

No. 82371

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

v.

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

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

**EXPEDITED MOTION TO STAY TRIAL PENDING WRIT REVIEW
(RELIEF REQUESTED BY MARCH 5, 2021)**

SNELL & WILMER L.L.P.
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Electronically Filed
Feb 02 2021 01:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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Attorneys for Petitioner

**NRAP 27(e) DECLARATION OF PATRICK G. BYRNE, ESQ. IN
SUPPORT OF MOTION TO STAY PENDING WRIT REVIEW**

Patrick G. Byrne, Esq., declares as follows:

1. I am an attorney with the law firm of Snell and Wilmer L.L.P., counsel of record for Defendant PricewaterhouseCoopers LLP (“PwC”) in the above-entitled action. I have personal knowledge of all matters stated herein and would be able to testify competently to them and make this declaration under the penalty of perjury.

2. I make this declaration in support of PwC’s Expedited Motion to Stay Trial Pending Writ Review.

3. On January 5, 2021, the district court issued an Order Denying Defendant PricewaterhouseCoopers LLP’s Motion for Summary Judgment and Motion to Strike Jury Demand. A Notice of Entry of Order was filed on January 20, 2021.

4. On January 22, 2021, PwC filed a Petition for Writ of Mandamus challenging the portion of the Order denying PwC’s motion to strike Plaintiff Michael Tricarichi’s jury demand.

5. Under the Eighth Judicial District Court’s prior Administrative Orders, jury trials had been stayed because of circumstances relating to the COVID-19 pandemic. However, on January 12, 2021, the Eighth Judicial District Court issued Administrative Order 21-01, providing that jury trials will resume starting on February 1, 2021.

6. Under the district court's January 20, 2021 Order and Administrative Order 21-01 reinstating jury trials, this case is set to be tried by a jury and is currently scheduled on a stack beginning on March 15, 2021.

7. PwC moved for a stay of the trial pending writ review on an order shortening time on January 22, 2021.

8. The district court issued a minute order denying PwC's motion to stay on February 1, 2021.

9. Because the jury trial is set to proceed on March 15 – in approximately six weeks – PwC has good cause to request that the Court consider this Motion on an expedited basis and render a decision by March 5, 2021, in time to avoid potentially unnecessarily sending its trial team to Las Vegas.

10. If the trial date is continued to a later date after the filing of this motion, undersigned counsel will promptly inform this Court so that it may adjust the date by which relief is requested.

11. I certify that this motion was filed at the earliest possible time following the denial of the stay in the district court.

12. PwC's motion is being electronically filed and served.

13. Upon information and belief, the telephone numbers and office addresses for the attorneys for all parties are as follows:

Counsel for Real Party in Interest:

Mark A. Hutchison
Todd L. Moody
Todd W. Prall
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Counsel for Petitioner:

SNELL & WILMER L.L.P.
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I hereby certify and affirm under penalties of perjury that the information contained within this Declaration is true, complete and accurate to the best of my knowledge.

EXECUTED this 2nd day of February 2021.

/s/ Patrick G. Byrne

Patrick G. Byrne, Esq.

Introduction and Relevant Factual Background

Michael A. Tricarichi (“Tricarichi”) sued Petitioner PricewaterhouseCoopers LLP (“PwC”) regarding tax advice PwC gave concerning a 2003 transaction in which Tricarichi sold all the stock of his wholly owned company. The Engagement Agreement Tricarichi entered with PwC states on its face that the “Agreement” consists of the “engagement letter and the **attached Terms of Engagement to Provide Tax Services.**” Exhibit 1 (APP387, 390) (bold text in original). In the attached Terms, PwC and Tricarichi unequivocally agreed “not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.” *Id.* (APP393).

PwC sought to enforce the jury waiver by moving to strike Tricarichi’s jury demand concurrently with its motion for summary judgment. Despite previously acknowledging that he had received the Terms, Tricarichi claimed for the first time during his October 2020 deposition that he had not received them. The district court denied PwC’s motion to strike the jury demand because “there is no rider that is signed or initialed by Plaintiff waiving the jury trial.” Exhibit 2 (APP1306).

Contrary to the district court’s reasoning, there is no requirement that Tricarichi must have separately signed or initialed the Terms of Engagement for them to be a binding part of the contract. Tricarichi signed the Engagement Agreement itself, acknowledging his acceptance of the full “Agreement,” which was

defined to include the Terms of Engagement. Nothing more was required.

PwC filed a Petition for Writ of Mandamus in this Court on January 22, 2021, challenging the district court's Order denying PwC's motion to strike Tricarichi's jury demand.¹ PwC now respectfully moves this Court to stay the trial pending its adjudication of the Petition. Should the case proceed to a jury trial before the Court can rule, PwC's Petition would be substantially defeated and PwC would likely lose any meaningful ability to challenge the Order. As this Court has recognized in granting writ review concerning questions of jury waivers, "wait[ing] to challenge the district court's denial of [a] motion to strike the jury demand on appeal" would pose "too difficult a burden to meet on appellate review" given that an appellant must show that "the error complained of substantially affected their rights" and that "the outcome of the case would have been different" absent the error. *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 96 40 P.3d 405, 407-408 (2002). Just as this reasoning supports the need for writ review, it equally supports the need to stay an impending jury trial pending that review.

For these reasons, and as explained further below, the Court should order that the trial in this matter be stayed pending writ review.

¹ As detailed in the above NRAP 27(e) Declaration, in compliance with NRAP 8(a), PwC first sought a stay in the district court, which motion the district court denied on February 1, 2021.

Argument

I. The NRAP 8 Factors Strongly Favor a Stay of the Trial.

In considering whether to grant a stay, the Court considers: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits in the appeal or writ petition. NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657 (2000). Not all factors need be weighed equally; the first factor may be especially strong and counterbalance other factors. *State v. Robles-Nieves*, 129 Nev. 537, 542 (2013) (citing *Mikohn*, 120 Nev. at 251). All of these factors weigh in favor of staying the trial pending the adjudication of PwC's Petition for Writ of Mandamus.

A. The Object of the Writ Proceeding Will be Defeated Absent a Stay of the Trial.

This factor clearly favors a stay because the entire object of PwC's Petition will be defeated if the trial is not stayed. *See Mikohn*, 120 Nev. at 252, 89 P.3d at 39 (holding that a stay is warranted where continuing with the proceedings will "render ... any victory on appeal ... hollow"). This Court has explicitly recognized that an appeal of a district court's refusal to enforce a contractual jury trial waiver after a trial occurs is "too difficult a burden" given that Nevada law requires an

appellant to show that “the error complained of substantially affected their rights” and that “the outcome of the case would have been different” absent the error. *Lowe Enters. Residential Partners, L.P.*, 118 Nev. at 96, 40 P.3d at 408. As such, this factor favors a stay.

B. PwC Will Be Substantially Injured Absent a Stay.

For similar reasons, PwC will be substantially injured without a stay. As this Court has recognized, “pre-litigation jury waivers are grounded in the parties’ freedom to contract and their corresponding right to allocate risk,” and in accordance with Nevada’s “public policy favoring enforceability of contracts.” *Id.* If PwC is forced to try this case before a jury – a process that is more time-consuming and more expensive than a bench trial – it will be permanently deprived of the benefit of its bargain.

C. A Stay Will Not Prejudice Tricarichi.

Tricarichi faces no prejudice from a stay of the trial until writ review is complete. The only potential prejudice Tricarichi could claim is delay, which is insufficient as a matter of law. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) (“a mere delay in pursuing ... litigation normally does not constitute irreparable harm”).

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D. PwC Satisfies the Final Stay Factor.

1. PwC's Petition Is Meritorious.

PwC's Petition should succeed on the merits because the district court erred by ruling that a plaintiff can carry his burden of proving that a jury trial waiver was not entered into knowingly, voluntarily, or intentionally simply by asserting that he did not receive the relevant part of the contract.

“[I]n accordance with Nevada’s public policy favoring the enforceability of contracts, ... contractual jury trial waivers are presumptively valid unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally.” *Lowe*, 118 Nev. at 97, 40 P.3d at 408. *Id.* Likewise, a party “is conclusively presumed to know [the] conten[t]s” of the full Agreement he signed “and to assent to them.” *Campanelli*, 86 Nev. at 841, 477 P.2d at 872. Moreover, where a collateral document is “by express terms made part of the contract, the terms of [that document] will control with the same force as though incorporated in the very contract itself.” *Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982). Indeed, numerous courts have held that where a party signs a contract that incorporates terms and conditions, those terms and conditions are part of the contract as a matter of law even if one party later claims that he did not actually receive a physical copy of them.

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

EMC, 2011 WL 1086035, at *4 (N.D. Cal. Mar. 24, 2011) (enforcing arbitration clause contained in General Terms and Conditions that were explicitly referenced in purchase agreement and were not attached but were available upon request).

Under these basic principles of contract law, the jury trial waiver is part of the contract between Tricarichi and PwC. There can be no doubt that Tricarichi and PwC expressly made the Terms of Engagement, including the jury trial waiver, part of the contract. The second sentence of the Engagement Agreement defines the “Agreement” to include the “engagement letter and the **attached Terms of Engagement to Provide Tax Services.**” Ex. 1 (APP388) (bold text in original). At the conclusion of the letter, Tricarichi signed it directly below a notation on the last page that the letter included “Enclosure(s): Terms of Engagement to Provide Tax Services.” *Id.* (APP391). By so signing the letter, Tricarichi acknowledged his acceptance of the “Agreement,” which had been defined on the first page to include both the engagement letter and the attached Terms of Engagement. Accordingly, the Terms of Engagement, including the jury trial waiver, should “control with the same force as though incorporated in the very contract itself.” *Lincoln Welding Works*, 98 Nev. at 345, 647 P.2d at 383; *see also MMAWC, LLC v. Zion Wood Obi Wan Trust*, 135 Nev. 275, 279, 448 P.3d 568, 572 (2019) (enforcing terms of document that contract stated was “attached hereto and incorporated herein”).

The reasoning in *Madison* underscores this conclusion here. There were two references to the Terms of Engagement in the Engagement Agreement's signed pages, including one in bold. *See Madison*, 2010 WL 2091691, at *3; Ex. 1 (APP387, 391). Tricarichi expressly agreed that the Terms were part of the "Agreement" between him and PwC. *Id.* (APP397, 391). Even crediting Tricarichi's dubious testimony that he did not receive a copy, he testified that he did not ask for a copy, nor ask about the enclosures specifically referenced on the signature page. Ex. 3 (APP448-49).

The district court's refusal to enforce the jury trial waiver because Tricarichi did not separately sign or initial the Terms of Engagement is in error. It makes no difference that Tricarichi claimed for the first time during his October 2020 deposition that he did not actually receive a copy of the Terms of Engagement. Not only was this claim directly contrary to assertions Tricarichi had made earlier in the litigation, including in his complaint, in a sworn affidavit, and in a brief submitted to the district court, but it should be irrelevant as a matter of law, Tricarichi does not dispute that he received and signed the engagement letter from PwC. Ex. 1 (APP391); Exhibit 3 (APP444-45). The letter defines the "Agreement" to include the Terms of Engagement, and Tricarichi made edits or notations on each of the pages of the letter that referenced the Terms. But if a party can create a fact question, and thereby obtain a jury trial, simply by claiming that he did not receive

or was not aware of the jury trial waiver—even though he signed a contract agreeing to be bound by the terms containing the jury trial waiver—it will render such waivers a dead letter.

Because PwC should succeed on the merits, the final factor weighs in favor of a stay.

2. *Because the Writ Proceeding Would Be Mooted Absent a Stay, PwC Need only Show that the Writ Proceeding Is Not Frivolous or Made for Dilatory Purposes.*

PwC satisfies this factor because it has demonstrated that denial of a stay will moot the writ proceeding and, under these circumstances, the only remaining question is whether the appeal is frivolous or made for dilatory purposes. *See Mikohn*, 120 Nev. at 253, 89 P.3d at 39. Far from frivolous, the writ petition raises substantial questions, which alone satisfies the final stay factor.

In circumstances where denying a stay would effectively eliminate the appeal, the last stay factor (likelihood of success on the merits) is “far less significant” than the first stay factor (whether the object of the appeal will be defeated if the stay is denied). *See Robles-Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 405-06 (finding that the first stay factor took on added significance because denying a stay would effectively eliminate the right to appeal); *see also Mikohn*, 120 Nev. at 253, 89 P.3d at 39 (finding that the last stay factor was less significant where the object of an appeal would be defeated if a stay was denied). In these

circumstances, the last stay factor “will counterbalance the first factor only when the appeal appears frivolous or the stay [is] sought purely for dilatory purposes.” *Id.* For example, in *Robles-Nieves*, this Court held that the first factor took on an “added significance in the context of an interlocutory appeal from an order granting a suppression motion because denying a stay would effectively eliminate the right to appeal . . .” 129 Nev. at 546, 306 P.3d at 405-06. Similarly, in *Mikohn*, the Court held that “[b]ecause the object of an appeal seeking to compel arbitration will be defeated if a stay is denied, and irreparable harm will seldom figure into the analysis, a stay is generally warranted [absent a showing that the appeal is frivolous or made purely for dilatory purposes].” 120 Nev. at 253, 89 P.3d at 39. Here, where it cannot reasonably be disputed that denial of a stay would moot the writ review, the likelihood of success is of minimal import, and only matters to evaluate frivolousness.

Conclusion

PwC respectfully requests that the Court stay the trial pending writ review.

DATED: February 2, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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Daniel C. Taylor
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Denver, Colorado 80202

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 2, 2021, I caused to be served a true and correct copy of the foregoing **EXPEDITED MOTION TO STAY TRIAL PENDING WRIT REVIEW** 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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Attorneys for Real Party in Interest

/s/Maricris Williams

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

4843-8100-6554.3

EXHIBIT 1

EXHIBIT 1

PricewaterhouseCoopers LLP
BP Tower, 27th Floor
200 Public Square
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

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

April 10, 2003

Dear Mr. Tricarichi:

We appreciate the opportunity to provide tax services to you and Westside Cellular, Inc. (collectively "you"). This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this "Agreement") set forth an understanding of the nature and scope of the services to be performed and the fees we will charge for the services, and outline the responsibilities of PricewaterhouseCoopers LLP ("PricewaterhouseCoopers," "we" or "us") and you necessary to ensure that PricewaterhouseCoopers' professional services are performed to achieve mutually agreed upon objectives.

Summary of Services

You have requested that PricewaterhouseCoopers perform tax research and evaluation services.

Timing of Engagement

We will be prepared to begin immediately.

Tax Return Disclosure and Tax Advisor Listing Requirements

Treasury regulations section 1.6011-4 require that taxpayers disclose to the IRS their participation in certain "reportable transactions." You agree to advise us if you determine that any matter covered by this Agreement is a reportable transaction that is required to be disclosed under section 1.6011-4. Similar Treasury regulations issued under Internal Revenue

EXHIBIT
PwC Dep Ex. No.

13

A-16-735910-B

071

TRICAR-NV0117243

APP0387



PricewaterhouseCoopers LLP
BP Tower, 27th Floor
200 Public Square
Cleveland OH 44114-2301
Telephone (216) 875 3000
Facsimile (216) 566 7846

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

April 10, 2003

Dear Mr. Tricarichi:

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PER DISCUSSION W/ M. TRICARICI:

1. HE UNDERSTANDS AND AGREES
THAT THIS IS REQUIRED

2. FEES: PWC AGREES TO
BILL MONTHLY SO THAT TRICARICI
CAN BE UP-TO-DATE ON FEES
INCURRED. HE UNDERSTANDS THE
FEES MAY EXCEED \$20,000.

- DISCUSSED W/ RON PADGETT



Code section 6112 require that we maintain lists of certain client engagements where we are material advisors to clients that have participated in either a reportable transaction or a transaction that is required to be registered with the IRS as a tax shelter. Therefore, if we determine, after consultation with you, that you have participated in either a reportable transaction or one required to be registered under Internal Revenue Code section 6111, we will place your name and other required information on a list. Sometime in the future the IRS may request our lists of reportable or section 6011 transactions, and we may be compelled to provide the IRS with the contents of our lists, including your name. We will advise you if we are ultimately required to provide your name to the IRS in connection with any matter covered by this agreement.

Fees

The fee for services relative to this project as described in the "Summary of Services" section of this Agreement will be based on our standard hourly rates. We will also bill you for our reasonable out-of-pocket expenses and our internal charges for certain support activities. Our internal charges include certain flat-rate amounts that reflect an allocation of estimated costs, including those associated with airline ticketing and general office services, such as computer usage, telephone charges, facsimile transmissions, postage and photocopying. We leverage our size to achieve cost savings for our clients in all areas of expense, including those covered by these internal charges and use this system of allocation to minimize total costs.

Payment of our invoices is due on presentation and expected to be received within 20 days of the invoice date.

We reserve the right to charge interest on any past due balances at a rate of 1% per month or part thereof.

TOTAL COST OF SERVICES IS NOT TO EXCEED \$ 20,000 WITHOUT
PRIOR WRITTEN AUTHORIZATION

* * * * *

We look forward to working with you and your staff during the completion of this important project. If this Agreement is in accordance with your understanding of our engagement, please sign the enclosed copy of this letter and return it to us. Please sign and retain the original for your files. If you have any questions or comments regarding the terms of this Agreement, please do not hesitate to call Mr. Richard P. Stovsky at 216-875-3111.

(2)

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TRICAR-NV0117246

APP0390

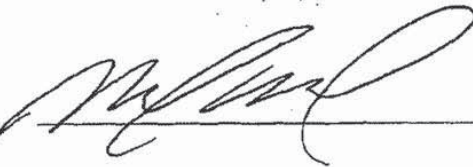


Yours very truly,

PricewaterhouseCoopers LLP

Enclosure(s): Terms of Engagement to Provide Tax Services

Accepted: Michael A. Tricarichi and Westside Cellular, Inc.

By: 

Date: 4/25/03

(3)

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TRICAR-NV0117247

APP0391

Terms of Engagement to Provide Tax Services

1. Entire Agreement

These Terms of Engagement to Provide Tax Services and the engagement letter to which they are attached (collectively, the "Agreement") constitute the entire agreement between the client to whom such engagement letter is addressed and any other legal entities referred to therein ("Client" or "you") and PricewaterhouseCoopers LLP, a Delaware limited liability partnership ("PricewaterhouseCoopers," "we" or "us"), regarding the services described in the engagement letter.

2. Responsibilities of the Client

In circumstances where the Client is a business entity, the Client agrees to identify those individuals authorized to request services from PricewaterhouseCoopers under the terms of this Agreement. Individuals authorized to request services agree to identify the purpose of the services, and identify for whom the services are to be performed (e.g., the corporation, an employee, a director) at the time the services are requested.

A fundamental term of this Agreement is that the Client will provide us with all information relevant to the services to be performed and to provide us with any reasonable assistance as may be required to properly perform the engagement. The Client agrees to bring to our attention any matters that may reasonably be expected to require further consideration to determine the proper treatment of any relevant item. The Client also agrees to bring to our attention any changes in the information as originally presented as soon as such information becomes available. Client consents to the use, by PricewaterhouseCoopers staff visiting or working from the Client site, of the Client's resources, including, but not limited to network, Internet and extranet access, for the purpose of accessing similar PricewaterhouseCoopers resources. Client acknowledges that it retains all management responsibilities related to judgments and decisions regarding the Client's financial, tax or business matters.

Unless otherwise indicated, any tax returns, reports, letters, written opinions, memoranda, etc. delivered to the Client as part of the tax services ("Deliverables") are solely for the Client and are not intended to nor may they be relied upon by any other party ("Third Party").

3. Responsibilities of PricewaterhouseCoopers

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

Some of the matters on which we may be asked to advise the Client may have implications to other persons or entities. However, we have no responsibility to these persons or entities unless we are specifically engaged to address these issues to such persons or entities, and we agree to do so in writing.

Tax jurisdictions may impose penalties for certain failures. Relative to the services provided under the terms of this Agreement, we will discuss with Client any tax positions of

which we are aware that we believe may subject the Client to penalties. We will also discuss with Client possible courses of action related to the Client's tax return to avoid the imposition of any penalty (e.g., disclosure). We will use our judgment in resolving questions where the tax law may be unclear, or where there are conflicts between taxing authorities' interpretations of the law and other supportable positions, and discuss them with you. We are not responsible for any penalties imposed for positions that have been discussed with Client where we recommended a course of action to avoid penalties and the Client elected not to pursue such course.

PricewaterhouseCoopers is not responsible for any penalties assessed against the Client as the result of the Client's failure to provide us with all the relevant information relative to the issue under consultation. Furthermore, the Client agrees to reimburse PricewaterhouseCoopers for any penalties imposed on PricewaterhouseCoopers, its partners or staff, as the result of the Client's failure to provide such information.

4. Electronic Communications

In performing services under this Agreement, PricewaterhouseCoopers and/or Client may wish to communicate electronically either via facsimile, electronic mail or similar methods (collectively, "E-mail"). However, the electronic transmission of information cannot be guaranteed to be secure or error free and such information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete or otherwise be adversely affected or unsafe to use. Unless you notify us otherwise, we shall regard your acceptance of this Agreement as including your consent to use E-mail. All risks related to your business and connected with the use of E-mail are borne by you and are not our responsibility.

Both parties will carry out procedures to protect the integrity of data. In particular, it is the recipient's responsibility to carry out a virus check on any attachments before launching or otherwise using any documents, whether received by E-mail or on disk or otherwise.

5. Engagement Limitations

The services performed under this Agreement will not constitute an examination or review in accordance with generally accepted auditing or attestation standards. Except as may be specified in this Agreement, we will not audit or otherwise verify the information supplied to us, from whatever source, in connection with this engagement.

In performing services under this Agreement, we may occasionally discuss financial accounting matters with Client. The services performed under this Agreement, including any such discussions, are not intended to and do not include an engagement or other undertaking to perform an engagement to issue an opinion on the application of financial accounting matters as contemplated under Statement on Auditing Standards (SAS) No. 97. We have no responsibility for such matters unless we are specifically engaged to address these issues pursuant to a specific written engagement agreement.

As you are aware, tax returns and other filings are subject to examination by taxing authorities. We will be available to assist the Client in the event of an audit of any issue for which we have provided services under this Agreement. However, unless otherwise indicated, our fees for these additional

services are not included in our fee for the services covered by this Agreement.

We will not be prevented or restricted by anything in this Agreement from providing services for other clients.

In the course of our engagement, certain communications between Client and PricewaterhouseCoopers may be subject to a confidentiality privilege. Client recognizes that we may be required to disclose such communications to federal, state and international regulatory bodies; a court in criminal or other civil litigation; or to other Third Parties, including Client's independent auditors, as part of our professional responsibilities. In the event that we receive a request from a Third Party (including a subpoena, summons or discovery demand in litigation) calling for the production of information, we will promptly notify you. We agree to cooperate with Client in any effort to assert any privilege with respect to such information, provided Client agrees to hold PricewaterhouseCoopers harmless from and be responsible for any costs and expenses resulting from such assertion.

6. Disassociation or Termination of Engagement
Either party may terminate this Agreement upon written notice to the other party. In the event of termination, Client will be responsible for fees earned and expenses incurred through the date termination notice is received.

7. Limitation of Liability
All services will be rendered by and under the supervision of qualified staff in accordance with the AICPA's Statements on Standards for Tax Services and the terms and conditions set forth in this Agreement. PricewaterhouseCoopers makes no other representation or warranty regarding either the services to be provided or any Deliverables; in particular, and without limitation of the foregoing, any express or implied warranties of fitness for a particular purpose, merchantability, warranties arising by custom or usage in the profession, and warranties arising by operation of law are expressly disclaimed.

IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED THAT PRICEWATERHOUSECOOPERS WAS GROSSLY NEGLIGENT OR ACTED WILLFULLY OR FRAUDULENTLY, SHALL PRICEWATERHOUSECOOPERS BE LIABLE TO THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS, EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD PARTY, WHETHER A CLAIM BE IN TORT, CONTRACT OR OTHERWISE FOR ANY AMOUNT IN EXCESS OF THE TOTAL PROFESSIONAL FEE PAID BY YOU TO US UNDER THIS AGREEMENT FOR THE PARTICULAR SERVICE TO WHICH SUCH CLAIM RELATES. IN NO EVENT SHALL PRICEWATERHOUSECOOPERS BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, EXEMPLARY, PUNITIVE, LOST PROFITS OR SIMILAR DAMAGES, EVEN IF WE HAVE BEEN APPRISED OF THE POSSIBILITY THEREOF.

8. Indemnification
Client agrees to indemnify and hold harmless PricewaterhouseCoopers and its personnel from any and all Third-Party claims, liabilities, costs, and expenses, including reasonable attorneys fees, arising from or relating to the services under this Agreement, except to the extent finally determined to have resulted from the gross negligence, willful misconduct or fraudulent behavior of PricewaterhouseCoopers relating to such services.

9. Resolution of Differences
In the unlikely event that differences concerning this Agreement should arise that are not resolved by mutual

agreement, to facilitate judicial resolution and save time and expense of both parties, PricewaterhouseCoopers and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.

10. Other Provisions
Notwithstanding any terms or conditions in this Agreement to the contrary, no conditions of confidentiality within the meaning of IRC §6111(d) or US Treasury regulations §1.6011-4 are intended, and Client (and each employee, representative, or other agent of Client) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of any transaction and all materials of any kind (including opinions or other tax analysis) that are provided to the Client relating to such tax treatment and tax structure. The foregoing sentence is effective as of the commencement of any discussions we may have had with Client regarding any transaction related to any services covered by this Agreement.

Neither party shall be liable to the other for any delay or failure to perform any of the services or obligations set forth in this Agreement due to causes beyond its reasonable control. All terms and conditions of this Agreement that are intended by their nature to survive termination of this Agreement shall survive termination and remain in full force, including but not limited to the terms and conditions concerning payments, warranties, limitations of liability, indemnities, and resolution of differences. If any provision of this Agreement, including the Limitation of Liability clause, is determined to be invalid under any applicable law, such provision will be applied to the maximum extent permitted by applicable law, and shall automatically be deemed amended in a manner consistent with its objectives to the extent necessary to conform to any limitations required under applicable law.

This Agreement will be governed by the laws of the State of New York.

Revised 04/08/03

Terms of Engagement to Provide Tax Services (California Addendum)

California law requires that we include the following notice in all engagement letters with California entities or individuals:

Engagement Letter Addendum

Notice Pursuant to California Business & Professions Code, Section 5079(a)(5)

PricewaterhouseCoopers LLP is owned by professionals who hold CPA licenses as well as by professionals who are not licensed CPAs. Depending on the nature of the services we provide, non-CPA owners may be involved in providing services to you now or in the future. If you have any questions about this matter, please do not hesitate to ask.

Revised 04/08/03

078

TRICAR-NV0117250

APP0394

EXHIBIT 2

EXHIBIT 2

1 **ORDR**

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3
4
5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**
7

8 MICHAEL A. TRICARICHI,
9 Plaintiff,

10 vs.

11 PRICEWATERHOUSECOOPERS LLP,
12 COÖPERATIEVE RABOBANK U.A.,
13 UTRECHT-AMERICA FINANCE CO.,
SEYFARTH SHAW LLP, and GRAHAM
R. TAYLOR,

14 Defendants.
15

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**

16 PricewaterhouseCoopers LLP ("PwC") filed a Motion for Summary Judgment and Motion
17 to Strike Jury Demand (the "Motions") that were set for hearing before the Court for December
18 21, 2020. Having reviewed and carefully considered the Parties' briefings, the Court denies
19 PwC's Motions. With respect to the causation issues the briefing establishes genuine issues of
20 material fact. With respect to PwC's motion for partial summary judgment and to strike Mr.
21 Tricarichi's jury demand there is no rider that is signed or initialed by Plaintiff waiving the jury
22 trial or agreeing to the limitation of damages.
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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

EXHIBIT 3

EXHIBIT 3

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DISTRICT COURT
CLARK COUNTY, NEVADA
- - - - - x
MICHAEL A. TRICARICHI, :
Plaintiffs, :
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 MICHAEL A. TRICARICHI
Thursday, October 1, 2020
9:01 a.m.

Job No.: 323672
Pages: 1 - 339
Reported By: Michelle M. Yohler, CSR, RMR, CRR

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

2

1 Deposition of MICHAEL A. TRICARICHI, held
2 remotely pursuant to notice before Michelle M.
3 Yohler, CSR, RMR, CRR, a certified shorthand
4 reporter in and for the County of Will, State of
5 Illinois.
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1 A P P E A R A N C E S

2 ON BEHALF OF THE PLAINTIFF:

3 MR. SCOTT HESSELL

4 MR. BLAKE SERCYE

5 SPERLING & SLATER

6 55 West Monroe Street, Suite 3200

7 Chicago, Illinois 60603

8 312.641.3200

9 shessell@sperling-law.com

10 bsercye@sperling-law.com

11

12 ON BEHALF OF THE DEFENDANTS:

13 MR. CHRISTOPHER D. LANDGRAFF

14 BARTLIT BECK LLP

15 54 West Hubbard Street

16 Chicago, Illinois 60654

17 312.494.4400

18 chris.landgraff@bartlikbeck.com

19

20

21 ALSO PRESENT:

22 Mr. Dan Lohaus, Videographer

23 Mr. Lawrence Wallace, Technician.

24

25

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

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

WITNESS

PAGE

MICHAEL TRICARICHI

By Mr. Landgraff.....

9

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

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

46

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

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

47

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

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

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

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

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

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

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