westside. Each of the members contributed $25,000 cash in exchange for a 25% membership interest in the newly formed entity.

44. Once the Fortrend letter of intent was executed, and Plaintiff paid $50,000 into escrow as required under terms thereof, Fortrend's lawyers drafted a stock purchase agreement setting forth the terms of the transaction. The draft agreement was sent to Plaintiff and his team of lawyers at Hahn Loeser, who were responsible for negotiating the terms of the agreement on behalf of Plaintiff.

45. It appears from the record that the draft stock purchase agreement (along with the letter of intent) was first sent to PwC by Plaintiff's brother on August 12, 2003.[82] PwC reviewed drafts of the agreement and communicated comments regarding the tax-related provisions to Mr. Folkman at Hahn Loeser. PwC did not directly communicate with Fortrend regarding the terms of the stock purchase agreement or the closing mechanics for the transaction.[83] The stock purchase agreement was executed and the transaction was closed on September 9, 2003.[84] The following day Nob Hill merged with and into Westside with Westside as the surviving corporation.

46. As noted above, Fortrend's acquisition of Plaintiff's stock required financing. In broad terms, the purchaser (Nob Hill) borrowed approximately $30 million from Rabobank and the remaining $5 million from Moffat International, another Fortrend affiliate. Rabobank, in an effort to eliminate risk associated with its loan, required that Plaintiff, Westside and Nob Hill each open up separate operating accounts at Rabobank prior to the closing. Westside deposited its cash on hand of approximately $40 million into its newly opened Rabobank account. The Rabobank loan of $30 million and the Moffat loan of $5 million were deposited into Nob Hill's operating account at the bank. Nob Hill granted Rabobank a first priority security interest in its operating

[77] The letter of intent indicated the purchaser was "Nob Hill Holdings, Inc., a Delaware corporation." TRICAR-NV00003723. However, the eventual purchaser of Plaintiff's stock was "Nob Hill, Inc.," a shell company incorporated in the Cayman Islands. Tricarichi v. Comm'r, T.C. Memo 2015-201 at 1441. Nob Hill's sole shareholder was Millennium Recovery Fund, LLC, a Fortrend affiliate also incorporated in the Cayman Islands. *Id.*
[78] TRICAR-NV00003723-3728.
[79] *Id.* at 3724
[80] Tricarichi v. Comm'r, T.C. Memo 2015-201 at 1440.
[81] *Id.*
[82] PwC-000064-65 (email from J. Tricarichi to R. Stovsky dated 8/12/03).
[83] Stovsky Call.
[84] Tricarichi v. Comm'r, T.C. Memo 2015-201 at 1443.

account as well as the operating account of Westside. The Tax Court found that the foregoing arrangement "gave Rabobank ... a 'springing lien' on Westside's cash at the moment it funded the loan."[85] At closing, Nob Hill transferred the purchase price of approximately $35 million from its Rabobank operating account to Plaintiff's newly opened account at the bank (and Plaintiff subsequently transferred the funds from its Rabobank account to Pershing Bank where he maintained his regular accounts). Plaintiff's loan documents and the closing mechanics were reviewed by Plaintiff's attorneys at Hahn Loeser. PwC was not asked to, and did not, review the closing mechanics associated with the funding of Fortrend's acquisition of Plaintiff's stock.[86]

47. On November 6, 2003, and after the merger of Nob Hill into Westside, Millennium Recovery Fund, LLC (the post-merger shareholder of Nob Hill) contributed purportedly high basis/low fair market value property (distressed debt with a reported tax basis of approximately $43 million) to Westside.[87] At some time prior to December 31, 2003, Westside charged off the distressed debt as worthless for federal income tax purposes. In accordance with its write-off of the distressed debt, Westside claimed a bad debt deduction of approximately $42.5 million on its federal corporate income tax return filed for the 2003 tax year. This deduction effectively eliminated any corporate income tax with respect to the cellular litigation settlement received by Westside earlier in the year. PwC had no involvement in the preparation of Westside's 2003 federal corporate income tax return.[88]

48. Plaintiff and his wife Barbara Tricarichi filed a U.S. Individual Income Tax Return (Form 1040) for the tax year ending December 31, 2003, reporting the proceeds from Plaintiff's sale of his stock in Westside as long-term capital gain and paying the resulting tax liability of approximately $5.3 million to the government.

VI. IRS Examination of Westside

49. In the summer of 2005, the IRS opened an examination of Westside's 2003 tax return.[89] Over the next few years, the IRS sought records from Westside (represented by Randall Dick, a tax controversy attorney located in San Francisco) and other interested parties regarding Fortrend's distressed debt strategy and the bad debt deductions claimed on Westside's 2003 return. According to the examining agent's activity records, while certain documents and information had been received from Mr. Dick in July of 2006, they were insufficient to substantiate the basis for the bad debt claims.[90] In the spring of 2007, the IRS issued summonses to Plaintiff, Rabobank and representatives of Fortrend.[91] Plaintiff, through his attorney Mr. Hart, responded to the IRS subpoena for documents and provided materials relating to the stock sale.[92]

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[85] *Id.* at 1450.
[86] Stovsky Call.
[87] *Id.* at 1444.
[88] Stovsky Call.
[89] TRICAR-NV0008367.
[90] *Id.*
[91] *Id.*
[92] TRICAR-NV0008048

50. By the summer of 2007, IRS Exam had spent a substantial amount of time reviewing the Transaction and processing materials relating to the transaction, including those it had received from Plaintiff.[93] Plaintiff was subsequently interviewed by the IRS in Las Vegas on November 30, 2007. Plaintiff, represented by Mr. Hart, was questioned about, among other things, his knowledge of Westside's distressed debt strategy and other aspects of the Transaction.[94]

51. On December 3, 2007, Westside's attorney, Mr. Dick, submitted a letter in response to an IRS information document request ("IDR"), acknowledging the IRS's allegation that the Transaction was similar to Notice 2001-16, but otherwise providing no additional information.[95] In January 2008, IRS Exam completed the examination report and 30-day letter for the Westside audit and turned its attention to the related transferee liability case against Plaintiff.[96]

VII. IRS Initiation of Transferee Liability Examination of Plaintiff

52. On January 22, 2008, the IRS issued a letter to Plaintiff informing him that the IRS was examining Westside and that Plaintiff may be liable as a transferee for any unpaid liabilities of Westside.[97] Included with the letter was an IDR seeking additional documentation and information from Plaintiff with respect to his potential liability as a transferee of Westside.[98] Plaintiff informed the IRS that Mr. Hart, Mr. Folkman and others at Hahn Loeser would be representing him relating to "Transferee liability under I.R.C. § 6901 for the tax liability of West Side Cellular, Inc." with respect to its 2003 corporate tax return.[99]

53. Around the same time that Plaintiff was informed of the transferee liability examination, the IRS issued a summons to PwC requesting materials and records relating to the Transaction.[100] PwC provided records in response to the summons on February 22, 2008, noting in its accompanying cover letter to the IRS that PwC "was engaged by Michael A. Tricarichi and West Side Cellular, Inc. solely to perform state, local and federal tax research and evaluation services…[and] PwC provided no services to Mr. Tricarichi or West Side Cellular, Inc. after the engagement."[101] Before producing documents to the IRS, PwC provided Plaintiff the opportunity to review the documents to be provided. Plaintiff reviewed the documents PwC planned to give to the IRS.[102]

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[93] TRICAR-NV0008367-8368.
[94] *See* TRICAR-NV0008369-70, TRICAR-NV0008039, TRICAR-NV0009671-9773.
[95] TRICAR-NV0008038.
[96] TRICAR-NV0008370.
[97] TRICAR-NV0010192.
[98] TRICAR-NV0010193.
[99] TRICAR-NV0010187-90.
[100] PwC-002501-2510 (requesting information pertaining to, *inter alia*, the stock sale, the Fortrend distressed debt strategy, the bad debt claim and Fortrend's asset recovery business).
[101] PwC-001324 (unsigned); TRICAR-NV0010184 (signed).
[102] Stovsky Call.

VIII. IRS Issuance of Notice 2008-20 and Notice 2008-111

54. As noted above, PwC reached the conclusion in 2003, when advising Plaintiff regarding the tax consequences of his proposed stock sale transaction, that it was "more likely than not" that Plaintiff's transaction was not the same or substantially similar to the intermediary transaction described in IRS Notice 2001-16.[103] The Notice described a transaction generally involving four parties: a seller (X), who desires to sell stock of a target corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T. In the transaction described in Notice 2001-16, the parties undertake the following steps pursuant to a plan: X purports to sell the stock of T to M (claiming capital gain treatment on the sale). T then purports to sell some or all of its assets to Y (with Y claiming a stepped-up basis in the assets equal to the purchase price paid for the assets). M then files a consolidated return and the consolidated group reports losses sufficient to offset the gain from T's asset sale (or in another version of the transaction, M is an entity not subject to tax and M liquidates T in a transaction that does not result in reported gain on M's sale of T's assets).

55. Notice 2001-16 is one of a series of notices issued by the IRS in which the IRS publicly identifies a particular form of transaction as an "abusive tax avoidance" transaction (a "listed transaction."). A taxpayer who participates in a listed transaction (as well as other reportable transactions) is required to disclose his or her participation in the transaction to the IRS on a disclosure statement (Form 8886) attached to the taxpayer's return. The listing of a transaction by the IRS, however, does not prohibit a taxpayer from participating in the transaction. The Treasury Regulations expressly provide that "[t]he fact that a transaction is a reportable transaction [including a listed transaction] shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper."[104] Consistent with this understanding, as discussed below,[105] the AICPA professional standards at the time did not prohibit a CPA practitioner from recommending a return position reflecting the intended tax benefits from a listed transaction (provided the practitioner concluded that the position satisfied the then applicable "realistic possibility of success" standard and any applicable reporting requirements).

56. It is also important to observe that IRS notices identifying listed transactions are published by the IRS in the Internal Revenue Bulletin and also included on a regularly updated website maintained by the IRS.[106] These notices are widely disseminated in the tax practitioner community through daily and weekly tax publications. In my experience, tax practitioners in general (and particularly those engaged in a nationally recognized controversy practice) have familiarity with, and ready access to, these notices.

57. Mr. Lohnes and others at WNT concluded that, because the Plaintiff's proposed stock sale transaction did not involve a buyer seeking to acquire assets of a target corporation in an effort to achieve a step-up in the basis of the target's assets,[107] the transaction was not

[103] 2001-1 C.B. 730.
[104] Treas. Reg. § 1.6011-4(a).
[105] See text discussion ¶ 117.
[106] https://www.irs.gov/businesses/corporations/listed-transactions.
[107] TRICAR-NV0001734, 1740.

described in Notice 2001-16. There was no use of an intermediary corporation to achieve capital gain treatment for a selling stockholder while at the same time providing asset purchase treatment (and stepped-up basis and increased amortization deductions) to a purchaser. As noted above, Mr. Folkman of Hahn Loeser concurred in PwC's conclusion.[108]

58. More than four years following the closing of Plaintiff's transaction, the IRS issued a new notice (IRS Notice 2008-20)[109] on January 17, 2008, in which it sought to modify the definition of intermediary transactions treated as listed transactions under Treasury Regulation § 1.6011-4(b)(2). Notice 2008-20 made clear, in its background section, that the general contours of the definition of an intermediary transaction remained the same:

> An Intermediary Transaction Tax Shelter attempts to avoid the corporate income tax from a *sale of assets*. Generally it involves transactions in which shareholders of a corporation dispose of their shares of stock of the corporation, one or more persons *purchase the corporation's assets* in one or more taxable transactions, and all or a portion of the gain or tax that would otherwise result to the corporation from *the sale of the assets* is avoided.[110] (emphasis added).

59. However, because the Treasury Department believed that identifying the transaction based on the role of an intermediary in facilitating the transaction (as under Notice 2001-16) may have resulted in over-disclosure or under-disclosure of transactions, the IRS in Notice 2008-20 identified four components necessary to characterize a transaction as the same as or substantially similar to the listed transaction described in Notice 2001-16. Those four objective components were:

> (1) A target corporation that directly or indirectly owns assets the sale of which would result in taxable gain, and, as of the time of the stock disposition described in component two, the target corporation has insufficient tax benefits to eliminate or offset such taxable gain in whole or in part. The tax that would result from such sale is referred to as the target corporation's "Built-in Tax."
>
> (2) At least 50% of the target corporation stock (by vote or value) is disposed of by the target corporation's shareholders (other than in liquidation) in one or more related transactions within a 12 month period.
>
> (3) Either within 12 months before, simultaneously, or within 12 months after the date on which, target shareholders have disposed of 50% or more of the target corporation's stock (by vote or value), all or most of the target corporation's assets are sold to one or more buyers in which gain is recognized with respect to the sold assets.

[108] See text discussion ¶38.

[109] IRS Notice 2008-20, 2008-1 C.B. 406, superseded by Notice 2008-111, 2008-2 CB 1299 (Dec. 1, 2008).

[110] *Id.*, Section 2.

(4) All or most of T's Built-in Tax described in component one that otherwise would result from the sale of target corporation's assets in component three is purportedly offset or avoided or not paid by target corporation.[111]

60. Notice 2008-20, much like Notice 2006-16, thus continued to identify a principal characteristic of intermediary transactions as involving a target corporation that owned assets the sale of which would result in taxable gain (built-in gain assets), and the avoidance of payment of tax on gain triggered by the sale of those assets.

61. Despite setting forth objective criteria for defining an intermediary transaction, Notice 2008-20 was subject to considerable criticism in the tax practitioner community for failing to provide rules under which buyers and sellers would be able to reasonably determine their reporting obligations.[112] Many of these criticisms centered on the lack of a knowledge or intent requirement in Notice 2008-20, and a concern that a person could be treated as participating in a listed intermediary transaction despite having no knowledge or reason to know of having entered into a plan to avoid payment of tax on the sale of built-in gain assets. In an apparent response to these and other concerns, the IRS issued Notice 2008-111[113] in December of 2008 (clarifying Notice 2001-16 and superseding Notice 2008-20).

62. Notice 2008-111 defines an intermediary transaction in general, much like Notice 2001-16 and 2008-20, as involving a corporation that would have a federal income tax obligation with respect to disposition of assets the sale of which would result in taxable gain ("built-in gain assets") in a transaction which would provide the purchaser with a cost or fair market value basis ("stepped-up basis") in the assets. Under the terms of Notice 2008-111, an intermediary transaction is further defined in terms of its objective components and its plan.

63. The four objective requirements of an intermediary transaction under Notice 2008-111, which must be present for a transaction to be treated as the same as or substantially similar to the transaction described in Notice 2001-16, are similar but not identical to those identified in Notice 2008-20. As a general matter, Notice 2008-111 replaced certain broader concepts in Notice 2008-20 with narrower bright-line rules.[114]

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[111] *Id.*, Section 3.01. In determining whether a person was a participant in a listed transaction under Notice 2008-20, the Notice provided narrow safe harbors for certain sellers and buyers. A stock seller was not treated as a participant if the only stock of the target corporation disposed of was traded on an established securities market, and prior to the disposition, the seller was not a 5% shareholder by vote or value. An asset purchaser was not viewed as a participant under Notice 2008-20 if it purchased only (i) publicly traded securities representing a less than 5% interest in that class of security or (ii) assets that were not securities and did not include a trade or business as defined under Code § 1060.

[112] *See, e.g.*, New York State Bar Association Letter to Treasury Department, dated May 23, 2008, Re: Notice 2008-20 (Intermediary Tax Shelters), Tax Notes Document 2008-11600.

[113] 2008-2 C.B. 1299 (Dec. 1, 2008).

[114] *Id.*, Section 3. The four components of an intermediary transaction previously identified in Notice 2008-20 were modified in Notice 2008-111 as follows: (1) component one was changed to require that the target corporation has insufficient tax attributes to offset the gain *in whole* (as opposed to the Notice 2008-20 requirement of offsetting the gain *in whole or part)*, (2) component two was changed to replace the requirement of a 50% stock disposition within a 12 month period under Notice 2008-20 with the requirement of an 80% stock disposition under Notice 2008-111, (3) component three was changed to replace Notice 2008-20's requirement of a sale of *all or most* of the target corporation's assets with a bright-line rule under Notice 2008-111 requiring a sale of 65% of the value of the target's

64. The key change, however, in Notice 2008-111 was to provide that, even if the four objective requirements are present in a transaction, a person will not be treated as participating in a listed transaction unless the person knows or has reason to know that the transaction is structured to effectuate a "plan."[115] A "plan" is defined for these purposes as an intermediary transaction structured to cause the tax on a target corporation's built-in gain assets to arise, in connection with the disposition by the target shareholders of a controlling interest in the target corporation's stock, under circumstances in which the person or persons primarily liable for the tax on the sale of the built-in gain assets will not pay the tax.[116] Any person owning 5% or more (by vote or value) of the target corporation, or any shareholder that is an officer or director of the target corporation, is treated under Notice 2008-111 as engaging in an intermediary transaction pursuant to a plan where such person or any of the following expanded group of persons knows or has reason to know that the transaction is structured to effectuate the plan: (i) any officer or director of the target corporation, (ii) any of target corporation's advisers engaged by target corporation to advise it or such shareholder with respect to the transaction, or (iii) any advisor of such shareholder that is engaged by that shareholder to advise him or her with respect to the transaction.[117]

65. Notably, while Notice 2008-111 clarified[118] the definition of intermediary transactions that would be treated as the same or substantially similar to the listed transaction described in Notice 2001-16, the Notice did not purport to provide a statement of substantive law or determination of a person's liability as a transferee. The IRS itself expressly stated in Notice 2008-111 that:

> 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 [of the target corporation].[119]

66. As to the effective date of Notice 2008-111, the Notice provides that it is "generally" effective January 19, 2001 (the effective date of Notice 2001-16).[120] The Notice goes on to state, however, that it imposes no disclosure requirements under applicable Code provisions (*i.e.*, Code §§ 6011, 6111 and 6112) due before December 1, 2008 (the effective date of Notice 2008-111) unless otherwise imposed by Notice 2001-16. Thus, if a person entered into a transaction after January 19, 2001 (but before December 1, 2008) that was not a listed transaction under the terms of Notice 2001-16, but was arguably characterized as a listed transaction under

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built-in gain assets, and (4) component four was changed to replace the requirement in Notice 2008-20 that *all or most of the built-in gain tax* would be avoided or not paid with a bright-line rule under Notice 2008-111 that *at least half* of the target corporation's built in gain tax purportedly would be avoided or not paid.

[115] *Id.*, Sections 2 and 4. Even if a transaction has all four components of an intermediary transaction, and a person engaged in the transaction pursuant to a Plan, Notice 2008-111 provides safe harbor exceptions for certain persons. *See* Notice 2008-111, Section 5.

[116] *Id.*, Section 2.

[117] *Id.*, Section 4.

[118] *Id.*, Section 7.

[119] *Id.*, Section 1.

[120] *Id.*, Section 6.

Notice 2008-111, then such person would not be in violation of any disclosure obligation to the IRS for any failure to report such person's participation in the transaction *at any time before* December 1, 2008.

67. On December 2, 2008, Mr. Lohnes emailed Mr. Stovsky indicating that he had reviewed Notice 2008-111 and concluded that the Notice did not change PwC's prior analysis of Plaintiff's transaction.[121]

68. Like all IRS Notices, Notice 2008-111 was published by the IRS in the Internal Revenue Bulletin and was widely disseminated in the tax practitioner community, including through daily and weekly tax publications regularly consulted by tax practitioners such as Tax Notes Today, RIA Checkpoint and CCH tax services.

IX. IRS Issuance of Transferee Liability Report; Plaintiff's Protest

69. Two months following the issuance of Notice 2008-111, Plaintiff (and his counsel, Mr. Folkman and Mr. Hart of Hahn Loeser) were notified by the IRS (by letter dated February 3, 2009) that it had determined that Westside had an outstanding tax liability for the 2003 tax year,[122] and that Plaintiff was liable as a transferee of Westside under Code § 6901.[123] The IRS enclosed a copy of a draft transferee report addressed to Mr. Tricarichi with its letter.

70. Shortly after receiving the IRS letter, Plaintiff retained the law firm of Bingham McCutchen LLP ("Bingham") to represent him before the IRS.[124] Glenn Miller, a tax partner at the firm, had principal responsibility for handling the IRS exam and responding to the transferee report. Subsequently, Michael Desmond (future IRS chief counsel) represented Plaintiff, both as a partner at Bingham and later as a solo practitioner, in connection with his proceedings before the IRS, Tax Court and Ninth Circuit.[125]

71. In late April of 2009, less than six months following the issuance of Notice 2008-111, Mr. Miller of Bingham, in response to the draft transferee report, sent a letter to IRS Exam explaining why it would be inappropriate and inequitable for the IRS to treat Plaintiff as a transferee for the tax liabilities of Westside for the 2003 tax year.[126] The Bingham letter contained a detailed discussion of Notice 2008-111 and concluded that Plaintiff's stock sale did not qualify as a transaction which was the same as or substantially similar to the intermediary transaction described in Notice 2001-16, as clarified by Notice 2008-111. Bingham explained in its letter, as PwC had concluded in 2003, that because there was no purchaser of target corporation assets and thus no sale of built-in gain assets, the Plaintiff's transaction could not be an intermediary transaction. As Mr. Miller stated in his letter, "[a]s noted in Notice 2008-111, without the

[121] PwC-001371-001382.

[122] On February 25, 2009, the IRS formally issued a Notice of Deficiency to Westside asserting an increase in tax liability of $15,186,570, plus additional penalties under Code § 6662. TRICAR-NV0003601.

[123] TRICAR-NV0010182.

[124] TRICAR-NV0010181.

[125] Sherri Dillon, a tax controversy partner at Bingham, also represented Plaintiff during the period 2009-2014.

[126] TRICAR-NV0026577-0026598.

existence of an asset buyer (Y) and without the existence of Built-in Gain Assets, a transaction cannot be an Intermediary Transaction."[127]

72. During this same time period, Plaintiff continued also to be advised by Mr. Hart. In March of 2009, Mr. Hart emailed Tim Conn, a Fortrend representative, notifying him about the IRS transferee liability claim against Plaintiff and inquiring about the status of the Westside audit.[128] Randall Dick, counsel to Westside in the audit, replied to Mr. Hart informing him that the IRS had issued a notice of deficiency to Westside, Westside had no assets and Westside would not be contesting the asserted tax and penalties with the Tax Court.[129]

73. The IRS issued its final transferee report to Plaintiff on August 11, 2009,[130] rejecting taxpayer's position regarding transferee liability as set forth in the Bingham letter of April 2009. On October 9, 2009, Mr. Miller of Bingham filed a Protest on behalf of Plaintiff challenging the IRS's claim of transferee liability.[131] The Protest reasserted many of the same arguments contained in Bingham's April 2009 letter (including those distinguishing Plaintiff's transaction from the transaction described in Notice 2001-16 and Notice 2008-111). Plaintiff signed a "Penalty of Perjury Statement" attesting under penalties of perjury that he had "examined th[e] protest, including any accompanying documents, and, to the best of [his] knowledge and belief, the facts presented in [the] protest are true, correct, and complete."[132] IRS Exam closed the case in December of 2009 and sent it to IRS Appeals.

X. Plaintiff's Challenge of Transferee Liability Claims at IRS Appeals

74. Although Plaintiff continued to be represented by Mr. Miller and Mr. Desmond of Bingham (as well as Mr. Hart), by early 2010 Plaintiff had also retained the New York law firm of Sullivan & Cromwell LLP ("S & C") and its senior tax partner, Donald Korb, former IRS Chief Counsel, to assist in the representation of Plaintiff before IRS Appeals.[133]

75. In preparation for a conference between Plaintiff's representatives and IRS Appeals on October 27, 2010, S & C lawyers prepared a detailed power point presentation outlining the Plaintiff's position.[134] Several slides in the presentation were devoted to S & C's conclusion that three of the four components necessary for finding an intermediary transaction under Notice 2008-111 were not present in Plaintiff's transaction.

76. Mr. Desmond and Mr. Miller of Bingham also attended the Appeals conference on behalf of Plaintiff.

[127] TRICAR-NV0026585.
[128] TRICAR-NV0007964.
[129] TRICAR-NV0007963.
[130] TRICAR-NV0073002-73026.
[131] TRICAR-NV0088601-88629.
[132] TRICAR-NV0088630.
[133] A summary of S & C invoices in the record indicates that S & C may have begun providing services to Plaintiff as early as August of 2009. TRICAR-NV0053570. By February 5, 2010, Mr. Miller sent a letter to the IRS requesting on behalf of himself "and [his] co-counsel Donald Korb of Sullivan & Cromwell" to transfer the case from the Appeals Office in Laguna Niguel, California to the Cleveland, Ohio office. TRICAR-NV0010352.
[134] TRICAR-NV0009264 (S & C power point presentation sent to P. Szpalik on October 26, 2010).

77. Following the Appeals conference, Mr. Desmond circulated to Plaintiff's other representatives his notes summarizing the IRS's settlement position presented at the conference.[135] These notes were in response to a summary of the IRS position emailed earlier by Mr. Andrew Mason, one of Plaintiff's counsel from S & C. Taken together, the notes suggested that the IRS's settlement position would reduce Plaintiff's transferee liability exposure from $28 or $30 million to approximately $14.4 million. Specifically, the IRS position proposed the following adjustments and/or concessions: (i) concession of 10% of the loss from the distressed debt transaction (approximately $4.2 million of the approximate $42 million loss reported by Westside), (ii) concession of an additional 20% of Westside's tax liability; (iii) imposition of penalties on Westside of 10% (not 20% or 40%), (iv) imposition of $5 million in interest, and (v) a "claim of right" credit for Plaintiff's transferee liability (reflecting a refund of the 15% long term capital gains tax paid by Plaintiff on the portion of his stock sales proceeds equal to the proposed transferee liability).

78. S & C prepared a numerical analysis of the settlement calculation[136] consistent with Mr. Desmond and Mr. Mason's notes, along with several counterproposals, which were sent to the team of Plaintiff's lawyers, apparently in preparation for a discussion with Plaintiff. I have seen nothing in the documentary record indicating whether one or more of these counterproposals were presented to the IRS.

79. In early December of 2010, S & C prepared and sent a "decision tree" analysis to IRS Appeals which it described as an approach to formulating a fair settlement for the case.[137] The analysis focused on the government's need to prevail on three separate issues in order to establish Plaintiff's transferee liability; namely (i) disallowance of the loss from the distressed debt strategy at Westside, (ii) characterization of Plaintiff's receipt of cash as proceeds from a liquidation of Westside, and (iii) satisfaction of the requirements for imposing transferee liability under Code § 6901. In one version of the "decision tree" document included in the record, which appears to be from the government's production, the government's likelihood of success is computed to be 17%.[138]

80. It appears that on or around December 10, 2010, IRS Appeals made a settlement offer to Plaintiff proposing a net transferee liability of approximately $16.14 million (as compared to a "current proposed total transferee liability" calculated by IRS Appeals to be approximately $32.28 million).[139] The Service's offer tracked the analysis and numbers it proposed at the October 27, 2010 Appeals conference, with the principal difference that the interest computation in the December offer (computed through 12/31/2010) was approximately $1.9 million higher than the interest computation included in the earlier proposal.

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[135] TRICAR-NV0073770-73.
[136] TRICAR-NV0073765.
[137] TRICAR-NV0073888.
[138] TRICAR-NV0009286-9287. The 17% is based on an estimate of the likelihood of the government prevailing on three separate issues identified above of (i) 80% on disallowing the loss from the distressed debt, (ii) 65% in characterizing the Plaintiff's proceeds as received in liquidation of Westside, and (iii) 40% in satisfying the requirements for imposing transferee liability. There appears to be an error, however, in the computation of the 17% overall probability, *i.e.*, multiplying (i) 80% by (ii) 65% by (iii) 40% results in a 20.8% probability of success.
[139] TRICAR-NV0073890-0073900.

81. The IRS's December 2010 settlement offer was not accepted by Plaintiff.

82. Plaintiff's representatives and IRS Appeals continued a back and forth with respect to the furnishing of information through the early months of 2011, culminating in a letter from Mr. Korb to Mr. Szpalik dated March 18, 2011, in which Mr. Korb set forth the basis on which Plaintiff was entitled to Westside's tax returns for 2003 and 2004, and also reiterated S & C's position that Plaintiff's sale of the Westside stock was not an "intermediary transaction" as defined by the IRS.[140] As Mr. Korb stated in his letter, "[a]s we have consistently explained, the IRS itself in the applicable notice, Notice 2008-111, provides a definition of intermediary transaction which relies on four objective components, and three of the four components are not present with respect to the sale of the West Side Cellular stock."[141] Mr Korb concluded his letter by stating:

> Thus, pursuant to the clear and unambiguous language of Notice 2008-111, the sale of the West Side Cellular stock is neither an intermediary transaction *nor* substantially similar to an intermediary transaction. We see no basis on which this conclusion can be challenged.[142]

83. Discussions between Plaintiff's representatives and IRS Appeals continued into the summer of 2011, when, on August 29, 2011, Mr. Szpalik sent Mr. Korb a proposed settlement computation based on a telephone conversation several days earlier.[143] The IRS's new settlement proposal was significantly more favorable to Plaintiff than its December 2010 proposal. While the new proposal retained a 10% concession on the losses claimed by Westside from its distressed debt strategy (and also a credit for the long term capital gains tax paid on the portion of Plaintiff's stock sale proceeds equal to the proposed transferee liability), it also conceded 35% (rather than 20%) of Westside's tax liability, eliminated the 10% penalty imposed on Westside's deficiency and computed interest to be approximately $1.2 million less than the interest charged as part of the December 2010 offer. In sum, the IRS's new settlement proposal calculated Plaintiff's net transferee liability to be approximately $12.4 million, which, according to the IRS, represented an effective 66% concession on the part of the government (when compared to the Plaintiff's "current proposed total transferee liability" of approximately $34.6 million).

84. No settlement was reached at IRS Appeals, and on February 10, 2012, Mr. Szpalik sent a letter to Mr. Korb stating that IRS Appeals had completed its efforts to resolve the dispute and had been unsuccessful in reaching agreement with the Plaintiff.[144] The letter also indicated that Plaintiff had declined post Appeals mediation and the case was accordingly being sent to Exam for further handling. At no time during any of these interactions with the IRS (or after, including through the Tax Court proceedings described below) did Plaintiff engage PwC or ask PwC whether it should or could revisit its conclusions from 2003 or 2008.

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[140] TRICAR-NV0073703-0073706.
[141] TRICAR-NV0073705.
[142] TRICAR-NV0073706.
[143] TRICAR-NV0009316-9317 (IRS Appeals' schedule comparing settlement computation for Tricarichi on 12/20/2010 with computation on 8/26/2011).
[144] TRICAR-NV0009318.

XI. Tax Court Proceedings

85. The IRS issued a Notice of Liability to Plaintiff on June 25, 2012, stating that Plaintiff was liable for $21,199,347 plus interest as a transferee of Westside.[145] Plaintiff filed a petition with the Tax Court in September of 2012 for review of the IRS notice of liability.[146]

86. Plaintiff was initially represented in the Tax Court proceedings by Mr. Desmond, who had since established his own law practice, and by Mr. Miller and Ms. Dillon of Bingham. In October of 2013, Plaintiff's counsel filed a motion for summary judgment seeking a determination from the Tax Court that Plaintiff's sale of stock to Nob Hill was not in fact or substance a liquidation of Plaintiff's stock in Westside. In a memorandum of law filed concurrently with Plaintiff's motion for summary judgment,[147] Plaintiff's counsel pointed out that the IRS had "repeatedly sought to denigrate" Plaintiff's stock sale transaction by "labeling it as a [sic] 'intermediary tax shelter transaction'" and that "[a]ny comparison of the stock sale at issue here to the intermediary transaction described in the [IRS] notices [was] misplaced."[148]

87. This same theme—the inapplicability of Notice 2008-111—was argued by Mr. Desmond in a motion in limine filed with the Tax Court.[149] The motion sought to preclude the government from introducing any evidence or argument at trial that Plaintiff's stock sale transaction was an "intermediary transaction tax shelter" within the meaning of Notice 2001-16 and 2008-111.[150] In addition to arguing that Notice 2008-111 was not relevant since the notice related to the question of whether a transaction was required to be disclosed as a listed transaction under Code § 6011 (and the government had not argued failure to comply with the reportable transaction disclosure requirements), Plaintiff's counsel also argued that the IRS had repeatedly sought to mischaracterize Plaintiff's stock sale as an "intermediary transaction tax shelter" defined in Notice 2008-111 "in a misplaced effort to denigrate the merits of the transaction."[151]

88. By early 2014, Plaintiff had expanded his legal team, adding attorneys from the law firm of McGuire Woods, including Craig Bell, a partner with tax controversy expertise, to assist Mr. Desmond in representing Plaintiff in Tax Court.

89. Prior to the Tax Court trial, Plaintiff's lawyers raised with Plaintiff the possibility once again of pursuing a settlement with the government.[152] Mr. Desmond suggested a potential settlement offer[153] based on the "transferee of transferee liability" theory articulated by the First

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[145] TRICAR-NV0027037-27046.
[146] TRICAR-NV0078007-78021.
[147] TRICAR-NV0070601-0070640.
[148] TRICAR-NV0070608 (at FN 3).
[149] TRICAR-NV0005483-5490.
[150] Note that although the heading of the motion refers to Notice 2001-16 and Notice 2008-20, the reference to Notice 2008-20 appears to be a clerical mistake, as the text of the motion discusses Notice 2008-111 and not Notice 2008-20 (which notice was superseded by Notice 2008-111).
[151] TRICAR-NV005487.
[152] TRICAR-NV0047880.
[153] TRICAR-NV0047878-47879.

Circuit in *Frank Sawyer Trust of May 1992 v. Comm'r.*[154] The First Circuit in *Frank Sawyer* held that, even where the government failed to prove that the selling stockholder had constructive knowledge of an intent to avoid payment of corporate level income tax, the selling stockholder could be found to have transferee liability where the selling shareholder was deemed to have received a fraudulent transfer from the purchaser of the stock and not the target corporation (*i.e.*, where the purchase price exceeded the value of the acquired stock). On remand, the Tax Court in *Frank Sawyer*[155] held that the selling shareholder was liable as the transferee of a transferee, based on a finding that the selling shareholder had received a "windfall" or "premium" equal to the excess of the sales proceeds received over the amount the shareholder would have received upon liquidation of the corporation (taking into account payment of any corporate income tax liability).

90. It appears that Mr. Desmond was considering a proposal pursuant to which Plaintiff would stipulate to the government's alternative "transferee of transferee liability" theory based on a "premium" amount of $11.5 million and a determination of transferee liability equal to 25% of the premium or approximately $2.9 million plus interest.[156] Plaintiff responded to Mr. Desmond's suggestion stating that it was premature for any settlement discussions and that Plaintiff was opposed to making a settlement offer at that time.[157]

91. In late August of 2014, following a four day Tax Court trial held in June, Plaintiff's representatives engaged in further settlement talks with the government.[158] Although not entirely clear, it appears from the record[159] that the government made a settlement offer based on a transferee of transferee liability theory. The government's settlement offer was based on a "premium" or windfall calculation of $11.5 million, interest running from March of 2004 (when Westside's 2003 tax return was due), and application of the "hot interest" provisions of Code § 6621 (imposing interest at a rate 2% higher than the rate normally applied).[160] Mr. Desmond created a spreadsheet which described potential counterproposals assuming one or more of the government's assumptions were modified. These modifications included a settlement based on transferee liability equal to 70% (and not 100%) of the "premium," a reduction of the premium amount for state tax, for interest running from June 2012 (the date Plaintiff received the notice of transferee liability) rather than March 2004, and for no imposition of "hot interest." Even taking all of these changes into account, they did not reduce the potential transferee liability to a number that was $5 million or below.

92. Mr. Desmond advised Plaintiff that, after several follow-up conversations with the IRS, there did "not seem to be any way to get the number close to even $5 million," which he

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[154] 712 F.3d 597 (1st Cir. 2013).
[155] T.C.Memo 2014-59.
[156] TRICAR-NV0047878.
[157] TRICAR-NV0047880.
[158] TRICAR-NV0051662 (email from M. Desmond to Plaintiff (with copy to R. Hart, C. Bell, and B. Riddlehoover) dated August 27, 2014 setting up a conference call "to discuss the IRS's settlement offer in more detail").
[159] TRICAR-NV0051663-51664 (email from M. Desmond to Plaintiff (with copy to R. Hart, C. Bell, and B. Riddlehoover), dated August 29, 2014, with attached "Settlement Discussion Framework").
[160] The underpayment rate under Code § 6621(a)(2) is the Federal short term rate plus 3%. In the case of large corporate underpayments, the interest rate under Code § 6621(c) (so-called "hot interest") is the Federal short-term rate plus 5%.

understood "would be a non-starte[r] from [Plaintiff's] perspective anyway."[161] Mr. Desmond indicated that the IRS had not "put[] a final number on the table," but the baseline for the government's offer was a finding of transferee liability in an amount equal to 70% of the $11.4 million "premium" paid to Plaintiff, which amount would equal $6.8 million (taking into account an offset for the long-term capital gains tax paid by Plaintiff on the "premium" portion of his stock sale proceeds) plus interest.[162]

93. The parties did not reach a settlement and the Tax Court decided in October of 2015 that Plaintiff was liable for $21,199,347 plus interest as a transferee of the assets of Westside.[163] The Tax Court determined that (a) Plaintiff was liable as a "transferee" under Ohio law for Westside's tax deficiency, penalties and interest (on the alternative bases that under Ohio law (1) the Rabobank loans were "shams" and (2) the transaction was properly collapsed and re-characterized as a de facto liquidation of Westside) and (b) the IRS could collect the aggregate liability from Plaintiff as a "transferee" (applying substance over form principles under the federal income tax law) under Code § 6901. In a supplemental decision following the parties' submissions of Rule 155 computations, the Tax Court later determined that Plaintiff was liable for approximately $13.9 million in pre-notice interest, meaning interest that accrued on Westside's 2003 tax liability between the date the tax was due (March 15, 2004) and the date the IRS issued Plaintiff the notice of transferee liability (June 25, 2012).[164]

XII. Ninth Circuit Proceedings and Cert Petition Filed with Supreme Court

94. Plaintiff, represented by Mr. Desmond, filed an appeal with the U.S. Court of Appeals for the Ninth Circuit challenging the Tax Court's finding of transferee liability and its finding that Plaintiff was liable for pre-notice interest.[165]

95. In a memorandum disposition filed by the Ninth Circuit on November 13, 2018, the Court affirmed the Tax Court decision that Plaintiff was liable for Westside's taxes under Code § 6901 and the Ohio Uniform Fraudulent Transfer Act.[166] In a concurrently filed opinion, the Ninth Circuit also affirmed the Tax Court decision that Plaintiff was liable for pre-notice interest of almost $13.9 million.[167]

96. On June 6, 2019, Plaintiff, through his counsel Jonathan Strouse of Harrison & Held LLP, filed a Petition for a Writ of Certiorari with the United States Supreme Court. Plaintiff's counsel framed the question presented to the Supreme Court as including:

[161] TRICAR-NV0051666.

[162] *Id.* The $6.8 million number assumes the government would agree to a credit for the long-term capital gains tax Plaintiff paid on the premium portion of the stock sale proceeds. The $6.8 million number is computed as follows: 70% of $11.4 million is approximately $8 million. The long-term capital gains tax that paid by Plaintiff on the $8 million (based on a 15% rate) is $1.2 million. Thus, the $8 million transferee liability less the $1.2 million offset would result in a transferee liability of $6.8 million plus substantial interest.

[163] T.C. Memo 2015-201 at 1458.

[164] Tricarichi v. Comm'r, T.C. Memo 2016-132, *aff'd*, 908 F.3d 588 (9th Cir. 2018).

[165] TRICAR-NV0086871-86987..

[166] 752 Fed. App'x. 455 (9th Cir. 2018).

[167] 908 F.3d 588 (9th Cir. 2018).

> [W]hether, after properly planning his affairs to minimize his overall federal income tax liability, and in light of the tax court and Ninth Circuit applying the wrong body of law, a taxpayer may be liable pursuant to I.R.C. § 6901 of the Internal Revenue Code for, *inter alia,* the conduct of third parties who purchased the taxpayer's business when the taxpayer had no involvement with, or actual knowledge of, the wrongful conduct of the third party and where the third party's conduct occurred months after the transaction closed.

97. On October 7, 2019, the Supreme Court denied Plaintiff's petition.[168]

OPINIONS AND BASIS FOR OPINIONS

I. Overview of Applicable Professional Standards

98. As discussed below, the applicable professional standards required that PwC exercise reasonable care and diligence in providing tax services to Plaintiff. PwC did not provide a guarantee of any kind to Plaintiff with respect to the tax consequences of his proposed transaction, and no such guarantee was required under the applicable professional standards. Moreover, PwC made clear to Plaintiff in its engagement agreement that the firm assumed no responsibility for informing Plaintiff of any tax law developments occurring after the date it had completed its services (defined in the engagement agreement as "tax research and evaluation services" pertaining to Plaintiff's proposed transaction).[169] Plaintiff agreed to these terms of PwC's engagement. An analysis of the facts and circumstances in the present case indicates that PwC exercised reasonable care and diligence in providing its agreed upon tax services to Plaintiff.

A. General: Tax Practitioner's Due Care Obligations

99. When analyzing the conduct of a tax practitioner providing tax services for a client, the critical inquiry centers on whether the practitioner exercised due care in the performance of such services. The due care inquiry is an objective standard—it focuses on the conduct of a reasonably prudent practitioner under similar facts and circumstances. Importantly, the nature and extent of the tax practitioner's due care obligations depends at the threshold on the scope of the practitioner's engagement.

100. The source of a CPA's due care obligations are found in the standards of conduct promulgated by the AICPA, the Treasury Department's standards of conduct and, in the case of return preparation advice, the Code's preparer penalty provisions in § 6694. Under each of these standards, evaluation of whether the accounting professional exercised due care focuses on whether the practitioner identified the material issues presented by the facts, and, applying the pertinent law to the facts, reached a reasonable resolution of those issues.

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[168] Sup. Ct. Dkt. No. 18-1520 (2019).

[169] See text discussion ¶28.

101. The primary source of professional responsibility standards for CPA tax practitioners during the time in question were standards promulgated by the AICPA. The AICPA Code of Professional Conduct contains general principles,[170] including the principle of due care, which requires the CPA "to discharge professional responsibilities with competence and diligence…[and] imposes the obligation to perform professional services to the best of a member's ability, with concern for the best interest of those for whom the services are performed and consistent with the profession's responsibility to the public."[171]

102. AICPA Rule 201 similarly provides that a CPA tax practitioner must exercise professional competence and due care. An Interpretation of AICPA Rule 201 provides in pertinent part that:

> A member's agreement to perform professional services implies that the member has the necessary competence to complete those professional services according to professional standards, applying his or her knowledge and skill with reasonable care and diligence, but the member does not assume a responsibility or infallibility of knowledge or judgment.[172]

As indicated by the foregoing language, the member's duty of due care and competence is evaluated in the context of the "member's agreement to perform professional services." In other words, the nature and extent of the tax practitioner's due care obligations depend at the threshold on the scope of the practitioner's engagement under the particular facts and circumstances. When the practitioner's engagement with the client has terminated, there is no further duty of due care owing to the client as the practitioner's professional services have been completed.

103. Under both the Nevada[173] and Ohio[174] state accountancy board rules, the AICPA professional standards (including the standards for tax services discussed below) have been adopted as the standards governing accountants licensed to practice in the respective states.

104. The AICPA has defined the standard of care and competence in the specific context of tax planning advice and tax return preparation in a series of statements issued by the AICPA known as the Standards for Tax Services ("SSTSs").[175] As discussed below, the SSTSs

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[170] *See* AICPA Code of Professional Conduct ("AICPA Code") ET Section 56 (Due Care). *See also* AICPA Code ET Section 55 (Objectivity and Independence) and ET Section 54 (Integrity). *See also* AICPA Rule 201, providing four basic standards of general application: professional competence, due professional care, planning and supervision, and relevant data. Except as otherwise provided herein, any reference to the AICPA Code in this report refers to the version of the AICPA Code in effect during the relevant time period involving PwC's conduct.
[171] ET Section 56 (Article V—Due Care) ¶ 01.
[172] AICPA Interpretation .02 201-1 (Competence).
[173] Nevada Administrative Code § 628.060-5(a) and (d); § 628.500.
[174] Ohio Admin. Code § 4701-9-09.
[175] The SSTS were revised in 2008, effective January 1, 2010, to clarify certain matters and to reflect changes to the federal and state tax laws. Except as otherwise noted, any reference to the AICPA SSTSs and Interpretations, as relates to PwC's advice to Plaintiff or conduct in 2003 refers to the version of such rules in effect during 2003. Any references to the AICPA SSTSs and Interpretations with respect to PwC's conduct in 2008 refers to the version of such rules in effect during 2008.

address, *inter alia,* the limited duty to update prior tax advice (SSTS No. 7),[176] the circumstances under which the practitioner has a duty to disclose an error discovered on a prior year's tax return (SSTS No. 6) and the standards for recommending a position on the taxpayer's tax return (SSTS No. 1). The preface to the SSTSs notes that the SSTSs provide more than mere advisory opinions and statements of good tax practice, but also serve as guidelines for the courts, the IRS, the state accountancy boards and other professional organizations as the appropriate articulation of professional conduct in a CPA's tax practice.[177]

105. The Treasury Department also defines the duties and obligations of tax practitioners, including accounting professionals, in regulations commonly referred to as "Circular 230."[178] The Treasury Department Circular 230 standards govern "practice before the IRS" and thus cover, among other things, the preparation and filing of tax returns[179] as well as providing advice with respect to a taxpayer's return.[180] Section 10.22 of Circular 230 provides, *inter alia*, that a practitioner must exercise "due diligence" in the preparation of tax returns and in making oral and written representations to the practitioner's clients with respect to any matter administered by the IRS.[181] Although the concept of "due diligence" is not further articulated in § 10.22, it has come to be understood as requiring the competence and thoroughness required of a reasonably prudent tax professional under similar facts and circumstances.

B. <u>Professional Standards Relating to Duty to Update Advice</u>

106. SSTS No. 7 specifically addresses an accountant's due care obligations in the context of providing a current client with updates relating to prior advice. This AICPA statement considers "the circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided."[182] The statement provides that "[a] member has no obligation to communicate with a taxpayer when subsequent developments affect advice previously provided with respect to significant matters, except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement."[183]

107. SSTS No. 7 reiterates the absence of an accountant's duty to update advice in the statement's explanation section, providing that "[s]ometimes a member is requested to provide tax

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[176] When SSTS was revised, the prior SSTS No. 8, Form and Content of Advice to Taxpayers, was renumbered to SSTS No. 7. *See* AICPA, Statements on Standards for Tax Services 1-7 (eff. Jan. 1, 2010) at 3. References herein to SSTS No. 7 are references to the current SSTS No. 7 that correspond to provisions of former SSTS No. 8. To the extent such language is quoted, the quoted language is taken from former SSTS No. 8.

[177] *See* AICPA, Statements on Standards for Tax Services 1-7 (eff. Jan. 1, 2010) at 3.

[178] Treasury Department Circular 230 (Rev. 6-2014), Regulations Governing Practice Before the Internal Revenue Service, Department of Treasury, Title 31 Code of Federal Regulations, Subtitle A, Part 10 ("Circular 230"). Except as otherwise provided herein, any reference to Circular 230 in this report refers to the version of Circular 230 in effect during the relevant time period involving PwC's conduct.

[179] Treasury Circular 230, § 10.2(d) (7/25/2002); § 10.1(a)(4) (9/25/2007).

[180] Treasury Circular 230, § 10.34 (7/25/2002) and (9/25/2007).

[181] Treasury Circular 230, § 10.22 (7/25/2002) and (9/25/2007).

[182] SSTS No. 7, ¶ 1.

[183] *Id.*, ¶ 4.

advice but does not assist in implementing the plans adopted. Although such developments as legislative or administrative changes or future judicial interpretations may affect the advice previously provided, a member cannot be expected to communicate subsequent developments that affect such advice unless the member undertakes this obligation by specific agreement with the taxpayer."[184]

108. SSTS No. 7 also instructs that taxpayers should be informed that (a) a member's advice is based on the situation existing as of the date the advice is rendered and (b) subsequent developments could affect previously rendered professional advice.[185] As noted above,[186] this precautionary language was included in PwC's engagement agreement with Plaintiff.

C. Professional Standards Relating to Duty to Disclose Error

i. *Treasury Circular 230, § 10.21*

109. Section 10.21 of Circular 230, "Knowledge of Client's Omission," provides that a practitioner who, having been retained by a client, knows that the client has not complied with the tax laws or has made an error on a filed return, must notify the client promptly of such noncompliance or error. The practitioner must also advise the client of the consequences, as provided under the Code and Regulations, of such noncompliance or error. Notably, the provision is limited to actual knowledge and does not purport to extend to situations in which a practitioner reasonably should know of an act of noncompliance or error.

110. Section 10.21 by its terms applies to knowledge of a "client's" error and advice the practitioner must provide to the "client." It does not impose a disclosure obligation in the case of a practitioner's knowledge of an error on a *former* client's return. When the Treasury Department intends to refer to former clients under Circular 230 in defining the practitioner's obligations it knows how to do so, as in the case of § 10.29(a)(2) of Circular 230 where certain prohibited conflicts of interest are defined as arising from a practitioner's responsibilities to "another client, a *former client* or a third person…."(emphasis added).

ii. *AICPA SSTS No. 6*

111. The AICPA in the SSTSs, much like the Treasury Department in Circular 230, also specifically addresses a member's obligations upon discovery of an error or omission on a client's tax return. SSTS No. 6, "Knowledge of Error: Return Preparation," considers the responsibility of a CPA who becomes aware of an error on a client's previously filed tax return or of the client's failure to file a required tax return. SSTS No. 6 defines the accountant's obligations upon discovery of an error or omission on the client's return as follows:

[184] *Id.*, ¶ 9.
[185] *Id.*, ¶ 10.
[186] See text discussion ¶ 28.

> A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return. A member should recommend the corrective measures to be taken. Such recommendation may be given orally.[187]

An "error" is defined for purposes of SSTS No. 6 as a position that fails to meet the standards of SSTS No. 1,[188] including the "realistic possibility of success" standard, which, as described below, generally requires a one-in-three likelihood of success if the position were challenged by the government.

112. As in the case of Circular 230, the practitioner's disclosure obligations under SSTS No. 6 are limited to circumstances involving the discovery of an error when the member is continuing to represent the client. The Explanation to SSTS No. 6 addresses the member's obligations upon discovery of an error "[w]hile performing services for a taxpayer."[189] Similarly, the Explanation considers the member's obligations if the client refuses to correct the error, stating that, "[i]f the taxpayer does not correct an error, a member should consider *whether to continue* a professional or employment relationship with the taxpayer,"[190] as well as the member's responsibility when the "member becomes aware of [an] error *while performing services* for a taxpayer that do not involve tax return preparation…"[191] Nothing in the language of SSTS No. 6 suggests any duty on the part of the practitioner to disclose an "error" to a *former* client of the practitioner. This is particularly true where, as here, PwC did not complete Plaintiff's tax returns. Donald Jesko of the accounting firm of Heiser & Jesko, Inc., completed Plaintiff's 2003 federal income tax return.[192]

113. The conclusion that a CPA tax practitioner does not have a duty to disclose a prior error discovered with respect to a *former client* is consistent with the disclosure obligations of lawyers under the lawyer professional codes. PwC, a public accounting firm, is not subject to the lawyer professional codes of any jurisdiction, including jurisdictions in which one or more of its principals may be licensed as attorneys. Nevertheless, it is instructive to consider the disclosure obligations of lawyers to their former clients, keeping in mind that lawyers, unlike their accountant counterparts, have a fiduciary relationship with their clients as a matter of law.

114. The American Bar Association Standing Committee on Ethics and Professional Responsibility ("ABA Standing Committee") recently addressed a lawyer's duty to inform a current or former client of a material error that occurred in the course of the lawyer's representation of the client. In its Formal Opinion 481,[193] the ABA Standing Committee

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[187] SSTS No. 6, ¶ 3.
[188] *Id.*, ¶ 1.
[189] *Id.*, ¶ 5.
[190] *Id.*, ¶ 6 (emphasis added).
[191] *Id.*, ¶ 9 (emphasis added).
[192] TRICAR-NV0006551.
[193] American Bar Association, Standing Committee on Ethics and Professional Responsibility, Op. 481 (2018).

concluded that no disclosure obligation is owed by a lawyer to his or her former client. The committee determined that, if an error relates to representation of a former client and the lawyer does not discover the error until after the representation has terminated, the lawyer has no obligation under the Model Rules of Professional Conduct to inform the former client of the error. The ABA Standing Committee explained that, while "[g]ood business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so . . . to mitigate any potential harm or prejudice to the former client . . . . [t]hose are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules."[194]

D. Professional Standards Relating to Return Preparation and Advice

115. SSTS No. 1, Tax Return Positions, sets forth the applicable standard for CPAs when recommending tax return positions or signing or preparing returns.[195] In general, SSTS No. 1 provides that "[a] member should not recommend that a tax return position be taken with respect to any item unless the member has a good faith belief that the position has a realistic possibility of being sustained administratively or judicially on its merits if challenged."[196] SSTS No. 7 makes clear that the general standard for rendering tax advice is the same "realistic possibility of success" standard that applies to recommending tax return positions.[197]

116. The AICPA issued Interpretation No. 1-1 in 2000 to provide further guidance on the application of the "realistic possibility of success" standard. This Interpretation clarified that the standard is less stringent than the "substantial authority" and "more likely than not" standards that apply under the Code § 6662 taxpayer accuracy-related penalty. Because the "substantial authority" standard was commonly understood by tax practitioners to require a 40% likelihood of success (and certainly less than the 50.1% likelihood of success required by the "more likely than not" standard), the "realistic possibility of success" standard was regarded as consistent with the one-in-three standard found both in the Treasury standards and the Code (as discussed below).

117. In AICPA Interpretation No.1-2, which was issued in 2003, the AICPA concluded that the "realistic possibility of success" standard (requiring a one-in-three likelihood of success) could be satisfied even if the transaction was treated as a listed transaction. Thus, for example, in Illustration 4 of the Interpretation, the AICPA concluded that "[n]otwithstanding the member's conclusion that the transaction is a listed transaction, the member may still recommend a tax return position with respect to the transaction if he or she concludes that the proposed tax return position satisfies the realistic possibility standard."[198]

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[194] *Id.* at 2.
[195] SSTS No. 1, ¶ 1.
[196] *Id.*, ¶ 2(a).
[197] SSTS No. 7, ¶ 3 (providing that "[a] member should assume that the tax advice provided to a taxpayer will affect the manner in which the matters or transactions considered would be reported on the taxpayer's tax returns" and concluding that, for purposes of giving tax advice, "a member should follow the standards in [SSTS No.1]."
[198] AICPA, Statement on Standards for Tax Services, Interpretation No. 1-2 (2003), Specific Illustrations (Illustration 4, Conclusion). The illustration noted that if the transaction is a listed transaction, the member should advise the taxpayer of the additional disclosure risks and the penalty risks for nondisclosure.

118. Consistent with the AICPA standards, former § 10.34 of Circular 230, as in effect in 2003, permitted a tax practitioner to advise a return position (or prepare a return incorporating a return position) so long as the position had a "realistic possibility of being sustained on its merits."[199] A position was deemed to have a realistic possibility of being sustained on its merits if "a reasonable well informed analysis by a person knowledgeable in the tax law would lead such person to conclude that the position has an approximately one-in-three or greater likelihood of being sustained on its merits."[200]

119. Similarly, Code § 6694, as in effect during 2003, imposed a penalty on an income tax return preparer for an understatement of tax liability on a client's tax return that was attributable to a position which the preparer knew or reasonably should have known did not have a "realistic possibility of being sustained on its merits."[201] The regulations under former Code § 6694, like the Circular 230 regulations, defined the realistic possibility standard as being met if a position had an approximately one-in-three or greater likelihood of success if challenged.[202]

II. PwC had no Duty Under the Applicable Professional Standards, Upon Learning of the IRS's Issuance of Notice 2008-111, to Update its Tax Advice Provided to Plaintiff in 2003

A. PwC Had No Duty to Update Advice to a Former Client

120. As described above,[203] PwC completed its services for Plaintiff in the fall of 2003, approximately five years before the issuance of Notice 2008-111. PwC's last invoice to Plaintiff was mailed to Plaintiff in November of 2003, describing services performed in September of 2003.[204] By late 2003, PwC had fully performed its services under the engagement agreement ("tax research and evaluation services" relating to Plaintiff's proposed stock sale),[205] the stock sale transaction had been completed, and the engagement of PwC had ended.

121. In contrast, after the closing of the Transaction, Mr. Tricarichi continued to be represented by his long-time advisor Mr. Hart and others at Hahn Loeser (and Mr. Hart after he left Hahn Loeser). Mr. Hart represented Plaintiff in his interview by IRS Exam in 2007[206] and throughout 2008 with respect to the audit of his participation in the Transaction. Moreover, less than three months following issuance of Notice 2008-111, Plaintiff engaged Bingham to represent him in connection with the IRS's issuance of its draft transferee liability report to Plaintiff.[207] The

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[199] Treasury Circular 230, § 10.34 (7/25/2002).
[200] Treasury Circular 230, § 10.34(d)(1) (7/25/2002) (also permitting non-frivolous positions that were adequately disclosed on the taxpayer's return).
[201] As under Circular 230, an income tax preparer was not subject to the Code § 6694 penalty, even in the absence of satisfaction of the realistic possibility of success standard, if the position was not frivolous and was adequately disclosed, or if there was reasonable cause for the position and it was taken in good faith.
[202] Treas. Reg. § 1.6694-2(b) (12/31/1991).
[203] See text discussion ¶ 54.
[204] TRICAR-NV0022766-22768 and TRICAR-NV30601-30606.
[205] See Factual Background, Section IV.A.¶
[206] TRICAR-NV0028330.
[207] See text discussion ¶¶ 70-73.

tax lawyers at Bingham were well aware of Notice 2008-111. As noted above, Mr. Miller of Bingham drafted a letter to IRS Exam shortly after being engaged containing a detailed discussion of Notice 2008-111 and concluding that Plaintiff's transaction was not the same as or substantially similar to the transaction described in Notice 2008-111.[208]

122. Despite the fact that PwC was no longer providing professional services to Plaintiff, and that Plaintiff was represented by other tax professionals, Plaintiff alleges that PwC had a duty to inform and/or advise Plaintiff regarding the issuance of Notice 2008-111. Plaintiff's allegation wrongly assumes that a tax practitioner has a continuing duty of care to a former client. PwC's engagement had terminated and, under the applicable standards detailed above, the firm had no professional duty or obligation to inform Plaintiff, its former client, of the issuance of the Notice.

123. As noted above, under SSTS No. 7, an accountant has no duty to update its prior advice "except while assisting a taxpayer in implementing procedures or plans associated with the advice provided or when a member undertakes this obligation by specific agreement."[209] Neither of the two exceptions is met in the present case. First, at the time of issuance of Notice 2008-111, PwC was not assisting Plaintiff in implementing plans associated with its advice—the transaction had closed back in 2003. Second, PwC did not undertake an obligation to inform Plaintiff of subsequent developments in the tax law affecting its advice. In fact, the parties agreed to the exact opposite in the Engagement Agreement, which, as noted above, provided that:

> Tax laws are subject to change at any time, and such changes may be retroactive in effect and may be applicable to advice given or other services rendered before their effective dates. We do not assume responsibility for such changes occurring after the date we have completed our services.[210]

PwC not only did not undertake an obligation to update its advice to Plaintiff by specific agreement (as would be required to find a duty under SSTS No. 7), it expressly disclaimed any obligation to do so in its engagement agreement with Plaintiff. Plaintiff agreed to this limitation on PwC's obligations. Again, at no time during any of Plaintiff's interactions with IRS Exam or IRS Appeals (or after, including through the Tax Court proceedings) did Plaintiff engage PwC or ask PwC whether it should or could revisit its conclusions.

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[208] See text discussion ¶¶ 71, 73.
[209] SSTS No. 7, ¶ 4.
[210] See text discussion ¶ 28.

B. Issuance of Notice 2008-111 did not Cause PwC's Prior Advice to be Erroneous and in Need of Update

124. Importantly, even if PwC had an obligation in general to provide Plaintiff with updated advice (which it did not), Notice 2008-111 did not, in my view, represent a development in the law causing PwC's prior advice to be erroneous and in need of update.

125. As noted above, in evaluating the federal income tax consequences of Plaintiff's proposed participation in the Transaction, PwC considered three principal issues: (1) the tax treatment of the proceeds received by Plaintiff from the sale of Westside; (2) whether the proposed transaction was a reportable transaction subject to disclosure to the IRS, and (3) whether Plaintiff would be liable for any unpaid corporate income tax liabilities of Westside.

126. PwC reached conclusions on each of the foregoing issues on a "more likely than not basis," *i.e.*, the likelihood of prevailing if the issues were challenged by the IRS was 50.1% or greater. PwC did not guarantee the tax consequences to Plaintiff.

127. In my view, as discussed below, PwC's "more likely than not" conclusions in 2003 were well within the range of tax advice one could expect from a reasonably prudent tax professional at the time. Moreover, as discussed below, the issuance of Notice 2008-111 did not cause PwC's prior advice to be erroneous and in need of update.[211]

i. *Characterization of Stock Sale*

128. The first of the three primary issues considered by PwC with respect to the potential tax risk of the proposed sale was the characterization of the sales proceeds received by Plaintiff in the transaction, and, in particular, whether such proceeds would be subject to capital gains treatment, or whether some portion of the proceeds might be re-characterized as ordinary income.[212] PwC acted in a reasonable and professionally responsible manner in providing advice to Plaintiff on this issue.

129. PwC advised Plaintiff that it was "more likely than not" that the sales proceeds from the proposed transaction would generally be treated as capital gains. Plaintiff was selling stock of a corporation to a third party, and assuming this form was respected, a sale of stock is generally accorded capital gains treatment under the federal income tax law. As PwC made Plaintiff aware, there was some risk that the IRS might seek to disregard the form of the transaction and instead re-characterize the transaction as in substance a liquidation of Westside. Mr. Lohnes's handwritten notes to his copy of the Stovsky memorandum referenced the *Lowndes* case,[213] addressing this possibility. However, two factors served to mitigate this risk. First, in the proposed transaction (unlike in *Lowndes*), the purchaser was an independent third party that expressed a clear intention to cause the corporation to operate business activity following the sale.

[211] Notice 2008-111 (and Notice 2008-20) did not create or identify new listed transactions. These notices instead explained (and generally narrowed) Notice 2001-16.
[212] TRICAR-NV0085859-85861.
[213] Lowndes v. United States, 384 F.2d 635 (4th Cir. 1967).

Second, even if the sale of stock was disregarded and the proceeds from the proposed transaction were re-characterized as received in a complete liquidation of Westside, such a liquidating distribution would still generally qualify for capital gains treatment under Code § 331(a).

130. In examining the tax treatment of the proposed stock sale in 2003, PwC also identified the risk that the IRS might seek to treat the "premium" portion of the purchase price (*i.e.*, the portion of the purchase price in excess of the corporation's assets less its anticipated liabilities) as a form of fee income paid by Fortrend to Plaintiff as compensation for facilitating a transaction (and not as stock sale proceeds). PwC suggested Plaintiff consider taking this position (treating the "premium" as ordinary income)[214] on its original return and then file for an immediate refund. Plaintiff chose not to take this more conservative approach. PwC also evaluated the possible application of other Internal Revenue Code provisions that might cause the proceeds to be subject to ordinary income treatment (e.g. Code § 341), but concluded that none of these applied.

131. Importantly, nothing in Notice 2008-111 changed the risk that the IRS would successfully challenge the treatment of Plaintiff's transaction as a stock sale, which risk the Plaintiff had been apprised of in 2003. As noted above,[215] Notice 2008-111 expressly provided that "this Notice does not affect the legal determination of whether a person's treatment of the transaction is proper..." Moreover, PwC had concluded that because of the absence of built-in gain assets, Plaintiff's transaction was not covered by 2008-111 for the same reasons it was not covered by Notice 2001-16 (as noted above, a conclusion also reached by Plaintiff's tax counsel). In short, even if PwC had a duty in general to update its advice to Plaintiff (which it did not), the issuance of Notice 2008-111 did not provide any reason for PwC to update or change its "more likely than not" conclusion that the proceeds from Plaintiff's stock sale would be subject to capital gains treatment.

132. It is worth noting that nothing in the record indicates that the IRS at any point challenged the general characterization of Plaintiff's proceeds from his stock sale in a manner inconsistent with PwC's advice.

ii. *Notice 2001-16 and Plaintiff's Disclosure Obligations*

133. PwC also advised Plaintiff in 2003 on whether Plaintiff's proposed stock sale transaction was a reportable transaction for purposes of Code § 6011 and the Treasury Regulations thereunder, in which case Plaintiff would be required to disclose his participation in the transaction on a disclosure statement (Form 8886) attached to his return. Among the transactions defined as "reportable transactions" and thus requiring disclosure under Treasury Regulation § 1.6011-4(b) are "listed transactions."[216] As noted above, a listed transaction is defined under the regulations as a transaction that is the "same as or substantially similar" to one

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[214] TRICAR-NV0085855 (handwritten note on the Stovsky memorandum indicating that Mr. Folkman agreed with PwC's analysis there was a risk of a portion of the purchase price being characterized as ordinary income).
[215] See text discussion ¶ 65.
[216] Treas. Reg. § 1.6011-4(b) (2/28/2003) also describes confidential transactions, transactions with contractual protection, certain loss transactions and transactions of interest as categories of reportable transactions requiring disclosure.

of the types of transactions the IRS has determined to be a tax avoidance transaction and identified by notice or other form of published guidance of the IRS as a listed transaction.[217] The Treasury Regulations make clear that "[t]he fact that a transaction is a reportable transaction shall not affect the legal determination of whether the taxpayer's treatment of the transaction is proper."[218]

134. The term "substantially similar" is defined in the regulations to include "any transaction that is expected to obtain the same or similar types of tax consequences and that is ether factually similar or based on the same or similar tax strategy."[219] As was recognized by PwC,[220] the term "substantially similar" is broadly construed under the regulations.[221]

135. PwC determined in 2003 that it was more likely than not that Plaintiff's proposed sale of Westside stock was not a reportable transaction, and more specifically, that it was not the same as or substantially similar to the transaction identified in Notice 2001-16.[222] PwC's conclusion was based on the fact that the sale of Westside stock, unlike the transaction described in Notice 2001-16, [223] was a single step sale transaction and did not involve a third party buyer seeking to acquire Westside's assets with a step-up in basis. In my view, PwC's advice to Plaintiff with respect to the applicability of Notice 2001-16 was appropriate and consistent with the advice one would expect of a reasonably prudent practitioner at the time.

136. Although, as noted above, the term "substantially similar" was to be broadly construed under the Treasury Regulations under Code § 6011, it was not unreasonable for a practitioner to conclude that Notice 2001-16 required as an essential element the use of a transitory intermediary company to allow both parties—seller and buyer—to achieve their objectives, *i.e.*, capital gain treatment for seller and step-up in basis in acquired assets for buyer. It was this "whipsaw" which the government focused on in both Notice 2001-16 and a related IRS Coordinated Issue Paper[224] when it raised concerns regarding the transaction under substance-over-form, step-transaction and related doctrines. The Treasury's own regulation example describing a transaction that is "substantially similar" to the listed transaction described in Notice 2001-16 focuses on transactions utilizing "different intermediaries" to offset gain from the sale of built-in assets.[225] The regulation example, however, still described a transaction involving "a seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and a buyer (Y) who desires to purchase the assets (and not the stock) of T [where] M agrees to

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[217] Treas. Reg. § 1.6011-4(b)(2) (2/28/2003).
[218] Treas. Reg. § 1.6011-4(a) (2/28/2003).
[219] Treas. Reg, § 1.6011-4(c)(4) (2/28/2003).
[220] TRICAR-NV0085862.
[221] Treas. Reg. §1.6011-4(c)(4) (2/28/2003).
[222] 2001-1 C.B. 730
[223] As described in Notice 2001-16, Intermediary Transactions Tax Shelter transactions "generally involve four parties: seller (X) who desires to sell stock of a corporation (T), an intermediary corporation (M), and buyer (Y) who desires to purchase the assets (and not the stock) of T." The form of the transaction identified in the notice is that, pursuant to a plan, X sells T stock to M, and M then sells T assets to Y, with Y claiming a stepped-up tax basis in the T assets acquired.
[224] See IRS Coordinated Issue, All Industries, Intermediary Transaction Tax Shelters, UIL 9300.16-00 (dated Dec. 19, 2002) at 5-9.
[225] Treas. Reg. § 1.6011-4(c)(4) (Example 2).

facilitate the sale to prevent the recognition of the gain that T would otherwise report."[226] Plaintiff's transaction did not involve a buyer desiring to purchase assets through an intermediary to achieve a step-up in the basis of the acquired assets.

137. The same reasoning underlying PwC's determination that it was "more likely than not" that Plaintiff's transaction was not an intermediary transaction within the meaning of Notice 2001-16 equally applied under Notice 2008-111. That is, although Notice 2008-111 defined an intermediary transaction in terms of four objective components and a "plan" requirement, Notice 2008-111, much like Notice 2001-16, continued to require: (i) a shareholder owning stock in a target corporation that owned built-in gain assets of sufficient magnitude; (ii) the shareholder's disposition of stock of the target corporation; and (iii) the sale of the target corporation's built-in gain assets and avoidance of tax on the gain resulting from such sale. Because Westside did not own built-in gain assets, and, thus, there could be no sale of built-in gain assets (or avoidance of tax on the gain from such sale), PwC concluded that Plaintiff's transaction failed to constitute an intermediary transaction under Notice 2008-111 on the same basis that it was not covered under Notice 2001-16.

138. The reasonableness of PwC's conclusion that Plaintiff's transaction was not the same as or substantially similar to the transaction described in Notice 2001-16 (or later in Notice 2008-111) is further evidenced by the similar conclusion reached by Plaintiff's subsequent tax counsel, including Bingham, S & C and Mr. Desmond, who continued to distinguish Plaintiff's transaction from Notice 2001-16 (as well as the later Notice 2008-111) before the IRS[227] and Tax Court[228] on the same basis as determined by PwC; namely, that the transaction did not involve a target corporation with built-in gain assets or the sale of those assets through an intermediary to a purchaser who sought to acquire the assets with a step-up in basis.[229]

139. It is also worth noting that, in the case of a transaction like Plaintiff's, which was entered into after issuance of Notice 2001-16 but before issuance of Notice 2008-111, even if it were concluded that Plaintiff's transaction was covered by Notice 2008-111, the effective date rules in Notice 2008-111[230] would mean that Plaintiff might have a future reporting obligation (*i.e.*, post December 1, 2008), but not that Plaintiff's original reporting was mistaken.[231] In short, at most this would mean Plaintiff had an obligation to report the transaction to the IRS on or after

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[226] *Id.*

[227] TRICAR-NV0009587-9590 (Plaintiff's Response to Draft Transferee Report); TRICAR-NV0008919-8922 (Plaintiff's Protest); TRICAR-NV009264-009268 (S & C Presentation to IRS Appeals).

[228] TRICAR-NV0005488 (Motion in Limine filed by Plaintiff in Tax Court proceedings arguing that Notice 2001-16 and Notice 2008-111 were not relevant because they related solely to disclosure obligations and government never asserted penalty against Tricarichi or other participants for failure to disclose); TRICAR-NV0004223 (Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment).

[229] Mr. Folkman of Hahn Loeser also concurred in PwC's conclusion at the time of the transaction. TRICAR-NV0085856.

[230] See text discussion ¶ 66.

[231] If Plaintiff's transaction was assumed to be covered by Notice 2001-16 without regard to Notice 2008-111 (contrary to PwC's conclusion as well as that of Plaintiff's subsequent advisors), then, even though Notice 2008-111 would not impose new disclosure obligations before December 1, 2008, Plaintiff would have had a reporting obligation at the time of the transaction in 2003. Of course, in that case, Plaintiff's alleged failure to report the transaction to the IRS would be the result of advice received in 2003, and not the issuance of Notice 2008-111, as Plaintiff alleges in the Amended Complaint.

December 1, 2008, a point in time when PwC was no longer representing Plaintiff and a point in time in which reporting the transaction would have little or no import because the IRS was already aware of Plaintiff's transaction. In this regard, it is noteworthy, as Mr. Desmond pointed out in the motion in limine filed on behalf of Plaintiff with the Tax Court, that the government did not seek to impose penalties against Mr. Tricarichi for any alleged failure to disclose his participation in the Transaction under Code § 6011.[232]

iii. *Transferee Liability*

140. PwC also advised Plaintiff in 2003 that it was "more likely than not" that Plaintiff would not have transferee liability for any unpaid corporate income tax liability of Westside following the proposed stock sale transaction. PwC's conclusion, which apparently resulted from Mr. Lohnes' consultation with Don Rocen (a senior tax controversy partner in WNT) and was based on a factual understanding that: the purchase price for the Westside stock would be paid by the purchaser with borrowed funds; Plaintiff would not be taking any assets out of Westside; Westside would be engaged in a post-sale business; and Westside would remain a solvent corporation in possession of cash assets sufficient to pay its tax and any other liabilities at the closing.[233]

141. At the time of PwC's advice, it was well established as a general matter that the sale of stock by a shareholder to a third party does not cause the shareholder to be responsible as a transferee for any unpaid debts of the corporation.[234] Limited authority at the time, however, suggested that a purported sale of stock might be re-characterized in order to impose transferee liability on the selling stockholder. In the tax context, the principal case addressing the issue was the Tax Court decision in *Owens v. Comm'r*,[235] where the Tax Court held that the taxpayer's purported sale of stock of his wholly-owned corporation should be disregarded and treated as a liquidating distribution resulting in transferee liability.

142. However, the implications and precedential value of *Owens* as it related to Plaintiff's proposed stock sale was questionable.[236] It was a reasonable reading of *Owens* at the

[232]See text discussion ¶ 87.

[233] TRICAR-NV0085853-85854 and 85856. Note that, although it was expected that the purchaser intended to utilize funds of Westside to repay the loan, this would be a post-closing action solely within the control and discretion of the purchaser.

[234] *See, e.g.*, Vendig v. Comm'r, 229 F.2d 93 (2nd Cir. 1956).

[235] 64 T.C. 1 (1975), *aff'd in part, rev'd in part*, 568 F.2d 1233 (6th Cir. 1977).

[236] In *Owens*, a split panel of ten Tax Court judges ruled six to four that a purported sale of the stock of a wholly owned corporation—which was liquidated shortly after closing and which held nothing but a cash bank account which was emptied on the closing date—should be disregarded and re-characterized as a liquidating distribution for tax purposes. The majority opinion was based in large part on gaps in the factual record. Among the factual issues that troubled the majority in *Owens* were: (1) questions about whether the purchasers were independently advised by third parties; (2) the lack of any documentation with respect to the purported loan; (3) the lack of documentation regarding the payment of cash out of the corporation's bank account and to whom it was paid; (4) the lack of any evidence that the purchaser intended to use the corporation for any business purpose; and (5) the lack of evidence regarding when the intention to liquidate the corporation (which occurred shortly after closing) was first conceived. The majority, having concluded that the purported sale should be re-characterized as a liquidation for federal income tax purposes, similarly concluded—with no discussion of the underlying state transferee liability law— that the shareholders were subject to transferee liability for certain unpaid liabilities for a prior tax year. The minority, on the

time (with due regard for both the majority and dissenting opinions) that a purported sale of stock was likely to be respected (both for tax and transferee liability purposes) if engaged in between true third parties with independent advisors, where the proceeds could clearly be traced to a third party financing, and where the purchaser intended to conduct business activities rather than immediately liquidate the company following the closing. If all of these factors were present, as argued by Bingham, S & C and McGuire Woods on behalf of Plaintiff before the IRS and Tax Court, this would support the conclusion reached by PwC that it was more likely than not that the transaction would be respected as a stock sale and not re-characterized as a liquidation for tax and transferee liability purposes.

143. It is worth pointing out that the Tax Court's reasoning in *Owens*, unlike the Tax Court's analysis in numerous decisions involving intermediary transactions subsequent to Plaintiff's stock sale, failed to consider whether the transaction could be collapsed under applicable state fraudulent transfer law in order to treat the shareholder as liable as a transferee, as required under the two-prong test of *Commissioner v. Stern*.[237] At the time of Plaintiff's proposed transaction, the limited case law authority that existed with respect to re-characterizing or "collapsing" transactions for purposes of state fraudulent transfer laws generally related to claims by creditors with respect to companies that had been subject to leveraged buyout transactions. Early case law in this area suggested that it was unclear whether fraudulent transfer laws were intended to apply to such transactions at all.[238]

144. Even in this context, the "collapsing" principle under state fraudulent transfer laws had not generally been applied for the purpose of treating a party—such as a selling shareholder—as a transferee of a debtor corporation where the party had not formally received an interest in assets previously held by the debtor corporation.[239] Transferee liability was generally understood as "a proceeding in rem against the property or fund which the transferee received from the transferor."[240] Thus, given the general state of the law at the time, it was reasonable to conclude, as PwC did (on a "more likely than not" basis), that Plaintiff, as a selling shareholder who would not in fact receive any of the assets of Westside, would not be subject to transferee liability.

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other hand, (including the trial judge who was the actual trier of fact) disagreed that there was no bona fide sale of stock, concluding that the purchasers were independent third parties, that the purchaser's post-sale activities were irrelevant to whether the taxpayer had engaged in a bona fide sale of its stock, and that there was no evidence of pre-arranged plan to liquidate the company. Note that on appeal, the Sixth Circuit held that the Tax Court's factual determination that there was no bona fide sale of stock was not clearly erroneous, but reversed with respect to the prior year and did not reach the transferee liability question as it determined there was no unpaid tax lability for the prior year.

[237] 357 U.S. 39 (1958).

[238] *See, e.g.*, United States v. Tabor Court Realty Corp., 803 F.2d 1288 (3rd Cir. 1986). Where a party to an LBO—generally a lender—had obtained a direct interest in a target corporation's assets (and was therefore clearly a transferee), courts were sometimes willing to "collapse" multiple steps of the transaction in evaluating whether the debtor corporation had received fair value from the transferee for the interest in the corporation's assets. *See, e.g.*, HBE Leasing Corp. v. Frank, 48 F.3d 623 (2nd Cir. 1995).

[239] *Cf.* Kupetz v. Wolf, 845 F.2d 842, 847 (9th Cir. 1988) ("We decline to use the law of fraudulent conveyances to force the selling shareholders in this case to give up the payments they have received.")

[240] United States v. Floersch, 276 F.2d 714, 717 (10th Cir. 1960).

145. The issuance of Notice 2008-111 did not represent a change in the substantive law of transferee liability. As noted above, Notice 2008-111 expressly provided that "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 equity as a transferee…"[241] Instead, the Notice addressed the definition of "intermediary transactions" that would be treated as the same as or substantially similar to the transaction described in Notice 2001-16 and, thus, subject to potential disclosure *in the future* to the IRS as listed transactions.

146. The reasonableness of PwC's conclusion that it was "more likely than not" that Plaintiff would not be subject to transferee liability because Plaintiff did not receive payments from Westside in liquidation or otherwise is evidenced by the defense of Plaintiff's position by his experienced tax counsel in more than ten years of proceedings before the IRS, the Tax Court, the Ninth Circuit and in a petition for certiorari filed with the U.S. Supreme Court. This is the very position Plaintiff's tax counsel consistently argued before the Service and the courts. Thus, Bingham in its protest filed on behalf of Plaintiff in October 2009,[242] S & C in its presentation to IRS Appeals in 2010,[243] and both Mr. Desmond (future IRS chief counsel) and McGuire Woods in pleadings before the Tax Court,[244] each maintained (distinguishing *Owens* and/or *Lowndes*) that Plaintiff's transaction did not involve a liquidation of Westside in either form or substance, and without a transfer there could be no transferee liability.

147. The government's settlement offers made to Plaintiff are also instructive in assessing the reasonableness of PwC's advice to Plaintiff that it was "more likely than not" that he would not be liable as a transferee with respect to any unpaid corporate income tax liability of Westside (as well as PwC's conclusion that issuance of Notice 2008-111 did not cause its prior advice to be erroneous and in need of update). As noted above, the IRS made numerous settlement offers to Plaintiff in the course of his litigation with the government, each of which occurred following issuance of Notice 2008-111 and involved a substantial concession on the part of the government of the "proposed total transferee liability." For example, based on the government computation, its December 2010 offer represented a 50% concession on the government's part and its August 2011 offer represented an "effective 66% government" concession of Plaintiff's "proposed total transferee liability."[245]

148. As with all IRS settlements by the IRS Office of Appeals, the terms under which the IRS offered to settle Plaintiff's case was required to be based on the merits of the taxpayer's position and the hazards of litigation.[246] That is, unlike the posture of private litigants in settlement, where litigation costs may be a major consideration, the government's position in

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[241] See text discussion ¶ 65.
[242] TRICAR-NV0026098-26126, at 26115-26121.
[243] See, e.g., TRICAR-NV009264-9284, at 9267-9271 (2010 power point slide presentation to IRS Appeals).
[244] TRICAR-NV0078758-78889, at 78851-78865 (Plaintiff's Opening Brief); TRICAR-NV0041035-41074, at 41065-41067 (Memorandum of Law in Support of Petitioner's Motion for Summary Judgment); TRICAR-NV0042963-43023, at 42996-43001 (Plaintiff's Simultaneous Answering Brief).
[245] See text discussion ¶¶ 80, 83.
[246] Internal Revenue Manual, § 8.6.4.1(1)-(2) (10/26/2007) (describing IRS Appeals' mission to resolve controversies on a fair and impartial basis—defined as "one which reflects on an issue-by-issue basis, the probable result in event of litigation, or one which reflects mutual concessions for the purpose of settlement based on the relative strength of the opposing positions where there is substantial uncertainty of result in the event of litigation").

settlement matters is typically based on the risks of an adverse outcome (including the precedential effect of such outcome in a variety of contexts) and not based principally on the litigation costs of pursuing a determination. The IRS Manual provides that a settlement offer will not be considered to have basis in law or be based on the hazards of litigation where, *inter alia*, the settlement offer is based solely on the conservation or resources.[247] Accordingly, the government's willingness to concede a substantial portion of Plaintiff's potential transferee liability in its settlement offers provides further evidence that PwC acted reasonably when it concluded that it was "more likely than not" that Plaintiff's proposed transaction would be respected as a stock sale, and not re-characterized as a liquidation for tax and transferee liability purposes, and when it determined that the issuance of Notice 2008-111 did not cause its prior advice to be mistaken.

III. PwC had no Duty Under the Applicable Professional Standards, Upon Learning of the IRS's Issuance of Notice 2008-111, to Advise Plaintiff Regarding Plaintiff's Tax Return (or Plaintiff's Alleged Lack of Compliance with the Tax Law)

A. Issuance of Notice 2008-111 did not Result in an Error on Plaintiff's Return

149. As noted above, the practitioner's duty to disclose under SSTS No. 6 and Circular 230 (§ 10.21) requires at the threshold the practitioner's discovery of an "error" on the client's prior return (or lack of compliance with the tax law). Because Notice 2008-111 did not result in an error on Plaintiff's return (or a lack of compliance with the tax law), PwC had no duty to disclose the issuance of Notice 2008-111 under either SSTS No. 6 or § 10.21 of Circular 230.

150. Plaintiff alleges the principal "error" which PwC "knew or should have known" about by December of 2008 is PwC's allegedly mistaken conclusion in 2003 that Plaintiff's participation in the Transaction was not required to be disclosed to the IRS as a reportable or listed transaction.[248] Plaintiff maintains that PwC knew of Fortrend's plan to engage in the distressed debt strategy to eliminate Westside's corporate income tax liability, and thus, under Notice 2008-111, PwC knew (or should have known) that its knowledge could be attributed to Plaintiff, resulting in Plaintiff being deemed to have engaged in an intermediary transaction pursuant to a "plan" under the terms of the Notice.[249] Plaintiff further maintains that because Notice 2008-111 has a general effective date of January 19, 2001 (the effective date of Notice 2001-16), this means the Notice has "retroactive effect" and "resulted in there being error(s) on Tricarichi's prior tax return(s)."[250]

151. Plaintiff's claim that the failure to report the transaction constitutes an "error" on Plaintiff's prior tax return given the "retroactive" effective date of the Notice rests on a fundamental misunderstanding of the Notice's effective date provisions. As noted above,[251] although Notice 2008-111 had a "general" effective date of January 19, 2001, it imposed no

[247] *Id.* § 8.6.4.1.3 (10/26/2007).

[248] Amended Complaint ¶ 83(d) (stating that "PwC's conclusion that the Fortrend transaction was not a reportable or listed transaction (*see, e.g.*, Trial Tr. 653:19-25 (Stovsky)) was incorrect or at the very least questionable, as PwC knew or should have known by December 2008").

[249] *Id.* ¶ 83(b)-(c).

[250] *Id.* ¶ 84(c).

[251] See text discussion ¶ 66.

disclosure requirements under Code § 6011 before December 1, 2008 (unless otherwise imposed by Notice 2001-16). Thus if a transaction was entered into during the period after issuance of Notice 2001-16 but before issuance of Notice 2008-111, and the transaction was not described in Notice 2001-16 but was described in Notice 2008-111, it would be deemed to be a listed transaction (even though entered into before issuance of Notice 2008-111); however, it would not require disclosure to the IRS prior to December 1, 2008, even assuming there was a duty to disclose. Contrary to Plaintiff's interpretation of Notice 2008-111, nothing in Notice 2008-111 suggests that Plaintiff's failure to report his participation in the Transaction on his 2003 return (or any time prior to December 2008) was an "error" within the meaning of SSTS No. 6 (or constituted a failure to comply with the tax laws under § 10.21 of Circular 230).

152. Plaintiff also appears to suggest that PwC's advice in 2003 regarding Plaintiff's potential transferee liability exposure was itself an "error" which PwC knew or should have known about after issuance of Notice 2008-111,[252] and thus should have disclosed to Plaintiff. The conclusion that Notice 2008-111 revealed that PwC's earlier advice with respect to transferee liability constituted an "error" requiring disclosure is mistaken for several reasons.

153. First, as noted above,[253] the IRS itself stated in Notice 2008-111 that the 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 equity as a transferee of property in respect of the unpaid tax obligation." Thus, even if Notice 2008-111 was thought to properly apply to Plaintiff's transaction, which neither PwC nor any of Plaintiff's many subsequent tax advisors concluded, the Notice did not imply that PwC's advice on transferee liability was any less correct than prior to the issuance of the Notice.

154. Second, as noted above, an "error" is defined under SSTS No. 6 as a tax return position that lacks a "realistic possibility of success" (meaning a likelihood of one-in-three or greater if challenged). Even assuming PwC's advice relating to Plaintiff's transferee liability constituted a position on Plaintiff's tax return, which itself is highly doubtful,[254] the record does not support the conclusion that there was no "realistic possibility of success" of the position prevailing if challenged. There appears to be no clearer evidence of the "realistic possibility of success" of PwC's view of transferee liability than the consistent position maintained by Plaintiff's experienced tax lawyers that Notice 2008-111 was inapplicable and had no bearing on the issue of Plaintiff's transferee liability. This includes Mr. Korb (former IRS Chief Counsel's) statement in correspondence to IRS Appeals that "pursuant to the clear and unambiguous language of Notice 2008-111, the sale of the Westside Cellular stock is neither an intermediary transaction *nor* substantially similar to an intermediary transaction...[w]e see no basis on which

[252] Amended Complaint ¶¶ 83-85.
[253] See text discussion ¶ 65.
[254] A taxpayer's liability for the unpaid taxes of another is not a position reported on the taxpayer's return. Plaintiff's joint federal income tax return for the 2003 tax year reported the proceeds from the sale of his stock in Westside as long-term capital gain (based on the difference between the amount of sales proceeds received and Plaintiff's basis in his Westside stock). Even if Plaintiff's reporting as a stock sale was deemed to be mistaken, and the transaction was instead re-characterized as a de facto liquidation, the proceeds received by Plaintiff (less those deemed to pay the corporate level income tax) would still generally be treated as long term capital gain under Code § 331 (*i.e.*, the error would not have a significant effect on the Plaintiff's reported tax liability.

this conclusion can be challenged").[255] It also includes the statement by Mr. Desmond (future IRS Chief Counsel) in pleadings before the Tax Court that the IRS "has repeatedly . . . sought to characterize the stock purchase as an 'Intermediary Transaction Tax Shelter as defined by Notice 2001-16 and Notice 2008-111 in a misplaced effort to denigrate the merits of the transaction."[256]

B. PwC Did not Have Actual Knowledge of an Error

155. Even if issuance of Notice 2008-111 resulted in an error on Plaintiff's prior tax return (which it did not), PwC had no duty to disclose the error (or a lack of compliance with the tax law) to Plaintiff in the absence of actual knowledge of the error by PwC.

156. As noted above,[257] both SSTS No. 6 and Circular 230 (§ 10.21) limit the practitioner's disclosure obligations to circumstances under which the practitioner knows of the error or lack of compliance with the tax law. SSTS No. 6 refers to the obligations of a member who "becomes aware of" an error on the taxpayer's return. Similarly, § 10.21 of Circular 230 refers to a practitioner who "knows" that the taxpayer has failed to comply with the tax law or has made an error on a return. Neither standard imposes an obligation to disclose an error of which a practitioner is not actually aware (even if a practitioner should have reasonably known of such error).

157. In the present case, Mr. Lohnes of PwC reached the conclusion that issuance of Notice 2008-111 did not change PwC's prior analysis.[258] I have seen no evidence in the record indicating that Mr. Lohnes had knowledge that his conclusion was incorrect (or failed to genuinely hold the belief that Plaintiff's transaction was not required to be disclosed to the IRS under Notice 2008-111).

158. Because PwC did not have actual knowledge or awareness of an error on Plaintiff's return (or lack of compliance with the tax law), PwC did not have a duty to disclose to Plaintiff.

C. PwC Did not Have a Duty to Disclose to Plaintiff as Former Client

159. A tax practitioner's disclosure obligations under SSTS No. 6 and Circular 230 are limited to circumstances involving the discovery of an error when the practitioner is continuing to represent the client.[259] Section 10.21 of Circular 230 by its terms applies to knowledge of a "client's" error and advice the practitioner must provide to the "client." Similarly, the Explanation to SSTS No. 6 addresses the member's obligations upon discovery of an error or omission "*[w]hile performing services* for a taxpayer."[260] The Explanation considers the member's

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[255] See text discussion ¶ 82.
[256] See text discussion ¶ 87.
[257] See text discussion ¶¶ 109 and 111.
[258] See text discussion ¶ 67.
[259] See text discussion ¶¶ 110, 112.
[260] SSTS No. 6, ¶ 5 (emphasis added).

obligations if the taxpayer refuses to correct the error, stating that the "member should consider *whether to continue* a professional or employment relationship with the taxpayer."[261]

160. As noted above, PwC concluded its professional services for Plaintiff in the fall of 2003, well before the IRS's release of Notice 2008-111.[262] Thus, even if Notice 2008-111 resulted in an "error" on Plaintiff's prior tax return and PwC had knowledge of such error (neither of which is the case), because PwC no longer continued to represent Plaintiff at the time of issuance of Notice 2008-111, PwC had no professional obligation to inform Plaintiff of Notice 2008-111.

161. Plaintiff alleges in his Complaint that PwC had "numerous opportunities" to inform PwC of its "bad advice" and "errors" between 2008 and 2015, including various conversations between Mr. Stovsky of PwC and Jim Tricarichi, Plaintiff's brother, and in communications between Plaintiff's counsel and PwC's counsel during the Tax Court proceedings.[263] However, nothing in Plaintiff's allegations suggests an ongoing representation by PwC of Plaintiff in December of 2008 or any time thereafter. That lack of representation is dispositive of the issue.

IV. Even Assuming, *Arguendo*, that PwC had a Duty to Notify Plaintiff of the Issuance of Notice 2008-111 (which it did not), and that PwC Breached that Duty (which it did not), Such Breach did not Cause the Damages which Plaintiff Now Seeks to Recover

A. Plaintiff Likely Relied on his Experienced Tax Counsel, and not PwC, in Contesting the IRS's Transferee Liability Claim

162. As noted above, Plaintiff was represented by Hahn Loeser at the time of issuance of Notice 2008-111 and, less than three months following release of the Notice, he engaged the law firm of Bingham McCutchen to represent him in his transferee liability audit by the IRS. For his representation before IRS Appeals, Plaintiff retained the New York law firm of Sullivan & Cromwell (including its senior tax partner Donald Korb (former IRS chief counsel)), as well as Michael Desmond of Bingham (future IRS chief counsel). Subsequently, Plaintiff also retained the law firm of McGuire Woods to act as co-counsel with Mr. Desmond in his Tax Court proceedings.

163. Each of the above counsel was an experienced tax controversy lawyer, and several of them had national reputations for their expertise in the area. My review of the record indicates that Plaintiff's lawyers regularly conferred with one another in formulating and presenting their advice to Plaintiff. Based on what I have seen in the record, it appears that Plaintiff likely relied on his experienced tax counsel in continuing to challenge the IRS's position administratively and before the Tax Court, the Ninth Circuit and in a certiorari petition filed with the U.S. Supreme Court. Plaintiff did not seek PwC's advice with respect to Notice 2008-111 or any other aspect of his defense against the IRS's transferee liability claim (other than to discuss summons production and related matters).

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[261] *Id.*, ¶ 6 (emphasis added).
[262] See text discussion ¶ 120.
[263] Amended Complaint ¶¶ 86-87.

164. Moreover, in my view, there is nothing that PwC could have reasonably advised Plaintiff with respect to the impact, if any, of Notice 2008-111 on Plaintiff's 2003 tax reporting, or with respect to his defense of the IRS transferee liability claims, that Plaintiff did not learn (or could not have learned) from the many experienced and reputable tax lawyers he retained to represent him from 2008 through 2019.

165. Plaintiff suggests in the Amended Complaint that PwC was in a unique position to inform Plaintiff about the risks of listed transaction status because PwC knew of Fortrend's plan to write off the distressed assets contributed to Westside post-closing in order to eliminate Westside's tax liability, and PwC's knowledge could be attributed to Plaintiff under Notice 2008-111.[264] More specifically, Plaintiff alleges that PwC's knowledge of the distressed debt strategy could cause Plaintiff to satisfy the "plan" requirement under Notice 2008-111 and thus cause the transaction to meet the requirements of a listed transaction under the Notice.[265] Plaintiff's focus on PwC's knowledge of Fortrend's plan to eliminate Westside's corporate income tax post-closing, and his allegation that PwC's failure to disclose its knowledge (and the application of Notice 2008-111) caused Plaintiff's damages, is mistaken for several reasons.

166. To begin, the very question of whether Plaintiff himself, or through his advisors, had knowledge of a "plan" was only relevant under Notice 2008-111 if the transaction also involved the sale of built-in gain assets by Westside and satisfied the other elements of an intermediary transaction described in the Notice. As discussed above,[266] a transaction is <u>not</u> described in Notice 2008-111 unless (i) the four objective elements of an intermediary transaction are present in the transaction <u>and</u> (ii) the taxpayer knows or has reason to know that the transaction is structured to effectuate a plan. Plaintiff's lawyers, including Bingham, S & C and Mr. Desmond, repeatedly maintained before the IRS and Tax Court that three of the four objective elements of an intermediary transaction were not present in Plaintiff's transaction and thus Notice 2008-111 did not apply.[267] For this reason, Plaintiff's lawyers did not find a need in their filings to focus on the "plan" requirement under Notice 2008-111. If Plaintiff's tax counsel thought that PwC's knowledge of the distressed debt strategy was crucial to the question of whether Plaintiff's transaction was within Notice 2008-111, they were certainly in a position to seek to question PwC about its knowledge of Fortrend's post-closing plans, and I have seen nothing in the record indicating that happened.

167. Moreover, as noted above, even if Notice 2008-111 did apply to Plaintiff's transaction (contrary to the conclusion reached by PwC and Plaintiff's many experienced tax lawyers) this would have resulted in characterization of the transaction as a listed transaction requiring disclosure—not a finding of transferee liability. In other words, a conclusion that Plaintiff's transaction was described in Notice 2008-111 may have been relevant to Plaintiff's post-December 1, 2008 reporting obligations (for which PwC had no responsibility since it no longer represented Plaintiff); it would not, however, represent a substantive law determination of Plaintiff's transferee liability (as the IRS itself stated in the Notice). Consistent with this

[264] Amended Complaint ¶ 83(b).
[265] *Id.* ¶ 83(c).
[266] See text discussion ¶¶ 62-64.
[267] See text discussion ¶138.

conclusion, the Tax Court did not analyze the applicability of Notice 2008-111, or even make mention of the Notice, in its decision. Additionally, Plaintiff's post-December 1, 2008 reporting obligations would have had no effect on the course of Plaintiff's interactions with the IRS. The IRS already knew of Plaintiff's transaction (it had already interviewed Plaintiff, completed its examination of Westside and substantially completed its draft report asserting transferee liability against Plaintiff) so reporting would not have alerted the IRS to anything that it did not already know.

B. Plaintiff Failed to Use Reasonable Efforts to Mitigate his Damages

168. Plaintiff received numerous settlement offers from the IRS, each of which, if accepted, would have substantially reduced the amounts Plaintiff ultimately owed to the IRS, stopped the accrual of interest, and avoided the payment of professional fees incurred in continuing to contest the IRS's claim of transferee liability. Plaintiff, however, without any input from PwC, chose to reject the government's settlement offers and, in so doing, failed to use reasonable efforts to avoid the damages for which he now seeks to recover in this proceeding.

169. In October and December of 2010, Plaintiff's representatives at S & C and Bingham discussed settlement of Plaintiff's case with IRS Appeals.[268] It appears from the record that IRS Appeals was willing to concede 10% of the disallowed loss claimed by Westside, an additional 20% of Westside's tax liability, reduce the penalty amount on Westside to 10% (from 20% or 40%), and provide Plaintiff with a "claim of right" credit equal to 15% of the transferee liability amount (to account for the fact that such amount had been taxed as part of Plaintiff's sale proceeds). The IRS settlement offer would have resulted in Plaintiff owing a net transferee liability (including interest) of $14.4 million in October and $16.2 million in December 2010. This was compared to an approximately $30 to $32 million net transferee liability amount that the IRS calculated Plaintiff would otherwise owe. Plaintiff failed to reach agreement with the IRS on either settlement offer.

170. Plaintiff's representatives at S & C and Bingham had further settlement discussions with IRS Appeals in late August 2011, which resulted in a new IRS settlement proposal that was significantly more favorable for Plaintiff than the offers discussed in 2010.[269] The IRS's new proposal retained a 10% concession on the losses claimed by Westside from its distressed debt strategy (as well as the "claim of right" credit), but it also conceded 35% (rather than 20%) of Westside's tax liability, eliminated the 10% penalty imposed on Westside and computed interest to be approximately $1.2 million less than the interest included as part of the December 2010 offer. In sum, the IRS's new settlement proposal computed Plaintiff's net transferee liability to be approximately $12.4 million, which, according to the IRS, represented an effective 66% concession on the part of the government. Plaintiff also failed to reach agreement with the IRS on this settlement offer.

171. In May of 2014, Plaintiff and Mr. Desmond considered the possibility of making a new settlement offer to the IRS prior to the Tax Court trial proceedings. Mr. Desmond emailed

[268] See text discussion ¶¶ 77, 80.
[269] See text discussion ¶ 83.

Plaintiff a rough draft of an offer letter seeking Plaintiff's view on moving forward with a settlement proposal. Plaintiff rejected out of hand any notion of making a settlement offer to the government, stating "I think it is premature for any settlement offer and I don't want to make one at this time. I don't want to give the [IRS] the impression that we think our case is weak, which I don't believe it is."[270]

172. In late August of 2014, following Plaintiff's Tax Court trial proceedings in June, Mr. Desmond once again had settlement discussions with the government. The government proposed a settlement based on a transferee of transferee liability theory assuming Plaintiff had received a "premium" or windfall on the sale of his stock equal to $11.4 million. The proposal also assumed that interest would be calculated from March of 2004 (when Westside's 2003 tax return was due) and that the "hot interest" provisions of Code § 6621 (imposing interest at a rate 2% higher than the normally applied rate) would apply. Mr. Desmond advised Plaintiff that the IRS had not "put a final number on the table," but the baseline for the government's offer was a finding of transferee liability in an amount equal to 70% of the $11.4 million "premium" paid to Plaintiff, which amount would equal $6.8 million (taking into account an offset for the long-term capital gains tax paid by Plaintiff on the "premium" portion of his stock sale proceeds) plus interest.[271] Plaintiff also failed to reach agreement with the IRS on this settlement offer.

173. In each of the above instances, Plaintiff had the opportunity to settle his tax dispute with the government for an amount that was substantially less than the taxes, penalties and interest that he was ultimately determined to owe the government.[272] It appears from the record that any number greater than $5 million was a "non-starter" for Plaintiff.[273] Plaintiff, without any input or advice from PwC, chose instead to continue to contest the IRS claim of transferee liability. By failing to reach a settlement agreement with the government in 2010, 2011 and 2014, Plaintiff through his own conduct (not that of PwC) incurred additional interest expense and professional fees which he now seeks to recover as damages in this proceeding.

* * * *

[270] TRICAR-NV0047881.
[271] See text discussion ¶¶ 91-92.
[272] In addition to the foregoing settlement opportunities, Plaintiff also had the option, in lieu of filing a petition with the Tax Court, to pay the assessed liability and then file a suit for refund in the appropriate federal district court or Court of Federal Claims. Code § 6901 "treats the transferee as the taxpayer, . . . so the transferee may contest the transferor's liability either in tax court . . . or in a refund suit." United States v. Williams, 514 U.S. 527, 539 (1995). If Plaintiff had paid the assessed liability in June of 2012 and filed a claim for refund, this would have generally stopped interest from accruing on the transferee liability amount from such date (or in the event Plaintiff prevailed in his refund suit, would have generally entitled Plaintiff to recover interest from the date of "overpayment").
[273] TRICAR-NV0051666.

Respectfully Submitted,

Kenneth L. Harris

Dated: May 23, 2020

Exhibit 37

UNITED STATES TAX COURT

MICHAEL A. TRICARICHI, TRANSFEREE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 23630-12
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	Filed Electronically
	)	
Respondent.	)	

CROSS-MOTION *IN LIMINE* TO EXCLUDE FROM TRIAL ANY EVIDENCE OR ARUMENT THAT THE STOCK PURCHASE TRANSACTION AT ISSUE IS AN "INTERMEDIARY TRANSACTION TAX SHELTER" WITHIN THE MEANING OF IRS NOTICE 2001-16 AND IRS NOTICE 2008-20

PETITIONER MOVES, pursuant to Tax Court Rules 50 and 143 and Federal Rules of Evidence Rules 401, 402 and 403, that the Court enter an order precluding respondent from introducing at trial any evidence or argument that the stock purchase transaction at issue in this case (which occurred on September 9, 2003) is an "Intermediary Transaction Tax Shelter" within the meaning of IRS Notice 2001-16, 2001-1 C.B. 703, and IRS Notice 2008-111, 2008-2 C.B. 1299.

IN SUPPORT THEREOF, petitioner respectfully states:

1. Rule 401 of the Federal Rules of Evidence is applicable here pursuant to Tax Court Rule 143 and section 7453 of the Internal Revenue Code ("Code"). Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

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action more probable or less probable than it would be without the evidence." *Armco, Inc. v. Commissioner*, 87 T.C. 865, 867 (1986). Under Rule 403, marginally relevant evidence can be excluded from trial on the grounds of prejudice, confusion or waste of time. "Even in a court trial, evidence of marginal relevance may be excluded under rule 403, Federal Rules of Evidence." *Laureys v. Commissioner*, 92 T.C. 101, 127 (1989).

2. In Notice 2001-16 and Notice 2008-111, respondent defined as a "reportable," "listed" transaction an "Intermediary Transaction Tax Shelter" with "four objective components." "[A] transaction <u>must</u> have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16." Notice 2008-111, sec. 3 (emphasis added).

3. The four objective components a transaction must have to be a Midco are:

a) A corporation with built-in gain assets;
b) The disposition of at least 50 percent of the stock in that corporation within a 12-month period;
c) Disposition of the built-in gain assets within the 12-month period; and
d) The offset or avoidance of tax on the built-in gain.

4. If a transaction is the same as or substantially similar to one identified by respondent in published guidance as a "listed" transaction, then any taxpayer who "participated" in that transaction is required to file an information statement with respondent disclosing such participation. Treas. Reg. §§ 1.6011-4(a), (b)(2); *see also* Treas. Reg. § 1.6011-4 (2003). Any "material advisor" with respect to such transaction is also required to disclose their involvement in the transaction pursuant to Code section 6111 and to maintain a "list" of all such transactions they advised on pursuant to Code section 6112.

5. For tax returns due after October 22, 2004, taxpayers who fail to disclose a reportable transaction are subject to significant monetary penalties under Code section 6707A. Prior to the enactment of Code section 6707A, a taxpayer's failure to comply with the disclosure requirement in the regulations gave rise to an adverse inference in any penalty defense case. Treas. Reg. § 1.6664-4(c)(iii) (2003). Material advisors have long been subject to a separate penalty regime if they fail to disclose or maintain lists with respect to reportable transactions. I.R.C. §§ 6707, 6708.

6. This case has nothing to do with the reportable transaction regime. Respondent has never asserted that

petitioner is liable for penalties under Code section 6707A for failing to disclose a reportable transaction or that petitioner failed to comply with the disclosure requirement set forth in Treas. Reg. § 1.6011-4. To petitioner's knowledge, respondent has also never asserted that West Side Cellular, Inc. ("West Side") (the corporation whose tax liability is at issue), Nob Hill Holdings, Inc. ("Nob Hill")(the purchaser of petitioner's stock in West Side) or any affiliate of Nob Hill failed to comply with any reportable transaction disclosure obligation. Nor is petitioner aware that respondent has ever alleged that any "material advisor" with respect to the stock purchase transaction failed to meet their disclosure or list maintenance obligations under Code section 6111 or 6112, or is liable for penalties under Code section 6707 or 6708.

7. Although the reportable transaction regime has no substantive application to this case, respondent has repeatedly made reference to and sought to characterize the stock purchase transaction as an "Intermediary Transaction Tax Shelter" as defined by Notice 2001-16 and Notice 2008-111 in a misplaced effort to denigrate the merits of the transaction. *See* Answer ¶¶ 10(i), 10(j). For example, in notices of deposition of nonparty witnesses issued by respondent, he states categorically that

"[t]his case concerns West Side Cellular's unpaid federal tax liabilities-caused by (1) an intermediary transaction of the type described in Notices 2008-111, 2008-2 C.B. 1299, and 2001-16, 2001-1 C.B. 730 . . . ." In questioning these witnesses at trial, it is expected that respondent will again seek to mischaracterize the stock purchase transaction as a "Midco."

8. In the stock purchase transaction at issue in this case, it is undisputed that three of the four objective components that a transaction "must" have to fit the definition of a reportable "Midco" transaction (or be substantially similar to that transaction) are missing. *See* Notice 2001-16 and Notice 2008-111. In particular, it is undisputed that West Side,

(1) Had no built-in gain assets;

(2) Did not dispose of such built-in gain assets within the 12-month period surrounding the stock purchase transaction; and

(3) Did not offset or avoid tax on the built-in gain.

9. Missing three of the four necessary elements of a Midco transaction, it simply cannot be argued that the stock purchase transaction at issue fits the definition of a Midco set forth in respondent's notice. While respondent is expected to argue about tax due from West Side as a result of certain litigation

settlements that took place in April 2003, those settlements and the ordinary income they generated have nothing to do with built-in gain or the avoidance of tax thereon and do nothing to make the stock purchase transaction a Midco.

9. Because the transaction at issue here is not a Midco and because, in all events, this case has nothing to do with the reportable transaction regime, any evidence or characterization of the transaction as a Midco is irrelevant and should be excluded from trial pursuant to Fed. R. Evid. 402. Even if there was some marginal relevance to that issue, attaching a pejorative "listed" transaction label unduly prejudices petitioner and will be a waste of valuable trial time. Any evidence or argument regarding that label should be excluded from trial pursuant to Fed. R. Evid. 403.

WHEREFORE, petitioner respectfully requests that this motion be granted.

Dated: May 19, 2014

/s/ Michael J. Desmond
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Exhibit 38

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Further affiant sayeth not.

Michael A. Tricarichi

Subscribed and sworn to before me

this 7th day of April, 2017.

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

My commission has no expiration date.

O.R.C. §147.03

Exhibit 39

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

KATHARINE A. ROIN, ESQ., the affiant, being first duly sworn, deposes and says as follows:

1. I am an attorney with the law firm Bartlit Beck LLP, counsel for PwC in this lawsuit. I have personal knowledge of all the matters stated below and would competently be able to testify to them if required to do so.

2. I make this Affidavit pursuant to EDCR 2.34 in support of PwC's Motion for Summary Judgment and Motion to Strike Jury Demand.

3. Attached as Exhibit 1 to the Motion is a true and correct copy of the Hearing Transcript on Defendant PwC's Motion to Dismiss Amended Complaint, dated July 8, 2019.

4. Attached as Exhibit 2 to the Motion is a true and correct copy of the February 2, 2011 Tolling Agreement between PwC and Michael Tricarichi.

5. Attached as Exhibit 3 to the Motion is a true and correct copy of T.C. Memo. 2015-201, *Michael A. Tricarichi v. Commissioner of Internal Revenue*, No. 23630-12, dated October 14, 2015.

6. Attached as Exhibit 4 to the Motion is a true and correct copy of excerpts of the deposition of James Tricarichi, taken August 3, 2020.

7. Attached as Exhibit 9 to the Motion is a true and correct copy of excerpts of the deposition of Michael A. Tricarichi, taken October 1, 2020.

8. Attached as Exhibit 10 to the Motion is a true and correct copy of IRS Letter to Michael A. Tricarichi ("IDR"), dated January 22, 2008, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0121454 – 121458.

9. Attached as Exhibit 11 to the Motion is a true and correct copy of IRS Letter to Michael A. Tricarichi, dated February 3, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0067021 – 67070.

10. Attached as Exhibit 12 to the Motion is a true and correct copy of excerpts of the deposition of Glenn Miller, taken August 18, 2020.

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11. Attached as Exhibit 13 to the Motion is a true and correct copy of excerpts of the deposition of Donald L. Korb, taken August 11, 2020.

12. Attached as Exhibit 14 to the Motion is a true and correct copy of excerpts of the deposition of Michael Desmond, taken August 19, 2020.

13. Attached as Exhibit 15 to the Motion is a true and correct copy of Glenn S. Miller Letter to IRS, dated April 29, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093731 – 93752.

14. Attached as Exhibit 16 to the Motion is a true and correct copy of Glenn S. Miller Letter to IRS, dated October 9, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0009424 – 9557.

15. Attached as Exhibit 17 to the Motion is a true and correct copy of the Don Korb Email to Michael Tricarichi, et al., dated June 9, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0123530 – 123589.

16. Attached as Exhibit 18 to the Motion is a true and correct copy of IRS Notice 2008-111, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0026636 – 26644.

17. Attached as Exhibit 19 to the Motion is a true and correct copy of IRS Letter to Michael Tricarichi, dated June 25, 2012, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0027037 – 27046.

18. Attached as Exhibit 20 to the Motion is a true and correct copy of the Order Granting Summary Judgment, dated October 22, 2018.

19. Attached as Exhibit 21 to the Motion is a true and correct copy of the Expert Report of Craig L. Greene, CPA/CFF, CFE, MAFF, dated May 26, 2020.

20. Attached as Exhibit 22 to the Motion is a true and correct copy of excerpts of the deposition of Craig L. Greene, taken September 25, 2020.

21. Attached as Exhibit 23 to the Motion is a true and correct copy of Richard Corn Email to Michael Desmond, et al., dated October 22, 2010, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0122486 – 122561.

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22. Attached as Exhibit 24 to the Motion is a true and correct copy of IRS Transferee Report to Michael Tricarichi, dated August 11, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0093619 – 93643.

23. Attached as Exhibit 26 to the Motion is a true and correct copy of Richard Corn Email to Peter Szpalik, et al., dated October 26, 2010, Bates-stamp ADMIN_TRI00910 – 930.

24. Attached as Exhibit 27 to the Motion is a true and correct copy of Donald L. Korb, et al. Memo to Michael Tricarichi, et al., dated October 8, 2009, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0135479 – 135488.

25. Attached as Exhibit 28 to the Motion is a true and correct copy of IRS Letter to Randall G. Dick, dated September 22, 2005, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0008109 – 8129.

26. Attached as Exhibit 29 to the Motion is a true and correct copy of the Taxpayer Interview Transcript of Michael Tricarichi, taken November 30, 2007, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0073774 – 73876.

27. Attached as Exhibit 30 to the Motion is a true and correct copy of Peter Szpalik Email to Donald L. Korb, dated August 29, 2011, Bates-stamp ADMIN_TRI01034 – 1035.

28. Attached as Exhibit 31 to the Motion is a true and correct copy of the Rebuttal Report of Arthur J. "Kip" Dellinger, dated June 25, 2020.

29. Attached as Exhibit 32 to the Motion is a true and correct copy of ABA Formal Opinion 481, dated April 17, 2018.

30. Attached as Exhibit 34 to the Motion is a true and correct copy of excerpts of the 30(b)(6) deposition of Brian Meighan, taken October 9, 2020.

31. Attached as Exhibit 35 to the Motion is a true and correct copy of excerpts of the deposition of Kenneth Harris, taken October 1, 2020.

32. Attached as Exhibit 36 to the Motion is a true and correct copy of the Expert Report of Kenneth L. Harris, dated May 23, 2020.

33. Attached as Exhibit 37 to the Motion is a true and correct copy of Cross-Motion *In Limine* to Exclude From Trial Any Evidence or Arument [sic] That the Stock Purchase

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

Transaction at Issue Is an "Intermediary Transaction Tax Shelter" Within the Meaning of IRS Notice 2001-16 and IRS Notice 2008-20, dated May 19, 2014, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0077953 – 77959.

34. Attached as Exhibit 38 to the Motion is a true and correct copy of the Affidavit of Michael A. Tricarichi in Support of Plaintiff's Opposition to Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment, dated April 7, 2017.

35. Pursuant to the foregoing and EDCR 2.34, I certify that, after numerous good-faith consultations with Tricarichi's counsel, Mr. Hessell, by telephone, counsel are unable to resolve this dispute without Court intervention.

36. This motion is made in good faith.

KATHARINE A. ROIN, ESQ.

SUBSCRIBED and SWORN to before me this 13th day of November, 2020.

Notary Public

"OFFICIAL SEAL"
LORI L. BARNICKE
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires October 10, 2022

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Exhibit 40

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

RICHARD P. STOVSKY, being first duly sworn, deposes and says that he has personal knowledge and is competent to testify to the following:

1. For more than 25 years, I served as a tax partner, including several years as Vice Chairman, Mid Central Region, of Defendant PricewaterhouseCoopers LLP ("PwC"). I was named a PwC tax partner in 1992.

2. I am over the age of 18. Based on my personal knowledge, experience as a PwC professional during the time period relevant to this action, and my review of relevant documents, I have knowledge of the facts stated in this Affidavit and, if sworn as a witness, am competent to testify to them.

3. I make this Affidavit pursuant to NRS 52.460 and in support of PwC's Motion for Summary Judgment.

4. All facts stated herein are based upon my personal knowledge, recollection of events, and/or are derived from the business records of PwC.

5. PwC's headquarters and principal place of business are in New York, New York.

6. I was the engagement partner on PwC's April 2003 engagement with Plaintiff Michael A. Tricarichi concerning his possible transaction with Fortrend International, LLC for the sale of Mr. Tricarichi's shares in Westside Cellular Inc. (the "Transaction").

7. Attached as Exhibit 5 to the Motion is a true and correct copy of the engagement letter and attached Terms of Engagement to Provide Tax Services (the "Engagement Agreement"), produced in this action by Tricarichi with Bates-stamp TRICAR-NV0117243 – 117250. I executed the Engagement Agreement on behalf of PwC. Mr. Tricarichi executed the Engagement Agreement on his behalf.

8. Attached as Exhibit 6 to the Motion is a true and correct copy of Richard P. Stovsky Memo to Westside Cellular, Inc./Michael Tricarichi files/Cleveland BP Tower regarding potential transaction, dated April 13, 2003, produced in this action by PwC with Bates-stamp PwC-049330 – 49334.

9. Attached as Exhibit 7 to the Motion is a true and correct copy of excerpts of the deposition of Richard P. Stovsky, taken September 1, 2020.

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10. Attached as Exhibit 8 to the Motion is a true and correct copy of PwC's Invoices to Michael A. Tricarichi, dated May 20, 2003, June 27, 2003, July 31, 2003, August 27, 2003, September 29, 2003, and October 29, 2003, produced in this action by Tricarichi with Bates-stamp TRICAR-NV0007532 – 7537.

11. Attached as Exhibit 25 to the Motion is a true and correct copy of Timothy Lohnes Email to Richard P. Stovsky regarding Notice 2002-111, dated December 2, 2008 produced in this action by PwC with Bates-stamp PwC-001371 – 1382.

12. Attached as Exhibit 33 to the Motion is a true and correct copy of Statements on Standards for Tax Services, dated August, 2000, Nos. 1-8, produced in this action by PwC with Bates-stamp PwC-028404 – 28439.

Richard P. Stovsky

RICHARD P. STOVSKY

STATE OF OHIO)
) ss.
COUNTY OF CUYAHOGA)

SUBSCRIBED AND SWORN to before me this 11th day of November 2020, by RICHARD P. STOVSKY.

Sharon Milcinovic

Notary Public

SHARON MILCINOVIC
NOTARY PUBLIC
STATE OF OHIO
My Commission Expires
July 11, 2021

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS, LLP, ET AL., Defendants.	CASE NO. A-16-735910-B DEPT NO. XI **PLAINTIFF MICHAEL TRICARICHI'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** JURY TRIAL DEMANDED

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Table of Authorities

Statutes

PricewaterhouseCoopers LLP ("PwC") fails to meet its heavy burden to demonstrate no material facts in dispute concerning the central issues in this case – namely, the scope of PwC's duty, causation and damages. While the parties' experts dispute whether PwC had a duty to reevaluate its prior advice in light of Notice 2008-111, discovery has confirmed PwC knew as soon as Notice 2008-111 issued, it should reevaluate its prior advice. But in conducting this necessary reevaluation, PwC personnel (Stovsky and Lohnes) recklessly failed to consult with PwC's Midco subject matter experts and concealed from Tricarichi material facts about the transaction – even though they were, in 2008 and after, in contact with Tricarichi and his lawyers. As a result of PwC's nondisclosure and concealment, Tricarichi has suffered nearly $20,000,000 in damages, comprised of legal fees and IRS interest he otherwise could have avoided. On these facts and the reasonable inferences from them – especially when viewed in a light most favorable to Tricarichi – PwC's motion for summary judgment should be denied so a jury can evaluate the evidence and witnesses live to decide the disputed issues of fact. Separately, PwC moves to strike Tricarichi's jury demand and to impose a damage limitation based on boilerplate terms and conditions it claims were part of the 2003 engagement agreement. This motion should be denied because (a) the boilerplate does not apply to the claims now pending before the Court and (b) PwC fails to prove the boilerplate was ever part of the original engagement agreement.

DISPUTED FACTS

A. Tricarichi Ensnared in Illegal Midco Transaction.

By way of background, prior to 2003, Michael Tricarichi was the founder, president and sole shareholder of Westside Cellular, a cellular service provider. Ex. 32 (Tax Ct. Op.) at 2-3; Ex. 33 at TRICAR-NV0035310. After discovering cellular providers were engaging in anticompetitive practices, Westside sued and eventually, after years of litigation, settled its antitrust claims against cellular providers, netting (after attorney fees and employee payments) proceeds of about $40 million. *See* Ex. 32 (Tax Ct. Op.) at 15-18. Tricarichi then considered a number of options, including investing in other ventures via Westside. Ex. 69 (Tax Ct. Tr.) at 88:-89. During the process, he was introduced to two companies (Fortrend and Midcoast) that offered to buy his shares in Westside and use Westside in their debt-collection businesses. *Id*. at 89:19-90-22. Fortrend claimed it could legitimately offset Westside's corporate tax liabilities from the settlement and ensure those liabilities were satisfied. *Id*. at 120:11-12, 122:5-9. Fortrend assured Tricarichi the proposed transaction, including its tax aspect, was legitimate. *Id*. at 175:1-16; Ex. 34 at TRICAR-NV0001743 (Fortrend term sheet indemnifying Tricarichi for all liabilities of Westside). Unbeknownst to Tricarichi, Fortrend's representations were false.

B. PwC Continually Monitored IRS Notices Regarding Advice to Tricarichi and Remained in Contact with Him For Years After the Westside Transaction closed.

Though PwC claims it had no further duty to Tricarichi after closing of the Westside transaction, its actions show otherwise. In November 2003, two months ***after*** the closing, PwC's Stovsky and Lohnes received a PwC Alert updating the list of IRS-prohibited transactions. *See* Exs. 1 & 2.[1] At Stovsky's request, Lohnes reviewed the list "for Westside Cellular" and determined that it "contain[ed] no items that would impact their transaction, other than the items we discussed previously, namely the midco listed transaction." Ex. 2 at PWC-WS 0276. Stovsky and Lohnes could not recall conducting any research to support this conclusion, and (based on this uninformed determination)

[1] "Ex. _" refers to Plaintiff's Appendix in Opposition to PwC's Motion for Summary Judgment. "PwC App. Ex. _" refers to PwC's Appendix in support of its Motion.

did not advise Tricarichi to take any action. Ex. 3 (Stovsky Dep.) at 198:15-199-3, 207:6-19; Ex. 4 (Lohnes Dep.) at 178:14-179:20, 221:6-15. At the time, PwC had designated Subject Matter Experts ("SMEs") on Midco transactions but Stovsky and Lohnes did not consult them contrary to PwC internal guidance. Ex. 5 at PwC-045125 ("If you have a client issue regarding a listed or other reportable transaction [including a Notice 2001-16 transaction], you should contact the appropriate SME.").

PwC was otherwise monitoring IRS investigations into Midco transactions in the hopes of generating more fees. In October 2003, a month after Tricarichi's transaction closed, PwC was highlighting the IRS's focus on reportable transactions such as Midcos as a chance to "sell a client service opportunity … for a fee." Ex. 6 at PwC-032316. PwC developed marketing materials to make "targets and clients" aware of the "potential impact" of IRS policies "before they make their buying decision" about who to seek guidance. *Id*. at PwC-032316; Ex. 7 at PwC-008900-01; Ex. 8 at PwC-009061 ("[B]est of luck in your targeting and proposal activities" for listed transactions; "[w]e currently have the competitive edge in the market."). An April 2004 PwC marketing presentation for potential clients highlighted, "The IRS is serious about enforcement actions [against listed transactions, including Midcos]. … The risks are real." Ex 9 at PwC-034238-39, 034276, 034326, 034337.

In February 2008, Tricarichi received IRS information request relating to its audit of the now Fortrend-owned Westside Cellular. Stovsky likewise received an IRS summons for PWC's documents. Ex. 10. PwC responded after first conferring with Tricarichi about the IRS summons but said nothing about its internal misgivings. Ex. 11 (Tricarichi Dep.) at 87:11-19; Ex. 12 (Hart Dep.) at 80:10-20; Ex. 3 (Stovsky Dep.) at 223:4-14.

Aware of the IRS Westside audit, Stovsky again consulted Lohnes in March 2008 about a new IRS notice (Notice 2008-34 regarding "Distressed Asset Trust (DAT) Transaction"), inquiring whether it might apply to Fortrend's distressed debt strategy to avoid Westside's taxes. Ex. 13. Lohnes told Stovsky not to worry: "I don't think this should apply to ***your client's*** fact pattern[.]" *Id.* at PwC-001768 (emph. added). Stovsky and Lohnes again could not recall what they did to come to this conclusion, did not consult with PwC's SMEs on Distressed Asset or Midco Tax Shelters, and said nothing to Tricarichi, even though they knew the IRS was investigating Westside. Ex. 14 at PwC-015183 - 015184; Ex. 3 (Stovsky Dep.) at 231:18-232:16; Ex. 4 (Lohnes Dep.) at 217:6-219:21. This was in marked contrast to how others at PwC handled similarly-situated clients with potential Midco exposure. *See, e.g.*, Ex. 15 at PwC-028883 (advising client, following IRS Notice 2008-20, "we have a few Tax Partners that are subject matter experts with regard to the Midco transaction and reporting requirements related to that transaction"); Ex. 16 at PwC-024369-70 (recommending clients consult PwC Midco SMEs and "proceed carefully, very carefully!" because PwC was working with taxpayers "who are under audit and who the IRS says engaged in a Midco listed transaction").

In April 2008, a federal district court held the Enbridge/Bishop transaction – where PwC introduced Fortrend and was paid a kickback – was a sham transaction. Ex. 17 at 13-14 (finding "Midcoast's reliance on PWC under the facts of this case to be unreasonable."). As one PwC professional stated to his tax colleagues, "This is not a good situation. The court also held that there wasn't even substantial authority for the positions taken [by PwC]. Accordingly, **I suspect we will hear more from the losing plaintiffs in the near future**." Ex. 18 at PwC-008492 (emph. added); Ex. 19 (PwC personnel troubled by *Enbridge* decision, especially since "findings say PWC suggested the midco transaction[.]"). On May 13, 2008, PwC's Washington National Tax Group met to discuss "Midco Transaction Update based on Enbridge Energy and Notice 2008-20." Ex. 20 at PwC-028534. The PwC presentation identified "Take-Aways to Discuss with Clients" such as how the IRS successfully imposed transferee liability in *Enbridge* and "Remind clients to be wary of transaction structures that eliminate income or gain, shift tax basis, or duplicate losses. If its too good to be true, it likely isn't[.]" *Id*. at PwC-028535. The presentation questioned whether there was a "business solution related to this issue" – *i.e.*, a way for PwC to make money, but the author did not "expect that many of our clients will have 'Midco' transactions pending [IRS] resolution." *Id*. Although Lohnes, a member of the Washington National Tax Group, likely attended the meeting, he said nothing about the *Tricarichi* case – and he did not discuss the "Take-Aways" with his client. Ex. 4 (Lohnes Dep.) at 238:7-23, 241:10-24.

Then, on December 1, 2008, the IRS issued Notice 2008-111, which clarified Notice 2001-16 regarding Midco tax shelters. Ex. 21 at PwC-001372 (PwC Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)). Notice 2008-111 was retroactively effective January 19, 2001, the date of original Midco Notice 2001-16. *Id*.[2] PwC's internal guidance emphasized that Notice 2008-111 "states that some taxpayers may have filed tax returns 'taking the position that they were entitled to the purported tax benefits of the types of transactions described in Notice 2001-16,' and that these taxpayers 'should

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[2] Notice 2008-111 superseded an earlier 2008 IRS Notice, which itself had, according to PWC personnel, "caus[ed] quite a stir." Ex. 22 at PwC-018371. In particular, there was concern at PwC that the notice was "so broad as to make almost every deal to sell stock of a company (short of a complete liquidation) a potential listed transaction." Ex. 23 at PwC-008651.

consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.'" *Id*.

Days after Notice 2008-111 issued, Stovsky contacted Lohnes to get his view of whether the Notice should change PwC's advice to Tricarichi. Lohnes "read through the Notice and agree[d] … that it shouldn't change any of our prior analysis" for Tricarichi. Ex. 24. Stovsky and Lohnes again could not identify any work or research either did to support this conclusion and once again did not consult with PWC's Midco experts. Ex. 3 (Stovsky Dep.) at 244:15-245:15, 248:9-14; Ex. 4 (Lohnes Dep.) at 253:20-254:7; Ex. 14 at PwC-015183 ("PwC has appointed Subject Matter Specialists (SMS) for each of the listed transactions … If you have a client issue regarding a listed … transaction, you should contact the appropriate SMS."); Ex. 25 (Karen Lohnes consulting with PwC Midco SME regarding Notice 2008-111's application to her client). Internally, PwC's Midco SME was updating PwC's compliance checklist for Midco transactions in light of Notice 2008-111 "**to share with clients**" and "alert engagement teams about when they need to seek a [SME]." Ex. 26 at PwC-008727; Ex. 27 at PwC-022643. Nonetheless, PwC said nothing to Tricarichi – with whom PWC was then in contact – and did not recommend that Tricarichi engage PwC's Midco experts. Ex. 3 (Stovsky Dep.) at 246:11-248:3.

PwC had numerous opportunities to inform Tricarichi of the potential problems PwC had identified with the Westside transaction, but failed to do so in late 2008, early 2009, or thereafter. Between 2008 and 2015, Stovsky had various conversations with Jim Tricarichi, Plaintiff's brother – who served as a liaison between Plaintiff and PwC – including discussions of Tricarchi's IRS audit and subsequent Tax Court case. Ex. 28; Ex. 3 (Stovsky Dep.) at 105:16-106:8, 109:9-15; Ex. 11 (Tricarichi Dep.) at 97:12-98:15, 102:13-103:4. PwC also provided documents to Tricarichi in connection with Plaintiff's IRS and

Tax Court proceedings. And prior to providing deposition and trial testimony in the Tax Court case, PwC witnesses, including Stovsky, met and communicated with Tricarichi's tax counsel in July 2013, December 2013 and June 2014. Ex. 29; Ex. 30 at TRICAR-NV0113180; Ex. 31 at TRICARI-NV0113240.

During these communications, Tricarichi's counsel informed PwC's counsel that the IRS was focused on, among other things, the distressed debt transactions that Fortrend used to offset Westside's tax liabilities. Ex. 30 at TRICAR-NV0113182. Indeed, in trying to convince the IRS not to depose Mr. Lohnes, PwC's counsel learned in October 2013 that the IRS planned to establish at trial that Tricarichi had actual or constructive notice of Fortrend's plan to write off Westside's tax liability via the distressed debt transactions. *Id.* at TRICAR-NV0113180 This was the very point addressed by Notice 2008-111, and yet, despite its duty to do so under AICPA SSTS No. 6, PwC did not tell Tricarichi that information PwC knew at the time could come back to haunt Tricarichi.

C. PwC Knew its Advice to Tricarichi Regarding the Westside Midco Transaction Was Wrong.

The transaction proposed by Fortrend and reviewed by PwC was widely promoted and known as a "Midco" or "intermediary" transaction. Ex. 32 (Tax Ct. Op.) at 2. In January 2001, the IRS listed Midco transactions as "reportable transactions" for federal income tax purposes, meaning the IRS considered them (as well as substantially similar transactions) to be improper tax-avoidance mechanisms. Ex. 35 (Notice 2001-16) at PwC040471 (PwC Alert "IRS warning on 'intermediary transactions'"); Ex. 36 at PwC-008758 (PwC has "an ethical obligation to discuss the implications of [Notice 2001-16] with each client who entered into transactions similar to those in the notices whether we are tax advisers or tax preparers").

Tricarichi was totally unsophisticated in tax matters and knew the proposed stock sale needed to be vetted by professionals. Ex. 11 (Tricarichi Dep.) at 109:18. He engaged his long-time lawyers at Hahn Loeser, who had some experience with Midco type transactions to handle documentation and due diligence. *Id.* at 109:19-21. At the suggestion of his brother, Tricarichi retained PwC to verify the tax aspects of the Fortrend transaction. Ex. 37 (J. Tricarichi Dep.) at 34:20-24; Ex. 11 (Tricarichi Dep.) at 37:1-11; Ex. 38 (PwC engagement agreement). Plaintiff's brother, who had a longstanding professional relationship with PwC partner Rich Stovsky, made the introduction. Ex. 37 (J. Tricarichi Dep.) at 64:9-16. Stovsky then brought in PWC Washington national tax office partner Timothy Lohnes, with the assistance of a few others, to analyze the transaction. Ex. 3 (Stovsky Dep.) at 35:18-24; Ex. 39 at PwC-WS 1221. In order to "stay in the loop with regard to the Westside transaction" Stovsky instructed Lohnes "[t]he more contact we have, the more we can bill for our services, and [Plaintiff's brother] pays the day he receives the invoice." Ex. 40. PwC ultimately charged approximately $48,000 in fees. Exs. 39 & 41.

PwC had a substantial, undisclosed conflict of interest that should have precluded PwC from reviewing a Midco transaction involving Fortrend as the counterparty. In 1999, PwC introduced Fortrend and its Midco concept to a transaction where PwC's client Midcoast (l/k/a Enbridge) was acquiring assets. Ex. 17 (Enbridge Op.) at 3. At closing, Fortrend paid PwC a $950,000 referral fee. Ex. 42 (wire transfer instruction for $950,000 from Fortrend to PwC; Ex. 43 (PwC billing acknowledging receipt).[3] The Enbridge Midco transaction was audited by the IRS starting in late 2003 (and before Tricarichi reported the Westside sale on any tax returns), found deficient by the IRS in 2004,

[3] *See also* Ex. 44 (Fortrend Brochure claiming "particularly strong relationship" with PwC).

and confirmed by the courts in 2008 and 2009 to be an illegal tax shelter. Ex. 17 (*Enbridge* Op.) at 6-7, 13-14; *see also* Ex. 45 at PwC-001427-28.[4]

Stovsky claims he performed a conflict check before beginning the Tricarichi engagement, but PwC produced no documents establishing that he did and has no explanation for how the Enbridge referral fee did not trigger a disclosure to Tricarichi. Ex. 4 (Lohnes Dep.) at 103:8-11, *id*. at 104:12-18; Ex. 3 (Stovsky Dep.) at 103:2-8; Ex. 48 (Corp. Rep. Dep.) at 170:23-171:13 (no written evidence Stovsky performed a conflict check); Ex. 49 (Desmond Dep.) at 129:5-130:2 (Tricarichi's lawyer confirms PwC never explained its relationship with Fortrend). Regardless, PwC failed to make any disclosure or obtain a waiver from Tricarichi as AICPA rules require. Ex. 50 (Dellinger Dep.) at 196:5-24 (PwC's accounting expert confirms duty to disclose and obtain conflict waiver).

PwC ultimately advised Tricarichi that the proposed stock sale transaction was legitimate for tax purposes, did not need to be reported under IRS Notice 2001-16 and, most importantly, that Tricarichi should have no personal exposure (or transferee liability) related to Westside once the transaction with Fortrend closed. Ex. 51 (Stovsky Memo) at PWC-WS 0601-03. But no one on the PwC team had any prior Midco experience. Ex. 3 (Stovsky Dep.) at 48:19-51:6, 52:12-25, 53:13-16 (failing to provide any details regarding any prior Midco experience); *id*. at 52:6-9 (stating that he did not view himself as an expert on Midco transactions); *id*. at 57:19-60:1; 69:15-18; Ex. 4 (Lohnes Dep.) at 44:18-23. As discussed above, in 2003 and continuing through 2008, PwC had two designated SMEs

[4] PwC also failed to disclose that prior to being engaged by Tricarichi, PwC had entered into a closing agreement with the IRS related to its promotion of illegal tax shelter transactions in the late 1990s. Ex. 46. Nor did PwC disclose that as a result of the closing agreement, PwC agreed to disclose to the IRS the names and transaction information of any client they had advised who participated in Notice 2001-16 transactions. Ex. 47.

on Midco transactions but Stovsky and Lohnes never consulted them. Ex. 5; *see also* Ex. 3 (Stovsky Dep.) at 55:11-56:3; *id*. at 61:4-14 (no one involved in the Westside transaction contacted subject matter experts for assistance); Ex. 4 (Lohnes Dep.) at 43:1-6 (did not discuss the Westside transaction with PwC's subject matter experts); Ex. 52 (Boyer Dep.) at 20:22-21:1; 26:20-26:25 (PwC Midco expert never contacted regarding Westside transaction).

Before it advised Tricarichi to go ahead, PwC gave another identically situated client, John Marshall, the exact opposite advice earlier in 2003, telling Marshall to steer clear of the transaction and requiring him to register the transaction under Notice 2001-16 on the PwC-prepared returns. Ex. 53 (*Estate of Marshall v. IRS*, 2016 WL 3460226) at **2, 4-5, 12. Specifically, "PwC concluded that the stock sale proposed by [Fortrend subsidiary] Essex was similar to a listed transaction" and "tried to discourage John from entering into the proposed stock sale." *Id.* at *5. PwC also "informed John in person that PwC could not consult or advise on the proposed stock sale, which meant PwC could not be involved in discussions or negotiations with Fortrend regarding it." *Id*.

Also unknown to Tricarichi until the tax court case, Stovsky created an internal memo to the file purportedly reflecting PwC's analysis of the issues during the engagement. Ex. 51 (Stovsky Memo) at PWC-WS 0600. The Tax Court repeatedly cited the "Stovsky Memo" in making findings against Tricarichi with respect to what he and "his advisers" knew about Fortrend's planned tax avoidance. Ex. 32 (Tax Ct. Op.) at 10-11. Stovsky cannot say when he made certain changes to the Memo, including in particular PwC's contention that all conclusions communicated to Tricarichi were qualified as "more likely than not." Ex. 3 (Stovsky Dep.) at 22:10-25:19. Nor does Stovsky know if he actually told Tricarichi that PwC's conclusions were only at "more likely than not" degree of confidence or what that meant. *Id.* at 147:9-148:12. Tricarichi adamantly denies PwC ever caveated their advice to him with this language, much less explained what that language meant. Ex. 11 (Tricarichi Dep.) at 42:16-43:8. There is no document, either internally or sent to the client, confirming Stovsky caveated PwC's advice in this fashion. *See* Ex. 3 (Stovsky Dep.) at 25:15-26:11, 276:23-277:10.

Regardless, the Stovsky Memo contains several conclusions PwC reached about the transaction that were not communicated with Tricarichi, for example: (a) the deductions Fortrend intended to use "WAS SUBJECT TO IRS CHALLENGE," (b) "THE CHARACTER OF THAT LOSS, VS. THE CHARACTER OF THE TAXABLE INCOME FROM THE LEGAL VERDICT MAY NOT MATCH"; and (c) PwC's advice that Notice 2001-16 was inapplicable was merely "A POSITION CAN BE TAKEN." Ex. 51 (Stovsky Memo) at PWC-WS 0602-03 (all caps in original).

Contrary to these unexpressed concerns and caveats, PwC advised Tricarichi that the Fortrend transaction was not substantially similar to Notice 2001-16 and that he should not be subject to any successor or transferee liability with respect to the transaction. Ex. 11 (Tricarichi Dep.) at 42:3-43:4; Ex. 51 (Stovsky Memo) at PWC-WS 0603 ("TRICARICHI SHOULD HAVE NO SUCCESSOR/TRANSFEREE LIABLITY FOR ANY CORPORATE LEVEL TAX.") (all caps in original). Contemporaneous hand-written notes of a PwC conference call show Lohnes communicating he would do the transaction "10 times of out 10." Ex. 54 at PWC-WS 0605. Relying upon PwC's advice, Tricarichi proceeded with the Fortrend transaction. Ex. 11 (Tricarichi Dep.) at 233:3-11. The Westside stock sale to a Fortrend special purpose entity (Nob Hill) closed on September 9, 2003. Ex. 32 (Tax Ct. Op.) at 23. Thereafter, Westside's remaining funds, rather than being used to facilitate Fortrend's debt-collection business, were drained by Fortrend. *Id.*

at 23-24; Ex. 55 (Transferee Rept.) at TRICAR-NV0010391-92. Westside did not pay any taxes and subsequently disappeared. *Id*. at 10394-96; Ex. 56 at TRICAR-NV0035780.

D. Tricarichi Incurred Millions of Dollars of Interest and Attorneys' Fees Fighting the IRS as a Result of PWC's Concealment.

In 2003, the IRS audited Westside's 2003 tax return and disallowed the $40 million-plus bad-debt deduction Fortrend used to offset the imbedded gain in Westside. *See* Ex. 57 (IRS Notice of Deficiency to Westside). The IRS sent a notice of deficiency to Westside with a tax deficiency of $15,186,570 and penalties totaling $6,012,777, plus millions in interest, but Westside – which had no assets or resources – did not pay anything and did not petition the U.S Tax Court for relief. Ex. 55 at TRICAR-NV0010387. The IRS then proceeded with a transferee liability examination of Tricarichi concerning Westside's 2003 tax liabilities. Transferee liability is a method of imposing tax liability on a person other than the taxpayer that is directly liable for the tax. In June 2012, the IRS formally assessed Tricarichi with transferee liability for Westside's tax deficiency, penalties and interest. Ex. 68 (PwC Ex. 80) (IRS Notice of Liability); Ex. 58 at TRICAR-NV0079525.

Tricarichi petitioned the U.S. Tax Court for review of the IRS Notice of Transferee liability. Ex. 59. The matter was litigated over a number of years and proceeded to trial in 2014. Ex. 60. The Tax Court found in October 2015 that – contrary to what PwC had told Plaintiff – the Fortrend transaction was an improper Midco transaction and Tricarichi was liable for Westside's tax deficiency and penalties totaling about $21.2 million, plus interest. Ex. 32 (Tax Ct. Op.) at 1, 68-69. Central to the Tax Court's finding of liability was the imputed, and undisclosed, knowledge of his advisors, particularly PwC, with regard to Fortrend's intentions not to pay Westside's taxes. Ex. 32 (Tax Ct. Op.) at **10-

13 (discussing Stovsky Memo conclusions); *id* at *19 ("PwC specifically declined to provide assurance that Fortrend's bad debt strategy was 'more likely than not' to succeed); *48 (criticizing Tricarichi and "his advisers" who were "clearly suspicious about Fortrend's scheme. But instead of digging deeper, they engaged in willful blindness and actively avoided learning the truth."). Without knowing what PwC knew until it was too late, Tricarichi spent $3.2 million dollars litigating and incurred $16,294,719.73 in interest between January 1, 2009 and November 13, 2018. Ex. 62 (Greene Rept.) at 16. Had he known PwC was not only conflicted but concealed material facts about the transaction, he would not have litigated the IRS case and, as a result, would have saved approximately $20,000,000. *Id.*; *see also* Ex. 63 at ¶¶ 8-9; Ex. 11 (Tricarichi Dep.) at 219, 234.

ARGUMENT

A. Standards for PwC's Motion for Summary Judgment.

Summary judgment is granted only when the record establishes no genuine issue of material fact is in dispute, and that the moving party is entitled to judgment as a matter of law. *Humphries v. New York-New York Hotel & Casino*, 133 Nev. 607, 609 (2017). The moving party bears the burden of production to submit undisputed evidence negating an essential element of plaintiff's claim. *Cummings v. Barber*, 460 P.3d 963, 968 (2020); *see also In re Cay Clubs*, 130 Nev. 920, 935 (2014) ("The party who moves for summary judgment has the burden of showing the absence of genuine issues of material fact."). When reviewing the record, the evidence, and any reasonable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729 (2005). Summary judgment in negligence cases is generally disfavored because the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461 (2007); *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777 (2012).

B. Disputed Issues of Fact Concerning the Scope of PwC's Duty Preclude Summary Judgment.

PwC performed accounting services for Tricarichi. That accountant-client relationship imposes duties on PwC that extend beyond the parties' contract. *PriceWaterhouseCoopers v. Giddens*, 496 B.R. 315, 323 (S.D.N.Y 2013) ("Given the parties' accountant-client relationship, the scope of defendants' duty to plaintiff is no narrower than the terms of the parties' agreement, and may be broader, based on professional accounting standards."), quoting *Berg v. Eisner LLP,* 941 N.Y.S.2d 616, 617 (2012). The question is whether IRS Notice 2008 triggered PwC's duty to disclose to Tricarichi that the accountant's earlier tax advice was erroneous. Plaintiff's expert, supported by AICPA accounting standards, will testify PwC was obligated to notify its client of the clarifying Notice (2008-111) and its impact in light of facts know to PwC. PwC (and its experts) disagree.

The parties' – and their experts' – disagreement as to the scope of PwC's duty cannot be resolved on summary judgment. *Bd. Of Tr. of the Teamster's Local 918 Pension Fund v. Freeburg & Freeburg, C.P.A.*, 1999 U.S. Dist. LEXIS 24275, *14 (E.D.N.Y. Sept. 28, 1999) ("Summary judgment is inappropriate in light of disputed material facts concerning the scope of Zerah's duties, whether Zerah and Company's auditing procedures complied with accountants' professional standards…"; jury will weigh expert opinions and resolve issues of fact); *Nina Footwear, Inc. v. Salibello & Broder, LLP*, 2011 N.Y. Misc. LEXIS 6690, *11-12 (N.Y. Sup. Ct. Aug. 25, 2011) ("The competing expert affidavits offer opposite opinions on the same facts and applicable AICPA standards. The experts disagree on the scope of an accountant's duty in these circumstances, which presents a factual issue requiring a determination on their credibility. As such, the matter cannot be decided on a motion for summary judgment."); *see also Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 12 (2018) (fact issue regarding scope of parties' relationship prevented summary judgment on professional negligence claim against accountants). PwC cites no accounting cases to the contrary. Indeed, PwC cites no accounting cases at all,[5] and in one of its cases, summary judgment is granted because the plaintiff failed to provide an expert opinion to support its claim.[6]

Highlighting the dispute between the experts, PwC makes three related arguments to circumvent the fact issues that must be decided by the jury: (1) PwC argues its view of the accounting standards, declaring that it had "no duty to update a former client." PwC Br. at 14; (2) PwC argues its view of the IRS Notice, claiming it did not apply to Tricarichi (*id*. at 17); and (3) PwC argues that if the Notice triggered a duty to disclose, PwC would have given the same advice (despite, for example, the conflicting advice it gave other clients) (*id*. at 18-20). Separately or in combination, these arguments do not give PwC a path to summary judgment.

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[5] PwC cites two cases, neither support their argument: *Boesiger v. Desert Appraisals*, 444 P. 3d 436 (2019) involves a realtor suing an appraiser for a supposedly undisclosed discrepancy that, in fact, was disclosed. In *Lee v. GNLV Corp.*, 117 Nev. 291 (2001) a restaurant was sued for employees' failure to perform Heimlich Maneuver on a choking customer; waitstaff called for medical help and treating physician testified Heimlich would not have helped the victim. Earlier in its brief, PwC cites an accounting case, albeit one addressing a motion to dismiss. *Friedman v. Anderson*, 803 N.Y.S. 2d 514 (N.Y. App. Div. 2005). There, the professional negligence claim was reinstated based in part on AICPA standards. *Id.* at 516. PwC omits the case in Section B, presumably because it undercuts its argument.

[6] *Boesiger*, 444 P. 3d at 439-40 ("We are not persuaded that the professional standards governing the appraisal industry are within the common knowledge of the average layperson. Accordingly, we hold the district court correctly concluded that appellants failed to provide evidence necessary to establish the first element of their claim for professional negligence.").

First, PwC's disagreement with plaintiff's expert as to the scope of the duty does not warrant summary judgment. PwC claims that there is no duty to update a "former client" under the SSTS (which the experts dispute) and that, even if there were, the contract specifically disclaims such a duty. On the "former client" front, PwC is wrong for a variety of reasons. As plaintiff's expert explains:

> Under SSTS [6] PWC should have informed the Plaintiff of [Notice 2008-111]. The term error includes a position taken on a prior year's return that no longer meets the standards of SSTS No. 1 discussed above due to legislation, judicial decisions, or administrative pronouncements having a retroactive effect. In my professional opinion, the following taken from SSTS Statement No. 6 applied to this Matter:
>
> > "03. A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return or upon becoming aware of a taxpayer's failure to file a required return. A member should recommend corrective measures to be taken…" * * *
>
> PWC clearly knew more about the issues with listed transactions than others and had a duty to tell Tricarichi and his attorneys about the material facts that they knew. The evidence as discussed above shows that the engagement team assigned to the Tricarichi matter were negligent in providing tax consultation.

Ex. 62 (Greene Rept.) at 15-16. [7]

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[7] In connection with the motion to dismiss, Tricarichi cited law establishing PwC's continuing duty to disclose material information about the transaction. *See, e.g., Garner v. Bank of Am. Corp,* 2014 WL 1945142 at *7-8 (D. Nev. May 13, 2014) ("[A] duty to disclose may arise from the parties' relationship .... For example, a 'special relationship' between the parties may trigger the duty to disclose, even where the plaintiff has access to facts suggesting a problem exists .... '[T]he suppression or omission of a material fact which a party is bound in good faith to disclose is equivalent to a false representation, since it constitutes an indirect representation that such fact does not exist.'") (citations omitted). PwC does not address this case law; instead, it engages in a battle of the experts wholly inappropriate on summary judgment. *See*, *e.g.*, *Nina Footwear*, 2011 N.Y. Misc. LEXIS 6690, *11-12; *LLV Holdco LLC v. Atalon Management Grp LLC*, 2017 WL 8728063, *3 (Nev. Dist. Ct. Dec. 20, 2017) ("Whether a special or confidential relationship exists is generally a fact question for the trier of fact.").

Further, consistent with Mr. Greene's reading, nothing in SSTS No. 6 itself forecloses application to "former" clients, as PwC's in-house and hired experts admit. Ex. 65 (Hodes Dep.) at 144:8-10 (SSTS 6 "does not state" that it does not apply to former clients); Ex. 50 (Dellinger Dep.) 104:15-20 (SST 6 does not exclude former clients).[8] And, internally, PwC continued to refer to Tricarichi in 2008 as a "client" and reviewed the transaction even though he hadn't reengaged PwC. Ex. 13 (Lohnes email to Stovsky) ("I don't think this should apply to your client's fact pattern"); Ex. 4 (Lohnes Dep.) at 227:17-22 (Lohnes did not question whether Tricarchi was a current or former client). Indeed, if a continuing client relationship is required to trigger a duty, there were sufficient continuing communications and contacts between Tricarichi and PwC following the 2003 transaction to confirm that Lohnes' reference to Tricarichi as "your client" was neither an anomaly nor inapt. *See* Fact Section, pp. 2-7.[9]

As a fallback, PwC argues that it had no duty to inform Tricarichi it was aware of an error in a previous return based on a "change in the law." PwC Br. at 14. But as PwC

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[8] Unlike SSTS 6.03, SSTS 6.09 contains the phrase "while performing services for a taxpayer," which could imply that 6.09 does not apply to a former client. Ignoring the distinction between 6.03 and 6.09, PwC tries to undercut Mr. Greene's opinion by taking one deposition question and answer about SSTS 6.09 out of context. PwC Br. at 15. PwC failed to advise the Court that, in his deposition errata affidavit, Mr. Greene clarified his answer to the cited question: "Answer should be: 'I don't believe the paragraph specifically references former clients, but it does say [in 6.03]: A member should inform the taxpayer promptly upon becoming aware of an error in a previously filed return…" Ex. 64 (Greene Dep. Errata Sheet 11/2/20).

[9] To dispute these facts and the inference of a client relationship, PwC cites that it did not bill Tricarichi for work subsequent to 2003, but that is not dispositive to an accountant-client relationship. *Wagenheim v. Alexander Grant & Co.*, 482 N.E.2d 955, 962 (Ohio App. 1983) ("As in the legal profession, the relationship that an accountant establishes with his client does not cease merely because the specific services provided at that time have been completed."); *In re Rossana*, 395 B.R. 697, 703 (Bankr. D. Nev. 2008) (payment of fees "is not a condition precedent for a finding that an attorney-client relationship existed"); *Bloom v. Hensel*, 872 N.Y.S.2d 776, 777 (N.Y. App. Div. 2009) ("An attorney-client relationship may exist in the absence of a retainer or fee"; existence of relationship is an issue of fact).

itself repeatedly points out (elsewhere) in its Brief, and as the Notice itself states, Notice 2008-111 was a clarification rather than a change in the law. PwC App. Ex. 18 ("This Notice clarifies Notice 2001-16"). As such, SSTS No. 6 is not supplanted by SSTS No. 8, nor is it disclaimed by PwC's addendum section concerning subsequent changes in the tax laws and regulations.

Second, Notice 2008-111 triggered an obligation by PwC to inform Tricarichi under STSS No. 6. PwC argues the Notice must have **"resulted"** in an "error in a previously filed return," and that "[n]o reasonable factfinder could find that the issuance of Notice 2008-111 in December 2008 resulted in an error in the tax return that Tricarichi previously filed." PwC Br. at 17. But SSTS 6 is concerned with whether the accountant "becomes aware" that there had been an error, and here, the facts show that PwC was in fact aware, as shown above. Fact Section, *infra*, at pp. 7-13.

PwC also argues the Notice did not change anything because Lohnes and Stovsky reacted to the Notice by (a) recklessly assuming that their prior work was correct and (b) failing to consult PwC's Midco experts in light of Notice 2008-111's clarification. PwC knew the advice was erroneous, as evidenced by the Enbridge transaction, its advice to Marshall, and its concern that it would face lawsuits as a result of its Midco advice. *See* Fact Section, pp. 10-11. The "happy accident" that Lohnes and Stovsky did not run the Tricarichi tax question past those in-the-know at PwC is an act of gross negligence – and not a get-out-of-negligence-free card. *See, e.g.*, *Sommer v. Federal Signal Corp.*, 593 N.E.2d 1365, 1367 (N.Y. Ct. App. 1992) (reversing summary judgment where "dispatcher – without verification or investigation – rushed to his own conclusion, recklessly indifferent to the consequences that might flow from a misperception.").

Third, PwC suggests that because Tricarichi's lawyers advocated to the IRS that the Notice did not apply, no one could dispute that fact (and thus Notice 2008-111 could not possibly have triggered a duty to revisit the transaction and inform Tricarichi). PwC Br. at 18-19. This argument goes nowhere because, as PwC knew, at least two entities did dispute this fact at the time: the IRS **and PwC itself** (as reflected, *inter alia*, in its advice to Marshall). *See also* Fact Section, pp. 10-11. Further, Tricarichi's lawyers advocated to the IRS that Notice 2008-111 did not apply for a very specific reason – in order to give the IRS Appeals Officer discretion to settle outside IRS parameters for listed Midco transactions and, in all events, their advocacy on behalf of a client is not dispositive. Ex. 66 (Korb Dep.) at 155:1-16; Ex. 49 (Desmond Dep.) at 27:15-28:19, 115:22-116:19.

C. Disputed Issues of Fact as to Damages PwC's Concealment Caused Tricarichi Preclude Summary Judgment.

PwC asks the Court to supplant the factfinder's role and conclude, as a matter of law, that PwC's breach of duty did not cause Tricarichi's damages. These issues are classic questions of fact for the jury to decide and not typically appropriate for summary judgment. *Klasch v. Walgreen Co.*, 127 Nev. 832, 841 (2011) ("[b]reach of duty and causation are classically questions of fact"); *see also Lee v. GNLV Corp.*, 117 Nev. 291, 296 (2001) ("courts are reluctant to grant summary judgment in negligence cases because foreseeability, duty, proximate cause and reasonableness are usually questions of fact for the jury").

Tricarichi will testify that had he known what PwC knew, he would not have continued to litigate with the IRS and would have reached the best resolution possible at the time. Ex. 11 (Tricarichi Dep.) at 219:4-9, 234:9-14. PwC argues that causation cannot be proven because Tricarichi's lawyers knew of Notice 2008-111. PwC Br. at 8-11. This argument fails to rebut causation as a matter of undisputed fact since, as set forth above, PwC's duty in 2008 and thereafter was not limited simply to identifying the existence of Notice 2008-111 but to revisit – in light of the Notice – whether its prior advice was wrong. Further, there is good reason to credit Tricarichi's testimony in this regard since the focus of the Tax Court's findings against him involved facts about the transaction that were known to PwC and imputed to Tricarichi. Ex. 32 at 19-22; Fact Section, pp. at 11-12.

PwC further argues Tricarichi did not have adequate resources to settle the Tax Court case at the amounts demanded. PwC Br. at 12-13. This argument, at most, goes to the amount of Tricarichi's claimed interest damages and not the fact of damages. Tricarichi's expert does not calculate damages assuming Tricarichi could have paid any particular amount demanded by the IRS in settlement. *See* Ex. 62 (Greene Rept.) at 16. Instead, he calculates the judgment Tricarichi would owe the IRS, absent PwC's concealment, would be substantially less in 2009 than it is now, and he unquestionably would not have incurred $3.18 million in legal fees fighting the IRS. *Id*. Further, Tricarichi was never given the opportunity in 2008 to make a fully informed decision, with the benefit of what PwC knew, and then negotiating the best possible resolution with the IRS. It is well-established under Nevada law that "damages need not be proven with mathematical exactitude" and the "mere fact that some uncertainty exists as to the actual amount of damages sustained will not preclude recovery." *Frantz v. Johnson,* 116 Nev. 455, 469 (2000). This is particularly true since PwC's concealment of material facts is why we can't know with absolute precision the amount of damages caused. *See Ruzicka Elec. & Sons, Inc. v. IBEW, Local 1*, 427 F.3d 511, 521-22 (8th Cir. 2005) (finding jury should determine extent of damages based on longstanding principle that "one whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered is not entitled to complain of the difficulty of exact computation") (citing, inter alia, *Eastman Kodak Co. of N.Y. v. S. Photo Materials Co.*, 273 U.S. 359, 379 (1927)).

D. Tricarichi's Notice 2008-111 Related Claims are Timely.

PwC's newest statute-of-limitations argument is without merit. As PwC misleadingly frames the issue, Tricarichi is complaining about an omission that took place in December 2008, and his claim is therefore untimely since he did not file his Amended Complaint until April 2019. PwC Br. at 20. This argument is wrong for several reasons.

First, PwC conveniently forgets how the Amended Complaint came to be filed. As the Court will recall, Tricarichi did not and could not discover PwC's negligent consideration of Notice 2008-111's applicability, and its ensuing failure to warn Plaintiff regarding the Notice, until after PwC produced – in August 2017 and March 2018 – its internal documents revealing as much. *See* Plaintiff's Opp. to PwC's Mot. for Sum. Judg., Aug. 1, 2018. Accordingly, Plaintiff's claim in the April 2019 Amended Complaint regarding this failure is timely under Nevada's two-year discovery statute of limitations. NRS 11.2075(1)(a) & (2). It is well-settled that "[w]hen the plaintiff knew or in the existence of proper diligence should have known of facts constituting the elements of his cause of action is a question of fact for the trier of fact." *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 800 (1990); *LLV Holdco*, 2017 WL 8728063 at *3-4 (finding "genuine issues of material fact as to what disclosures Defendants were required to make … and when, as it relates to a statute of limitations analysis, Plaintiffs were on 'inquiry notice'…."). Accordingly, summary judgment is inappropriate.

Second, PwC misapplies the parties' tolling agreement. Tricarichi sought and obtained a tolling agreement from PwC at the end of 2010, as soon as he knew the IRS was actually going to pursue him for Westside's tax liability; the tolling agreement was in place starting January 2011. The broadly worded tolling agreement applies to "any claim … Tricarichi may have … arising from the services performed by PwC for Tricarichi relating to the sale of West Side Cellular." PwC App. Ex. 2. PwC had a duty to Tricarichi with respect to Notice 2008-111 arising from PwC's services in connection with the Westside sale – giving bad advice that it was obligated to revisit with Tricarichi in light of IRS Notice 2008-111. As such, Tricarichi's claim in the Amended Complaint does arise from the services originally performed by PwC relating to the sale of West Side Cellular and relates back to the matters alleged regarding those services in Tricarichi's original complaint filed in April 2016, within the term of the tolling agreement that expired in May 2016. *See* NRCP 15(c)(1); Compl. ¶¶ 73-74 (alleging PwC fraudulently concealed its misdeeds, including – as discovery subsequently bore out – concealing its knowledge of the illegitimacy of the Midco transaction).

Finally, it would be inequitable to dismiss Plaintiff's claim. Despite numerous opportunities to warn Plaintiff after the issuance of Notice 2008-111, PwC stayed silent, and did not even reveal its consideration of the Notice's applicability to Plaintiff (and its misguided decision to let Plaintiff nonetheless proceed at his peril) until compelled to do so during the limited discovery allowed before the Amended Complaint was filed. In such a circumstance, "the Court cannot resolve … factual questions [as to Plaintiff's knowledge], and must, as is general practice, allow the case to proceed[.]" *Bourdel v. Wells Fargo Advisors, LLC*, 2013 WL 1855745 at *4 (D.Nev. Apr. 30, 2013) (equitably tolling statute of limitations when plaintiff's discovery of evidence of misconduct arguably undermined defendant's initial false assurances of no breach).

E. PwC's Motion to Strike the Jury Trial Demand and Limit Damages Should Be Denied.

1. The 2003 Engagement Letter and Rider Are Inapplicable to Tricarichi's Present Claims.

PwC argues a boilerplate rider purportedly attached to the parties' 2003 engagement letter serves to limit PwC's damages exposure and deprive Tricarichi of a jury trial. But the claims pending before the Court are not predicated upon the original engagement agreement and therefore are not subject to the boilerplate damage-limitation and jury-waiver clauses. Indeed, elsewhere in its motion (and previously in this litigation), PwC emphasizes that the 2003 engagement terminated before Notice 2008-111 issued and PwC's duties arose. *See, e.g.*, PwC Br. at 5, 14, 16.

The "survival" clause in section 10 of the boilerplate ("Other Provisions") does not save PwC's argument. That clause notes, "All terms and conditions of this Agreement that are intended by their nature to survive termination of this Agreement shall survive termination and remain in full force, including … limitations of liability … and resolution of differences." PwC App. Ex. 5 at TRIVAR-NV117249. By their nature, however, limitation-of-liability and jury-waiver clauses "survive" termination to apply to disputes later arising under the contract – not to rope in any dispute subsequently arising between the parties. At minimum, such questions of intent are not properly decided on summary judgment. *See Agricultural Aviation Eng. Co. v. Bd. of Clark Cty. Comm'rs.*, 794 P.2d 710 (Nev. 1990) (reversing summary judgment where fact issue existed as to exculpatory clause's intent).

Even if the damage-limitation and jury-waiver clauses did "survive" the engagement agreement's termination, they are inapplicable on their face. The damage-limitation clause expressly limits PwC's liability to "the total professional fee paid by

[Tricarichi] to [PwC] under this agreement for the particular service to which such claim relates." Rider ⁋ 7. As PwC itself notes, Tricarichi did not pay PwC any fee in connection with its 2008 review of Notice 2008-111, nor receive those services under the agreement. PwC Br. at 16. Similarly, the jury-waiver clause expressly applies only to "differences concerning this Agreement." Rider ⁋ 9. The dispute before the Court is not such a claim. It is a dispute about whether PwC breached duties under applicable industry standards after Notice 2008-111 issued. As such, the 2003 jury waiver and damage limitation clauses are inapplicable on face.

2. The Rider Is Not Properly Part of the Engagement Letter in Any Event.

PwC's arguments about the rider are unavailing for additional reasons. First, there is a genuine issue of material fact as to whether Tricarichi even received the rider. Tricarichi has testified that he did not, and PwC has come forward with no affirmative evidence that he did. Ex. 11 (Tricarichi Dep.) at 46:17-47:10, 71:18-23; Ex. 3 (Stovsky Dep.) at 80:25-81:14.[10] Tricarichi is entitled to have this evidence construed in the light most favorable to him. *See Angel v. Cruse*, 130 Nev. 220, 226 (2014) (finding error in the district court's decision to credit defendants' characterization of plaintiff's affidavit rather than "construe the evidence in [plaintiff's] favor."); *Poole v. Nevada Auto Dealership Investments, LLC*, 135 Nev. 280, 292 (Ct. App. 2019) (plaintiff was entitled to have his own deposition testimony viewed in the light most favorable to him).

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[10] In an affidavit, Stovsky testifies that Tricarichi "executed the Engagement Agreement," defined as "the engagement letter and attached Terms of Engagement to Provide Tax Services." PwC App. Ex. 40 ¶ 7. Stovsky does not testify that Tricarichi signed the Terms of Engagement to Provide Tax Services (he did not) and does not testify that Tricarichi had in his possession the Terms of Engagement to Provide Tax Services when he executed the engagement letter. At the very most, Stovsky's affidavit highlights a dispute of fact regarding the form of the engagement letter received and executed by Tricarichi.

PwC attempts to sidestep Tricarichi's testimony by urging the Court to disregard it entirely under the so-called "sham affidavit" doctrine, but there is neither an affidavit nor a sham. None of the prior statements identified by PwC are contrary to Mr. Tricarichi's testimony that he neither received nor approved the rider before executing the engagement letter: PwC argues Tricarichi's unsworn Complaint references the content of the rider, but the Complaint does not allege that he saw or approved it prior to executing the engagement letter (PwC Br. at 23); PwC argues Tricarichi "acknowledged" the rider in an affidavit in 2017, but, again, Tricarichi did not aver that he had the rider when he executed the agreement, and specifically disvows that the Rider was discussed or drawn to his attention. PwC App. Ex. 38 ¶¶ 4, 5. PwC misleadingly claims Tricarichi produced the letter with the rider in discovery but fails to mention the cited version was received from tax counsel **<u>in 2015</u>**. Ex. 67 (PwC App. Ex. 5 with 2015 cover email).

Still further, Tricarichi's testimony does not fit the narrow circumstances where the "sham affidavit" rule applies. As discussed in *Nutton v. Sunset Station, Inc.*, 131 Nev. 279 (Ct. App. 2015), the question is whether the "conflicting" testimony is out of "desperation" in the face of a pending motion. *Id*. at 294-295. Here, as in *Nutton*, no summary judgment motion was pending at the time of Tricarichi's deposition testimony, and PwC has made no showing that would support an express, affirmative finding that Tricarichi's testimony was "designed solely to avoid summary judgment."[11] At best, PwC identifies a credibility issue for the jury to resolve. PwC's cite to a concurring opinion in

[11] PwC also makes no showing any alleged inconsistency satisfies the elements of judicial estoppel, an extraordinary remedy under Nevada law. *See Delgado v. American Family Ins. Grp.*, 125 Nev. 564, 570 (2009) (listing five factors necessary for estoppel). Among other reasons, PwC's motion for summary judgment was denied under N.R.C.P. 56(f) rather than on the merits. *See* 5/31/2017 Order Regarding Defendant PricewaterhouseCoopers LLP's Motion for Summary Judgment.

an unpublished disposition by the Court of Appeals is nonprecedential, entirely dictum, and inapposite. *See Cynthia Pickett, MSW, LCSW, LADC, Inc. v. McCarran Mansion, LLC*, 2019 WL 7410795 (Nev. Ct. App. Dec. 31, 2019) (unpublished) (court may disregard contradictory affidavits that "cannot otherwise be legitimately reconciled as anything but manufactured").

PwC's second gambit for avoiding Tricarichi's unequivocal testimony argues the rider is part of the agreement regardless whether Tricarichi received it, reviewed it, or approved it. PwC, however, offers no testimony the rider was given to, made available to, or even accessible to Tricarichi. This ends the issue. Although parties *may* bargain by reference to an external document and incorporate the terms of that document into their agreement, the terms themselves must, at minimum, be accessible to the party against whom they are enforced. *Martin v. Citibank, N.A.*, 64 A.3d 477 (N.Y. App. Div. 2009) (affirming denial of summary judgment where plaintiff denied receiving page of agreement and "defendant's employee who rented the box to plaintiff could not recall whether all of the pages of that agreement were actually given to plaintiff."); *La Amapola, Inc. v. Honeyville, Inc.*, 2017 WL 10574226, *4 (C.D. Cal. July 28, 2017) (declining to incorporate terms and conditions referenced in agreement when those terms were not where the agreement said they would be (on the back side of the agreement), and no separate copy of the terms was provided to the plaintiff).

Here, as in *Martin*, Tricarichi testified the engagement letter alone "was the agreement," he had never seen the rider before, he would have proposed changes to it (as he did in the engagement itself), and he never would have signed it as is. Ex. 11 (Tricarichi Dep.) at 71:18-74:6. As in *Martin*, PwC produces no evidence that a copy of the rider was sent to Tricarichi with the engagement letter. And, as in *La Amapola*, there is no incorporation by reference where the agreement guided Tricarichi to something that didn't exist – an attachment – which was not otherwise provided or made available.

PwC has no authority for a different result under Nevada law. Rather, PwC cites unremarkable cases that allow incorporation by reference from a separate writing into a contract. *See Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345-46 (1982) (Subcontract was "one-page, short-form document" requiring subcontractor's conformity with plans and specifications of the main contract); *Living Ecology, Inc. v. Bosch Packaging Technology, Inc.*, 2019 WL 7597039 (D. Nev. Dec. 9, 2019) (business-to-business dispute involving a contract containing specific references to specific terms and conditions).

PwC also ineffectually relies on *Madison Who's Who of Execs. &Profs. Throughout the World, Inc. v. SecureNet Payment Sys., LLC*, 2010 WL 2091691 (E.D.N.Y. May 25, 2010). There, unlike here, the plaintiff signed a statement that "he agreed that he had received a copy of the Terms & Conditions and that he would adhere to all of the guidelines outlined therein." *Id.* at *3. Similarly inapplicable is *Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc.*, 2011 WL 1086035 (N.D. Cal. Mar. 24, 2011), where, unlike here, the reference to incorporated terms was unmistakable and the agreement contained an offer to supply a copy of those terms. *Id.* at *1. No such language, and no such offer of supply is contained within the engagement letter.

3. Genuine Issues of Material Fact Preclude Enforcement of the Damages Limitation Clause.

Given the factual disputes regarding receipt of the rider, the damages limitation clause in the rider cannot be enforced at this stage. Faced with similar scenarios and allegations, courts decline to enter summary judgment, allowing plaintiffs' claims to proceed to trial without preemptively limiting defendants' damages exposure. So, for example, in *U.S. Energy Dev. Corp. v. Superior Well Svcs., Inc.*, 65 N.Y.S.3d 364 (N.Y. App. Div. 2017), the court affirmed denial of summary judgment when the plaintiff did not receive contractual terms and conditions – including a limitation of liability clause – until after the fact, and thus did not accept or ratify such terms. Similarly, in *Lorbrook Corp. v. G&T Inds., Inc.*, 562 N.Y.S.2d 978 (N.Y. App. Div. 1990), dismissal was denied where there was disagreement regarding whether certain terms and conditions, including a forum selection clause, were properly part of the parties' contract. Indeed, in seeking to drastically limit its liability via the rider clause, PwC takes on a heavy burden because such agreements are generally disfavored. *Agricultural Aviation*, 794 P.2d at 712-13 (reversing summary judgment).

One final obstacle to summary judgment on the damage limitation clause remains, as PwC acknowledges, there can be no limitation on damages if PwC was grossly negligent. *See* PwC Br. at 27. While Plaintiff need not prove gross negligence, a jury could find PwC was, in fact, grossly negligent. Under New York law, gross negligence exists where a defendant ignores or gives short shrift to a known risk. *See, e.g., Sommer,* 593 N.E.2d at 1367, 1371 (reversing summary judgment on limitation-of-liability clause where defendant alarm company, thinking its services were no longer needed, ignored fire signals and employee did not question or seek advice from those more knowledgeable); *S.A. de Obras y Servicios, COPASA v. Bank of Nova Scotia*, 96 N.Y.S.3d 173, 176-77 (N.Y. App. Div. 2019) (affirming denial of summary judgment on limitation-of-liability clause where financial advisor deviated from industry standards and internal practices and did not properly address the known risks inherent in developing a bid for a large road project). Nevada law is in accord with New York's. *See Kuser v. Barengo*, 254 P.2d 447, 451-52 (Nev. 1953) (reversing judgment as a matter of law where defendant driver ignored risk posed by equipment, failed to slow down and careened off the road); *F.D.I.C. v. Johnson*, 2012 WL 5818259 at *6 (D.Nev. 2012) (denying motion to dismiss gross negligence claim where defendant allegedly recommended loan despite knowledge that it was not viable).

Here, as in the foregoing cases, PwC ignored and gave short shrift to a known risk. By the time Notice 2008-111 was issued, PwC – via its SME – was well aware of the risks Midco transactions posed for clients such as Tricarichi, particularly the risks posed by evolving IRS pronouncements. Further, PwC's apparent reason for not contacting Tricarichi was a known concern within PwC that "we will hear more from the losing [Midco] plaintiffs in the near future." Ex. 18. PwC's failure – in December 2008 and continuing thereafter – to advise Tricarichi regarding Notice 2008-111 and other material facts about the transaction without even consulting the SMEs constituted gross negligence.

4. The Jury Trial Waiver Is Likewise Unenforceable.

Especially given the factual dispute regarding whether Tricarichi received the rider, jury trial waiver clause cannot be enforced. A contractual jury trial waiver is unenforceable where the party opposing the waiver can show the waiver was not entered into "knowingly and voluntarily." *Lowe Ents. Res. Partners, L.P. v. Eighth Jud. Dist. Ct.*, 40 P.3d 405, 410-11 (Nev. 2002) (Multifactor test to determine whether waiver was knowing and voluntary, including whether waiver was negotiated, conspicuous, and reviewed by counsel). (quoting *Whirlpool Fin. Corp. v. Sevaux*, 866 F.Supp 1102, 1105 (N.D.Ill. 1994). "[A]s the right of jury trial is fundamental, courts indulge in every reasonable presumption against waiver." *Whirlpool*, 866 F.Supp. at 1105 (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

Here, the factors weigh against enforceability. First, PwC concedes there were no negotiations regarding the clause. PwC Br. at 29; *see also Whirlpool*, 866 F.Supp at 1106 ("Where a waiver provision is set out in an unnegotiated form contract … it is presumed that there was not a knowing waiver of the right to a jury trial."). Second, even if Tricarichi received the rider, the jury waiver was still not conspicuous, since it was buried in fine print near the end of the rider. *See* Rider ⁋ 9; *see also Whirlpool*, 866 F.Supp at 1106 ("[A]lthough the provision [unlike PwC's] was printed in capital letters, it was [still] not so conspicuous as to insure a knowing and voluntary waiver…. [it] constituted three lines in a six-page form") And, since Tricarichi never received the waiver, his attorney could not have had an opportunity to review it.[12] The only case PwC cites that the waiver could be enforced despite Tricarichi not receiving the rider – *Supermedia LLC v. Mustell & Borrow*, 2011 WL 13175082 (S.D. Fla. 2011) – is readily distinguishable. In that case, the rider was "available on the Internet." PwC Br. at 30. That is not so here.

Given Tricarichi's fundamental right to a jury trial, and the purported waiver was not entered into knowingly, voluntarily or intentionally, PwC's motion to strike the jury demand should be denied. *See First Union Nat. Bank v. U.S.*, 164 F.Supp. 2d 660 (E.D. Pa. 2001) (jury trial waiver was not knowingly accepted or intelligible, and thus was not enforceable, even though waiver was conspicuous, signatory executed signature page of agreement alone, without seeing documents containing waiver); *Bank of N.Y. v. Cheng Yu Corp.*, 413 N.Y.S.2d 471 (N.Y. App. Div. 1979) (reversing grant of motion to strike jury

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[12] To the extent Tricarichi testified that he "may have" run the "Engagement Agreement" by attorney Randy Hart (*see* PwC Br. at 30), Tricarichi was, of course, referring to the engagement letter *minus* the purported rider. *See* Ex. 11 (Tricarichi Dep.) at 71:18-72:25, 74:7-14.

demand where signatory maintained he could not read the document containing the waiver).

CONCLUSION

For the foregoing reasons, PwC's motions for summary judgment and to strike the jury demand and limit damages should be denied.

Dated: December 4, 2020

SPERLING & SLATER, P.C.

/s/ Scott Hessell

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC and that on this 4th day of December, 2020, I caused the above and foregoing documents entitled **PLAINTIFF MICHAEL TRICARICHI'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** to be served through the Court's mandatory electronic service system, per EDCR 8.02, upon the following:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Madelyn B. Carnate-Peralta
An employee of Hutchison & Steffen, PLLC

Electronically Filed
12/8/2020 5:28 AM
Steven D. Grierson
CLERK OF THE COURT

SCHTO

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A TRICARICHI, Plaintiff, vs PRICEWATERHOUSE COOPERS, LLP, ET AL, Defendant(s),	**Case No.** A 16 735910 B **Dept. No**. XI **Date of Hearing:** N/A **Time of Hearing:** N/A

3rd AMENDED ORDER SETTING CIVIL JURY TRIAL, CALENDAR CALL and PRE-TRIAL CONFERENCE

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a jury on a **Five week stack** to begin, **March 15, 2021 at 1:30p.m.**

B. A calendar call will be held on **March 9, 2021 at 9:30a.m.** Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;

(2) List of depositions;

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

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

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

C. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on **February 18, 2021 at 9:15a.m.**

D. The Pre-Trial Memorandum must be filed no later than **February 12, 2021**, with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the

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

Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DATED this 8th day of December, 2020.

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Elizabeth Gonzalez, District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, a copy of the foregoing 3rd Amended Order Setting Civil Jury Trial, Calendar Call and Pre-Trial Conference was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing Program.

/s/ *Dan Kutinac*
Dan Kutinac

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

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

PricewaterhouseCoopers LLP ("PwC") filed a Motion for Summary Judgment and Motion to Strike Jury Demand (the "Motions") that were set for hearing before the Court for December 21, 2020. Having reviewed and carefully considered the Parties' briefings, the Court denies PwC's Motions. With respect to the causation issues the briefing establishes genuine issues of material fact. With respect to PwC's motion for partial summary judgment and to strike Mr. Tricarichi's jury demand there is no rider that is signed or initialed by Plaintiff waiving the jury trial or agreeing to the limitation of damages.

Accordingly, PwC's Motion for Summary Judgment and Motion to Strike Jury Demand is denied.

DATED this 5th of January, 2021.

ELIZABETH GONZALEZ
DISTRICT COURT JUDGE