

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

**REPLY IN SUPPORT OF EXPEDITED MOTION TO STAY TRIAL  
PENDING WRIT REVIEW**

**(RELIEF REQUESTED BY MARCH 5, 2021)**

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## Introduction

PwC respectfully moves to stay the trial pending the adjudication of its Petition for a Writ of Mandamus because PwC would lose any meaningful ability to challenge the Order if the case were to proceed to a jury trial before adjudication of its Petition. Indeed, this Court has explicitly recognized that “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 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. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 96 40 P.3d 405, 407-408 (2002).

In opposition, Michael Tricarichi (“Tricarichi”) does not seriously dispute that writ review would be mooted absent a stay, that PwC will be substantially injured absent a stay, or that PwC’s Petition is neither frivolous nor for the purposes of delay. As such, PwC satisfies three of the four factors relevant to granting a stay. Instead, Tricarichi focuses on (1) his self-serving, inconsistent testimony claiming that he never received a copy of the complete contract, and (2) the timing of PwC’s motion to strike the jury demand – a fact that played no role in the district court’s denial of a stay. Neither of these arguments justify the denial of a stay.

The Court should stay the trial pending writ review.

## **Argument**

### **I. There Is No Real Dispute that Three of the Four Stay Factors Favor PwC.**

The Opposition generally concedes that writ review will be mooted absent a stay, that PwC will be substantially injured absent a stay, and that Tricarichi will not. Indeed, he acknowledges that “[i]t cannot be denied that PwC’s goal in pursuing this writ could be affected if a stay is not granted,” and instead argues that this is unimportant. Opp’n at 8. But while satisfying this factor does not render a stay “automatic,” to give it “little weight” as Tricarichi urges is contrary to Nevada law. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004); *State v. Robles-Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 405-06 (2013). The harm PwC faces absent a stay is closely related, as it will lose the benefit of its bargain if PwC must try this case to a jury with no effective ability to challenge that ruling. Finally, while Tricarichi complains of delay, he also concedes that he will not be seriously harmed by a stay. Opp’n at 8. Though he argues the “balance of the equities” disfavors a stay, there is no such factor in the analysis, and in any event his only point supporting such a factor is delay.

### **II. PwC’s Petition Is Meritorious.**

Tricarichi argues that the district court did not clearly err or arbitrarily and capriciously abuse its discretion in denying the motion to strike the jury demand. But where denial of a stay will moot the writ proceeding, the question is whether the

appeal is frivolous or made for dilatory purposes. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d at 39; *Robles-Nieves*, 129 Nev. at 546, 306 P.3d at 405-06. Though *Mikohn* and *Robles-Nieves* concerned interlocutory appeals, the NRAP 8(c) factors apply equally to writ review. *See* NRAP 8 (“Stay or Injunction Pending Appeal or Resolution of Original Writ Proceedings”). And, because PwC’s Petition is neither frivolous nor made for dilatory purposes, a stay is warranted here.

Notwithstanding the above standard, PwC’s Petition is likely to succeed on the merits. Tricarichi seeks to avoid review of the Order by casting the ruling as a finding of fact, but the district court’s decision giving conclusive weight to his self-serving testimony that he did not actually receive a copy of the Terms of Engagement (the “Terms”) was legal error. First, as explained in PwC’s Petition, Tricarichi’s self-serving claim that he did not receive the Terms should be irrelevant as a matter of law. Tricarichi indisputably signed the engagement letter, and that letter defined the “Agreement” to include both the letter itself *and the Terms*. APP391, 444-45. Pursuant to standard principles of Nevada contract law, Tricarichi was presumed to know the full contents of the Agreement, including the Terms. *See Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970). Numerous courts have refused to allow a contracting party to escape provisions in attached terms that are explicitly referenced in the main contract by later claiming in court he did not receive them. *See* PwC Pet. at 19-21.

This Court should hold the same here and refuse to allow Tricarichi to escape the jury trial waiver with a last-minute claim that he did not receive the Terms. Until his October 2020 deposition, Tricarichi never disputed that the Terms were part of his Engagement Agreement. In his April 2016 complaint, he admitted that he “signed” an “Engagement Letter” with PwC, and specifically referenced a provision contained in the Terms. *See* PwC Pet. at 9. Tricarichi also submitted an affidavit in 2017 acknowledging that his Engagement Agreement with PwC consisted of both the letter and the Terms, stating that “PwC sent me an engagement letter and asked me to sign it ... There were no other drafts of the engagement letter, *or of the rider to the letter*, exchanged with me.” APP1250 at ¶ 3. Further, Tricarichi’s opposition to PwC’s motion for summary judgment confirmed that the Terms were “attached to the engagement letter that PwC sent” him. APP1278-79.

Yet, in his October 2020 deposition, Tricarichi claimed for the first time that he did not actually receive a copy of the Terms. APP443-44. Tricarichi also testified that he did not ask for a copy of the Terms when he saw them referenced in the Engagement Agreement. APP448-49. This testimony should make no difference, as it was not only directly contrary to his earlier assertions, but it should be irrelevant as a matter of law. Tricarichi received and signed the engagement letter from PwC. APP391, 444-45. The letter defines the “Agreement” to include the Terms of Engagement, and Tricarichi made detailed edits or notations on each of

the pages of the letter that referenced the Terms. APP388, 391. The district court erred by ruling that Tricarichi's 2020 testimony exempted him from the Terms.

### **III. The Motion's Timing Is Irrelevant.**

PwC's November 2020 Motion filed concurrently with its Motion for Summary Judgment was not "last-minute," or otherwise unreasonably delayed. PwC filed it shortly after the close of fact discovery. Nor did the timing factor into the district court's ruling in any respect; the sole reason it gave for denying PwC's motion was that the Terms were not separately initialed or signed. APP1306-07. In short, nothing about PwC's Motion was surprising or late. As such, the unpublished decisions Tricarichi cites are inapposite. *See 3300 Partners, LLC v. Eighth Judicial Dist. Court*, 410 P.3d 981 (Nev. 2018) (unpublished) (affirming denial of motion to strike jury demand as untimely where it was filed after trial date and during preparations for a jury trial); *GGP, Inc. v. Eighth Judicial Dist. Court*, 437 P.3d 178 (Nev. 2019) (unpublished) (containing almost no discussion as to timing and, as can be the case with unpublished dispositions, insufficient discussion of the circumstances or analysis to materially aid the Court here).

The Court should grant PwC's Motion to Stay the Trial Pending Writ Review.

DATED: February 16, 2021

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## CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 16, 2021, I caused to be served a true and correct copy of the foregoing

### **REPLY IN SUPPORT OF 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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