No. 82371

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

Electronically Filed Mar 26 2021 03:14 p.m. Elizabeth A. Brown Clerk of Supreme Court

v.

The Eighth Judicial District Court, in and for the County of Clark, State of Nevada, and The Honorable Elizabeth Gonzalez,

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

MICHAEL TRICARICHI'S APPENDIX

Mark A. Hutchison (4639) Todd L. Moody (5430) Todd W. Prall (9154) HUTCHISON & STEFFEN, LLC 10080 West Alta Drive, Suite 200 Las Vegas, NV 89145 Tel: (702) 385-2500 Fax: (702) 385-2086 Scott F. Hessell (*Pro Hac Vice*) Blake Sercye (*Pro Hac Vice*) SPERLING & SLATER, P.C. 55 West Monroe, Suite 3200 Chicago, IL 60603 Tel: (312) 641-3200 Fax: (312) 641-6492

Docket 82371 Document 2021-08767

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Summary Judgment		
App'x of Exhibits In Support of Plaintiff	12/4/2020	1312
Michael Tricarichi's Opposition to Defendant's		
Motion for Summary Judgment, and Exhibits		
3, 11, 18, 20, 21, 32, 58, 61, 67, and 69 thereto		

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3, 11, 18, 20, 21, 32, 58, 61, 67, and 69 thereto		
Order Regarding Defendant	5/31/2017	1308
PricewaterhouseCoopers LLP's Motion for		
Summary Judgment		

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this date the *MICHAEL TRICARICHI'S APPENDIX* was filed electronically with the Clerk of the Nevada Supreme Court, and served on the

following by Electronic Service:

Snell & Wilmer L.L.P Patrick G. Byrne, Esq. <u>pbyrne@swlaw.com</u> Kelly H. Dove <u>kdove@swlaw.com</u> Bradley T. Austin <u>baustin@swlaw.com</u> 3883 Howard Hughes Pkwy Suite #100 Las Vegas, NV 89169 Bartlit Beck LLP Mark L. Levine (admitted pro hac vice) <u>mark.levine@bartlitbeck.com</u> Christopher D. Landgraff (admitted pro hac vice) <u>chris.landgraff@barlitbeck.com</u> Katharine A. Roin (admitted pro hac vice) <u>kate.roin@barlitbeck.com</u> 54 West Hubbard Street, Suite 300 Chicago, Illinois 60654

DATED this 26th day of March, 2021.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

1	ODM	Electronically Filed 5/31/2017 3:29 PM Steven D. Grierson CLERK OF THE COURT
2	Mark A. Hutchison (4639) Todd L. Moody (5430)	Atump. Atum
3	Todd W. Prall (9154)	
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	(Pro Hac Vice)	
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14	tdbrooks@sperling-law.com	
15	Attorneys for Plaintiff	
16	DISTRICT COUF	RT
17	CLARK COUNTY, NE	EVADA
18	MICHAEL A. TRICARICHI,) CASE NO. A-16-735910-B
19		DEPT NO. XV
20	Plaintiff,)
	V.	ORDER REGARDING
21 22	PRICEWATERHOUSE COOPERS, LLP,	DEFENDANT PRICEWATERHOUSECOOPERS
22	COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO.,	LLP'S MOTION FOR SUMMARY JUDGMENT
24	SEYFARTH SHAW LLP and GRAHAM R. TAYLOR,	
25		
	Defendants.)
26		
27		
28		
		APP1308

1	Defendant PricewaterhouseCoopers LLP's (PwC's) Motion for Summary Judgment
2	came on for hearing before this Court on May 10, 2017. Todd L. Moody and Scott F. Hessell
3	appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and
4	Winston P. Hsiao appeared on behalf of Defendant PwC.
5	The COURT CANNOT FIND, based on the record presently before it, that genuine
6 7	issues of material fact exist, regardless of which state's law applies in this case.
8	The COURT NOTES that Mr. Tricarichi affirmatively says in his Affidavit on page 3,
9	lines 10-12, "PwC's work and advice to me about proceeding with the Fortrend transaction
10	extended into August 2003"
11	THE COURT FINDS NRCP 56(f) relief as set forth in paragraph 10 of Mr. Tricarichi's
12	Affidavit is appropriate.
13	Having considered the same and good cause appearing,
14 15	IT IS HEREBY ORDERED that Defendant PwC's Motion for Summary Judgment is
15	DENIED without prejudice solely based on NRCP 56(f).
17	IT IS FURTHER ORDERED that Plaintiff is entitled to limited discovery necessary to
18	oppose PwC's motion for summary judgment as set forth in Paragraph 10 of Mr. Tricarichi's
19	Affidavit, which requested PwC documents and testimony regarding the Bishop and Marshall
20	transactions; PwC's review, promotion or advocacy of, or other advice regarding transactions
21	similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make
22 23	Mr. Tricarichi aware of those transactions.
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	APP1309

1 IT IS FURTHER ORDERED that the parties shall meet and confer in good faith 2 regarding the appropriate scope of the limited discovery necessary to oppose summary 3 judgment, and if there is a dispute, the parties may seek a decision from the Court. 4 DATED: 11 May 30 5 TRICT COURT JUDGE 6 7 8 Submitted by: 9 10 /s/ Todd W. Prall Mark A. Hutchison (4639) 11 Todd L. Moody (5430) Todd W. Prall (9154) 12 HUTCHISON & STEFFEN, LLC 13 10080 West Alta Drive, Suite 200 Las Vegas, NV 89145 14 Scott F. Hessell 15 Thomas D. Brooks (Pro Hac Vice) 16 SPERLING & SLATER, P.C. 17 55 West Monroe, Suite 3200 Chicago, IL 60603 18 Attorneys for Plaintiff 19 20 Approved as to form and content by: 21 SNELL & WILMER L.L.P. 22 23 /s/ Patrick Byrne Patrick Byrne (7636) 24 Bradley Austin (13064) 25 2883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 26 Telephone: 702-784-5200 pbyrne@swlaw.com 27 baustin@swlaw.com 28

APP1310

1	Peter B. Morrison (<i>Pro Hac Vice</i>) Winston P. Hsiao (<i>Pro Hac Vice</i>)
2	SKADDEN, ARPS, SLATE, MÉAGHER, & FLOM LLP
3	300 South Grand Avenue, Suite 3400 Los Angeles, California
4	Telephone: 213-687-5000
5 6	Attorneys for Defendant
7	PricewaterhouseCoopers LLP
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1 2 3 4 5 6 7 8 9 10 11 12 13	APEN Mark A. Hutchison (4639) Todd W. Prall (9154) HUTCHISON & STEFFEN, PLLC 10080 West Alta Drive, Suite 200 Las Vegas, NV 89145 Tel: (702) 385-2500 Fax: (702) 385-2086 Email: mhutchison@hutchlegal.com tprall@hutchlegal.com Scott F. Hessell Thomas D. Brooks Blake Sercye (<i>Pro Hac Vice</i>) SPERLING & SLATER, P.C. 55 West Monroe, Suite 3200 Chicago, IL 60603 Tel: (312) 641-3200 Fax: (312) 641-6492 Email: shessell@sperling-law.com	Electronically Filed 12/4/2020 3:58 PM Steven D. Grierson CLERK OF THE COURT
14 15	tdbrooks@sperling-law.com bsercye@sperling-law.com	
16 17	Attorneys for Plaintiff DISTRICT COU	DT
17		
19	CLARK COUNTY, N	EVADA
20	MICHAEL A. TRICARICHI,) CASE NO. A-16-735910-B) DEPT NO. XI
21	Plaintiff,	
22	v.)) APPENDEX OF EXHIBITS IN
23	PRICEWATERHOUSECOOPERS, LLP, ET) SUPPORT OF PLAINTIFF) MICHAEL TRICARICHI'S
24	AL.,) OPPOSITION TO) DEFENDANT'S MOTION FOR
25	Defendants.) SUMMARY JUDGMENT
26)
27		
28		

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5 6	Ex. 2	November 14, 2003 Richard Stovsky Email to Timothy Lohnes re RE: Updated list of "listed transactions" (Notice 2003-76)
7	Ex. 3	September 1, 2020 Deposition Transcript of Richard Stovsky (Ex- cerpt)
8 9	Ex. 4	August 4, 2020 Deposition Transcript of Timothy Lohnes (Excerpt)
10	Ex. 5	April 6, 2003 PwC List of Reportable Transactions
11 12	Ex. 6	October 30, 2003 Thomas Palmisano Email to Mike Morris and Mark Thompson re [redacted] tax shelter/reportable transaction discussion
13 14	Ex. 7	February 22, 2004 Stuart Finkel Email to rtda network re Welcome to the WNTS Tax Shelter Technical Team
15 16	Ex. 8	February 23, 2004 Stuart Finkel Email to rtda network re FW: Listed Transaction Summaries
17 18 19	Ex. 9	April 15, 2004 Brandon Mark Email to Shelley Penaloza re Urgent Copies Needed, attaching PwC Presentation "Compliance Issues with Respect to the New Tax Shelter Disclosure Regime"
20	Ex. 10	January 29, 2008 IRS Summons to Richard Stovsky
21 22	Ex. 11	October 1, 2020 Deposition Transcript of Michael Tricarichi (Excerpt)
23	Ex. 12	September 16, 2020 Deposition Transcript of Randy Hart (Excerpt)
24 25	Ex. 13	March 3, 2008 Timothy Lohnes Email Richard Stovsky re RE: FW: IRS issues new Listed Transaction-Please read attached canvass
26 27	Ex. 14	December 1, 2006 Subject Matter Specialists (SMS) - Reportable Transactions
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1	Ex. 15	February 28, 2008 William Galanis Email Mark Boyer re RE: Notice 2008-20
2 3	Ex. 16	March 23, 2009 Elaine Church Email to Rochelle Hodes re RE: Tax Shelter
4 5	Ex. 17	March 31, 2008 Opinion-Enbridge Energy Co. Inc. v. USA
6 7	Ex. 18	April 2, 2008 Gary Cesnik Email to Elaine Church re RE: US Dis- trict Court Concludes That Midco Transaction on Which We Pro- vided Advice Was a Sham
8 9	Ex. 19	May 2, 2008 Joe Realmuto Email to Pat Pellervo re RE: Today's WSJ-Midco Transactions
10	Ex. 20	May 13, 2008 WTS Meeting Agenda
11 12	Ex. 21	December 1, 2008 Guidance on Intermediary Transaction Tax Shel- ters (Notice 2008-111)
13 14	Ex. 22	May 28, 2008 Derek Cain Email to Rochelle Hodes re RE: FW: no- tice 2008-20 info
15 16	Ex. 23	May 29, 2008 Rochelle Hodes Email to Gary Cesnik, Carl Duyck and Elizabeth Case re Midco - notice 2008-20 - Independence Im- plications
17 18	Ex. 24	December 2, 2008 Timothy Lohnes Email to Richard Stovsky re Notice
19 20	Ex. 25	March 14, 2011 Karen Lohnes Email to Mark Boyer re RE: FW: Re- portable
21 22	Ex. 26	December 2, 2008 Rochelle Hodes Email to David Andres, Derek Cain and Mark Boyer re summary description of notice 2008-111
23 24	Ex. 27	December 4, 2008 Rochelle Hodes Email to Mark Boyer re RE: Other Updates for Notice 2008-111
25	Ex. 28	September 17, 2009 Richard Stovsky Letter to Michael Tricarichi
26 27	Ex. 29	July 16, 2013 Stephen Markus Email to Sheri Dillon re RE: Docu- ments
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1	Ex. 30	October 29, 2013 Stephen Markus Email to Sheri Dillon re RE: pro- posed Tim Lohnes deposition
2 3	Ex. 31	July 16, 2013 Stephen Markus Letter to Sheri Dillon re In the Mat- ter of Westside Cellular, Inc.
4 5	Ex. 32	October 14, 2015 Tax Court Opinion-Michael Tricarichi v. Commissioner of Internal Revenue
6 7	Ex. 33	December 30, 2002 Opinion- Cincinnati SMSA Limited Partnership v. Public Utilities Commission of Ohio
8 9	Ex. 34	July 22, 2003 Nob Hill Holdings Letter to Michael Tricarichi re Pur- chase of All of the Stock of Westside Cellular
10 11	Ex. 35	IRS warning on "intermediary transactions" (Notice 2001-16)
12	Ex. 36	January 31, 2001 TLS Risk Management Alert
13	Ex. 37	August 3, 2020 Deposition Transcript of James Tricarichi (Excerpt)
14	Ex. 38	April 10, 2003 PwC Engagement Letter to Michael Tricarichi
15 16	Ex. 39	November 15, 2003 Richard Stovsky Email to James Tricarichi at- taching Billing Detail
17 18	Ex. 40	August 17, 2003 Richard Stovsky Email to Timothy Lohnes (cc Turk) re Westside
19 20	Ex. 41	May 20, 2003 PwC Invoice No. 4187-019547-0 to Michael Tricarichi
20 21	Ex. 42	November 9, 1999 Wire Transfer Instructions to Rabobank- Nederland
22 23	Ex. 43	Novmeber 16, 1999 PwC Accounts Receivable Client Receipts
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26	T 44	Lohnes) re Midco Enbridge 5th Circuit
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1 2	Ex. 47	August 8, 2002 Laura Erdberg Email to tls-us partners 1, tls-us partners 2, tls-us partners 3, tls us partners 4 attaching Advance Notice of Summons
2 3 4	Ex. 48	October 9, 2020 30(b)(6) Deposition Transcript of Brian Meighan (Excerpt)
5	Ex. 49	August 19, 2020 Deposition Transcript of Michael Desmond (Excerpt)
7 8	Ex. 50	September 22, 2020 Deposition Transcript of Arthur J. (Kip) Dellinger (Excerpt)
9 10	Ex. 51	April 13, 2003 Richard Stovsky Memo to West Side Cellular Inc./Michael Tricarichi Files/Cleveland BP Tower re Potential Transaction
11 12	Ex. 52	September 17, 2020 Deposition Transcript of Mark Boyer (Excerpt)
13	Ex. 53	June 20, 2016 Tax Court Memo 2016-119, Estate of Marshall v. IRS
14 15	Ex. 54 Ex. 55	Richard Stovsky Notes and Memos May 15, 2012 Tranferee Report
16 17	Ex. 56	April 5, 2011 Ohio Secretary of State Notice of Canceled Articles of Incorporation for West Side Cellular
18 19	Ex. 57	February 25, 2009 IRS Letter to West Side Cellular, Inc. re Notice of Deficiency
20	Ex. 58	June 25, 2012 IRS Interest and Penalty Report
21 22	Ex. 59	September 21, 2012 Tax Court Petition
23	Ex. 60	January 9, 2014 Tax Court Scheduling Order
24	Ex. 61	Intentionally Left Blank
25 26	Ex. 62 Ex. 63	May 26, 2020 Expert Report of Craig L. Greene April 7, 2017 Affidavit of Michael Tricarichi
27 28	Ex. 64	October 7, 2020 Errata Sheet of Craig Greene
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1	Ex. 65	September 29, 2020 Deposition Transcript of Rachel Hodes (Excerpt)
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4	Ex. 67	October 22, 2015 Michael Desmond Email to Scott Hessell attach- ing PwC Engagement Letter
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1	CERTIFICATE OF SERVICE
2	Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC
3	and that on this 4 th day of December, 2020, I caused the above and foregoing documents entitled
4	APPENDEX OF EXHIBITS IN SUPPORT OF PLAINTIFF MICHAEL
5	TRICARICHI'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY
6 7	
8	JUDGMENT to be served through the Court's mandatory electronic service system, per EDCR
9	8.02, upon the following:
10	ALL PARTIES ON THE E-SERVICE LIST
11	/s/ Madelyn B. Carnate-Peralta An employee of Hutchison & Steffen, PLLC
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Exhibit 3



Transcript of Richard Stovsky

Date: September 1, 2020 **Case:** Tricarichi -v- PricewaterhouseCoopers LLP, et al.

Planet Depos Phone: 888.433.3767 Email:: transcripts@planetdepos.com www.planetdepos.com

WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

APP1320

11111121212121223341415440546MR. LANDGRAFF: And I'll just have a7running objection to that based on the testimony8so far if tha's okay, Scott.9MR. LANDGRAFF: And I'll just have a7running objection to that based on the testimony8so far if tha's okay, Scott.9MR. HESSELL: That's fine.10MR. LANDGRAFF: Rather than object every11ther today reprint fail to say also as you're sitting11mer today that with respect to the other12MR. HESSELL: And your objection is what?13MR. LANDGRAFF: Is that Mr. Stovsky says14that that's not what he, you know, believes a15Mideo to be or what the what the standard16what the notice provides.17MR. HESSELL: Yeah, and that's fine. I18just want to understand that we're on the same19page about what I'm referring to when I describe a20Mideo transaction, regardless of what he or PwC's21view is of whether it qualifies.23Q Are we on the same page, Mr. Stovsky?24A Yes.24A Yes.	23
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23 Q Are we on the same page, Mr. Stovsky? 23 MR. LANDGRAFF: Objection, form.	
25 Q And on behalf of PwC in 2003, you advise 25 MR. LANDGRAFF: Go ahead. I just	
23 Q Fuld on bendit of t we in 2003, you devise 25 Mile 17 HD OR 4 1. Ob anead. Tjust	24
1 Mr. Tricarichi that the Westside transaction was 1 objected. Go ahead.	27
2not a Midco transaction under Notice 2001-16,105jected. 36 ancdat2BY THE WITNESS:	
3 correct? 3 A As I sit here today, 17 years from the	
4 A We advised that on a more-likely-than-not 4 the time of services performed, I can't recall	
5 basis it was not a Midco transaction. 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5 5	
6Q And you used those words, "more likely6BY MR. HESSELL:	
7 than not," when you communicated to 7 Q Okay. After sorry. Strike that.	
8 Mr. Tricarichi? 8 Did the advice that you gave	
 9 A Based on my notes in the file, yes. 9 Mr. Tricarichi on various conclusions with respect 	
10 Q That's not what I asked you. I asked 10 10 to the Westside transaction all take place in a	
11 whether, as you're sitting here today, you used 11 single conversation?	
12 your testimony under oath is that when you advised 12 A No.	
12 your testiniony under oath is that when you advised12A No.13 Mr. Tricarichi that the transaction the13Q So your advice on different topics with	
14 Westside transaction was not a Midco under Notice 14 respect to the Westside transaction happened in	
17A I don't as I sit here today, I don't17A Based on my notes in the file, that's18nearly specifically position these words18servest	
18 recall specifically reciting those words. 18 correct. 10 0. Mathe it accords it in a base to day.	
19 Q I take it as you're sitting here today, 20 you also don't recell baring our bined to	
20 you also don't recall having explained to 21 Ma Triagnishi what the given formula of many and the formula to the many dated April 12th of	
21 Mr. Tricarichi what the significance of more 22 1 ¹ L the sector of	
22 likely than not might mean in the context of the 22 2003?	
23 conclusions and opinions given by PwC in the 23 A Yes.	
24 context of this transaction? 24 Q And with respect to that Stovsky memo, did	
25MR. LANDGRAFF: Object to the form.25 you do you recall adding notes to that memo	

25	27
1 following your conversations with Mr. Tricarichi?	1 A As I sit here today, I don't recall
2 A I don't specifically recall when I wrote	2 anybody demanding it be orally, nor do I recall
3 notes, but it's clear that I have notes on that	3 anybody requesting it to be in writing. We we
4 memo.	4 don't provide services that aren't requested.
5 Q Some of them and what you're referring	5 Q Well, is there any reason why PwC couldn't
6 to now when you say you have notes on the memo are	6 have proposed to Mr. Tricarichi that the advice be
7 the handwritten notes in in the margins?	7 provided in writing?
8 A Handwritten as well as typed.	8 A There's no reason other than we were
9 Q All right. Do you know at what point in	9 engaged to provide specific services and provided
10 time you added the notation that's in all caps at	10 those services.
11 the top of the memo about how the conclusions of	11 Q I understand that you were engaged to
12 PwC are at a more-likely-than-not level of	12 provide those services, but I think we both agree
13 opinion?	13 that the engagement agreement is silent on whether
14 A I don't recall at the time.	14 there were writing whether the advice should be
15 Q So as you're sitting here today, you can't	15 provided in writing or orally, correct?
16 say whether that notation at the top of the	16 A I agree
17 Stovsky memo was added following an actual	17 MR. LANDGRAFF: Object
18 conversation with Mr. Tricarichi, correct?	18 BY THE WITNESS:
19 A Correct.	19 A silent.
20 Q Why didn't PwC issue a written opinion	20 I agree it's silent as to that, but if
21 in regarding its conclusions with respect	21 if Mr. Tricarichi or his team wanted something in
22 with respect to the Westside transaction?	22 writing, they could have requested it.
23 A We weren't engaged to issue a written	23 BY MR. HESSELL:
24 opinion.	24 Q But how would Mr. Tricarichi have known to
25 Q Well, did you ever propose to	25 ask for PwC's advice to be provided in writing?
26	28
1 Mr. Tricarichi that it might be a good idea that	1 MR. LANDGRAFF: Object to the form.
2 he received a written opinion from PwC?	2 BY MR. HESSELL:
3 A I can't recall. Sometimes our advice is	3 Q Strike that. That's a bad question.
4 written, sometimes it's oral, verbal.	4 We do agree, right, that you did not share
5 Q But there you do agree with me that	5 with Mr. Tricarichi the what I refer to as the
6 there's nothing in the engagement agreement that	6 Stovsky memo or any of the various iterations of
7 would have prohibited PwC from providing its	7 it, correct?
8 conclusions in writing, correct?	8 A Correct.
9 A Correct. And there's also nothing in the	9 Q And you also didn't ever communicate to
10 engagement agreement that would require a	10 Mr. Tricarichi or anyone on his team that you were
11 written a written submission to Mr. Tricarichi.	11 preparing an internal memo stating setting
12 Q No one for Mr. Tricarichi ever advised PwC	12 forth what the basis for your opinions PwC's
13 that it did not want to receive PwC's advice or	13 opinions were in connection with the Westside
14 conclusions regarding the Westside transaction in	14 transaction, correct?
15 writing, correct?	15 A I don't believe I mentioned that, but I
16 MR. LANDGRAFF: Object to the form.	16 can't recall specifically.
17 BY THE WITNESS:	17 Q Have there been times in your practice at
18 A No one from Mr. Tricarichi's team	18 PwC where you have recommended to clients that it
19 requested I can't recall if anybody advised us	19 is in their interest to receive PwC's advice in
20 not to issue a written document. 21 BY MR. HESSELL:	20 writing even if not requested specifically by the 21 clients?
	22 A As I sit here today, I can't recall that
22 Q I just want to be clear. As you sit here 23 today, you have no recollection of anyone from	22 A As i sit here today, i can't recall that 23 happening, no.
24 Mr. Tricarichi's team demanding that PwC's advice	24 Q In every instance where you've been
25 only be provided orally, correct?	25 involved in PwC providing advice in writing, the
25 only be provided orany, confect?	2.5 monored in two providing advice in writing, the

33	35
1 Q And prior to obtaining that title, vice	1 Q Is there anyone else as you sit here today
2 chairman, you also held several other leadership	2 that you recall playing a substantial role in the
3 positions at PwC before that, correct?	3 advice PwC gave to Mr. Tricarichi in the context
4 A Correct.	4 of the Westside transaction?
5 Q Throughout in total, it looks like you	5 A I don't know what you mean by
6 spent almost 35 years at PwC?	6 "substantial," but the the people I named
7 A Yes.	7 provided a significant portion of the services.
8 Q Virtually all of your professional career,	8 Q All right. And what was
9 right?	9 (garbled audio) role in connection with Mr
10 A Right.	10 with the advice PwC gave Mr. Tricarichi on the
11 Q And throughout the entire period of time	11 Westside transaction?
12 that you were employed at PwC, you were both a	12 MR. LANDGRAFF: Apologies, Scott, can
13 licensed CPA and a licensed attorney, correct?	13 MS. REPORTER: I'm sorry
14 A I was a licensed attorney but didn't	14 MR. LANDGRAFF: Michelle and I had the
15 practice law. And I was a licensed CPA, I	15 same problem. Can you try that again, Scott.
16 believe, since 1986 is when I got my license.	16 Sorry.
17 Q When you say you were a licensed attorney	17 BY MR. HESSELL:
18 but you didn't practice, what do you mean by that?	18 Q What was the role of Mr. Lohnes with
19 A I took the bar in 1983, passed the bar	19 respect to Mr the Westside transaction and the
20 exam, and was admitted to the bar but didn't	20 advice PwC gave?
21 practice law.	21 A Tim Lohnes was a member of our Washington
22 Q Meaning you didn't work at a law firm?	22 National Tax Group and he led the technical work
A I didn't work at a law firm and I didn't	23 relative to the federal tax side of the
24 practice law at PwC.	24 engagement.
25 Q But you did go through the exercise of	25 Q Was Mr. Lohnes (garbled audio).
34	36
1 maintaining your active legal license while	1 It was Mr. Lohnes who analyzed whether the
1 maintaining your active legal license while	1 It was Mr. Lohnes who analyzed whether the
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24 half hours, correct?

23 worked on the Westside transaction was two and a

A Yes, that's the time that he recorded.

18 A Yes.

A No.

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45 Q -- from a system? Q And you're not aware that he worked more 1 A I'm sorry? than two and a half hours as reflected in PX 1, 2 Q That you didn't pull it from a system? 3 correct? MR. LANDGRAFF: Objection. 4 A I'm not aware, no. BY THE WITNESS: 5 Q And as you sit here today, you don't A Yeah, I just don't recall exactly what I 6 specifically know what work Mr. Rocen did to come 7 to the conclusions he did with respect to the **BY MR. HESSELL:** Westside transaction, correct? 8 Q Sorry, that question, I kind of cut it off 9 A Well, Mr. Rocen was an expert in his area 10 so let me try it again. 10 so --Your best recollection is that you created 11 Q I know --12 the Tricarichi invoice details that are reflected 12 A -- so I --13 in PX Number 1? Q I know his qualifications and --13 MR. LANDGRAFF: Let him finish. Let --14 A That's my best recollection, correct. 14 Q And you would have done that after either 15 BY THE WITNESS: 16 knowing what the partners were doing or consulting 16 A Let me finish. So I don't -- I don't 17 with them? 17 specifically know the work that he did to form his 18 conclusions on this transaction, but he was an 19 Q Do you know what work Mr. Lohnes did to 19 expert in the area. 20 come to the conclusions that he did in the context 20 BY MR. HESSELL: 21 of the Westside transaction? 21 Q Right. So -- and just to be clear, you **22** A Mr. Lohnes -- you mean the specific work 22 have no personal knowledge of what work he did in 23 that he did? 23 the two and a half hours that he billed with 24 respect to the Westside transaction, correct? Q Right. A I don't. And I also don't know what work 25 46 Q Do you know what specific work Mr. Rocen 1 he did becoming an expert in the area that was not 2 did to come to his conclusion that Mr. Tricarichi charged to our client. 2 should not face any personal liability associated Q All right. And you're not aware of any 3 4 with the Westside transaction? 4 document, email, memo that Mr. Rocen created with MR. LANDGRAFF: Object to the form as to respect to the work that he did on the Westside 5 6 the characterization. transaction. correct? 6 BY THE WITNESS: 7 A Correct. A Mr. Rocen? 8 Q You've never seen an email from Mr. Rocen 9 BY MR. HESSELL: 9 communicating what the basis for his advice was in 10 Q Yeah. 10 the context of the Westside transaction, correct? A I don't know who you're referring to. 11 A I didn't -- I have not received it or Q Did I mispronounce his name? 12 never received an email, correct. A Oh --13 Q Have you ever seen any work product from Q Mr. Rocen. 14 the files of Mr. Rocen with respect to the A -- Mr. Rocen. Sorry. 15 Westside transaction? Don Rocen was a member of our National Tax 16 A No. 17 practice. He was the -- formerly assistant 17 Q Do you have any idea why that is? 18 commissioner of the IRS. I think he was deputy 18 A I don't. 19 general counsel. I don't know what specifically Q Prior to the Westside transaction, you 19 20 he did to form his conclusion. 20 personally had never been involved in advising a 21 Q As -- as reflected on PX 1, it appears 21 client regarding a Midco transaction, correct? 22 that the total amount of time that Mr. Rocen A I can't recall if it was prior to the 22

- 23 transaction or not, but I had one other client
 - 24 that had been looking at a transaction that was
 - 25 assessed or was starting to be assessed relative

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1 to a third-party transaction, but it never	1 this other matter?	
2 materialized.	2 A I don't.	
3 Q What's your best recollection of when that	3 Q And you don't recall having billed the	
4 took place?	4 client?	
5 A I really can't say.	5 A No, not as I sit here today I can't	
6 Q And was PwC engaged to provide any advice	6 recall.	
7 on behalf of this other other client you're	7 Q Prior to April 2003, had you ever been	
8 referring to?	8 engaged to evaluate a transaction involving	
9 A I just I can't recall. I know the	9 Fortrend?	
10 transaction never materialized.	10 A No.	
11 Q Can you tell me anything more about what	11 Q Was either sorry. Strike that.	
12 role you played in connection with this other	12 What was the name of the intermediary	
13 client?	13 entity that was involved in this other transaction	
14 A It was it was a client of mine, but	14 you're referring to?	
15 I I can't recall any specifics other than that	15 A Oh, I can't recall if there was one.	
16 was a topic.	16 Q What role was your client, in this other	
17 Q So is it fair to say that prior to	17 transaction, where were they in the structure of	
18 Mr. Tricarichi's transaction, you had never been	18 the proposed transaction? Were they the buyer or	
19 engaged by any other client to evaluate a Midco	19 the seller or	
20 transaction?	20 A I cannot recall, truly.	
21 A I just can't recall if it was before or	21 Q So as you sit here today, you cannot	
22 after.	22 recall any advice that you had given a client	
23 Q Right. I know. My my question is	23 regarding a Midco transaction prior to April	
24 about whether you were actually engaged by the	24 of 2003, fair?	
125 other client to perform any convices in the	25 A Fair.	
25 other client to perform any services in the		
50		52
50 1 context of that prior transaction.	1 Q And you certainly never represented to	52
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53	55
1 BY THE WITNESS:	1 BY MR. HESSELL:
2 A That's not correct. I consulted with Tim	2 Q Well, my question is whether you looked to
3 Lohnes.	3 PX 2, which appears to be the document at PwC that
4 BY MR. HESSELL:	4 identifies subject matter experts on certain
5 Q But Mr. Lohnes, to your	5 reportable transactions before deciding who to
6 understanding strike that.	6 engage on Mr. Tricarichi's behalf in evaluating
7 Was it your understanding in in 2003	7 the Westside transaction?
8 that Mr. Lohnes had been identified as the subject	8 A I can't recall consulting with people on
9 matter expert at PwC regarding Midco transactions?	9 this list other than Bill Galanis as it relates to
10 A There are numerous subject matter experts	10 the Tricarichi transaction.
11 in in virtually all the areas that we have at	11 Q You do agree with me that PX 2, number 14
12 our National Tax practice. He was one of them.	12 on the list of reportable transactions appears to
13 Q Have you ever seen Mr. Lohnes identified	13 identify that the subject matter experts at PwC
14 on any document from PwC as a subject matter	14 regarding Notice 2001-16 transactions were Phil
15 expert on Midco transactions specifically?	15 McCarty and Mark Boyer?
16 A Not specifically, no.	16 A That's yeah, that's what it says, but,
17 Q But there are certain people who are18 identified by PwC as subject matter experts	17 again, those were the people that would have been18 coordinating our effort around that specific
19 regarding Midco transactions, correct?	19 topic. There were numerous people that were
20 A I'm not sure what you're referring to.	20 subject matter experts providing services in those
21 You may be referring to the point-person. So PwC	21 areas.
22 would have a listing of point-people for various	22 Q But you didn't consult with either
23 areas that we consult on at National Tax. Those	23 Mr. McCarty or Mr. Boyer regarding the Westside
24 point-people would be responsible for coordinating	24 transaction, correct?
25 the effort, for instance. But we had numerous	25 A Not specifically. I consulted I believe
	56
54 1 experts in the area providing advice.	56 1 with members of WNTS, or Washington National Tax,
1 experts in the area providing advice.	 ⁵⁶ 1 with members of WNTS, or Washington National Tax, 2 Ed Abahoonie who referred me to another person who
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1 Tricarichi transaction?	1 the area.
2 A I as I as I said, I don't recall	2 Q And how are you aware of that, because he
3 specifically.	3 told you?
4 Q As you sit here today, you don't know	4 A He told me and because of the referral
5 whether Mr. Lohnes had any prior Midco experience	5 that I referred to earlier.
6 that you can identify before the Tricarichi	6 Q Have you ever seen any document that
7 transaction, correct?	7 reflects any work that Mr. Lohnes has done on any
8 MR. LANDGRAFF: Object	8 Midco transaction other than Mr. Tricarichi's?
9 BY THE WITNESS:	9 A There would be no document to see for any
10 A As I sit here go ahead.	10 work that people at PwC perform on other clients.
11 MR. LANDGRAFF: I just objected to the	11 So there there would be no document to see.
12 form. Just give me a second to object and then	12 Q So the answer to my question is, no,
13 you can answer.	13 you've never seen any document or email or memo by
14 THE WITNESS: Okay.	14 Mr. Lohnes that reflects work he has done on
15 BY THE WITNESS:	15 another Midco transaction besides
16 A As I sit here today can you repeat the	16 Mr. Tricarichi's, correct?
17 question, please.	17 A I've also never seen any memo or work for
18 BY MR. HESSELL:	18 any other PwC partner for work they performed.
19 Q As you sit here today, you don't know	19 Q But I didn't ask you that. My question
20 whether Mr. Lohnes had any prior Midco experience	20 was whether it was fair to say that you have never
21 that you can identify before the Tricarichi	21 seen any document, email, memo, or client matter
22 transaction, correct?	22 that reflects that Mr. Lohnes had worked on any
23 A As I sit here today, I can't identify any	23 Midco transaction prior to Mr. Tricarichi's
24 prior experience, but I knew that he had prior	24 transaction, correct?
25 experience.	25 A Again, that's correct because there is no
58	60
1 Q How do you know that?	1 such document that I'm aware of.
 Q How do you know that? A Based on his expertise in the area and 	 such document that I'm aware of. Q Have you ever seen Mr. Lohnes identified
 Q How do you know that? A Based on his expertise in the area and based on his he being referred by another WNTS 	 such document that I'm aware of. Q Have you ever seen Mr. Lohnes identified on any document you've seen as a subject matter
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2 0 Well, as far as - Tm sorry. Go ahcad. 2 A We were looking into and analyzing. 3 A Go ahead. 3 evaluating, the Westside transaction. 4 Q As far as you know, neither Mr. McCarty 5 were looking into and analyzing. 5 nor Mr. Royer were ever consulted on any aspect of Mr. Tricarichi is transaction correct? 4 Q Right. You were about - one of the 7 A As far as Naow. 7 its aspect of Mr. Theoremich is transaction correct? 6 9 Mr. Tricarichi's transaction correct? 16 obox at and evaluation services, and then we determined 10 their performation that bey consulted 9 A Wein we were engaged to provide research 10 and evaluation services, and then we determined 11 that may so no file areas to look into. 12 A lever heard that, correct. 12 Q Night. So PAC was generally engaged to 13 1- that may so no file areas to look into. 12 Q Nego was set to evaluate was whether 13 14 transaction, nyou identified than on of 14 transaction, nyou identified than one of 14 typics 14 transaction, nyou identified to evaluate was whether 19 1	61	63
3 A Go ahead. 3 evaluating, the Westside transaction. 4 Q Kafar as you know, neither Mr. McCarty 4 Q Right. You were about one of the 5 nor Mr. Boyer were ever consulted on any aspect of 6 do was to look at and evaluate whether it was a 7 A Saf are as Lhaow. 7 A Saf are as Lhaow. 7 8 Q Never heard find, correct? 6 do was to look at and evaluate whether it was a 9 Mr. Tricarichi's transaction georetize 1 insteed or reportable transaction under 9 M. Kinoz Carty or Mr. Boyer regarding 1 1 in and evaluation services, and then we determined 11 that wouldn't be the that wouldn't be 12 Q Right. So PAC was generally engaged to 13 I tart twouldn't be the that wouldn't be 13 A Well, we were engaged to assess the 14 typical. 15 A Do you know what the purpose of PX 2 is?? 16 M R. LANDGRAFF: Object to the form. 16 O poole would be at National Tax for variaos 16 Q And then after you started to assess the 19 I tarsystaft fieldly recail this this 22 Q. M. Tricarichi didn' tell you which tax 23 <th>1 they weren't.</th> <th>1 context of the Westside transaction, correct?</th>	1 they weren't.	1 context of the Westside transaction, correct?
4 Q Asf ar as you know, neither Mr. McCarty 4 Q Right. You were about one of the 5 norm. Boyer were ever consulted on any aspect of 6 5 things that you were engaged by Mr. Tricarichi to 6 Mr. Tricarichi's transaction, correct? 6 do was to look at and evaluate whether it was a 7 A As far as Lawow. 7 hashed to look at and evaluate whether it was a 9 Mr. Tricarichi's transaction, correct? 9 A Well, we were engaged to provide research 9 Mr. Tricarichi's transaction, correct? 9 A Well, we were engaged to provide research 10 and evaluation services, and then we determined 11 11 that that was one of the areas to look it and evaluate we determined 11 that that was one of the areas to look it and evaluate the twe met general practice of whothe correct? 12 A Incerve heard that, correct. Although 12 13 - that wouldn't be the that wouldn't be 14 14 typics. 14 14 15 Q Do you know what the purpose of PX 2 woid be to 18 18 16 Ma Kins and other areal this or this 14 A Correct. 23 <td< th=""><th>2 Q Well, as far as I'm sorry. Go ahead.</th><th>2 A We were looking into and analyzing,</th></td<>	2 Q Well, as far as I'm sorry. Go ahead.	2 A We were looking into and analyzing,
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 13 Q Right. And do you see at the top of PX 2 14 it says that "If you have a client issue regarding 15 a listed or other reportable transaction, you 16 should contact the appropriate subject matter 17 expert," abbreviated "SME," right? 18 A That's that's what it states, correct. 19 Q It also says that "Noncompliance with the 20 final disclosure and list maintenance regulations 21 carry significant risk to the firm and our 22 clients," correct? 13 BY MR. HESSELL: 14 Q Do you have it there? 15 A Hold on. 16 Q Take your time. 17 A Yes, I have it. 18 Q PX 40 appears to be the bills that PwC 19 sent Mr. Tricarichi regarding the Westside 20 transaction, correct? 21 A Yes. 22 Q And were you the person at PwC who was 		
14 it says that "If you have a client issue regarding14Q Do you have it there?15 a listed or other reportable transaction, you15 A Hold on.16 should contact the appropriate subject matter16 Q Take your time.17 expert," abbreviated "SME," right?17 A Yes, I have it.18 A That's that's what it states, correct.18 Q PX 40 appears to be the bills that PwC19 Q It also says that "Noncompliance with the19 sent Mr. Tricarichi regarding the Westside20 final disclosure and list maintenance regulations20 transaction, correct?21 carry significant risk to the firm and our21 A Yes.22 clients," correct?22 Q And were you the person at PwC who was		
 15 a listed or other reportable transaction, you 16 should contact the appropriate subject matter 17 expert," abbreviated "SME," right? 18 A That's that's what it states, correct. 19 Q It also says that "Noncompliance with the 20 final disclosure and list maintenance regulations 21 carry significant risk to the firm and our 22 clients," correct? 15 A Hold on. 16 Q Take your time. 16 A Yes, I have it. 18 A That's that's what it states, correct. 19 Q It also says that "Noncompliance with the 20 transaction, correct? 21 A Yes. 22 Q And were you the person at PwC who was 		
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19Q It also says that "Noncompliance with the 20 final disclosure and list maintenance regulations 21 carry significant risk to the firm and our 22 clients," correct?19 sent Mr. Tricarichi regarding the Westside 20 transaction, correct?21A Yes. 2222Q And were you the person at PwC who was		
20 final disclosure and list maintenance regulations20 transaction, correct?21 carry significant risk to the firm and our21 A Yes.22 clients, "correct?22 Q And were you the person at PwC who was		
21 carry significant risk to the firm and our21 A Yes.22 clients," correct?22 Q And were you the person at PwC who was		
22 clients," correct? 22 Q And were you the person at PwC who was	-	
23 A Correct. That's what it says. [23 responsible for actually sending these involces to	A Correct. That's what it says.	23 responsible for actually sending these invoices to
24 Q And you did have a client issue regarding 24 Mr. Tricarichi?		
25 a listed or other reportable transaction in the 25 A You mean physically mailing		25 A You mean physically mailing

65	67
1 Q No, I mean responsible	1 Did you have many direct communications
2 A Yes. Yes. Yep.	2 with Mr. Tricarichi either via email or phone?
3 Q Responsible in that you might have	3 A I had several communications that I recall
4 directed somebody to actually physically mail	4 with Mr. Tricarichi via email I'm sorry, via
5 them.	5 phone call. I believe there was an in-person
6 A Yes. Correct.	6 meeting. And of course I had numerous phone calls
7 Q And I don't see any details on these bills	7 and email communication and meetings with
8 that were sent to Mr. Tricarichi regarding the	8 Mr. Tricarichi's team.
9 Westside transaction. Was that typical at the	9 Q And who did you who was the team that
10 time?	10 you interfaced with in the context of the Westside
11 A Yes.	11 transaction for Mr. Tricarichi?
12 Q So you didn't the bills you sent in	12 A Primarily Jeff Folkman from Hahn Loeser,
13 2003 to your clients, you didn't identify who	13 the law firm. Jeff was the lawyer leading the
14 worked on the matters or how many hours?	14 transaction. And Jim Tricarichi.
15 A Not typically, no.	15 Q And what role did Jim Tricarichi play in
16 Q I take it these bills were the amount	16 the context of this transaction from your
17 of these bills was created by pulling the time	17 perspective?
18 entries that had been made by the various partners	18 A Jim was integrally involved with the
19 who worked on the matter during the preceding	19 transaction and the work that we were doing.
20 month?	20 Q In what way?
21 A Yeah, as in general, that's the way it	21 A He was one of our contact points. He was
22 would it would be derived.	22 the one to reach out to us when the engagement
23 Q Well, let me rather than tell you how	23 began. And so he was on many, many calls and
24 it was done, why don't you just tell me, what was	24 and emails if I recall correctly.
25 your practice in or around 2003 for creating	25 Q Before Mr. Tricarichi's transaction, had
66	68
1 invoices like PX 40?	1 you reviewed Notice 2001-16 before?
2 A I would review the time and and then	2 I said "before" twice. Let me try to ask
3 invoice the client for the time that I felt was	3 that again.
4 appropriate to charge.	4 Prior to April of 2003, had you reviewed
5 Q And did you generally try to send the	5 Notice 2001-16 in any in any way?
6 bills out in 30-day increments?	6 A As I sit here, I can't specifically
7 A That was the the goal. It didn't	7 recall, but I reviewed virtually all notices that
8 always happen that way.	8 came out from the IRS. So I believe I did.
9 Q And did you, as far as you know, actually	9 Q Was there a process at PwC for how tax
10 send them to Mr to Michael Tricarichi	10 partners received notice that were issued by the
11 specifically at this address?	11 IRS?
12 A As far as I know, yes.	12 A There was there was a process where
13 Q By mail as far as you know?	13 rulings and notices were distributed. There was
14 A That's how we typically would send them.	14 also a process where every each morning I would
15 Q I didn't see much in the way of email	
	15 read tax updates from the day before.
· ·	15 read tax updates from the day before.16 O How did you receive those tax updates?
16 communication directly from you to Mr. Tricarichi.	16 Q How did you receive those tax updates?
16 communication directly from you to Mr. Tricarichi.17 Do you know why that would be?	16 Q How did you receive those tax updates?17 A Again, in 2003 I can't recall
16 communication directly from you to Mr. Tricarichi.17 Do you know why that would be?18 MR. LANDGRAFF: Object to the form as to	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 20 MR. HESSELL: Fair point. 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been 20 hard copy back then.
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 20 MR. HESSELL: Fair point. 21 BY MR. HESSELL: 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been 20 hard copy back then. 21 Q Do you besides we talked about
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 20 MR. HESSELL: Fair point. 21 BY MR. HESSELL: 22 Q Do you know why there is I'll withdraw 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been 20 hard copy back then. 21 Q Do you besides we talked about 22 Mr. Lohnes already, but are you aware of anyone
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 20 MR. HESSELL: Fair point. 21 BY MR. HESSELL: 22 Q Do you know why there is I'll withdraw 23 the question. 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been 20 hard copy back then. 21 Q Do you besides we talked about 22 Mr. Lohnes already, but are you aware of anyone 23 else who worked on Mr. Tricarichi's transaction
 16 communication directly from you to Mr. Tricarichi. 17 Do you know why that would be? 18 MR. LANDGRAFF: Object to the form as to 19 why you didn't see it. 20 MR. HESSELL: Fair point. 21 BY MR. HESSELL: 22 Q Do you know why there is I'll withdraw 	 16 Q How did you receive those tax updates? 17 A Again, in 2003 I can't recall 18 specifically. Likely through email or website 19 transmission. Could have could have also been 20 hard copy back then. 21 Q Do you besides we talked about 22 Mr. Lohnes already, but are you aware of anyone

69		71
1 MR. LANDGRAFF: Object to the form.	1 BY MR. HESSELL:	/1
2 BY THE WITNESS:	2 Q I take it you also didn't communicate to	
3 A You said other than Mr. Lohnes?	3 him in 2008 that you had never worked on another	
4 BY MR. HESSELL:	4 transaction at PwC involving the purchase of a	
5 Q Right.	5 corporation whose balance sheet included only cash	
6 A Not specifically, no.	6 and tax liabilities, correct?	
7 Q It got kind of garbled on that one, so let	 7 A Can you repeat the question. 	
8 me say, other than Mr. Lohnes, who we've already	8 Q You didn't communicate to Mr. Tricarichi	
9 discussed, you're not aware of anyone else who	9 in 2008 that you had never worked on another	
10 worked on Mr. Tricarichi's transaction having been	10 transaction at PwC involving the purchase of a	
11 involved in a Midco transaction, right?	11 corporation whose balance sheet included only cash	
-	12 on hand and tax liabilities, correct?	
13 Q Correct.	13 A I don't recall communicating with	
14 A No.	14 Mr. Tricarichi in 2008 at all.	
15 Q Don't know whether Mr. Rocen had any	15 Q Not aware of anyone at PwC communicating	
16 experience with Midco transactions prior to	16 with Mr. Tricarichi in 2008 that you had never	
17 Mr. Tricarichi's, correct?	17 worked on another transaction at PwC involving the	
18 A No, I correct, I don't know.	18 purchase of a corporation whose balance sheet	
19 Q Do you agree that in the 35 years or so	19 included only cash on hand and tax liabilities,	
20 that you were at PwC, you cannot recall any other	20 correct?	
21 transaction where a purchaser bought a corporation	21 A Correct, I'm not aware that anybody	
22 whose balance sheet included only cash and tax	22 communicated that to Mr. Tricarichi from PwC.	
23 liabilities?	23 Q And as far as you go, you did have	
24 A I can't recall any others.	24 communications with Mr. Tricarichi after the	
25 Q But that was the fact pattern here, right?	25 transaction was concluded, correct?	
70		72
1 Nob Hill paid for cash on hand at Westside plus	1 A In two	
2 the potential tax liabilities of Westside	2 MR. LANDGRAFF: I just object to the form.	
3 Cellular?	3 Can you can you use a first name with the	
4 A Can you repeat that.	4 with Tricarichi?	
5 Q Sure. That in the Westside	5 MR. HESSELL: Ah, yes. Good objection.	
6 transaction, that was the fact pattern, correct?	6 BY MR. HESSELL:	
7 Nob Hill paid for the stock of Westside Cellular	7 Q So in well, let me just say it, in	
8 whose balance sheet included only cash on hand and	8 2009, you had written communications with Michael	
9 the tax liabilities?	9 Tricarichi, correct?	
10 A Yeah, I can't recall specifically what was	10 A Yes, 2009 I believe we did have written	
11 on the balance sheet. I guess I'd have to look at	11 communications with Michael Tricarichi.	
12 that.	12 Q And it appears on that letter to	
13 Q Well, as you sit here today, are you aware	13 Mr. Tricarichi that perhaps you had oral	
14 of anything else on the balance sheet of Westside	14 communications with Jim Tricarichi regarding the	
15 Cellular other than the cash on hand from the	15 Westside transaction that preceded the letter,	
16 settlement it had obtained and the potential tax	16 correct?	
17 liabilities of Westside Cellular?	17 A I'd have to look at the letter.	
18 A No.	18 Q All right. We'll get to it	
19 Q Did PwC ever communicate to Mr. Tricarichi	19 A Yeah. So	
20 how unusual this transaction was in that respect?	20 Q later.	
21 MR. LANDGRAFF: Object to the form.	21 I asked you the question of whether you	
22 BY THE WITNESS:	22 had communicated the unusual nature of this	
23 A I don't I can't recall if we	== all termine and and and and of this	
	23 transaction in in 2008, and you said you had no	
	23 transaction in in 2008, and you said you had no 24 communications with Mr. Tricarichi, so I want to	
24 communicated on that point specifically. 25	23 transaction in in 2008, and you said you had no 24 communications with Mr. Tricarichi, so I want to 25 just	

77	79
1 A That's the date of the letter, so I would	1 agreement?
2 assume so.	2 A That's what my note says, correct.
3 Q I was going to say that is it	3 Q And who is David Padgett
4 consistent with your recollection that you would	4 A David
5 have sent him an engagement letter on or about	5 Q Or, I'm sorry, Ron Padgett.
6 April 10th, 2003?	6 A Ron Padgett was one of my partners, and he
7 A Yes. Based on the file, yes.	7 was the local quality and risk management partner
8 Q And is it also consistent with your	8 who looked at all engagement letters.
9 recollection that Mr. Tricarichi didn't actually	9 Q And
10 sign the engagement agreement until April 25th of	10 A Or or or we consulted with for our
11 2003?	11 engagement letters.
12 A That's the date that he that it was	12 Q Why was it that PwC was asking
13 dated, so I would assume that's correct.	13 Mr. Tricarichi to tell PwC if the transaction was
14 Q And what can you tell me about the	14 a reportable transaction?
15 handwritten notations that are contained on PX 29?	15 A That was, I believe, required language in
16 A Which ones specifically?	16 our engagement letter.
17 Q Well, there are only a couple of them so	17 Q Required by who?
18 either one.	18 A By the treasury regulations.
19 A On Page 1 there's a cross-out that	19 Q Okay. So at this time, had you determined
20 Q Just to be clear, we're talking about the	20 whether the reportability of a transaction was
21 page that is Bates-labeled 46632 at the bottom?	21 within the scope of PwC's engagement for
22 A Yes. Yes.	22 Mr. Tricarichi?
23 There's a cross-out by Mr. Tricarichi.	23 A I don't believe we determined at this time
24 And then on Page that's labeled 46633, there's a	25 A rubi t bereve we determined at this time 24 on April 10th.
25 handwritten note initialed by Mr. Tricarichi.	25 Q You do agree with me, though, that PwC was
78	80
1 Q And then you also there appears to be a	1 not relying on Mr. Tricarichi to analyze whether
 2 handwritten note from you at the end 	2 the Westside transaction qualified as a as a
3 A Yes.	3 listed or reportable transaction under
4 Q about a discussion with Mr. Tricarichi?	4 Notice 2001-16, correct?
5 A Yes.	5 A Correct.
6 Q And that's the page that's marked 46635?	6 Q PwC did its own work in evaluating why
7 A Yes.	7 whether, sorry, the Westside transaction
8 Q And what can you tell me about the	8 constituted a listed or reportable transaction
9 conversation you had with Mr. Tricarichi about the	
10 handwritten edits?	
	 10 A Right. 11 Q I mean, one of the reasons that
-	12 Mr. Tricarichi engaged you was to evaluate that
12 related to the strikeout that Mr. Tricarichi had 13 done on on Page 46632. And the second note was	
8	13 issue?
14 related to fees and his comment on Page 46633.	14 MR. LANDGRAFF: Object to the form.
15 Q And as I as I read this negotiation,	15 MR. HESSELL: Strike that. I'll withdraw
16 Mr. Tricarichi was striking on Page 1 of the PwC	16 that. We've already talked about it.
17 engagement agreement that PwC or, sorry, strike	17 BY MR. HESSELL:
18 that.	18 Q When Mr. Tricarichi returned this letter
19 That he, Mr. Tricarichi, agreed to advise	19 to you signed, did it include any attached terms
20 you, PwC, if any matter covered by this agreement	20 and conditions from PwC?
21 is a reportable transaction that's required to be	21 A I can't recall.
22 disclosed?	22 Q Well, if it did, would that have been in
23 A That's what he struck out, correct.	23 your file?
24 Q And as I understand the testimony, you	24 A Presumably, yes.
25 told him that that provision had to be in the	25 Q Did Mr. Tricarichi ever agree or

81 83 1 acknowledge in any conversations that you had with 1 terms and conditions as it always is. 2 him that he had received the PwC terms and Q I get from everything that you just said 2 3 conditions along with the engagement agreement? 3 that you can't say as you're sitting here today A Not that I can recall, but that wouldn't 4 whether the letter that you sent to Mr. Tricarichi 4 on or about April 10th, 2003, included the form 5 be -- no, not that I can recall. 5 Q Do you remember ever having any terms and conditions from PwC, correct? 6 6 7 discussions with Mr. Tricarichi where he expressly 7 MR. LANDGRAFF: Object. Asked and 8 agreed and accepted the terms and conditions --8 answered. 9 the form terms and conditions of PwC to go along 9 BY THE WITNESS: 10 A Yes, I can say with certainty that the 10 with the engagement agreement? A I don't recall conversations, but the 11 terms and conditions were attached to the letter. 11 12 terms and conditions are part of the engagement **12 BY MR. HESSELL:** 13 agreement. And if he didn't receive them, I would 13 Q How can you say that? 14 have assumed he would have asked for them. 14 A Because my recollection is that they were, 15 Q Do you know whether Mr. Tricarichi 15 as they always are. 16 received the PwC form terms and conditions along Q So there's never been an instance in your 16 17 with the proposed engagement? 17 time at PwC where you send an engagement agreement 18 A Well, the proposed engagement letter he 18 out without the terms and conditions? 19 received obviously, and those terms and conditions A Not to my knowledge, no. 19 20 were part of that letter. 20 Q Never heard from anybody else at PwC that 21 Q But that's not what I asked you. I'm 21 they ever sent a letter out without the terms and 22 asking --22 conditions? A Then repeat your question. 23 23 A I wouldn't hear from people on that topic. 24 MR. LANDGRAFF: Yeah, that is what you Q And is there anything in the files that 24 25 asked him, just to be clear. 25 you've seen that indicates to you that PX 29 was 82 84 MR. HESSELL: No, I didn't. I asked him 1 sent with the terms and conditions from PwC? 2 does he know whether Mr. Tricarichi received the 2 A I haven't looked at that file in -- in 3 PwC form terms and conditions with the proposed 3 years, but I do recall the terms and conditions 4 engagement agreement. 4 being in the file with the engagement letter. 5 MR. LANDGRAFF: Object, asked and 5 Q And when you say "with the engagement 6 answered. 6 letter," what do you mean by that? 7 Go ahead, Rich. 7 A Along -- as part of the engagement letter. BY THE WITNESS: 8 8 Q But there's no record that the actual A I know Mr. Tricarichi received the letter. 9 engagement letter that was sent to Mr. Tricarichi 10 included those terms and conditions, correct? 10 and the terms and conditions were referenced in 11 the letter and attached to the letter. 11 A It does -- such record doesn't exist at 12 BY MR. HESSELL: 12 PwC. 13 Q How do you know that they were attached to 13 O So there is no record at PwC that can 14 the letter sent to him? 14 confirm whether the engagement agreement that you 15 A Well, the terms and conditions are part of 15 actually sent to Mr. Tricarichi included the terms 16 the letter. Had he not -- well, so I always, as 16 and conditions, correct? 17 anybody else at PwC, included the terms and 17 A There's no record of PwC that can confirm 18 conditions with the letter. 18 or -- or state otherwise in terms of the terms and And our control at PwC would be that if I 19 19 conditions, there's no record. 20 gave a letter to one of our administration --20 MR. LANDGRAFF: Scott, if you're -- I 21 administrative people to process and there was an 21 don't know if you're pausing to change topics, but 22 enclosure labeled on -- marked on the letter and 22 if you are, we've been going --23 it wasn't attached, they would come back in and --23 MR. HESSELL: We have. Just --24 and say, "We need the enclosure." 24 MR. LANDGRAFF: We've been going long 25 So I believe the letter was sent with the 25 enough that I need to go.

101		103
1 would capture that information or ever disseminate	1 BY MR. HESSELL:	
2 it.	2 Q Not you're not aware, I take it, that	
3 Q So I take it there there was no	3 anybody at PwC ever communicated to Mr. Tricarichi	
4 database or other means of communicating	4 that Fortrend had paid PwC a referral fee in the	
5 transaction negative transactional experiences	5 context of the Enbridge transaction, correct?	
6 that PwC clients had had to other PwC partners or	6 MR. LANDGRAFF: Object to the form.	
7 clients?	7 BY THE WITNESS:	
8 A Correct.	8 A Correct.	
9 Q Are you aware prior to being engaged by	9 BY MR. HESSELL:	
10 Mr. Tricarichi that Fortrend had paid a referral	10 Q Can you think of any reason why the	
11 fee to PwC of almost \$1 million in a prior	11 Quality and Risk Management group would not have	
12 transaction?	12 identified the payment of a referral fee by	
13 A I was not aware of that, no.	13 Fortrend to PwC as a potential conflict of	
14 Q Do you know of any reason why the Quality	14 interest on the Westside transaction?	
15 and Risk Management group who performed the	15 MR. LANDGRAFF: Object to the form.	
16 conflict check wouldn't have been able to identify	16 BY THE WITNESS:	
17 a referral fee paid by Fortrend as a potential	17 A I can't think of a reason why they would	
18 issue with the Westside engagement?	18 or wouldn't.	
19 MR. LANDGRAFF: Object to the form.	19 BY MR. HESSELL:	
20 BY THE WITNESS:	20 Q Well, don't you think Mr. Tricarichi had	
21 A I'm not aware.	21 reason to expect that if Fortrend had paid PwC a	
22 BY MR. HESSELL:	22 referral fee prior to his transaction, that PwC	
23 Q In 2008 or after, did you come to learn	23 would disclose that fact?	
24 that PwC had received a referral fee referral	24 MR. LANDGRAFF: Object to the form.	
25 fee from Fortrend in the context of an Enbridge	25	
102		04
1 a transaction called Enbridge?	1 BY THE WITNESS:	
2 MR. LANDGRAFF: Object to the form.	2 A I'm PwC's client base is vast. I don't	
3 BY THE WITNESS:	3 think that information would be available.	
4 A I just recently heard of a referral fee	4 BY MR. HESSELL:	
5 within the last couple weeks.	5 Q So as far as you understand it, when	
6 BY MR. HESSELL:	6 Quality and Risk Management performs a conflict	
7 Q From who?	7 check on a matter, they would not identify the	
8 A From my attorney our attorney, Chris	8 payment of a fee by the counter-party to a PwC	
9 Landgraff.	9 client?	
10 Q So prior to the last couple of weeks, you	10 A I can't I don't know.	
11 were not aware that Fortrend had paid PwC a	11 Q I take it you're not prepared to tell me	
12 referral fee in the context of the Enbridge	12 anything about how Quality and Risk Management	
13 transaction?	13 performed conflict checks in or around 2003, fair?	
14 MR. LANDGRAFF: Object to the form.	14 A I'm sorry, you you froze.	
15 BY THE WITNESS:	15 Q Oh. I said you're not prepared to testify	
16 A Correct.	16 on behalf of PwC about what processes Quality and	
17 BY MR. HESSELL:	17 Risk Management used at all regarding the conflict	
18 Q That was not a good question. Let me ask	18 check on the Westside engagement?	
19 it I just want to be clear that until a couple	19 A I'm prepared to testify but I can't answer	
20 weeks ago, you were not aware that For	20 if I don't know.	
21 Fortrend had paid PwC a referral fee in the	21 Q Right. And I'm just trying to I know	
22 context of the Enbridge transaction, correct?23 MR. LANDGRAFF: Object to the form.	22 you would answer if I if you did know, and I'm	
	23 just trying to be clear that you aren't as	
24 BY THE WITNESS:	24 you're sitting here today, you're not prepared to	
25 A Correct.	25 answer questions about the processes at PwC that	

Transcript of Richard Stovsky Conducted on September 1, 2020

105		107
1 were performed on the Westside engagement because	1 things that you wrote down here or he was	107
2 you don't know?	2 communicating them back to you?	
3 A Correct.	3 A It appears that he communicated these to	
4 MR. LANDGRAFF: Object to the form.	4 me.	
5 BY THE WITNESS:	5 Q Why do you say that?	
6 A Correct.	6 A Because it said that J.T. told his	
7 BY MR. HESSELL:	7 brother bro these three things. So he must	
8 Q I'm going to have you take a look at	8 have stated those to me oh, wait, I lost you	
9 Tab 35, which I'm marking as Plaintiff's	9 he must have stated those things to me.	
10 Exhibit 35.	10 Q And the first point it says, "Attorney is	
11 (WHEREUPON, Plaintiff's Exhibit No. 35 was	11 the one who brought in the buyers therefore sue	
12 presented to the witness.)	12 them" exclamation point?	
13 BY MR. HESSELL:	13 A Jim must have said that to me and I wrote	
14 Q Are you there with me?	14 it down.	
15 A Yes.	15 Q You didn't you didn't communicate to	
16 Q Is Plaintiff's Exhibit 35 your	16 Jim that he should sue the lawyer who brought the	
17 handwriting?	17 buyer?	
18 A I believe so.	18 A No, the it appears to me that this is	
19 Q What is what does this document	19 what Jim told his brother.	
20 reflect?	20 Q I see. What what about number two,	
21 A It appears to be notes from a conversation	21 'Only reason he approached PwC was because of his	
22 I had with J.T. or Jim Tricarichi.	22 attorney"?	
23 Q In or around June 25th of 2012?	23 A Again, that's Jim's comment to me.	
24 A That's what it that's what it appears,	24 Q Was that consistent with what your	
25 yes.	25 recollection was of what transpired?	
100		100
106		108
1 Q And do you remember what the context was	1 A I I don't have specific recollection of	108
 Q And do you remember what the context was that you were having a conversation with Jim 	2 it.	108
 Q And do you remember what the context was that you were having a conversation with Jim Tricarichi in or around June 25th of 2012? 	2 it.3 Q And then the third bullet point you're	108
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1 mark LANDGRAF: Object to the form. 2 subjects? 3 A 1 don't think so because I didn't speak of 4 Mark LANDGRAF: Object to the form. 2 BY MR. HESSELL: 3 Q Take a look at PX 42. 4 WHERELOPON, Plaintif's Exhibit No. 42 was 5 Q Your anany on just took you just 6 Istendand wrote noise down and didn't respond? 7 A Right. That - that would have been my 8 BY MR. HESSELL: 9 Q Do you recail any other conversations with 9 10 Im Tracerifically. Jim and I would talk 12 A Not specifically. Jim and I would talk 13 Form time to time and I can't recall specific 14 that was said specifically, but 15 Ko moti me to like this? 19 Q D you know where you would have kept in try your file nothes like this? 21 A I don't 22 Q Following the closing of the transaction, like at your 23 Q O hyou know how these came to be produced 20 M Ares. 23	109		111
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145 Q Okay. So because Mr. -- you have in your Regardless of whether Fortrend's 1 1 2 notes that Mr. Folkman identified for you that 2 transaction following closing was subject to 3 there is some risk, you're deducing that you also 3 challenge, it should not be Mr. Tricarichi's 4 communicated what Mr. Lohnes had concluded about 4 concern because Tricarichi has not successor or 5 the highly aggressive nature of Fortrend's 5 transfer liability -- transferee liability for 6 transaction to Mr. Folkman? Westside's taxes, right? 6 7 A The discussions we had were 7 A Yes, subject to our more-likely-than-not 8 all-encompassing. We talked about the entire 8 level of confidence. 9 transaction numerous times with Mr. Folkman I'm Q But you didn't tell Mr. Tricarichi -- Mike 9 10 sure. 10 Tricarichi or Jim Tricarichi that "We're only Q And the next note down says, "We state"? 11 50.1 percent confident that you're not going to be 11 12 A "We stated that." 12 subject to transferee or successor liability for 13 Q Do you know -- "we stated that there is no 13 Westside's taxes," right? 14 guarantee." And then it says, "Jim Tricarichi 14 A Well, we said it was more likely than not. 15 understands this." Q No, you specifically remember as you're 15 16 A Right. 16 sitting here today that you communicated to 17 Q So is that the nature of the advice that 17 Mr. Tricarichi that you only -- that PwC only had 18 you -- you see reflected in your notes 18 a 50.1 percent level of confidence about him not 19 that -- strike that. 19 being exposed to successor or transferee 20 In any event, we do agree that you didn't 20 liability? 21 communicate to Mike Tricarichi or his 21 A As I said earlier, as I sit here today, I 22 representative in 2008 or afterwards that 22 can't recall a specific discussion and that's why 23 Mr. Lohnes had regarded Fortrend's contribution of 23 I had my -- my notes. 24 credit card debt as a very aggressive 24 Q I know, but as to the specific issue of 25 tax-motivated transaction, right? 25 successor and transferee liability, you don't know 146 A We didn't communicate in 2008 with -- with 1 whether you used the term "more likely than not," 1 Mr. Tricarichi, correct. 2 right? 2 3 O Or afterwards? A Well, again, my note says all conclusions 3 4 A Or after. 4 were qualified as more likely than not. So I -- I 5 Q And you didn't follow up with 5 don't have specific recollection, no. Fortrend -- I'm sorry. Strike that. 6 Q Did you communicate to Mr. Tricarichi 6 7 PwC didn't follow up with Fortrend 7 that -- or his representatives that Lohnes -- Tim 8 regarding how their very aggressive tax-motivated 8 Lohnes had concluded that, quote, a position can 9 transaction would work, right? 9 be taken that the Westside transaction was not a 10 A Correct. 10 reportable transaction? Q And you didn't advise -- sorry. Strike 11 A I don't recall communicating --11 12 that. 12 communicating that as I sit here today. 13 Do you know how Mr. Lohnes came to the 13 Q In fact, the -- the final conclusion 14 conclusion that Fortrend's transaction was a very 14 that's reflected in PX 4 by Washington National 15 aggressive tax transaction? 15 office of PwC was that it's not a listed or 16 A I don't. 16 reportable transaction, correct? 17 Q When he communicated that to you, what did 17 MR. LANDGRAFF: Object to the form. **18 BY THE WITNESS:** 18 you do in response? 19 A I -- I can't recall. I'd have to look at 19 A Correct. Again, subject to our level of 20 the -- at emails or any documentation of 20 confidence. 21 conversations that we had. 21 BY MR. HESSELL: 22 O Ultimately, the conclusion that PwC 22 O Was PX 4 maintained on the PwC -- a 23 reached, which is reflected on Page 3 at the 23 database of some sort at PwC, like a document 24 bottom, was regardless of whether 24 management system of some sort?

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A No.

25 Westside -- sorry. Strike that.

149 1 Q Maintained on your hard drive?	1 And you answered, "Well, he asked us to	151
2 A Yeah, I guess.	2 identify tax issues and risk in a transaction that	
3 Q Did you have a ShareDrive back in 2003?	3 they were proposing."	
4 A I can't recall if we did or we didn't.	4 MR. LANDGRAFF: Can you show him the	
5 Q Do you remember any discussion that you	5 transcript if you're going to read from it.	
6 can testify to the jury about concerning the level	6 BY MR. HESSELL:	
7 of confidence that PwC had in the various	7 Q I'm really it's not really about the	
8 conclusions that are reached in PX 4?	8 tax court or what you testified to before. I'm	
9 A I'm sorry, can you repeat that.	9 just trying to confirm that that's, in fact, what	
10 Q Yeah	10 PwC that PwC was, in fact, engaged by	
11 A Do I	11 Mr. Tricarichi to identify tax issues and risks to	
12 Q do you remember any specific discussion	12 Mr. Tricarichi in the Westside transaction, right?	
13 that you had internally at PwC regarding the level	13 A Yes.	
14 of confidence that PwC had in the various	14 Q And you did perform PwC did perform all	
15 conclusions set forth here?	15 of the work that it thought appropriate for the	
16 A No.	16 engagement, correct?	
17 Q Was there any limitations that Mike	17 A Yes.	
18 Tricarichi put on the scope of work that PwC could	18 Q And as far as you know, so did everyone	
19 perform to determine that the transaction would be	19 else at PwC who worked on this matter, right?	
20 respected from a federal tax perspective?	20 A Yes.	
21 A No.	21 Q Have you seen any emails or time records	
22 Q No one from no one neither Mike	22 or memos or notes that reflect what work Tim	
23 Tricarichi nor any of his representatives ever	23 Lohnes did to come to the conclusions that are	
24 told anyone at PwC not to perform work that PwC	24 reflected in PX 4?	
25 thought needed to be done with respect to this	25 A Well, we had we had several emails, but	
150		152
1 matter, right?	1 I don't have what was the other things you	
2 A Correct.	2 listed?	
3 Q Other than communicating that you if	3 Q Time records, memos to the file, or the	
4 you exceeded \$20,000 you had to bill him monthly,	4 like that would reflect what work he actually did.	
5 did Mr. Tricarichi or any of his representatives	5 A No.	
6 put a limit on how much PwC could spend in coming	6 Q None of the factual assumptions that are	
7 to the conclusion that the transaction would be	7 listed in the memo in PX 4 were were	
8 respected?	8 communicated to Mike Tricarichi, correct?	
9 A No.	9 MR. LANDGRAFF: Object to the form.	
10 Q You never heard from the client that you	10 BY THE WITNESS:	
11 shouldn't do whatever you thought necessary to	11 A The factual?	
12 complete the engagement, right?	12 BY MR. HESSELL:	
13 MR. LANDGRAFF: Object to the form.	13 Q Yeah, the factual assumptions.	
14 BY THE WITNESS:	14 A I don't believe so.	
15 A Correct. We we followed our our	15 Q And you didn't tell the client that PwC	
16 our assignment. 17 BY MR. HESSELL:	16 had not investigated the reasonableness of the	
	17 assumptions that it was relying on to come to the	
18 Q And I think you testified at the tax court19 trial that you were PwC was engaged by	18 conclusions it ultimately did, correct?19 A Correct.	
20 Mr. Tricarichi to identify tax issues and risk to	20 MR. HESSELL: I have to use the restroom	
21 him in the Westside transaction being proposed by	20 MR. HESSELL: Thave to use the restroom 21 and now would be as good a time as any to break	
22 Fortrend, correct?	22 for lunch. Is that okay with you?	
23 A I'd have to look at the transcript.	23 THE WITNESS: Sure.	
24 Q Well, at Page 590 you were asked, "What	24 THE VITALSS. Suite. 24 THE VIDEOGRAPHER: We are going off the	
25 type of tax research did he ask you to perform?"	25 record at 12:09.	
	T DEPOS	

197	199
1 transactions that was issued on November 7 of 2003	1 me to Tim Lohnes.
2 at about 2:30 p.m., correct?	2 Q I noted
3 A Yes.	3 A I don't recall reaching out to him, no.
4 Q And I take it you got this in your inbox	4 Q Okay. I noted that, too. And you
5 or email box?	5 you you anticipated my next question. You
6 A Yeah, I can't tell you exactly how it's	6 didn't reach out as far as you recall to
7 communicated to us but I received it.	7 Mr. Throndson or Ms. Trainer or anyone else in
8 Q Well, how were tax source technical tax	8 advance of communicating to Mr. Lohnes, right?
9 technical documents sent to partners?	9 A Yeah, not to my recollection. Correct.
10 A Yeah, I believe it was a it was an	10 Q And Mr. Lohnes responds that he'll take a
11 email to all tax partners.	11 look and get back to you before the end of the
12 Q All right. And then you in turn	12 week or by the end of the week, right?
13 A Or all tax professionals probably.	13 A Yes.
14 Q Okay. And then you in turn forwarded it	14 Q And you did you and Mr. Thorn you
15 the next or a few days later to Mr. Lohnes,	15 and Mr. Lohnes were considering whether this
16 right?	16 notice had an implication to Mr. Tricarichi and
17 A Yes.	17 the Westside Cellular transaction, correct?
18 Q And you asked to have him take a look at	18 A Concerning whether our conclusion
19 the items below regarding the Westside Cellular	19 concerning confirming our conclusion.
20 transaction, right?	20 Q And you did understand in 2003 and
21 A Correct.	21 afterwards that the IRS sometimes issues notices
22 Q And according to you in the email thread,	22 after a transaction that the IRS makes
23 it looks like there's no item that requires action	23 retroactive, right?
24 by the selling shareholder. The items relates	24 A From time to time.
25 that relate would be the loss on a 351 transaction	25 Q And in those scenarios, advice PwC may
198	200
1 and third-party asset sale, right?	1 have given originally can change because of a
2 A Right.	2 retroactive IRS notice, right?
3 Q And the selling shareholder in that	3 A It's conceivable.
4 sentence would be Mr. Tricarichi, right?	4 Q And you were evaluating the
5 A Yes.	5 transaction even you were evaluating the IRS
6 Q No in your initial assessment of the	6 notice in November 2003 even though the
7 notice, you concluded that no action was required	7 transaction had already closed in two-thousand
8 by Mr. Tricarichi in response to this notice,	8 in September of 2003, correct?
9 right?	9 A We were confirming our conclusion based on 10 the notice that had some out
10 A Well, I I said it looks like there is	10 the notice that had come out.
11 no so 12 Q Right.	11 Q And you were confirming advice PwC had 12 given even though you previously had testified
12 Q Right. 13 A I was looking to Tim for confirmation	13 that, in your view, your representation for
14 of our conclusion.	14 Mr. Tricarichi was concluded
15 Q Did you do any like your own research	15 A Correct.
16 or analysis of the Washington or the WNTS alert	16 Q already?
17 before you communicated to Mr. Lohnes a few days	17 A Correct.
18 later?	18 Q And you were doing that to make sure that
19 A Well, I don't know what you mean by	19 there was no change in the advice that you had
20 research. I'm sure I read it.	20 given that needed to be communicated to the
21 Q Well, other than reading the link, do you	21 client, correct?
22 remember inquiring of anybody else or	22 MR. LANDGRAFF: Object
 23 A I don't I don't remember that, but I do 	23 BY THE WITNESS:
24 note on Page 2 that Tim Throndson is the person to	24 A I was doing that to confirm that there was
25 contact who, again, was the person that referred	25 no change in the advice that we provided. Hadn't
25 contact who; again, was the person that reterred	

1 Is that is that accurate? 2 We had no obligation to reach out to our 1 Is that is that accurate? 2 We had no obligation to reach out to our 2 MR_LANDCRAFF: Object to the form. He 4 Instance standards, but we never got to that point 5 MR_LANDCRAFF: Is the 5 Q Had you in in November of 2003, had you 9 Noked into or investigated the issue of whether 6 One clock of whether 6 Q So you can answer. 7 MR_LANDCRAFF: Is the 8 BY THE WITNESS: 9 A Marts is that is that the 11 to het AICPA standards required you to got back in 11 he MR_LANDCRAFF: Is the 13 A Can't recall if I reviewed if because there was 7 MR_LANDCRAFF: Is the 14 standards, the the - so I 15 MR_LANDCRAFF: Is the 14 standards, the the - so I 15 MR_LANDCRAFF: Is the 13 a Can't recall if I reviewed if because there was In MR_LANDCRAFF: Is the 14 standards, the the - so I Is the is that the			203
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6 Q So you can answer. 7 BY MR. HESSELL: 8 9 Q Had you in in November of 2003, had you 9 9 looked into or investigated the issue of whether 7 10 the ACPA standards required you to get back in 7 11 touch with Mr. Tricarichi if a new notice or fact 11 12 came out that that changed you prior advice? 12 facetions. Is the question whether he knows that 13 A Can't recall that I researched the 13 14 standard. Lakew we had the the so 1 13 15 probably knew the standard generally. I can't 13 16 a can't recall that I' researched the 14 19 Q U understand - obviously I've seen some 19 20 from the emails that you concluded in cach of the 18 21 instances where you relooked at Mr. Tricarichi's 21 accurate or not. It's 22 moderstand that. 22 23 understand that. 23 24 My question is whether you were doing it 23 25 for your own benefit or whether you were doing it 20 24 the client? 20 3 MR. LANDGRAFF: Solgiet to the form 3 4 No. Lan't say. Me ne			
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221	223
1 A I can't recall knowing that.	1 Westside or Mr. Tricarichi transaction with the
2 Q And I take it you didn't communicate to	2 IRS before responding to the summons?
3 Mr. Tricarichi or his advisors those facts because	3 A Not to my knowledge.
4 you weren't aware of them?	4 Q Did you have any communications with
5 A Correct.	5 Mr. Tricarichi, Mike Tricarichi or Jim Tricarichi,
6 Q And not aware of anybody else at PwC	6 in advance of responding to this summons?
7 getting in touch with Mr. Tricarichi and advising	7 A Yes.
8 him that the Franchise Tax Board had opened a	8 Q In what form?
9 promoter penalty exam of PwC and was asking for	9 A We invited Mike Tricarichi and I believe
10 information about intermediary transactions,	10 Randy Hart in to review the material that we were
11 correct?	11 sending to the IRS in response to the summons
12 A I'm not aware of anyone at PwC, no.	12 before we sent it.
13 Q PX 14.	13 Q And did they?
14 (WHEREUPON, Plaintiff's Exhibit No. 14 was	14 A Yes.
15 presented to the witness.)	15 Q How did you invite them? Like, what
16 BY MR. HESSELL:	16 manner of communication?
17 Q A letter from you to Denise McCaskill at	17 A I can't recall specifically.
18 the IRS regarding the matter of Westside Cellular,	18 Q And did you actually meet them, Randy and
19 Inc., dated February 22nd, 2008, correct?	19 Mike Tricarichi, when they were reviewing the
20 A Yes.	20 documents?
21 Q Did you actually send a signed letter to	21 A I believe they came to our office and I
22 Ms. McCaskill and this is just a copy of the	22 provided the documents and they sat in a
23 unsigned version?	23 conference room.
24 A I'm sure I sent a signed letter.	24 Q But you didn't have any substantive
25 Q Was it your practice to keep a copy of the	25 communications with them other than saying hello
222	224
1 letter but not the actual signed one in your	1 and showing them the conference room?
2 files?	2 A That's my that's my recollection,
3 A Yes.	3 correct.
4 Q And did you actually craft this response	4 Q Do you know whether the matter for which
5 on your own or did you get assistance from	5 documents were being sought in February of 2008
6 counsel?	6 was the investigation of Westside's tax
7 MR. LANDGRAFF: You can answer that "yes"	7 obligations as opposed to the transferee
8 or "no," but don't go any into any advice you	8 investigation of Mr. Tricarichi?
9 may have received from an attorney.	9 A I I don't know.
10 BY THE WITNESS:	10 Q How long before the February 22nd letter
11 A You want to word it in a yes-or-no way?	11 went out did you have that interaction with
12 BY MR. HESSELL:	12 Mr. Tricarichi and Mr. Hart about reviewing PwC's
13 Q It was a yes-or-no way I think.	13 documents?
14 A No, you said did I do it myself	14 A I don't recall the specific date.
15 Q Oh	15 Q Was it a month before, two months before?
16 A or did I get assistance from counsel.	16 A Well, I think we received the the
17 Q Did you get assistance from an attorney in	17 summons at the end of January, so it had to be
18 crafting this response?	18 between that the date that we received the
19 A Yes.	19 summons and February 22nd.
20 Q Who was that?	20 Q Did you provide did PwC provide a copy
21 A A member of the Office of General Counsel	21 of the documents it was producing to the IRS to
22 at PwC.	22 Mr. Tricarichi and Mr. Hart at that time?
23 Q Do you know why the summons came to you?	23 A Not at that time. At a later date they
24 A I don't.	24 requested or Mr. Tricarichi requested it, so we
25 Q Had PwC shared any information about the	25 sent it to him then.

229 231 A I do. Q Well, what do you mean by that front of 1 1 2 2 mind then; just that it was the -- one of the Q And you received -- you're one of the PwC 3 U.S. tax partners and received an IRS notice from things that was on your mind because you had just 3 4 Quality and Risk Management on or about March 3rd, 4 done this document-gathering effort? 5 2008, right? 5 A Correct. Q You weren't concerned that Mr. Tricarichi, A Yes. 6 6 7 Q And you -- and you see that the -- in the 7 if the transaction got investigated by the IRS, 8 QRM communication, it says that "This is a might later sue you or seek a tolling agreement? 8 9 important request for information on a listed 9 A I was -- I was not concerned about that, 10 transaction that was recently identified by the 10 no. 11 IRS entitled Distressed Asset Trust Transaction. 11 Q Were -- in or around this time, were 12 "We must determine whether PwC was 12 others at PwC expressing concern about Midco 13 involved with any of these transactions -- with 13 transactions, in particular whether clients might 14 any transaction that is the same or substantially 14 turn around and sue PwC for advice regarding such 15 similar to the listed transaction identified in 15 transactions? 16 the notice below," right? 16 A My -- I was never -- I never heard that --17 A Correct. 17 that being discussed, no. 18 Q And you asked Mr. Lohnes to consider the 18 Q Did you discuss the March 2008 IRS notice 19 message below as well as the one from California 19 with anyone other than Mr. Lohnes? 20 last week and whether it applies to Mr. Tricarichi 20 A I don't believe so. 21 or the Westside transaction, correct? 21 Q Did you do any research on your own to 22 A Yes. 22 come to the conclusion that it didn't apply? 23 Q This is four years -- four-years-plus 23 A I can't recall if I did or I didn't. 24 after Mr. Tricarichi's transaction closed, you and Q You didn't contact -- contact Elaine 24 25 Mr. Lohnes are again conferring about a new IRS 25 Church or Rochelle Hodes in QRM to determine 230 232 1 notice and whether it might apply, correct? 1 whether the Westside transaction needed to be A Yes, we had just answered the summons so registered or listed under this Notice 2008-34, 2 2 3 it was clearly top of mind. And when I saw this, right? 3 4 I reached out to Tim to see if our -- just to 4 A I did not. 5 confirm our conclusions. 5 Q Didn't contact whoever was the subject Q And, just to be clear, because it doesn't 6 matter expert on DAT transactions to determine 6 7 expressly say, you were conferring with Mr. Lohnes 7 whether they thought the Westside transaction 8 about whether this March 2008 IRS notice might 8 might apply? 9 apply to Mike Tricarichi's Midco transaction. 9 A I did not. 10 correct? 10 Q Did you do anything else --11 A Yes. 11 (audio garbled) -- email Mr. Lohnes and get his 12 Q Why did you think it might apply? 12 opinion? 13 A I didn't know whether it didn't or it 13 A Did I do anything else... 14 didn't [sic], but something piqued my curiosity so 14 Q To investigate whether this notice 15 I asked. 15 applied? 16 Q Yeah, but what piqued your curiosity in A Not that I can recall. 16 17 particular about distressed asset trusts? 17 Q Did you review any documents produced to 18 refresh your recollection about the transaction? 18 A You know, I can't say but something did 19 because I was -- the -- since the summons was just A I had just -- I had just reviewed the 19 20 documents so I don't believe I reviewed them 20 issued, the whole area was on my mind. 21 Q And the summons issuing created concern I 21 again. 22 imagine from your perspective about this 22 Q Did you record your time in your time 23 entry system to reflect the work you did looking 23 particular transaction, correct? 24 A Incorrect. I was not concerned but I was 24 at this notice and its potential application to 25 just more aware. 25 Westside?

		pr		225
1	A We record all of our time, every every	1	Q court decision?	235
1 2 h	hour. So my time was recorded into a non	2	A No.	
	non-client, non-chargeable category I'm sure.	3	Q There wasn't concern expressed amongst	
4	Q Is there a particular like we have a	4	people at PwC in around that time that the that	
	natter number that's like friends of the firm,		this was the Enbridge case was not a good	
-	kind of, nonbillable matters. Is there a	6	situation because the court held that there wasn't	
	particular code or entry that would identify those	7	even substantial authority for the positions	
-	tems?		taken?	
9	A I can't recall specifically. We had	9	A Not to me.	
-	numerous non-client codes, much to the chagrin of	10	Q Didn't hear from anyone else at PwC that	
	the firm.		they were worried that that PwC would be	
12	Q Of course. Same here.		hearing from the losing plaintiffs in the near	
13	But your practice is to record every hour		future?	
_	of the day you're in the office working into some	14		
	natter number?	15	Q Prior to preparing for this deposition,	
16	A Either it could be a client number, it		did you did you know anything about the	
	could be admin, it could be practice development,		Enbridge case?	
	t could have been just community involvement.	18	A I recall the Enbridge case. I didn't	
	You there's hundreds literally hundreds of		review it in anticipation of this deposition.	
	codes.	20	Q Oh, you didn't. When do you remember	
21	Q Do you have tasks when you put those		first learning about Enbridge?	
	codes in, do you have to put tasks that you were	22	A I couldn't tell you specifically.	
	working on that would identify in some way that	23	Q You weren't involved in any in the	
	you were looking at Westside again?		Enbridge case itself, right, with the advice in	
25	A No.		connection with Midco's client or Enbridge?	
	234			236
1	Q In any event, Mr. Lohnes confirmed that he	1	A Correct.	
2 č	loesn't think the 2008 notice should apply either	2	Q 19. PX 19.	
	o the Westside transaction for the reasons he	3	(WHEREUPON, Plaintiff's Exhibit No. 19 was	
4 s	states in PX 16, right?	4	presented to the witness.)	
5	A Correct.	5	BY THE WITNESS:	
6	Q And you didn't go any further than that?	6	A All right.	
7	A Right.	7	BY MR. HESSELL:	
8	Q PX 17.	8	Q Do you know who Mark Boyer is?	
9	(WHEREUPON, Plaintiff's Exhibit No. 17 was	9	A I do.	
10 p	presented to the witness.)	10	Q Did you ever participate in this WTS	
11 Î	BY MR. HESSELL:	11	meeting regarding the Enbridge Energy decision?	
12	Q You wouldn't have been on the you	12	A No.	
13 v	weren't part of tax core QRM?	13	Q Have you ever seen this memo before?	
14	A I was not.	14	A No, I don't believe I saw it in	
15	Q So you wouldn't have received an email	15	preparation.	
16 f	from Elaine Church regarding the Enbridge case and	16	Q Was there an effort in May of 2008 to	
17 t	hat a district court had concluded that a Midco	17	at PwC to market PwC's expertise in being able to	
18 t	ransaction on which PwC provided advice was a		determine whether a particular transaction	
19 s	sham?	19	qualified as a Midco transaction?	
20	A Correct, I would not have gotten that.	20	A I don't recall of a of such an effort.	
21	Q Did you hear did you prior to	21	Q On Page 2 of PX 19, there's some takeaways	
22 p	preparing for this deposition, did you hear in or	22	to discuss with clients regarding the Enbridge	
23 a	around April of 2008 about the Enbridge tax court	23	case.	
	lecision or	24	Do you see that?	
25	A No.	25	A Yes.	
L	PLANET	- T-		

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1 particular subject matter, or did you get notices	1 prior analysis of the Westside transaction in
2 from the Knowledge Gateway like into your email or	2 particular?
3 otherwise?	3 A Yes, to confirm our conclusion.
4 A I can't recall if they pushed out	4 Q And he says he agrees with your
5 notifications or not, but the Knowledge Gateway	5 assessment. So what did you do in advance of
6 was a very voluminous resource for us.	6 calling Mr. Lohnes to determine whether
7 Q Is it still (audio garbled) as of your	7 Notice 2008-111 applied to the Westside
8 retirement?	8 transaction or did not?
9 A I don't believe it was called Knowledge	9 A I can't recall
10 Gateway as as of my retirement. I can't recall	10 Q How did you sorry.
11 exactly what it was called.	11 A I can't recall what I did.
12 Q All right. In any event, you agree that	12 Q How did you get in touch with Mr. Lohnes?
13 in 2008 at the end of 2008, when a new notice	13 A I presume either an email or phone call.
14 came out regarding intermediary tax shelters, you	14 Q Well, there's no email, that's why I'm
15 reached out to Mr. Lohnes again to inquire whether	15 asking.
16 it would change any of our prior analysis on the	16 A Oh. Well, I presume I called him.
17 Westside transaction?	17 Q And given the timing, it looks like since
18 A Can you direct me to that.	18 Notice 2008-111 came out on December 1st and he's
19 Q 21. Plaintiff's Exhibit 21, the one right	19 responding to you on December 2nd, I presume you
20 before.	20 got in touch with Mr. Lohnes soon after the IRS
21 (WHEREUPON, Plaintiff's Exhibit No. 21 was	21 issued Notice 2008-111, right?
22 presented to the witness.)	22 A It would appear that way, yes.
23 BY THE WITNESS:	23 Q And did you why were you evaluating
24 A Yes.	24 whether Notice 2008-111 might change any of your
25	25 prior analysis of the Westside transaction advice?
	244
242	244
1 BY MR. HESSELL:	1 A Well, again, it was to confirm our
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245	247
1 prior advice to Mr. Tricarichi, correct?	1 all about what your discussion with Jim Tricarichi
2 A Our our prior conclusion, correct.	2 was?
3 Q Do you know why he concluded that?	3 A I don't recall
4 A I don't.	4 MR. LANDGRAFF: Object to the form.
5 Q Do you know what what steps he took to	5 THE WITNESS: Sorry.
	6 MR. LANDGRAFF: Object to the form.
	7 Go ahead.
9 Q Did you consult did you ask Mr. Lohnes	9 A I don't recall the discussion with Jim
10 what steps he took to determine whether the	10 Tricarichi, but he must have requested a copy of
11 2008-111 notice would change PwC's prior advice on	11 material that we had previously provided to to
12 the transaction?	12 Mike Tricarichi and and his lawyer for review
13 A No, Tim Lohnes was was and is an expert	13 that we sent to the IRS.
14 in the area and I didn't question his you know,	14 BY MR. HESSELL:
15 his actions.	15 Q I see here that this one Plaintiff's
16 Q You didn't consult with anyone else at PwC	16 Exhibit 43 is actually contains a signature on
17 besides Mr. Lohnes regarding whether the 2008	17 it.
18 notice changed PwC's prior advice, correct?	18 Do you see that?
19 A Correct.	19 A Yeah.
20 Q In December of 2008, had you worked on any	20 Q Do you know why this file copy from PwC
21 other Midco transactions between Mr. Tricarichi's	21 actually has a signature on it but others don't?
22 and strike that.	22 A I don't.
In December of 2008, other than ones we've	23 Q Did you have any other communications with
24 already talked about, had you worked on any other	24 Mr. Tricarichi before or after this letter related
25 Midco transaction?	25 to the tax court case or the transaction?
246	248
246	248 1 A With Mike Tricarichi?
1 A No.	1 A With Mike Tricarichi?
 A No. Q Is it fair to say that between 2003 and 	1A With Mike Tricarichi?2Q Yeah.
 A No. Q Is it fair to say that between 2003 and 2008, you had no other substantial Midco-related 	 A With Mike Tricarichi? Q Yeah. A Not that I can recall, no.
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	249 251
1 BY MR. HESSELL:	1 might be nearing the end here.
2 Q Did you understand when you were reviewing	2 MR. LANDGRAFF: Okay. Can we take ten?
3 the various notices and considering with	3 MR. HESSELL: Yes.
4 Mr. Lohnes whether they applied to the Westside	4 MR. LANDGRAFF: Thank you.
5 transaction, that if you concluded that they did	5 THE VIDEOGRAPHER: We are going off the
6 apply, that PwC would have an affirmative listing	6 record at 1515.
7 or disclosure obligation to the IRS?	7 (WHEREUPON, a recess was had.)
8 A No, I never because we confirmed our	8 THE VIDEOGRAPHER: We are back on the
9 conclusion, I never went to that the next step	9 record at 1529.
10 in determining if we had a reporting	10 BY MR. HESSELL:
11 responsibility.	11 Q Following the IRS notice in notice in
12 Q But you did understand generally that if a	12 2008, both of them, you did not reach out to
13 transaction is identified by the IRS as a listed	13 Mr. Tricarichi or any of his advisors and tell him
14 or reportable transaction, the accountant as well	14 that you were considering whether those notices
15 as the client has an affirmative obligation to	15 changed PwC's prior advice, correct?
16 maintain or dis list or disclose to the IRS,	16 A Correct.
17 correct?	17 Q Nor did you reach back out to
18 A Not	18 Mr. Tricarichi or any of his advisors with respect
19 MR. LANDGRAFF: Object	19 to any of the other notices we looked at that came
20 BY THE WITNESS:	20 out following closing of the transaction, right?
21 A Not necessarily I'm sorry.	21 A Right.
22 MR. LANDGRAFF: I objected to form.	22 Q PwC did not communicate to Mr. Tricarichi
23 Go ahead.	23 that they were considering whether those notices
24 BY THE WITNESS:	24 might have an implication on their prior advice,
25 A Not necessarily. There were specific	25 fair?
	250 252
1 definitions and requirements for you to be for	1 A Correct.
2 one to be required to report. So I hadn't done	2 Q Do you have any knowledge at all about
3 that analysis.	3 PwC's role in another Midco transaction called
3 that analysis.4 BY MR. HESSELL:	
•	3 PwC's role in another Midco transaction called
4 BY MR. HESSELL:	3 PwC's role in another Midco transaction called4 Marshall?
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273	275
1 Q I want you to turn to Exhibit	1 qualified as more likely than not?
2 Plaintiff's Exhibit 14 that you reviewed earlier	2 MR. HESSELL: Objection, leading.
3 with Mr. Hessell. This is the February 22nd	3 BY THE WITNESS:
4 letter February 22nd, 2008 letter from you to	4 A Although I don't recall the specific
5 Ms. McCaskill at the IRS.	5 conversations, it's clear from my notes that I
6 A Yes.	6 communicated that, so I have no doubt.
7 Q And in the middle of the letter you see	7 MR. LANDGRAFF: Let me just check one
8 the statement your statement that actually,	8 thing. I think that's all I've got. Let me
9 it's the second and third sentence. You say,	9 just
10 "Please note that PricewaterhouseCoopers, LLP,	10 Thank you. That's all the questions I
11 (PwC) was engaged by Michael Tricarichi and	11 have.
12 Westside Cellular, Inc., solely to perform state,	12 MR. HESSELL: I have some follow-up. Hold
13 local, and federal tax research and evaluation	13 on.
14 services related to the sale of Mr. Tricarichi's	14 FURTHER EXAMINATION
15 stock in Westside Cellular, Inc. PwC provided no	15 BY MR. HESSELL:
16 services to Mr. Tricarichi or Westside	16 Q Let's start with the last subject first.
17 Cellular, Inc. after this engagement."	17 The entire basis for your testimony that
18 What what did you mean by that?	18 you qualified opinions based on or qualified
19 A Just what it said.	19 your conclusions to Mr. Tricarichi is based on the
20 Q Can you explain what what did you	20 statement in your letter, correct?
21 mean by the fact or by your statement that PwC	21 MR. LANDGRAFF: Object to the form.
22 provided no services to Mr. Tricarichi or Westside	22 BY THE WITNESS:
23 Cellular after the engagement.	23 A Can you repeat the question. I'm sorry.
24 MR. HESSELL: Objection, form.	24 BY MR. HESSELL:
25	25 Q Sure. The whole the whole basis for
274	276
1 BY THE WITNESS:	1 your testimony here that you qualified PwC's
2 A I'm not sure if it was in response to	2 conclusions to Mr. Tricarichi is the note in
3 something in the summons, but or I was just	3 Plaintiff's Exhibit 4, which I call the Stovsky
4 stating a fact.	4 memo, that they
5 BY MR. LANDGRAFF:	5 A Uh
6 Q When when did the engagement with	6 Q more likely than not, correct?
7 Mr. Tricarichi end?	7 A No, I think that's part of the basis, but
8 A Sometime in September of 2003.	8 we communicated risk throughout the the work
9 Q So I want to go back to Exhibit 4, which	9 that we did including the recommendations on the
10 is again, Plaintiff's Exhibit 4, which is	10 agreement.
11 the what Mr. Hessell referred to as the Stovsky	11 Q I understand you communicated risk. My
12 memo. Are you do you have that exhibit in	12 my question is specific to the level of the "more
13 front of you?	13 likely than not" verbiage.
14 A I do.	14 And you have we've already I asked
15 Q And you said you testified that you	15 several times, you have no separate recollection
16 couldn't you couldn't specifically recall the,	16 of having communicated that language to
17 you know, exact conversation in which you provided	17 Mr. Tricarichi other than the fact that it's
18 your conclusions to Mr. Tricarichi or his	18 written in that memo, correct?
19 representatives relating to the fact that your	19 A Correct.
20 opinions were qualified as more likely than not.	20 Q And you can't say when in time you added
21 Do you recall talking about that?	21 that language into the memo?
21 Do you recall taiking about that? 22 A Yes.	
	21 that language into the memo?
22 A Yes.	21 that language into the memo?22 A Correct.
A Yes.Q Do you have any doubt that you	 21 that language into the memo? 22 A Correct. 23 Q And you agree with me that at no point in

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Conducted on September 1, 2020

	277			279
1	Mr. Tricarichi or any of his advisors with respect	1	returns prior to this transaction?	
2	to PwC's conclusions on the transaction?	2	A No.	
3	A Not that I know of.	3	Q Do you know who did?	
4	Q And you also agree with me that you	4	A No.	
5	haven't seen any written notes that you took of	5	MR. HESSELL: Will you pull up Mike,	
6	the conversations you had with Mr. Tricarichi and	6	will you pull up PwC Exhibit Number 9.	
7	his advisors that reflect you used that "more	7	It's not in your binder, it's just going	
8	likely than not" verbiage in communicating with	8	to be on the screen.	
9	the clients, correct?	9	THE WITNESS: Okay.	
10	A Correct.	10	(WHEREUPON, a document was presented to	
11	MR. LANDGRAFF: Object to the form.	11	the witness.)	
12	BY THE WITNESS:	12	BY MR. HESSELL:	
13	A Correct.	13	Q Do you agree with me that that these	
14	BY MR. HESSELL:	14	two documents, the first four pages which go up to	
15	Q When the IRS initiates an investigation of		the signature pages and then the next two pages	
16	a PwC transaction like the February 2008 letter		or the next three pages which contain the terms	
	where it asks for documents, does that trigger any		and conditions are are actually separate	
	sort of internal review process about PwC's advice	18	documents?	
19	on the transaction?	19	A Yeah, the the terms and conditions that	
20	A I don't I don't know. I contacted our	20	get attached to engagement letters are dependent	
21	Office of General Counsel. I don't know what they		on the type of engagement.	
22	did other than guide me through the response.	22	Q And why is it that PwC has separate terms	
23	Q So I take it then that you're not aware of	23	and conditions with really small letters that it	
24	any internal review process at PwC that was	24	attaches or you say that are attached to these	
	triggered by the summons request from the IRS on	25	engagement agreements?	
	278			280
1	the Tricarichi transaction?	1	MR. LANDGRAFF: Object to the form.	
2	A I'm not aware I'm not aware of a review	2	BY THE WITNESS:	
3	that was triggered by the summons.	3	A I couldn't say.	
4	Q Or by any I mean or by any of the	4	BY MR. HESSELL:	
5	subsequent events, the deposition or the trial	5	Q You see at the bottom	
6	testimony, none of that as far as you know	6	MR. HESSELL: Can I take control of the	
7	triggered any sort of internal review of the work	7	document now, Michael.	
8	that was done on the Tricarichi transaction,	8	BY MR. HESSELL:	
9	correct?	9	Q Do you see at the bottom of the page	
10	A Yeah, I don't I don't know of I	10	here I think it's covered by the stamp on the	
11	don't know either way if one was triggered.	11	first page, but on Page 2 of the engagement	
12	Q Did did you at some point tell	12	agreement and then Page 3, there are this notation	
13	Mr. Tricarichi or his brother that PwC could not	13	here for the page numbers of the engagement in	
14	prepare Mike Tricarichi's tax returns associated	14	paren (indicating).	
15	with this transaction?	15	It's on Page 3 there and then on Page 2	
16	A I don't recall	16	here (indicating)?	
17	Q Did you tell Mr. Tricarichi that either	17	A Yes, I see that.	
18	Mr. Tricarichi or his or any of his	18	Q And do you agree with me that that	
19	representatives that you couldn't prepare the tax	19	numbering does not continue on to the attachment	
20	returns for either Mr. Tricarichi or Westside	20	of the terms and conditions?	
21	because you were already had already been	21	It doesn't show 4 at the bottom of this	
22	engaged to prepare tax returns for somebody else	22	page, and it which is Bates-labeled 459 or 5	
23	in connection with the transaction?	23	it doesn't continue the numbering from the	
24	A No, I don't recall that.	24	engagement agreement itself, right?	
25	Q Had you prepared Mr. Tricarichi's tax	25	A Correct.	

Exhibit 11



Transcript of Michael A. Tricarichi

Date: October 1, 2020 **Case:** Tricarichi -v- PricewaterhouseCoopers LLP, et al.

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WORLDWIDE COURT REPORTING & LITIGATION TECHNOLOGY

APP1350

	October 1, 2020
33	35
1 introduce you to MidCoast, correct?	1 Q And Mr. Folkman and Hahn Loeser negotiated
2 A No.	2 the deal with Fortrend for you; is that correct?
3 Q And as part of your discussions with	3 A They papered the deal. I don't know that
4 Hahn Loeser and your brother Jim, you also learned	4 they negotiated the deal. There were a lot of
5 about another potential buyer called Fortrend; is	5 negotiations that were going on at the time with
6 that correct?	6 different people.
7 A Yes.	7 Q You agree that that Jeff Folkman was
8 MR. HESSELL: Object to the form of the	8 your lead negotiator of the terms of the stock
9 question.	9 purchase agreement between Westside and Nob Hill?
10 BY MR. LANDGRAFF:	10 A Ultimately he wrote the agreement, but he
11 Q And PwC did not introduce you to Fortrend;	11 got input from a number of sources including PwC.
12 is that correct?	12 Q PwC was not at the meeting where the price
13 A I don't believe they did, no.	13 was negotiated with Fortrend; is that correct?
14 Q PwC was not at your initial meeting with	14 A I don't know. There were a couple of
15 Fortrend; is that correct?	15 different prices from Pw or, I'm sorry, from
16 A I don't think so, no.	16 Fortrend over the time we were talking to them,
17 Q And what was Fortrend's proposed role in	17 and there were a number of meetings.
18 the Westside transaction?	18 So I don't think so, but I you know, I
19 A I don't understand the question.	19 leave the possibility open.
20 Q What did you understand that Fortrend was	20 Q As you sit here today, you don't think
21 going to do?	21 you're leaving the possibility open, but you don't
22 A They were going to buy the stock of the	22 think PwC was an attendant at a meeting where a
23 company.	23 price was negotiated with Fortrend; is that fair?
24 Q You chose to do the deal with Fortrend	24 A Yeah, I don't think they were, but I
25 instead of with MidCoast, right?	25 like I said, I I leave the possibility open.
34	36
34 1 A Yes.	1 Q When were you first introduced to anyone
1 A Yes. 2 Q Why did you do that?	36 1 Q When were you first introduced to anyone 2 at PwC?
 A Yes. Q Why did you do that? A Because Fortrend was going to pay us more 	36 1 Q When were you first introduced to anyone 2 at PwC? 3 A When? Sometime in 2003, mid 2003. Maybe
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So we were looking so we wanted another 1 two of them, and we finally got to the and I	39
2 big four, big six I don't remember how many 2 think that we had talked to Rich while we were	
3 there were at the time accounting firms to look 3 bouncing back and forth.	
4 at it. 4 So he came into the into the deal	
5 So my other brother, Jim, had a 5 before we decide and this is my recollection	
6 relationship with Rich Stovsky. I don't know what 6 before we decided specifically to go with	
 7 their exact relationship was, whether they were 7 Fortrend he may have come after we decided 	I
8 golfing buddies or whatever. But Jim suggested 8 don't know. But we wanted a second opinion of	
9 that we have we talk to Rich and maybe we could 9 deal.	i the
10 have PwC be the second opinion that we were 10 It was basically the same deal. The	
11 looking for. 11 Fortrend deal and the MidCoast deal was the sa	me
12 Q And what was the opinion itself that you 12 thing, it was a stock purchase agreement. The	liic
13 were getting a second opinion on?	V
14A Okay, what I was looking at at the time15 only currentee in my mind was the uncount the144 were willing to pay for the stock.	3
15 was basically two possibilities. 15 And, like I said, at the time, I didn't	
16Possibility number one was leaving16Find the find the	
17 there was never a discussion of liquidating the 17 there was never a discussion of liquidating the 17 there was never a discussion of liquidating the	
18 company. There was a discussion about leaving the 18 because they were separate companies. But	VOII
19 assets in the company and converting the company 19 know , so that was that was the situation.	you
19 assets in the company and converting the company19 know, so that was in situation.20 to a real estate investment company.20 So Pricewaterhouse was brought in from the	1e
21 And in the event that we did that, we 21 beginning to advise us on the transaction and	
22 would have paid the tax that was owed the 22 primarily advise us on the transaction and 22 primarily advise us as a thumbs up or a thumbs	
23 corporate tax that was owed. And the money would 23 down.	
24 have remained in the company and the company would 24 mainly speaking, what I what I told	
25 have made investments in various types of things.	Ţ
25 have made investments in various types of timigs. 25 Ken Stovsky wich Thiet with Ken Stovsky wa	
1 That was one possibility. 1 don't want if we do this deal "this deal"	40
 2 The other possibility was this stock sale, 2 being with Fortrend or whoever we picked if 	T
3 which we had never contemplated until Jeff Folkman 3 do this deal, I do not want this to bounce back of	
4 brought it up. And then once he brought it up, we 4 me, okay? There is no way that I'm going to do	11
5 looked at it, but it was something that 5 this deal even if there's a minute chance that	
 6 just you know, it was a very complicated thing. 6 it's going to bounce back on me. I said I'd 	
 7 And I don't like do doing things that I don't 7 and I don't like do doing things that I don't 7 ather pay the tax. 	
8 grasp. 8 And that was what Stovsky was told at the	
 9 So we decided that we would have someone 9 time that we hired PwC. 	
10 else look at it as well. And during that time, we 10 dise look at it as well.	
10 erse rook at it as well. And during that time, we10 Q well, what11 had an accountant I'm trying to remember what11 A He was told that by me.	
12 his name was, Don something and he had a11A He was tord that by me.12Q Okay. I didn't mean to interrupt you.	
13 relationship with a guy by the name of Gary Zwick.	
14 And I think Gary Zwick had some sort of loose14 A Yes.	
15 association with Fortrend. 15 Q What as and you said there was a you	
16 So Don Jesco (phonetic) Don Jesco. So 16 were looking for a second opinion. What was t	
17 Don recommended that we talk to Gary Zwick and see 17 opinion that Hahn Loeser gave you that you we	
18 if there was a competitive aspect on this stock 18 looking for a second opinion on? From	
19 purchase agreement. 19 A Well, their	
20 So we talked to Gary Zwick, and there was 20 Q PwC	
20 30 we talked to Galy Zwick, and there was 20 Q I we 21 another guy, Block I think his name was, but I 21 A opinion. I'm sorry.	
21 another guy, Block 1 think his hane was, but 1 21 A Opinion. 1 in sorry. 22 don't remember what something Block. And we 22 Q I I	
22 don't remember what something block. And we 22 Q 11 23 had a meeting with them, and they said basically 23 A Finish.	
23 had a meeting with them, and they said basicarry23 A Finish.24 that they were in the same business as MidCoast.24 Q stopped for let me ask it again.	
25 So we bounced back and forth between the 25 That was my fault.	
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	,
41 1 You mentioned that you were you were	43 1 He was told I wanted assurance that this
	2 deal is going to be good and that nothing bad is 2 going to be prove if we do it. And that is what he
3 an opinion that Hahn Loeser gave you. What was	3 going to happen if we do it. And that's what he
4 the opinion that Hahn Loeser gave you that you	4 was told.
5 were looking for a second opinion on?	5 And more likely than not is a figment of
6 A Well, Hahn Loeser brought in MidCoast and	6 PwC's imagination because those words were never,
7 they said it was a good deal. So that would have	7 and I repeat, never discussed, papered, they don't
8 been the opinion, was it a good deal and what was	8 show up in an email, there's nothing.
9 the likelihood that it was going to crater.	9 Q Do you have do you have did you take
10 Q And what do you mean by	10 any notes in what you claim today sitting here
11 A Hahn since Hahn since Hahn Loeser	11 today that Rich Stovsky told you?
12 brought them in, we assumed Hahn Loeser was	12 A Did I take any notes? No, I didn't take
13 recommending them.	13 any notes. Did you give me any paper?
14 We can't I can't imagine Hahn Loeser	14 Q Did you write down at the time Rich
15 bringing in bringing in a potential buyer that	15 Stovsky gave you the advice, did you write down
16 they had reservations about.	16 what he told you?
17 Q When you say it was a good deal and	17 A I may have. I don't know. I don't have
18 that and wasn't going to crater, what do you	18 it.
19 mean by that?	19 Q What happened to it if you may have?
20 A I mean it wasn't going to crater like it	20 A I don't know.
21 did.	21 Q Did you send an email to anyone involved
22 Q What does "crater" mean? Meaning not do	22 in the deal saying, "I just talked to Rich Stovsky
23 the deal? I mean	23 and said the deal's not going to crater and it's a
24 A No, crater means after you do the deal	24 good deal and we can go ahead and do it"?
25 there are negative ramifications.	25 A I might have.
42	44
1 Q What did	1 Q Well, where is that email?
2 A Which there were.	2 MR. HESSELL: Objection to the form of the
3 Q What did Rich Stovsky tell you with	3 question.
4 respect to what was the second opinion that	4 BY THE WITNESS:
5 Rich Stovsky gave you?	5 A I can't tell you. Where is the where
6 A That it wasn't going to crater.	6 is the more likely than not? Show me that.
7 Q Rich Stovsky used those words with you?	7 BY MR. LANDGRAFF:
8 A No, he didn't use those words. He told me	8 Q You as you sit here today, is there a
9 that it was a good deal, go ahead and do it.	9 single piece of paper that you authored recounting
10 Q When did Rich Stovsky tell you it's a good	10 your claimed conversation with Rich Stovsky about
11 deal, go ahead and do it?	11 the deal?
12 A I don't remember exactly. Sometime before	12 A Number one, it's not a claimed
13 we did the deal. We did the deal in September.	13 conversation, okay? It was an actual
14 Q And those are the words that you say Rich	14 conversation.
15 Stovsky used in telling you about the deal?	15 Number two, there were witnesses to the
16 A Oh, yeah. Both similar words. I don't	16 conversation. My brother Jim is one of them,
17 know if those were the exact words, but words to	17 okay? So I don't know what you're talking about.
18 that effect, yes.	18 Q Can you answer my question?
19 This more-likely-than-not crap that you	19 A I just answered it.
20 you guys have been talking about in all these	20 Q Is there a single piece of paper that you
	21 authored recounting your claimed conversation with
[2] depositions is BS, okay? It's total BS. That was	
21 depositions is BS, okay? It's total BS. That was 22 never discussed, that was never stated, that was	
22 never discussed, that was never stated, that was	22 Rich Stovsky about the deal?
22 never discussed, that was never stated, that was 23 never part of the employment, that was never	22 Rich Stovsky about the deal?23 A I don't think there's a single piece of
22 never discussed, that was never stated, that was	22 Rich Stovsky about the deal?

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		47
1 can't identify a single piece of paper that you	1 Q And can you tell us what other pages you	
2 authored recounting your claimed conversation with	2 did you claim you did not receive?	
3 Rich Stovsky about the deal; is that correct?	3 A I don't I resent your using the words	
4 A The answer to my question is to your	4 "you claim" and wish you wouldn't do that.	
5 question is what I said. I don't think there's a	5 PwC-002489 through 2491.	
6 single piece of paper either way.	6 Q So it's your testimony that you did not	
7 Q You mentioned your brother Jim. Jim	7 receive the terms and conditions that are part of	
8 was Jim was your withdrawn.	8 Exhibit 9; is that correct?	
9 Jim was the main contact with PwC for	9 A It's my testimony that I didn't receive	
10 regarding your side of the Westside sale; is that	10 the pages that I just outlined.	
11 fair?	11 Q Now so you did receive and Exhibit 9	
12 A Yes.	12 has two copies of the first page because there's	
13 Q And did Jim have your blessing to be the	13 a there's a page that doesn't have any marking	
14 conduit between you and PwC?	14 on it on Exhibit 9.	
15 A He was the conduit between me and Rich	But the the second page of Exhibit 9 is	
16 Stovsky.	16 a is the first page of a letter to you from	
17 Q And Rich Stovsky is who you communicated	17 PwC. And that ends in the Bates number 485; is	
18 with at PwC, right?	18 that correct?	
19 A Yes.	19 A The second page? Yeah, 485, that's the	
20 Q Did Jim Tricarichi have your blessing to	20 second page. That has my strikeout on it.	
21 be the conduit between you and and Rich Stovsky	21 Q Okay. So you received you received the	
22 relating to the Westside sale?	22 page ending in 485; is that fair?	
-		
23 A Yes, he was the conduit between me and 24 between Westride and Dich Storyly	23 A No, I made the page ending in 485. I	
24 between Westside and Rich Stovsky.	24 received the page ending in 484.	
25 Q And you trusted him with that role?	25 Q Okay. So you received 484 and you	
		48
	 marked your marking is shown on 485? A Correct. 	
2 Q If you would turn it's probably in the	-	
3 first binder to Exhibit 9.	3 Q And then we'll talk about 486, but then	
4 MR. LANDGRAFF: And I'll ask that	4 you received or your marking shows up on	
5 Exhibit 9 be marked as PwC Exhibit 9.	5 Page 487; is that correct?	
6 MR. HESSELL: This one has already been	6 A That's correct.	
7 marked, right?	7 Q And and then your signature appears on	
8 MR. LANDGRAFF: I believe so, Scott.	8 the Page 488; is that correct?	
9 That's right.	9 A That's correct.	
10 (WHEREUPON, a certain document was marked	10 Q Okay. So let's go back to Page 485 of	
11 PwC Deposition Exhibit No. 9, for identification.)	11 Exhibit 9 that you said contains your strikeout.	
12 BY THE WITNESS:	12 A Yeah.	
13 A I got it.	13 Q So on Page 485 of Exhibit 9, you it's	
14 BY MR. LANDGRAFF:	14 your strikeout, you crossed out the statement on	
15 Q Do you have that in front of you, sir?	15 the on this page saying, quote, "You agree to	
16 A I do.	16 advise us if you determine that any other matter	
17 Q Did you receive Exhibit 9?	17 covered by this agreement is a reportable	
18 A No.	18 transaction that is required to be disclosed under	
19 Q What did you did you what didn't	19 Section 1.6011-4."	
20 what part of Exhibit 9 did you not receive?	20 Is that correct?	
21 A I did not receive the page that's marked	21 A That's correct.	
22 PwC-02 002486.	22 Q Why did you strike that out?	
23 Q Any other part of Exhibit 9 that you did	23 A Because I didn't want Pricewaterhouse to	
	25 A Decause I than t want I free water nouse to	
24 not receive?	24 have an out.	
24 not receive? 25 A Yes.		

Conducted on October 1, 2020

69	71
1 A I read it before I did the strikethrough,	1 A Well
2 yeah.	2 MR. HESSELL: Objection, foundation.
3 Q You see the second sentence of the	3 BY THE WITNESS:
4 engagement agreement on Page 485 of Exhibit 9, it	4 A I've never seen something signed by a
5 says, "This engagement letter and the"	5 corporation, so, yeah, that's what it says, but I
6 bold "attached terms of engagement to provide	6 don't believe that to be a valid contractual
7 tax services (collectively this, quote, agreement,	7 signature.
8 end quote) set forth an understanding of the	8 BY MR. LANDGRAFF:
9 nature and scope of the services to be performed	9 Q The only other thing other than the
10 and the fees we will charge (inaudible) and	10 signatures on Page 488 of Exhibit 9 that you
11 outline the responsibilities (inaudible) and you	11 signed says "Enclosure(s): Terms of Engagement to
12 necessary to ensure PricewaterhouseCoopers'	12 Provide Tax Services."
13 professional services are performed to achieve	13 Do you see that?
14 mutually-agreed-upon objectives."	14 A I do.
15 Do you see that?	15 MR. HESSELL: Objection to the form of the
16 MR. HESSELL: You broke up a little bit	16 question.
17 there while reading it. I really don't want you	17 BY MR. LANDGRAFF:
18 to have to read it all	18 Q Now, it's your claim that you did not get
19 BY THE WITNESS:	19 a version of the engagement agreement with the
20 A You don't have to read it again. I got	20 Terms of Engagement to Provide Tax Services,
21 it.	21 right?
22 BY MR. LANDGRAFF:	22 A I have never seen this document before
23 Q You see where the bold language of the	23 these depositions.
24 second sentence on Page 485 that refers to the	24 Q If, as you claim, you didn't get a copy of
25 attached Terms of Engagement to Provide Tax	25 the Terms of Engagement to Provide Tax Services,
70	72
1 Services?	1 did you ask where they were when you saw them on
2 A Yeah.	2 Page 1 of Exhibit 9?
3 Q So if you'd flip to Page 489, the Bates	3 A I don't believe so, no.
4 number ending in 489 of Exhibit 9.	4 Q If, as you claim, you didn't get a copy of
5 A 489? Yeah, I got it.	5 the terms of engagement to provide tax services,
6 Q And the top of the page, it's it's a	6 did you ask where the enclosure was that's
7 little there's like a hole punch that knocks	7 referred to right above your signature?
8 out a little bit out, but do you see the title	8 A Well, there's an "S" on the end of
9 at the top of that page?	9 "enclosure," so where's the other one?
10 A Yeah.	10 Q Did you ask where any enclosures were?
11 Q "Terms of Engagement to Provide Tax	11 A No, I don't believe that I did. I assumed
12 Services"?	12 that this was the agreement.
13 A Yeah.	13 Q And
14 MR. HESSELL: Objection.	14 A I've never let me put it this way:
15 BY MR. LANDGRAFF:	15 I've done plenty of of of engagement
16 Q So the the title on Page 489 matches	16 letters. This would be if I saw this
17 the bold language on Page 485 that you edited,	17 document attached to the engagement letter, this
18 correct?	18 would have been the first one of its kind because
19 A It matches the page that I edited, yeah,	19 I've never gotten an engagement letter that had a
20 the language on the page, sure.	20 separate attached sheet that wasn't part of the
21 Q And your signature appears on Page 488 of	21 of the engagement letter itself that didn't have a
22 Exhibit 9; is that right?	22 signature line or initial line or something for me
23 A That's right.	23 to acknowledge that I received it.
24 Q And so does Pricewaterhouse's signature,	24 And if I had received this particular
25 right?	25 document, I would have made changes to it.

73		75
1 Q What would you have made changes to?	1 Q Why do you assume he did?	
2 A I would have struck number seven,	2 A Because Stovsky and him were the ones that	
3 "Limitations of Liability" because that would	3 were communicating.	
4 defeat me that would defeat my purpose of	4 Q You Jim Tricarichi didn't sign the	
5 hiring you in the first place.	5 letter, right?	
6 And I would have struck the part about	6 A No, I signed it. I didn't say I didn't	
7 New York law.	7 review it. You asked me if I had anyone else	
8 Q Anything else you would have struck?	8 review it.	
9 MR. HESSELL: Objection	9 And you asked me specifically about Randy	
10 BY THE WITNESS:	10 Hart, and I said I didn't recall. Now you're	
11 A No.	11 asking me about Jim, and I'm saying it's more	
12 MR. HESSELL: speculation.	12 likely than not that Jim reviewed this letter but	
13 BY THE WITNESS:	13 I can't say for certain.	
14 A I don't know.	14 Q And why is it more likely than not that	
15 BY MR. LANDGRAFF:	15 Jim reviewed the letter?	
16 Q Why would the limitation of liability	16 A Because Jim was involved in the	
17 defeat your purpose of hiring PwC? Was your	10 A Decause shin was involved in the 17 transaction.	
18 purpose to sue them?	18 Q Did you ask Mr. Folkman to review the	
	19 letter?	
•		
20 purpose was to get tax advice on a \$40 million	20 A I don't have any recollection of that.	
21 deal.	21 Q Did you ask Carla Tricarichi to review the	
22 Q And why would a limitation of liability	22 letter?	
23 defeat the purpose of hiring PwC?	23 A I don't have any recollection of that	
24 A Because I'm not going to be limited in	24 either.	
25 if your advice goes bad, I'm not going to be	25 Q Page 1 of Exhibit 9 or the you could	
74		76
1 limited to what I paid you for your advice.	1 look at either page, the page that you the page	76
 limited to what I paid you for your advice. I'm going to want I'm going to 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. Q Did you run it by Randy Hart? 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC engagement was? 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. Q Did you run it by Randy Hart? A I may have. Q Well, which is it, did you 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC engagement was? A Yeah. Q And if you look at the page ending in 487 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. Q Did you run it by Randy Hart? A I may have. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC engagement was? A Yeah. 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. Q Did you run it by Randy Hart? A I may have. Q Well, which is it, did you 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC engagement was? A Yeah. Q And if you look at the page ending in 487 	76
 limited to what I paid you for your advice. I'm going to want I'm going to if if there's punitives, I'm going to want punitives. If there's penalties, I'm going to want penalties. I would never have signed that. Ever. Q Did you ask anyone to review the engagement agreement between you and PwC to give you feedback? A No. Q Did you run it by Randy Hart? A I may have. Q Well, which is it, did you A I don't know. I don't recall. 	 look at either page, the page that you the page ending in 485 is what I mean by the first page of it. A Got it. Q Was it your understanding that what you asked PwC was to perform tax research and evaluation services relating to the sale of of Westside stock? A That's what it says. Q Is that what your understanding of the PwC engagement was? A Yeah. Q And if you look at the page ending in 487 where you wrote in the the portion about the 	76
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81	83
1 A I don't recall that either.	1 Q Exhibit 309, Page 164
2 Q Did you receive invoices from PwC any time	2 A Wait a minute. Wait a minute. Wait a
3 after this invoice that you received sometime in	3 minute. Is that in this book or the other book?
4 October of 2003?	4 MR. HESSELL: The other the second
5 A I don't recall.	5 binder, volume two.
6 Q Do you think it's possible you received	6 THE WITNESS: Oh, I'm in the wrong book.
7 invoices from PwC after 2003?	7 I'm sorry.
8 A It's possible. I wasn't paying the	8 MR. LANDGRAFF: And, Lawrence, you can
9 invoices.	9 take the
10 Q You did did you ever pay PwC after	10 THE WITNESS: My bad.
11 2003?	11 MR. LANDGRAFF: down.
12 A I don't recall.	12 BY THE WITNESS:
13 Q What do you mean you weren't paying the	13 A 309. Got it.
14 invoices?	14 BY MR. LANDGRAFF:
15 A I wasn't the person who paid the invoices.	15 Q Exhibit 309, Page 164.
16 Q Who was the person who paid the invoices?	16 A Got it.
17 A Well, it would have been Jimmy, or it	17 Q Line 14, "QUESTION: And have you had any
18 would have been my it could have been Scott	18 ongoing relationship with PricewaterhouseCoopers
19 Ginsburg, or it could have been Nemic, my	19 after the sale of your stock?
20 accounting person.	20 "ANSWER: I don't think so."
21 Q Did Scott Ginsburg or	21 Were you asked that question and did you
22 A Steve Nemic.	22 give that answer?
23 Q I'm sorry. Go ahead.	23 A Yeah, I said the same thing I just said,
24 A Steve Nemic.	24 "I don't think so."
25 Q Did Scott Ginsburg or Steve Nemic work for	25 Q Now, you know
82	1 A (Unintelligible)
1 you after the sale of the Westside stock?	 A (Unintelligible.) Q You knew PwC received a summons from the
 A Scott Ginsburg did. Q Did 	
 A He didn't work for me, he worked with me. Q Did he ever tell you we received an 	 4 sale, right? 5 A I don't know that I I I don't know
6 invoice from PwC in 2004 or 2005 or after the	6 that I knew that in 2008. I knew that at some
7 Westside sale?	7 point before the trial, but I can't tell you when.
8 A I have no recollection either way.	8 Q Do you do you recall PwC inviting you
9 Q Now, you you did not have an ongoing	9 and your counsel to review or look at documents
10 relationship with PwC after the sale of the	10 that PwC was planning on sending the IRS in
11 Westside stock in September 2003, correct?	11 response to a summons that PwC had received?
12 MR. HESSELL: Objection to the form of the	12 A I think I think there was some
13 question.	13 coordination between Hahn Loeser and PwC at that
14 BY THE WITNESS:	14 time. But I can't tell you for sure what year
15 A Define ongoing relationship.	15 that was or when that was.
16 BY MR. LANDGRAFF:	16 Q Did was there any coordination with you
17 Q If you'd turn to Exhibit 309.	17 personally in reviewing the materials that PwC was
18 MR. HESSELL: Is that in the other binder?	18 intending to send to the IRS?
19 MR. LANDGRAFF: He's already looked at it,	19 A I may have. I don't have a specific
20 but, yes. It should be in the second binder.	
20 but, yes. It should be in the second binder.	20 recollection of that.
21 BY THE WITNESS:	20 recollection of that.21 Q Do you recall going to PwC's office to
21 BY THE WITNESS:	21 Q Do you recall going to PwC's office to
21 BY THE WITNESS:	21 Q Do you recall going to PwC's office to 22 review materials that PwC had said it's going to
21 BY THE WITNESS: 22 A 309. What is that?	21 Q Do you recall going to PwC's office to
21 BY THE WITNESS:22 A 309. What is that?23 BY MR. LANDGRAFF:	 Q Do you recall going to PwC's office to review materials that PwC had said it's going to send to the IRS in response to a summons that PwC

	October 1, 2020
85	87
1 Q Do you recall going to a any PwC office	 A Do you want me to speculate? Q I'd like you to answer my question.
2 to review materials that PwC said it was going to	
3 send the IRS to the IRS in response to a4 summons that PwC had received?	3 A Well, I can tell you that if I did go and
	4 see documents in 2008 at PwC, that I would have
5 A I asked you a question. I'm going to	5 requested that Stovsky be there and I would have
6 I'm going to tell you that I'm not sure and I'm	6 talked to Stovsky.
7 going to tell I'm asking you to define which	7 Q Do you have any recollection
8 PwC office that would have been.	8 A That's the best I'm going to do.
9 Q And I'm asking you do you recall going to	9 Q Okay. That so let me just I'd like
10 any PwC office?	10 you to answer my question.
11 A There was a PwC office in the same	11 Do you have any recollection of talking
12 building as Hahn Loeser, in the BP building,	12 with anyone at PwC about PwC's response to a
13 downtown Cleveland, and I would go there from time	13 summons that PwC received from the IRS relating to
14 to time.	14 the Westside stock sale?
15 You are asking me a specific question	15 A I'm going to say it one more time. If I
16 about reviewing specific documents during a	16 went to PwC to look at documents, I'm sure that I
17 specific time frame. If you told me that I I	17 would have talked to people at PwC. And since my
18 did that in New York, I would be questioning it	18 contact at PwC was Rich Stovsky, that I would have
19 because I don't recall going to PwC's office in	19 talked to Rich Stovsky.
20 New York, okay? Or Chicago or any other office.	20 Q Do you have any recollection of talking to
21 If you're asking me did I do I have a	21 Rich Stovsky about PwC's response to an IRS
22 specific recollection of going to PwC's office in	22 A I'm not going to answer that again.
23 the BP building to review specific documents, I	23 That's twice now.
24 can tell you that I don't have a specific	24 Q No, you you're saying if, if, if. I'm
25 recollection of that.	25 asking you as you sit
86	88
1 Q Do you do you recall talking with	1 A I'm telling
2 anyone at PwC in the 2008 time frame about PwC's	2 Q today
3 response to an IRS summons that PwC had received	3 A I don't have a specific recollection.
4 relating to the Westside stock sale?	4 You're telling me I did. And if you're telling me
5 A Well, I already if you take the 2008	5 I did, then I'm going to tell you that I wouldn't
6 out of that question, I'll answer it. Because I	6 have done that without talking to someone at PwC.
7 already answered 2008.	7 Q I'm asking you questions; I'm not telling
8 Q I'd like an answer to my question.	8 you anything, sir. So see if you can focus on my
9 A Well, I can't answer that question because	9 question.
10 I you have to give me a time frame. If you say	10 MR. HESSELL: He answered it. He just
11 2008, I told you I wasn't sure of the time frame.	11 answered it.
12 So I'm going to give you the same answer that I	12 BY MR. LANDGRAFF:
13 just gave you, which is I'm not sure of the time	13 Q You you have no recollection of talking
14 frame.	14 to Rich Stovsky about PwC's response to an IRS
15 Q Do you so regardless of any time	15 summons; is that fair?
16 frame or can you put it in time let me ask	16 A No, that's not fair because that's not
17 you that, do you recall going to PwC's office to	17 what I told you.
18 look at documents that PwC had told you that PwC	18 Q Well, okay, so let me ask the question and
19 planned to send to the IRS in response to a	19 let's see if you can answer it.
20 summons that PwC had received?	20 Do you have any recollection of talking
21 A I don't have a specific recollection of	21 with Rich Stovsky or anyone at PwC about PwC's
22 that, but that's not to say I didn't do it.	22 response to an IRS summons that it received
23 Q Do you have any recollection of talking	23 relating to the Westside stock sale?
24 with anyone at PwC about PwC's response to a	24 MR. HESSELL: Objection
25 summons that PwC received from the IRS?	25

1Q Were you invoiced or billed for the time2PwC spent gathering documents that PwC was going3to send to the IRS?4A I think that's the same question you asked5me about did I get any more bills from PwC, and6I I told you that I may have but I'm not sure.7Q Now, PwC did not interact with the IRS on8your behalf after the transferee liability report9was issued, right?10MR. HESSELL: Objection, calls for11A I don't understand your question.12BY THE WITNESS:13A No, clue.14BY MR. LANDGRAFF:15Q I mean, you didn't you didn't hire PwC16 to participate in in your interactions with the18A Specifically? No, I separted them to19stand behind their advice.21But that I expected them to22Q But you didn't separately engage PwC to23Q But you didn't separately engage PwC to24Q And PwC didn't attend settlement meetings252008, right?	95
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94	
1 MR. HESSELL: Objection to the form of the 1 A I have no knowledge of that. I didn't	96
2 question. 2 attend any settlement negotiation meetings with	
3 BY THE WITNESS: 3 the IRS.	
4 A Specifically? No. 4 Q When you do you remember when you first	
5 BY MR. LANDGRAFF: 5 retained Bingham?	
6QYou had your own team; you had Glenn6AYeah, sometime in 2009.	
7 Miller and Sullivan & Cromwell and Mike Desmond, 7 Q When did you first retain Sullivan &	
8 right? 8 Cromwell?	
9 MR. HESSELL: Objection to the form of the 9 A It was after that.	
10 question. 10 Q Was it also in 2009?	
11 BY THE WITNESS: 11 A I don't have a specific recollection.	
12A Well, I didn't have them until 2009 I12Q Do you recall asking Rich Stovsky in 2009	
13 think. So I don't again, you're very nebulous 13 for for him to send you documents?	
14 on time frames. So if you would give me specific 14 A Send me documents? Why would he send me	
15 time frames, if I have a recollection of a 15 documents?	
16 specific time frame, I'll tell you. If I don't, 16 Q Do you recall my question is do you 17 When the frame, I'll tell you. If I don't, 16 Q Do you recall my question is do you	
17 I'll ask you. So if you give me a specific time 17 recall asking Rich Stovsky in 2009 to send you	
18 frame on that, I'll tell you. 18 PwC's file?	
19 BY MR. LANDGRAFF: 19 A Personally, no. The lawyers may have done	
20 Q In 2009, you had you had a legal team 21 helping you had you had a legal team	
21 helping you with your interactions with the IRS, 22 right? 21 Q Do you have and I apologize, I don't 22 linewifit's in your hinder. Do you have on	
22 right? 22 know if it's in your binder. Do you have an 23 Exhibit 224 in your binder?	
23 A I believe I hired Bingham in 2009. 23 Exhibit 224 in your binder? 24 O And Bingham's a law firm right? 24 A I de	
 24 Q And Bingham's a law firm, right? 25 A Yes. 26 MR. LANDGRAFF: And I'd ask that 	

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1 THE WITNESS: Hold on.	1 have do you remember receiving documents from
2 MR. LANDGRAFF: I'm just asking for the	2 Mr. Stovsky around this time in 2009?
3 record	3 A I'm sorry I'm not answering your questions
4 THE WITNESS: I have a 223 yes, I have	4 the way you want me to answer them, but I am
5 224.	5 answering them. And I'm going to answer it again.
6 MR. LANDGRAFF: Okay. Let's have	6 And that is, there are no documents attached to
7 Exhibit 224 marked as PwC Exhibit 224.	7 this letter. I can't tell you if I received
8 (WHEREUPON, a certain document was marked	8 specific documents or any documents.
9 PwC Deposition Exhibit No. 224, for	9 And if you want to show me documents, I'll
10 identification.)	10 be happy to tell you whether I have a recollection
11 BY MR. LANDGRAFF:	11 of receiving those documents or not. But short of
12 Q And this is 224 is a September 17th,	12 that, giving me a three-line letter doesn't
13 2009 letter to you from Rich Stovsky; is that	13 strike doesn't ring any bells.
14 correct?	14 Q Do you do you know if you were billed
15 A That's what it purports to be.	15 for the time PwC spent gathering documents in
16 Q And well, did you receive it?	16 2009?
17 A I don't have a specific recollection of	17 A I don't know
18 receiving it.	18 MR. HESSELL: Objection
19 Q Were you	19 BY THE WITNESS:
20 A It's addressed to my house in Nevada.	20 A that would be a question to ask Jim.
21 Q Is that the correct address where you	21 BY MR. LANDGRAFF:
22 lived in 2009?	22 Q I'm asking you.
23 A I believe so, yes.	23 A Do I have a specific recollection of that?
24 Q And Mr	24 No. Is it possible that I was? Yes. Is it
25 A That's not where	25 possible that I was and Jimmy paid it? Yes.
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1 O Stovsky	1 O Did did vou ask PwC to conduct any
1 Q Stovsky 2 A got documents, but yeah.	1 Q Did did you ask PwC to conduct any 2 research relating to the Westside sale as part of
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1 Q Do you know not do you not know what 2 "you" means?	 Stovsky. Jimmy saw Stovsky all the time. They were friends. They exchanged leads. They were
 3 A I'm sorry, sir, but if you're going to 4 debase me in this deposition, I'm going to stop it 	
5 and we're going to take the video to the Court and	5 So don't if you're asking me did Jim
6 we're going to see what the judge thinks of it,	6 ask for this, I can tell you that I don't know.
7 okay?	7 Q So for the
8 Q You you asked me what what "you" is.	8 A If you're asking me did I ask for it, I
9 Do you not know what "you" is? Do you	9 can tell you I didn't.
10 A "You" is	10 Q So for the rest of the deposition, when I
11 Q explain that?	11 say "you," unless I tell you otherwise, I mean
12 A could be "you" could be you as me,	12 you, Michael Tricarichi. Understand?
13 you, it could be you as my representatives.	13 A I understand, but if there's more than me,
14 Jimmy asked for the documents, I didn't.	14 I'm going to say there's more than me.
15 Q Okay. I'm not	15 Q I you asked me to explain what "you"
16 A You can see that in the letter, right?	16 means, and I'm telling you, when I use "you," I
17 Q I'm not I'm not asking you about the	17 mean you, Michael Tricarichi.
18 exhibit. I'm	18 Do you understand?
19 A I'm saying that	19 A I understand that. And I also understand
20 (Unintelligible - speaking at once.)	20 that you're not I listen, we can have a
21 MS. REPORTER: Hang on. Stop. Hold on	21 caveat and the caveat will be if you ask me did I
22 one second.	22 specifically do something, I will tell you.
23 I can't get two and three people talking	23 But if I also say it's possible that
24 at one time	24 someone else did it on my behalf, I will tell you
25 THE WITNESS: Well, if he'd let me finish	25 that as well.
102	104
1 my answer	1 Q Did you personally ask anyone from PwC to
2 MS. REPORTER: I need THE WITNESS:	2 perform any tax research relating to the Westside
3 THE WITNESS: you wouldn't have that	3 stock sale in 2009?
4 problem.	4 A Personally, no. Possibly through someone
5 MR. HESSELL: Mike.	5 else, yes.
6 MS. REPORTER: I need the question and	6 Q Did you personally ask PwC to do any tax
7 answer one at a time because I can't get anything	7 evaluation relating to anything relating to the
8 you're saying otherwise.	8 Westside stock sale in 2009?
9 So the last thing I got was the question,	9 A Same
10 'Tm not asking you about the exhibits. Tm "	10 MR. HESSELL: Objection
11 and then there was an interruption.	11 BY THE WITNESS:
12 BY MR. LANDGRAFF:	$17 \Lambda_{}$ onewar
	12 A answer.
13 Q Okay. I'm not asking you about	13 MR. HESSELL: to the form of the
13 Q Okay. I'm not asking you about14 these these documents. What I'm asking you is,	13 MR. HESSELL: to the form of the 14 question.
13 Q Okay. I'm not asking you about14 these these documents. What I'm asking you is,15 in 2009, did you ask PwC to perform any tax	13 MR. HESSELL: to the form of the14 question.15 BY MR. LANDGRAFF:
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105 1 of contact with Nob Hill?	107 1 BY MR. LANDGRAFF:
2 A Depend on time frame.	2 Q Exhibit 32 is addressed to you, right?
3 Q In the summer of 2003.	3 A Yeah.
4 A Okay, I don't know when they formed	4 MR. LANDGRAFF: And if I need to say it,
5 Nob Hill, and I don't even know if Nob Hill was	5 we'll we'll mark this as PwC Exhibit 32.
6 formed by the summer of 2003.	6 BY MR. LANDGRAFF:
7 We were talking to Fortrend, okay? They	7 Q Did you review the term sheet when you
8 incorporated an entity called Nob Hill to be the	8 received it from Nob Hill Holdings?
9 buyer of stock, which is not unusual because I do	9 A I'm sure I looked at it and I'm sure I
10 that when I purchase large things. I don't	10 would have had Folkman look at it.
11 purchase them personally or I don't purchase them	11 Q Do you know whether you had changes that
12 through another corporation that's currently doing	12 you wanted to propose to the term sheet?
13 business; I'll form a nice, new corporation or a	13 A Specifically, no, that was up to Folkman.
14 nice, new LLC that will be the sole entity that	14 That's one of the things we hired Folkman to do.
15 will take possession of whatever it is, okay?	15 And we also had we had also hired PwC to advise
16 So I don't know when Nob Hill was formed.	16 Folkman as to terms that he needed to include in
17 I know that it was formed by Fortrend. And I hope	17 the in the agreement.
18 that answers your question.	18 Q Do you know if if Folkman or PwC made
19 Q So between and whether it was well,	19 edits or proposed changes to the term sheet?
20 let me just ask it this way and see if it helps:	20 MR. HESSELL: Objection, foundation.
21 Who was your main point of contact with Fortrend	21 BY THE WITNESS:
22 with respect to the Westside stock sale?	A I have no idea. I'm sure they did.
23 A The main contact with Fortrend was	23 BY MR. LANDGRAFF:
24 Folkman.	24 Q Why are you sure they did?
25 Q Jeff Folkman from Hahn Loeser?	25 A Because I've never done a deal where I got
106	108
1 06 1 A Yeah, he's the only Folkman in this	108 1 a contract from another entity and didn't make
	1 a contract from another entity and didn't make
 A Yeah, he's the only Folkman in this conversation. 	 a contract from another entity and didn't make changes to it.
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109	
1 Q Who would have sent who from your team	111 1 of Exhibit 36, but if you look at the the
2 would have been the person to send PwC draft	 2 typeface and everything else now, it could have
3 purchase agreements?	 3 been an attachment, but it the email doesn't
4 A That would have been Folkman.	4 tell me that this is it says the email has a
5 Q Do you know if PwC were you personally	5 thing in it that says, Closing checklist, buyer's
6 made aware of whether PwC made comments or	6 SE, dot, dot.
7 suggested changes to draft stock purchase	7 So I don't know that this necessarily was
8 agreements?	8 attached to that email, so don't hold me to it.
9 A I believe they did.	9 Q Do you see where it says "Attachments" and
10 Q Do you did you discuss PwC's view of	10 it says, "Closing Checklist - Buyer's/Seller's
11 the stock purchase agreement with PwC	11 Stock''?
12 representatives?	12 A Yeah, I see that.
13 A Did I? No. But my representatives did.	13 Q And so with that note, the attachment is
14 Q And was that acceptable to you that your	14 there on Exhibit 36, you're still not sure that
15 representatives were the communicators with PwC	15 this closing document checklist was attached?
16 with respect to the stock purchase agreement?	16 A Possible.
17 A Well, I told you at the onset of this	17 Q Possible
18 deposition that I had no specific tax knowledge.	18 A Possible, sure.
19 So I hired people that I assumed had tax	19 Q Because it says it, right, that's why it's
20 knowledge, which would have been PwC and	20 possible?
21 Hahn Loeser.	21 A It says that something's attached and this
22 So if they're going to show me something	22 is attached. I mean, this is I I don't
23 that has a red flag in it, I'll be happy to say,	23 have a I don't have any reason to believe it
24 hey, that's a red flag. But not having specific	24 wasn't attached and I don't have any reason to
25 knowledge of tax transactions, I would have relied	25 believe that it was other than it has the same
110	112
1 on PwC and Hahn Loeser to give me the advice that	1 title that's what's written in the cover email.
2 I paid them for.	2 Q Well, that that's pretty good reason to
3 Q Was it acceptable to you that your	3 believe it was attached; would you agree with
4 representatives were the communicators with PwC	4 that?
5 with respect to the stock purchase agreement and6 PwC's views of the stock purchase agreement?	5 A That's what you said. I didn't say it. I 6 said
· •	
7 A Yeah, I am not going to micromanage that.8 That's not me.	7 Q I'm asking 8 A I don't know.
9 Q If you would turn to Exhibit 36.	9 Q I'm asking you
10 MR. LANDGRAFF: And we'll mark that as	10 A I said I don't know.
11 PwC 36.	11 Q seriously sitting there today are
12 (WHEREUPON, a certain document was marked	12 you seriously sitting here under oath saying
13 PwC Deposition Exhibit No. 36, for	13 you're it's just as likely that it wasn't
14 identification.)	14 attached when there's an attachment reference as
15 BY THE WITNESS:	15 it was attached? Is that what you're sitting here
16 A I see it.	16 saying?
17 BY MR. LANDGRAFF:	17 MR. HESSELL: Objection to the form of the
18 Q And Exhibit 36 is an August 13th, 2003	18 question. Argumentative.
19 email from Jim Tricarichi to you with a copy to	19 BY THE WITNESS:
20 Jeff Folkman and Randy Hart; do you see that?	20 A What I have seen is you guys attaching
21 A I do.	21 stuff after the fact that was never attached to
22 Q And there's a closing checklist that	22 the original document.
23 attachment, right?	23 So with that caveat in mind, I will tell
24 A Yeah, I don't I don't see this as being	24 you that I am not certain that this document was
25 part of this email. I see it I see it as part	25 attached to the email. And I have no reason to be

217 1 in that IRS notice that you won't show me that is	1 transferee the entire transferee liability
2 stuff you should have known and didn't.	2 theory, which we don't know what your transferee
-	
5 liability and the guy that made that determination	5 had learned, as you claim today, that PwC received
6 is dead, and I and we can't even ask him any	6 money from Fortrend in the Enbridge transaction?
7 kind of questions about how he arrived at that.	7 A I wouldn't have that's a clear conflict
8 The main problem that I have with	8 of interest, and I would have fired you
9 with with PwC is that they kept secrets from	9 immediately.
10 us. They never gave us an opinion, they never	10 Q What would you have done with respect to
11 told us what the potential pitfalls of the	11 the sale of Westside?
12 transaction were, which the judge seized on in the	12 A I would have probably tried to find
13 tax case.	13 another accounting firm to give me another
14 Q So you said that PwC took money from	14 opinion. I wouldn't have done the deal with
15 Fortrend in the Enbridge transaction, there's some	15 Westside for sure in September of 2009 depending
16 IRS notice that you claim I won't show you. What	16 on when that came up.
17 are you talking about?	17 I don't think I could have hired another
18 A The notice that's in contention in this	18 accounting firm and gotten a I couldn't hire
19 case that I that you keep asking me about, 2008	19 I told you before I couldn't hire KPMG and if
20 something 111. I don't know. Whatever it is.	20 if PwC was out, I would have to go find another
21 Q Whatever	21 accounting firm of some stature to give me another
22 A I asked you	22 opinion.
23 Q about the	23 That wouldn't have happened immediately.
A I asked you twice to show me that notice	24 I would not have done that deal.
25 and you refused to show to me.	25 Q If you had gotten another opinion from
218	220
1 Q I what is it about 2008-111 that PwC	1 another accounting firm, would you have gone
12 should have told you in 2003?	2 through with the sale?
 2 should have told you in 2003? 3 A Oh, not in 2003, no. In 2008 they should 	2 through with the sale?3 A Depends on what the opinion was.
3 A Oh, not in 2003, no. In 2008 they should	3 A Depends on what the opinion was.
 A Oh, not in 2003, no. In 2008 they should 4 have told me. 	 3 A Depends on what the opinion was. 4 Q With respect to transferee liability, what
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1 A Okay, now you're mischaracterizing my	1 have any evidence that PwC
2 testimony.	2 A Where did that come from?
3 Q I'm not trying to. Tell me what evidence	3 Q I'm asking you.
4 you have that PwC knew in 2003 of a Fortrend	4 A You you better lay some kind of
5 scheme not to follow through on whatever Fortrend	5 foundation for that because I don't know where
6 said it was going to do?	6 that's coming from.
7 A We have notes to file that you people	7 Q Okay. So you don't have any information
8 wrote to one another.	8 or evidence to suggest that PwC knew that Fortrend
9 Q That say what about knowledge of	9 intended not to follow through on what Fortrend
10 Fortrend of a Fortrend scheme?	10 said it was going to follow through on in 2003?
11 THE WITNESS: I I I don't know where	11 MR. HESSELL: Objection, asked and
12 to go with this, Scott. I really don't know where	12 answered, and mischaracterizes what the witness
13 to go with this because he's playing stupid now,	13 just said.
14 and I am not going to go along with that, okay?	14 You can answer if you can.
15 BY MR. LANDGRAFF:	15 BY THE WITNESS:
16 Q Can you answer my question, sir?	16 A I think I've already answered it. I don't
17 A I did answer your question.	17 know what more I can say. I don't know where you
18 Q No, you haven't, and so I'll ask it again.	18 get the failed to follow through part. They
19 And if you can't answer it, that's okay, but the	19 followed through just fine. Fortrend followed
20 question is, what what evidence do you have	20 through just fine.
21 that PwC knew in 2003 of a Fortrend scheme for	21 BY MR. LANDGRAFF:
22 Fortrend not to follow through on whatever	22 Q So what do you contend PwC should have
23 Fortrend said it was going to do?	23 told you about what you claim PwC knew of
24 MR. HESSELL: Objection, asked and	24 Fortrend's plan?
25 answered. He identified	*
	25 A Look, they should have given me
230 1 MR. LANDGRAFF: He hasn't don't testify	232 1 information on what the plan was and what the
-	
	3 IRS would look at that plan and what the
4 MR. LANDGRAFF: Don't testify for him.	4 likelihood was that the IRS was going to bounce
5 MR. HESSELL: I'm not. It's right there.	5 the plan.
6 I mean, I'm read I'm literally	6 Not only that, but your knowledge, just
7 MR. LANDGRAFF: I'd like	7 your knowledge of this plan is attributed to me.
8 MR. HESSELL: just reading what he's	8 Based on this Notice 2008-111, it's attributed to
9 already said.	9 me. And I and you didn't give me the
10 MR. LANDGRAFF: I'm sorry to talk over	10 information.
11 you. I'd like an answer to my question.	11 Go to number four. "An officer or
12 BY MR. LANDGRAFF:	12 director of T engages in the transaction pursuant
13 Q Mr. Tricarichi	13 to the plan or any of the following knows or has
14 MR. HESSELL: He gave you	14 reason to know the trans the transaction is
15 BY MR. LANDGRAFF:	15 structured to effectuate the plan.
16 Q answer the question, please do so. If $\frac{1}{2}$	16 "Any officer or director of T. Any of T's
17 not, just say you can't answer it, and I'll move	17 advisors by T to invade to advise T or X with
18 on.	18 the respect to the transaction or any advisor of X
19 A I'm telling you that you have produced	19 engaged by that engaged by that X to advise it
20 documents that show that Fortrend that that	20 with respection with respect to the
21 PwC knew the plan that Fortrend had to reduce the	21 transaction."
22 tax liability. That's what I'm saying, okay?	22 You are the advisor. PwC is the advisor.
23 Q Do you have any evidence of what you	23 And the judge in the tax case attributed your
24 called Fortrend's intention not to follow through	24 knowledge of the plan to me, which I had no
25 on what Fortrend said it was going to do? Do you	25 knowledge of.

1 Q What do you 1 1 11 <th></th> <th>222</th>		222
2 A Could I be more clear? 2 as to what they could no could not do with Mideo 3 Q What dod you would have done if I 4 Q. So how do you know you could have settled 4 Q. So how do you know you could have settled 5 5 should have told you whaterer it is you claim PwC 5 6 came out? What would you have none? 7 7 A I would no have done the transaction. If 5 8 I knew that there was a risk of in this 7 9 transaction that it was going to blow up, I 10 10 wouldn't have done it. I made that clear to 11 11 Stowy when he was retained. 12 acknowledged that we owed the tax. 13 you contend 13 We would have got - aknowledged 14 A (Unittelligible) just said what would I 1 15 that we owed the tax. 13 ww and hor'you understand? 10 acknowledged that we owed the tax. 15 MR. HESSELL: Take a breath 13 MW and too'ryou call have got - aknowledged 14 A Wint don'you anderstand? 20 Q What amount could you hawe goten than 21<	1 O What do you	233 235 1 litigation section of the IRS, they had directives
3 Q What do you contend you would have dore if 3 eases. 4 Q So how do you know you could have settled 5 Should have told you in 2008 after. Notice 2008-111 5 6 came out? What would you have none? 6 7 A I would not have done the transaction. If 6 10 would 't have done it. It made that elear to 7 11 browsky when he was retained. 10 12 Q That that wasn't my question. What do 11 13 you contend 13 14 A (Unintelligible) just said what would I 14 15 have done it ransaction 13 We would have settled Maye gore to a 15 have done the transaction 13 We would have settled Maye gore to a 15 have done if Y dhad known. And I said I wouldn't 16 ferent section of the IRS, what Desmod used to 18 A - what don't you understand? 19 we would have settled Maye gore to a 15 have fone if Y dhad known. and I said I wouldn't 16 16 have settled fon a much lower number than the 18 13 we would have settled w	· ·	
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Exhibit 18

gary.cesnik@us.pwc.com [gary.cesnik@us.pwc.com]
4/2/2008 1:08:13 PM
elaine.church@us.pwc.com
tax core qrm
Re: US District Court concludes that Midco transaction on which we provided advice was a sham
Untitled attachment 01137.gif

This is not a good situation. The court also held that there wasn't even substantial authority for the positions taken. Accordingly, I suspect that we will hear more from the losing plaintiffs in the near future.

Elaine Church/US/TLS/PwC

Elaine Church/US/TLS/PwC	
04/02/2008 08:40 AM 202 414 1461; Right Fax (813) 281-6388 Washington DC US "Reply to All" is Disabled	To Tax Core QRM
	cc
	Subject US District Court concludes that Midco transaction on which we provided was a sham

FYI

Moccago

Citations: Enbridge Energy Co. Inc. et al. v. United States; No. 4:06-cv-00657 Date: Mar. 31, 2008

Company Engaged in Sham Transaction; Refund Denied

A U.S. district court has held that a company is not entitled to a refund of taxes and the penalty it paid when the IRS disallowed depreciation and amortization deductions associated with the company's purchase of a pipeline business, finding that the purchase occurred through a sham intermediary tax shelter transaction.

Full Text Published by taxanalysis*

ENBRIDGE ENERGY COMPANY, INC. AND ENBRIDGE MIDCOAST ENERGY, L.P. F/K/A ENBRIDGE MIDCOAST ENERGY, INC. F/K/A MIDCOAST ENERGY RESOURCES, INC. Plaintiffs v. UNITED STATES OF AMERICA Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

APP1368



Confidential

OPINION AND ORDER

Pending before the court in this federal tax suit are cross motions for summary judgment filed by the Plaintiffs (Doc. 24) and the Defendant (Doc. 23). Having considered these motions, the responses and replies thereto, the complete record before the court, and all applicable legal standards, and for the reasons articulated below, the court DENIES Plaintiffs' motion for summary judgment; and GRANTS Defendant's motion for summary judgment.

I. Background and Relevant Facts

In November 1999, Dennis Langley ("Langley") allegedly sold all of the stock (the "Bishop Stock") of his solely-owned pipeline business, The Bishop Group, Ltd. ("Bishop"), to K-Pipe Merger Corporation ("K-Pipe"). With the sale of the Bishop Stock, Bishop simultaneously changed its name to K-Pipe Group, Inc. K-Pipe and K-Pipe Group, Inc. then merged, with K-Pipe Group, Inc. as the survivor ("K-Pipe Group"). The next day, the newly-merged K-Pipe Group allegedly sold substantially all of the assets of Bishop (the "Bishop Assets"), which consisted primarily of natural gas pipelines, to Midcoast Energy Resources, Inc. ("Midcoast"). Midcoast began taking depreciation and amortization deductions based on its acquisition of the Bishop Assets. The Government disallowed these deductions, as well as others, because it claimed that the overall transaction was a sham. The Government contends that, for federal tax purposes, K-Pipe's involvement should be disregarded and Midcoast should be treated as having acquired the Bishop Stock. Midcoast, having paid the taxes flowing from this characterization, as well as a twenty percent penalty, has brought the current suit to obtain a refund.

A. The Challenged Transaction(s)

The material facts of this case are undisputed. In mid-1999, Langley decided to sell Bishop. Based on his tax advisors' advice, Langley was interested in a stock, rather than asset, sale because an asset sale would generate greater taxes. Engaging the services of an investment banking firm, Chase Securities, Inc. ("Chase"), Langley initiated a modified auction process to gauge interest in and contact potential buyers of the Bishop Stock. After signing a confidentially agreement, interested buyers were provided with a Confidential Offering Memorandum and invited to submit "preliminary non-binding indications of interest." (Gov't Ex. 9, Doc. 23).

One potential buyer was Midcoast, a publically-traded company engaged in the business of constructing and operating natural gas pipelines. Midcoast was interested in owning the Bishop Assets, which included an interstate natural gas pipeline system located in Kansas, Oklahoma, and Missouri, because the assets "provided a stable cash flow from longterm transportation contracts and would nearly double Midcoast's existing pipeline asset base, providing Midcoast with the critical mass it sought to achieve." (Kaitson Aff. § 3, Doc. 26). On July 21, 1999, Midcoast responded to Chase with a preliminary non-binding indication of interest stating that it would be prepared to pay \$157 million in cash for the Bishop Stock. (Gov't Ex. 9.1, Doc. 23). On August 30, 1999, after conducting due diligence, Midcoast sent Langley a non-binding proposal to purchase the Bishop Stock for \$184.2 million, subject to certain conditions. (Gov't Ex. 25, Doc. 23). The proposal also included "supplemental offers" by Midcoast to give Langley (i) half of any rate increase that might result following an application by Bishop with the Federal Energy Regulatory Commission ("FERC"); and (ii) an opportunity to negotiate and enter into "Project Development Agreements" ("PDAs") concerning, inter alia, certain future pipeline expansion projects and the use of certain pipeline rights-of-way. (Id.). Langley did not accept this offer, but the negotiations continued. Due to continued due diligence, Midcoast's offer to purchase the Bishop Stock dropped to \$163 million by the end of the first week of September 1999. (Kaitson Aff. ¶ 4, Doc. 26). According to Midcoast, "[t]his resulted in a significant gap between the price Midcoast was willing to pay and the price Langley indicated he was willing to accept." (Id.).

To help "bridge this gap," Midcoast's tax advisor at the time, PricewaterhouseCoopers, L.L.P. ("PWC"), suggested Midcoast pursue a "Midco transaction," whereby Langley could sell the Bishop Stock to a third party who would, in turn, sell the Bishop Assets to Midcoast. This structure would provide the best of both tax worlds: Langley would only be taxed once on his capital gains, and Midcoast would receive the step-up in basis on the Bishop Assets. Thus, PWC approached Fortrend International LLC ("Fortrend")¹ about "facilitating" Midcoast's purchase of the Bishop Assets. (*See* Palmisano Dep., dated Feb. 22, 2007, at 48, Doc. 23).

In early September 1999, Fortrend began negotiating with Langley about acquiring the Bishop Stock. Langley provided Fortrend with the same auction material that he had given to other potential bidders. Although they had not participated in the negotiations between Langley and the other bidders, Midcoast and PWC participated in the negotiations between Langley and Fortrend. For example, Langley's representative faxed to Fortrend and PWC a draft Mutual Confidentiality Agreement and a draft letter of intent (Gov't Exs. 35 and 36, Doc. 23), and Langley's representatives emailed to PWC a draft Stock Purchase Agreement between Fortrend and Langley, which was a red-lined version of the agreement that had been drafted between Midcoast and Langley, with Fortrend substituted for Midcoast (Gov't Ex. 37, Doc. 23). On September 30, 1999, K-Pipe Holdings Partners, L.P., affiliated with Fortrend and the holding company of K-Pipe Merger

Corporation, submitted a non-binding letter of intent, offering to purchase the Bishop Stock for approximately \$188 million. (Gov't Ex. 65, Doc. 23). The letter of intent also indicated that "other agreements" would be negotiated. (*Id*.).

On October 1, 1999, K-Pipe and Midcoast signed a non-binding letter of intent concerning the sale to Midcoast of the Bishop Assets. (Gov't Ex. 66, Doc. 23). In this letter of intent, Midcoast agreed to pay either \$187,868,000 or \$182,068,000 for the Bishop Assets, depending on certain variables. Additionally, the asset letter of intent provided that Midcoast could exercise its option to purchase the "Butcher Interest," a royalty interest that Bishop had acquired years earlier. Bishop had both an obligation to pay the royalty, as well as a right to receive payment; thus, no royalties were paid from 1989 to 1999.

The parties negotiated numerous issues in the lead up to the financing and execution of the final stock and asset purchase agreements (hereafter "Stock Purchase Agreement" and "Asset Purchase Agreement"). In general, Midcoast continued discussions with Langley regarding certain issues affecting the Bishop Assets. These issues included a PDA that Langley was causing Kansas Pipeline Company ("KPC"), a partnership included in the Bishop Assets, to enter with a Langley affiliate. (Kaitson Aff. ¶ 9, Doc. 26). Midcoast claims it became so concerned about a continuing relationship with Langley through the PDA that it indicated it would not buy the Bishop Assets unless there was a provision for terminating the PDA relationship. Langley, therefore, put in place an agreement giving KPC the option to terminate the PDA upon the payment of \$10.75 million. K-Pipe agreed to pay Langley \$3 million more for the Bishop Stock, and Midcoast agreed to pay K-Pipe a corresponding amount for the Bishop Assets.

With respect to the Stock Purchase Agreement, Langley requested that K-Pipe agree to pay a \$15 million "break-up fee" if K-Pipe failed to close the Stock Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 2-32, Doc. 23). K-Pipe also agreed not to liquidate Bishop for at least two years. (*Id.*). Finally, Fortrend agreed to guarantee K-Pipe's obligations under the Stock Purchase Agreement. (*See* Guaranty, Stern Aff. Ex. 30, Doc. 25).

With respect to the Asset Purchase Agreement, Midcoast agreed to pay K-Pipe \$15 million if Midcoast failed to close the Asset Purchase Agreement by November 15, 1999. (*See* Gov't Ex. 1-5, Doc. 23).² Midcoast also agreed to be liable to any third-party donee or creditor beneficiaries of K-Pipe should the deal fall through. (*Id.*). Finally, Midcoast agreed to certain guarantees of K-Pipe's obligations under the Stock Purchase Agreement, including an obligation to indemnify Langley should he receive anything other than capital gain tax on the sale of the Bishop Stock to K-Pipe.³

Langley and K-Pipe executed the Stock Purchase Agreement on November 4, 1999, effective as of October 25, 1999. (*See* Stock Purchase Agreement, Gov't Ex. 2-34, Doc. 23). The following day, November 5, 1999, K-Pipe and Midcoast executed the definitive Asset Purchase Agreement. (*See* Asset Purchase Agreement, Gov't Ex. 1-4, Doc. 23).

K-Pipe financed its acquisition of the Bishop Stock with a loan from Rabobank Nederland ("Rabobank"). Although Fortrend had requested a 30-day secured term loan for an amount up to \$195 million, the loan was expected to be repaid in a week. (Gov't Ex. 85, Doc. 23). As part of its protection regarding the loan, Rabobank required the following "pledges": (i) the membership interest of K-Pipe Holdings Partners, L.P.; (ii) an escrow account in the name Langley, established at Rabobank, into which the \$195 million would be deposited and would be distributed upon the closing of the sale of the Bishop Stock; and (iii) a second escrow account held at Rabobank with account balances in excess of \$200 million, which Midcoast would establish through its own secured financing with Bank of America. (*Id.* at 2). For reasons that are not entirely clear from the record, Fortrend requested that the loan amount be increased from \$195 to \$215 million. (Gov't Ex. 92, Doc. 23). Fortrend also requested that the pledge of the membership interests of K-Pipe Holdings, L.P. be removed. (*Id.*).

On November 4, 1999, but dated "as of November 8, 1999," K-Pipe executed a Promissory Note to pay Rabobank up to \$195 million on November 28, 1999, plus interest, as well as a Security and Assignment Agreement. (Gov't Exs. 148 and 149, Doc. 23). The \$195 million, to be deposited into K-Pipe's account at Rabobank on November 8, 1999, was conditioned on, *inter alia*, (i) K-Pipe executing and delivering the Security and Assignment Agreement; (ii) K-Pipe, Langley, Midcoast, and Rabobank entering into an escrow agreement (the "Escrow Agreement");⁴ (iii) Rabobank, as escrow agent, receiving the escrow amount equal to at least the principal (\$195 million) plus all interest to be due on the advance through maturity, plus \$1 million (the "Escrow Amount"); (iv) Rabobank receiving an upfront fee of \$750,000; and (v) K-Pipe using the proceeds to purchase the Bishop Stock. (Gov't Ex. 148, Doc. 23). Under the Security and Assignment Agreement, K-Pipe pledged as collateral (i) the Escrow Agreement and the Escrow Amount; (ii) all of its accounts with Rabobank; (iii) all other accounts; (iv) all personal property; and (v) any proceeds of any of the collateral. (Gov't Ex. 149, Doc. 23). The Escrow Agreement was entered into by K-Pipe, as the seller, Midcoast, as the buyer, Rabobank, as the escrow agent, and Bank of America, as the lender. (Gov't Ex. 1-6, Doc. 23). Under the Escrow Agreement, Bank of America agreed to fund \$198.1 million into an escrow account set up with Rabobank ("Rabobank Escrow Account #18359"). (*Id*). Thus, the \$198.1 million loan acted as security for K-Pipe's loan from Rabobank for the purchase of the Bishop Stock.

On November 8, 1999, the stock purchase transaction closed. As noted above, Bishop changed its name to K-Pipe Group, Inc. and merged with K-Pipe Merger, with K-Pipe Group, Inc. as the surviving entity. K-Pipe Group requested, in writing, a

drawdown of \$123,345,000 under the Promissory Note to be credited into its Rabobank account ("K-Pipe Group Rabobank #18313") and authorized Rabobank to debit its up-front fee of \$750,000 from the account. (Stern Aff. Ex. 35 at 1160, Doc. 25). K-Pipe Group then authorized the wire transfer of \$122,594,852 to Langley under the Stock Purchase Agreement. (Gov't Ex. 1-5 at ENB 317, Doc. 23).

On November 9, 1999, the asset purchase transaction closed. As contemplated by the Escrow Agreement, the following amounts were wired from Rabobank Escrow Account #18359: (i) \$112,695,895 to K-Pipe Group Rabobank #18313 in consideration for the Bishop Assets; (ii) approximately \$79 million directly to Bishop's creditors; and (iii) \$6.1 million to Bank of America "for the benefit of Butcher Interest Partnership." (See Gov't Exs. 1-6 and 117, Doc. 23). As noted above, the Butcher Interest was a royalty interest in which Bishop had both an obligation to pay and a right to receive payment. Nevertheless, in exchange for a partnership interest and a distribution of \$6.225 million, K-Pipe Group transferred the Butcher Interest to a partnership, The Butcher Interest Partnership, owned 55% by K-Pipe Group and 45% by Midcoast. (Kaitson Aff. ¶ 12, Doc. 26). Midcoast retained the option to purchase K-Pipe Group's interest, and K-Pipe Group retained the option to sell its interest. (Id.). On November 9, Midcoast, on behalf of the Butcher Interest Partnership, transferred \$6.225 to K-Pipe Group Rabobank #18313. Finally, K-Pipe Group received approximately \$10 million from a cash reserve account held by a Bishop partnership that was released once Midcoast paid the related Bishop debt. In total, K-Pipe Group received \$128,960,431 for the sale of the Bishop Assets. (See Gov't Ex. 116, Doc. 23). From these funds, K-Pipe Group repaid the Rabobank loan and approximately \$2 million in fees to advisors involved in the transactions, including \$299,750 to LeBoeuf, Lamb, Greene & MacRae, which allegedly acted as K-Pipe's counsel on the negotiations. (See id.). The price differential between the stock purchased and the assets sold totaled \$6,364,579, which the Government contends was K-Pipe's "fee" for the transaction.

After the transactions, K-Pipe Group retained title to the Bishop Stock, the interest in the Butcher Interest Partnership, \$10 million in cash reserves, and certain causes of action against third parties. Because K-Pipe Group had a substantial reportable gain from the sale of the Bishop Assets, K-Pipe Group's parent company, Signal Capital Associates, L.P., allegedly contributed high basis, low fair market value assets to K-Pipe Group in order to offset the gain on the assets.⁵ K-Pipe Group filed tax returns for the years 2000, 2001, and 2002, but it engaged in virtually no business activity during that time. K-Pipe Group was ultimately sold to Baguette Holdings, LLC, an entity affiliated with Fortrend, in 2000.

Midcoast took a basis in the Bishop Assets of approximately \$192 million, which represents the \$122.7 million in cash and \$79 million in assumed liabilities that it paid to K-Pipe Group. Midcoast began taking depreciation and amortization deductions in accordance with this basis in 1999.

On January 31, 2000, Midcoast, through KPC, allegedly terminated the Project Development Agreements and paid Langley \$10.75 million. (Stern Aff. Ex. 38, Doc. 25). In its 2000 corporate tax return, Midcoast deducted this payment "because it was made to terminate a contractual obligation." (Jordan Aff. ¶ 5, Doc. 27).

On November 10, 2000, Midcoast paid K-Pipe Group \$244,750 for K-Pipe Group's interest in the Butcher Interest Partnership. Midcoast, through a subsidiary, then terminated the Butcher Interest, effective January 1, 2001. (*See* Termination Agreement of the Butcher Interest, Kaitson Aff. Ex. 1, Doc.26). Midcoast claims that it had an adjusted basis in the Butcher Interest of \$5,775,416. (Jordan Aff. ¶ 8, Doc. 27). In its 2001 corporate tax return, Midcoast deducted the alleged loss associated with the termination of the Butcher Interest Partnership in the amount of \$5,775,416. (*See id.*).

Enbridge Energy Company, Inc. ("Enbridge"), the present taxpayer, acquired Midcoast in 2001.

B. The IRS Audit of Midcoast and the Notice of Deficiency

In February 2001, the IRS issued Notice 2001-16 designating certain intermediary transaction tax shelters as "listed transactions" that can be challenged by the Government. The notice describes the intermediary transaction as follows:

These 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. Pursuant to a plan, the parties undertake the following steps. X purports to sell the stock of T to M. T then purports to sell some or all of its assets to Y. Y claims a basis in the T assets equal to Y's purchase price. Under one version of this transaction, T is included as a member of the affiliated group that includes M, which files a consolidated return, and the group reports losses (or credits) to offset the gain (or tax) resulting from T's sale of assets. In another form of the transaction, M may be an entity that is not subject to tax, and M liquidates T (in a transaction that is not covered by § 337(b)(2) of the Internal Revenue Code or § 1.337(d)-4 of the Income Tax Regulations, resulting in no reported gain on M's sale of T's assets.

Depending on the facts of the particular case, the Service may challenge the purported tax results of these transactions on several grounds, including but not limited to one of the following: (1) M is an agent for X, and consequently for tax purposes T has sold assets while T is still owned by X, (2) M is an agent for Y, and consequently for tax purposes Y has purchased the stock of T from X, or (3) the transaction is otherwise properly recharacterized (e.g., to treat X as having sold assets or to treat T as having sold assets while T is still owned by X). Alternatively, the Service may examine M's

consolidated group to determine whether it may properly offset losses (or credits) against the gain (or tax) from the sale of assets.

(See Notice 2001-16, 2001-1 C.B. 730). PWC brought the notice to Midcoast's attention, but advised that disclosure of the Bishop transaction was unnecessary because it was not the "same or substantially similar" to the transaction described in Notice 2001-16. (See Robert Aff. ¶ 3, Doc. 28). According to Midcoast, the IRS subsequently broadened the meaning of "substantially similar" such that it found it found it prudent to disclose the Bishop transaction. (See Jordan Aff. ¶ 2, Doc. 27). Enbridge, as the successor in interest to Midcoast, finally disclosed the transaction to the Office of Tax Shelter Analysis of the Internal Revenue Service on January 3, 2003. (See Disclosure Statement, Gov't Ex. 62, Doc. 23).

In November 2003, the IRS began its audit of the transaction and examined Midcoast's Forms 1120 for tax years ending December 31, 2000, and May 31, 2001. (*See* Jordan Aff. ¶ 2, Doc. 27). It examined Midcoast's Form 1120 for tax year ending December 31, 1999, to the extent any losses had been carried back from Midcoast's 2000 tax year. (*See id.*).

On September 14, 2004, the IRS issued its Notice of Deficiency to Midcoast, listing deficiencies of \$573,470 for 1999 and \$3,276,338 for 2000. (*See* Notice of Deficiency, Stern Aff. Ex. 13, Doc. 25). Additionally, the IRS assessed a twenty percent penalty on the 2000 deficiency in the amount of \$655,267.60. The IRS explained that Midcoast's "returns had been adjusted to reflect the acquisition of stock in 1999 of The Bishop Group, Ltd., also known as (a/k/a) K-Pipe Group, Inc., rather than the assets of that entity." (*Id.*). The IRS also explained that it would not allow the deductions from the Butcher Interest Partnership because there was no evidence that the Butcher Interest had a basis in the hands of Bishop. Finally, the IRS explained that it would not allow the capitalization of terminating the PDA because the costs were included in the purchase price of the Bishop Stock. (*See id.*).

Midcoast paid the amounts set forth in the Notice of Deficiency under protest. (Stern Aff. Ex. 73, Doc. 25). Midcoast also paid under protest the interest associated with these amounts, \$911,641. (Jordan Aff. ¶ 7, Doc. 27). Midcoast then filed a tax refund claim with the IRS. Midcoast claimed that, because it acquired assets, not stock, it was entitled to take total depreciation, alternative minimum tax ("AMT") depreciation, and amortization deductions in the amounts of \$23,\$16,420, \$22,686,331, and \$1,749414, respectively, for the 2000 tax year. (*Id.* ¶ 5). Midcoast also claimed it was entitled to take total depreciation and amortization deductions on the assets in the amounts of \$7,228,853 and \$745,973, respectively, for the 2001 tax year. (*Id.* ¶ 8). Additionally, for the 2000 tax year, Midcoast claimed that it was entitled to a \$10.75 million deduction for the cancelled PDA and a \$182,138 deduction for losses from the Butcher Interest Partnership. (*Id.* ¶ 5). Finally, Midcoast stated in its refund claim that it was entitled to deduct the loss associated with the termination of the Butcher Interest Partnership in the amount of \$5,775,416 for the 2001 tax year. (*Id.* ¶ 8).

The IRS denied, in relevant part, Midcoast's refund request for these amounts. (See Stern Aff. Ex. 17, Doc. 25).

C. The Current Case

On February 28, 2006, Midcoast⁶ filed the current suit against the Government, seeking a refund of the total amount paid, plus interest. It claims that it purchased the Bishop Assets, not the Bishop Stock, and that the Government's characterization otherwise is erroneous.

The court has jurisdiction over this action pursuant to 28 U.S.C. 1346(a) (1) ("The district courts shall have original jurisdiction ... [over] ... [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws[.]").

The parties have each moved for summary judgment. The key issue is whether the substance of the transaction matches its form. The cross motions for summary judgment are now ripe for ruling.

II. Summary Judgment Standard

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The initial burden falls on the movant to identify areas essential to the nonmovant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Moreover, if the party moving for summary judgment bears the burden of proof on an issue, either as a plaintiff or as a defendant asserting an affirmative defense, then that party must establish that no dispute of material fact exists regarding all of the essential elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986) (the movant

with the burden of proof "must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis in original).

Once the movant meets its burden, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. Celotex, 477 U.S. at 323-24. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). Instead, the non-moving party must produce evidence upon which a jury could reasonably base a verdict in its favor. Anderson, 477 U.S. at 248; see also DIRECTV Inc. v. Robson, 420 F.3d 532, 536 (5th Cir. 2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." Webb v. Cardiothoracic Surgery Assoc. of North Texas, P.A., 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998); Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 139-40 (5th Cir. 1996); Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir. 1994), cert. denied, 513 U.S. 871 (1994); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 506 U.S. 825 (1992). Nor are pleadings summary judgment evidence. Wallace v. Tex. Tech Univ., 80 F.3d 1042, 1046 (5th Cir. 1996) (citing Little, 37 F.3d at1075). The non-movant cannot discharge his burden by offering vague allegations and legal conclusions. Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998) (citing Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198-200 (5th Cir. 1988). The non-moving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990). In reviewing evidence favorable to the party opposing a motion for summary judgment, a court should be more lenient in allowing evidence that is admissible, though it may not be in admissible form. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1988).

In a refund suit, the taxpayer has the burden of proving that the IRS's determination is incorrect. Yoon v. Comm'r, 135 F.3d 1007, 1012 (5th Cir. 1998).

III. Analysis

A. The Substance of the Transaction: Sale of Stock or Sale of Assets?

It is undisputed that Midcoast wanted to own the Bishop Assets. The Government contends that there were two "direct" routes in which Midcoast could have purchased the Bishop Assets: (1) a direct asset sale, or (2) a stock sale, followed by a liquidation of Bishop. In a direct asset sale, the purchaser (Midcoast) gets a cost basis in the assets, the corporation (Bishop) is liable for the tax on the gain, and the shareholders (Langley), who receive the asset proceeds, are liable for a gain on their shares. *See* I.R.C. §§ 1001, 331, and 1012. In the stock sale/liquidation scenario, the selling shareholders (Langley) are liable for the tax on any gain in their shares, and, while the liquidation of the target (Bishop) into its acquiring parent corporation (Midcoast) will be tax free, the assets will take their historic or "carryover" basis. *See* I.R.C. §§ 1001, 332, and 334. For situations in which a buyer cannot directly purchase the assets, like where a seller mandates a stock sale, the Code authorizes certain purchasers to elect to treat the price they paid for the stock as the asset basis. *See* I.R.C. § 338. However, the election effects a deemed sale of the assets, and the corporate level tax on the deemed sale must be paid by the newly acquired target corporation. A section 338 election would, therefore, have provided less value to Midcoast had it chosen that route. Thus, there were definite tax benefits to all the parties involved in using an intermediary to purchase the stock and sell the assets. In particular, Midcoast enjoyed a substantial step up in basis on the Bishop Assets.

A key principle in tax law is that the incidence of taxation depends upon the substance of a transaction rather than its form. *See Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *see also Freytag v. Comm'r*, 904 F.2d 1011, 1015 (5th Cir. 1990) ("The fundamental premise underlying the Internal Revenue Code is that taxation is based upon a transaction's substance rather than its form. Thus sham transactions are not recognized for tax purposes . . ."). There are numerous iterations of the substance over form doctrine, which include, in relevant part, (1) the conduit theory; (2) the step transaction doctrine, and (3) the economic substance doctrine. Here, the Government contends that under any one of the substance over form doctrines, the participation of K-Pipe should be disregarded, and Midcoast should be deemed to have purchased the Bishop Stock and to have liquidated Bishop. The court finds that the conduit theory is the most analogous to the facts in this case and applies this substance over form doctrine to affirm the Government's recharacterization of the transaction as one of stock rather than assets.

In the conduit theory of the substance over form doctrine, the court may disregard an entity if it is a mere conduit for the real transaction at issue. As the Supreme Court stated in *Comm'r v. Court Holding Co.*, 324 U.S. 331 (1945),

The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

Id. at 334 (internal citations omitted). The contours of the conduit theory are not well defined. Nevertheless, a close scrutiny of the precedent discussing conduits provides the court with guidance on when and how to apply this theory.

In *Court Holding*, an apartment house was the sole asset of a corporation. *Id.* at 332. The corporation wanted to sell this asset and had reached an oral agreement with a third party purchaser. *Id.* at 333. Before the agreement for the asset sale could be reduced to writing, the corporation's attorney informed the purchaser that the sale could not be consummated because it would result in a sizable income tax on the corporation. *Id.* Rather than consummate the sale, the corporation transferred the apartment house in the form of a liquidating dividend to the corporation's two shareholders. *Id.* The two shareholders, in turn, formally conveyed the asset to a purchaser who had originally negotiated for the purchase of the asset from the corporation. *Id.* The Supreme Court affirmed the Tax Court's conclusion that, under these facts of the entire transaction, the role of the intermediary should be disregarded and the corporation should be deemed as having sold the asset. *Id.* at 334.

The Supreme Court faced a similar situation in *United States v. Cumberland Pub. Serv. Co.*, 338 U.S. 451 (1950). In that case, the shareholders of a closely-held corporation offered to sell all the corporate stock to a local cooperative. *Id.* at 452. The cooperative refused to buy the stock, but countered with an offer to buy certain assets from the corporation. *Id.* The corporation refused, not wanting to pay the heavy capital gains tax from the asset sale transaction. *Id.* The shareholders agreed to acquire the assets as a liquidated dividend and then sell them to the cooperative. *Id.* at 452-53. The cooperative accepted, and the assets were transferred in this manner. *Id.* at 453. The corporations remaining assets were sold, and the corporation dissolved. *Id.* The Tax Court found that the sale was made by the shareholders and not the corporation plan to make the sale itself. *Id.* The Supreme Court accepted the Tax Court's finding of fact that the sale was made by the shareholders argument that the shareholders at 455. As the Court noted, "[t]he Government's argument that the shareholders acted as a mere 'conduit' for a sale by respondent corporation must fall before this finding. *Id.*

These Supreme Court cases form the backdrop of the conduit analysis, but neither *Court Holding Co.* nor *Cumberland* deal with the same factual scenario as in this case, i.e., when a corporation sells its stock to an entity, which turns around and sells the assets to a third party. The parties have directed the court's attention to three 5th Circuit cases addressing more analogous factual scenarios: *Davant v. Comm'r*, 366 F.2d 874 (5th Cir. 1966); *Blueberry Land Co. v. Comm'r*, 361 F.2d 93 (5th Cir. 1966); and *Reef Corp. v. Comm'r*, 368 F.2d 125 (5th Cir. 1966). The court addresses each in turn.

In Davant, two corporations, Warehouse and Water, were owned by common owners, who wanted to sell the assets of Warehouse to Water and liquidate Warehouse. 366 F.2d at 877-88. The corporations' attorney, Bruce Sr., advised against the direct sale of assets because he believed that the IRS would take the position that the stockholders had received a dividend taxable at ordinary rather than capital rate. Id. at 878. Therefore, Bruce Sr. suggested that the stockholders make a sale of their stock to an unrelated third-party, who could, in turn, sell Warehouse's operating assets to Water and liquidate Warehouse without compromising the original stockholders' capital gain treatment. Id. The attorney's son, Bruce Jr., who was himself an attorney, agreed to purchase the stock and sell the assets. Id. Bruce Sr. contacted the bank holding the corporations' accounts and secured a loan for Bruce Jr. to purchase Warehouse. Id. The stock of Warehouse was the collateral for the loan, and it was understood that Water would then buy the assets Warehouse. Id. This money, plus part of the money that Warehouse had in its bank account, would then be used to repay the loan. Id. Bruce Jr. received \$15,583.30 for his part in the transaction, and the Bank received one day's interest on the loan. Id. Bruce Jr. played almost no role in negotiating the transactions or the loan. See id. The taxpayers reported capital gain from the sale of the Warehouse stock; the Commissioner disregarded sale of stock to Bruce Jr., arguing that the substance of the transaction was a corporate reorganization with the taxpayers receiving dividends taxable as ordinary income to the extent of earnings and profits. Id. at 879. The Tax Court agreed with the Commissioner's characterization, and the Fifth Circuit affirmed. The Fifth Circuit examined and viewed the relevant portions of the Tax Code "as a functional whole" to determine that "[d]istributions of corporate funds to stockholders made with respect their stockholdings must be included in their gross income to the extent that those distributions are made out of the corporation's earnings and profits." Id. The 5th Circuit concluded that all the steps by the taxpayer were for the sole purpose of turning what otherwise would be a dividend taxed at the ordinary income rate into a capital gain. Id. at 880. It disregarded Bruce Jr.'s participation because

"his presence served no legitimate nontax-avoidance business purpose." *Id.* at 881. He was, in the Tax Court's factual determination, "not a purchaser of the stock in any real sense but merely a conduct through which funds passed from Water to Warehouse and from Warehouse to [the stockholder petitioners]." *Id.* at 880.

In Blueberry Land Co., the corporate taxpayers, involved in the real estate development business, owned certain mortgages and unpaid installment obligations (collectively, "Mortgages"), which they wanted to sell. 361 F.2d at 94-95. A prospective buyer for the assets was First Federal, and the parties began negotiating an asset purchase agreement. Id. at 95. First Federal and the taxpayers entered into such an agreement, but the agreement was later rescinded when the taxpayers' attorney advised against a direct asset sale due to the tax consequences. Id. at 96. Another attorney, familiar with the nature of the proposed transaction, came forward with an offer to purchase the taxpayer corporations' stock, liquidate the corporations, and sell the assets to First Federal. Id. at 97. The attorney formed a shell corporation, Pemrich, to complete the transaction. Id. According to plan, Pemrich purchased the stock, dissolved the corporations, and sold the Mortgages to First Federal. /d. Pemrich retained as an apparent profit \$1,931.71 on the deal. /d. at 98. The taxpayer corporations and their stockholders "were not divorced from the transaction," as the stockholders were required to open certain savings accounts at First Federal as collateral for the transferred Mortgages. Id. These savings accounts represented 15% of the original sales price of the mortgaged properties. Id. In upholding the Tax Court's determination that Pemrich had been a mere conduit for the real obligation flowing between the taxpayer corporations and First Federal, the Fifth Circuit found that Pemrich was entirely dependent on the pre-existing negotiations between the taxpayers and First Federal and that the substance of the transaction was a sale by the taxpayers of their Mortgages, i.e., their assets. Id. 101-102. The Court was careful to note, however, that its opinion should not be construed as preventing or discouraging "a real and bona fide sale of stock by stockholders of one corporation to a second corporation, and liquidation of the first by the acquiring corporation to obtain its assets." Id. at 102. The key is the transaction must be substantively real and bona fide. The tension between legitimate and sham transactions is reflected in the Fifth Circuit's following comments in the case:

We have said many times, and we here reiterate, that one may not only lawfully yearn for tax savings, but he may utilize and exploit every available legitimate means of arranging his affairs to achieve this end. Thus Taxpayers and their stockholders were entitled to avail themselves of the sale of stock method of disposing of Taxpayers if they so chose. But the stumbling block here is that First Federal, which throughout this transaction was the only party actually interested in obtaining Taxpayers' mortgages, could not -- and hence would not -- itself purchase Taxpayers' stock from the stockholders, because of restrictions on the types of investments open to it. This made necessary the use of an intermediary, which would purchase all of Taxpayers' stock, liquidate Taxpayers into it and thereby obtain their assets (principally the mortgages), and then sell the mortgages to First Federal.

This plan certainly presents a legitimate method whereby the stockholders of one corporation can dispose of their stock to a second corporation, which in turn liquidates, and sells the assets of, the acquired corporation. If this actually takes place, a transaction conducted in this way would be upheld and given effect for Federal income tax purposes. But the question here is not whether a plan of this type is valid or invalid. The question rather is whether under the circumstances of this case, the plan was really what it purported to be. Stated another way, the issue is whether in substance the transaction was as formally cast by the parties; and if not, whether the form, or the substance, should control for tax purposes.

We must take guard against oversimplification, for a glib generalization that substance rather than form is determinative of tax consequences not only would be of little assistance in deciding troublesome tax cases, but also would be incorrect. The fact -- at least the tax world fact -- is that in numerous situations the form by which a transaction is effected does influence and may indeed decisively control the tax consequences. This generalization does, however, reflect the fact that courts will, and do, look beyond the superficial formalities of a transaction to determine the proper tax treatment.

Id. at 100-101.

Finally, in *Reef Corp.*, one of the issues to be determined was whether the taxpayer was entitled to a stepped-up basis in assets acquired in a transaction involving an intermediary. *See* 368 F.2d at 127-30. There, two shareholder groups owned the taxpayer corporation, Reef Fields Gasoline Corporation ("Reef Fields"). *Id.* at 128. One group, the Butler group, decided to buy out the other, the Favrot group. *Id.* One plan that was formulated involved the liquidation of Reef Fields, which would sell its operating assets to a new corporation to be formed in exchange for cash and notes. *Id.* The Favrot group would receive cash and notes while the Butler group would receive only notes. *Id.* The Butler group rejected this plan after learning it would have to pay taxes on the gain and would not be receiving the cash to pay the taxes. *Id.* Thus, the parties agreed to and executed a new plan. *Id.* The Butler group formed another corporation, Reef Fields. *Id.* On the same day, Reef Fields contracted to sell its properties to New Reef, but before the sale of the properties, and in accordance with a pre-arranged plan, all of the stock of Reef Fields was sold to an intermediary, who was to carry out the sale of the assets of Reef Fields to New Reef with New Reef giving promissory notes to Reef Fields as consideration. *Id.* Reef Fields distributed the promissory notes to the intermediary, an attorney named George Strong ("Strong") with a business connection to the Favrot group, and Strong pledged the notes to Butler group, Favrot group, and New Reef for

the stock they sold to him. *Id.* In affirming the Tax Court's decision to disregard the sale of Reef Fields to Strong, the Fifth Circuit stated as follows:

[Strong] was a mere conduit in a preconceived and prearranged unified plan to redeem the stock of the Favrot group in Reef Fields. His activity was but a step in the plan. He carried out a sales contract already entered into between the corporations. He assumed no risk, incurred no personal liability, paid no expenses and obtained only bare legal title to the stock. There was an insufficient shifting of economic interests to Strong. It is settled that under such circumstances substance must be given effect over form for federal tax purposes. The holding of the Tax Court in this regard was not clearly erroneous.

Id. at 130.

All of these cases turn on the trial court's particular findings of fact, which requires examining the transaction as a whole to determine whether it is bona fide. Several facts stand out as particularly relevant and include (1) whether there was an agreement between the principals to do a transaction before the intermediary participated; (2) whether the intermediary was an independent actor; (3) whether the intermediary assumed any risk; (4) whether the intermediary was brought into the transaction at the behest of the taxpayer; and (5) whether there was a nontax-avoidance business purpose to the intermediary's participation. Many of these facts are present in this case and weigh in favor of declaring K-Pipe a mere conduit in the transaction.

Although there was not a formal agreement between Langley and Midcoast regarding the stock sale, the evidence reflects that K-Pipe was able to facilitate that agreement by acting as an intermediary. Midcoast goes to great lengths to distance itself from Fortrend and K-Pipe in order to infuse legitimacy into the intermediary transaction. However, the undisputed facts reveal that it was Midcoast's tax advisors, PWC, who brought Fortrend into the picture and helped to structure the Midco transaction. Ultimately, Fortrend's participation was far less fortuitous than Midcoast intimates. Moreover, there is no objective evidence in the record that K-Pipe negotiated the stock sale at all. All of the communications involved Midcoast, and it was at the insistence of Midcoast's tax advisors that certain actions be undertaken, such as the agreement not to liquidate Bishop for two years and the formation of the Butcher Interest Partnership to add "good facts" to the transaction. Additionally, K-Pipe's obligations were almost entirely indemnified by Midcoast through various side agreements and under the Stock and Asset Purchase Agreements. It was Midcoast's loan that acted as security for the \$195 million, which K-Pipe borrowed. K-Pipe, having been created for the purposes of this transaction, could not have provided any assets as security. After the transaction, K-Pipe engaged in virtually no business activity and was, in substance, a mere shell. Finally, K-Pipe's sole purpose in participating in the transaction was to allow Midcoast to step up the basis of the Bishop Assets. Under the facts of this case, the court finds that K-Pipe's role in the transaction should be disregarded.

Disregarding K-Pipe leaves the court with the question of what was the real substance of the transaction: a sale of stock or a sale of assets. In *Blueberry Land Co.*, the Fifth Circuit affirmed the Tax Court's determination that a similar transaction was, in substance, a sale of assets. Nevertheless, in that case, the parties had initially agreed to sell and purchase the assets. Here, by contrast, Langley would not entertain a direct asset sale. Thus, the only way in which Midcoast could have obtained the Bishop Assets was to purchase the Bishop Stock and liquidate. Indeed, it negotiated extensively with Langley for this very purpose. The fact that Midcoast and Langley did not ultimately reach a formal agreement as to the stock purchase is not dispositive. Without K-Pipe's participation, Midcoast must be treated as having purchased the Bishop Stock and liquidated. The Government's recharacterization of the sale as such for tax purposes was, therefore, appropriate.

B. The Butcher Interest

Midcoast makes two claims relevant to the Butcher Interest: first, Midcoast claims that it is entitled to an ordinary loss in the amount of \$182,138 arising from its 45 percent share of the losses from the Butcher Interest Partnership in 2000; and, second, Midcoast claims that it is entitled to either a capital loss or an ordinary loss under IRC §§ 162 or 165 in the amount of \$5,775,416 relating to the termination of the Butcher Interest Partnership in 2001. The Government argues that Midcoast cannot take any deductions related to the Butcher Interest Partnership because the partnership was a sham.

To determine whether the Butcher Interest Partnership was a sham, the court must examine whether entering into the partnership had economic substance. *See Merryman v. Comm'r*, 873 F.3d 879, 881 (5th Cir. 1989) ("transactions which have no economic purpose or substance other than the creation of income tax losses or credits are to be disregarded for tax purposes"). The court must examine the objective realities of the transaction in resolving whether economic substance is present. *See id.* "Where . . . there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Government should honor the allocation." *Id.* (quoting *Frank Lyon Co. v. United States*, 435 U.S. 561, 583-84 (1978)). Here, the court finds that K-Pipe and Midcoast entered the Butcher Interest Partnership solely for the purpose of tax avoidance. The Butcher Interest Partnership was a part of a preconceived plan to provide "good facts" to K-Pipe's participation and disguise the true nature of the Midco

transaction. The court is not persuaded that the Bishop Interest had any inherent value to Midcoast other than as a means to bolster its tax position. The court finds, therefore, that the Butcher Interest Partnership was a sham and that Midcoast is not entitled to any deductions relating thereto.

C. The PDA

Midcoast is claiming that it is entitled to deduct the entire \$10.75 million relating to the terminated Project Development Agreement as an ordinary and necessary business expense under I.R.C § 162. The Government contends that the \$10.75 million was, like the \$3 million, additional consideration paid for the Bishop stock. The court finds that the facts support the Government's position and holds that Midcoast is not entitled to an additional deduction for this amount.

D. The I.R.C. § 6662 Penalty

The IRS may impose a twenty percent penalty for, *inter alia*, negligence or disregard of rules or regulations or a substantial understatement of income tax. I.R.C. § 6662(b).⁷ Negligence "includes any failure to make a reasonable attempt to comply with the provisions of [the Internal Revenue Code]" or to exercise ordinary and reasonable care in preparing a tax return. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662-3(b)(1). According to the regulations, "[n]egligence is strongly indicated where . . . a taxpayer fails to make a reasonable attempt to ascertain the correctness of a deduction, credit or exclusion on a return which would seem to a reasonable and prudent person to be 'too good to be true' under the circumstances[.]" Treas. Reg. § 1.6662-3(b)(1)(ii). "Disregard of rules and regulations" includes any careless, reckless, or intentional disregard of the rules and regulations relating to the Internal Revenue Code. *See* I.R.C. § 6662(c); Treas. Reg. § 1.6662-3(b)(2). A "substantial understatement of income tax" occurs, in the context of a corporation taxpayer, if the amount of understatement exceeds greater of (i) 10 percent of the tax required to be shown on the return or (ii) \$10,000. I.R.C. § 6662(d)(1)(B). Because it is undisputed that, having recharacterized the Bishop transaction as an acquisition of stock, Midcoast understated its income tax by 10 percent, the court shall begin by discussing the substantial understatement of income tax shall begin by discussing the substantial understatement of income tax by 10 percent, the court shall begin by discussing the substantial understatement of income tax by 10 percent, the court shall begin by discussing the substantial understatement of income tax provision.

Meeting the mathematical element of the substantial understatement of income tax, standing alone, does not carry the day for the Government because certain statutory exceptions may be applicable. *See Klamath Strategic Inv. Fund, LLC v. United States*, 472 F. Supp. 2d 885, 900 (E.D. Tex. 2007). Under section 6662, the penalty for a substantial understatement of income tax may not be applicable if Midcoast (1) had "substantial authority" to support the deductions at issue or (2) adequately disclosed the relevant facts relating to the deductions and there is a reasonable basis for the tax treatment claimed. *See* I.R.C. § 6662(d)(2)(B). I.R.C. § 6664 provides an additional exception and states,

No penalty shall be imposed . . . with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.

I.R.C § 6664(c)(1). There are, however, special rules in cases involving tax shelters, which are defined under the Code as "(I) a partnership or other entity, (II) any investment plan or arrangement, or (III) any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax." I.R.C. § 6662(d)(2)(C)(iii). If a tax shelter is involved in a case with a corporate taxpayer, neither the substantial authority or the adequate disclosure/reasonable basis exceptions under section 6662(d)(2)(B) applies. I.R.C. § 6662(d)(2)(C)(ii). ⁸ Even if a tax shelter is implicated, the corporate taxpayer may still rely on the reasonable cause/good faith exception in section 6664.

The court finds that the Midco transaction in this case meets the definition of a tax shelter under the Code. It is clear that Midcoast undertook the intermediary transaction with the sole purpose of inflating its basis in the Bishop Assets to increase deductions for depreciation and amortization. This qualifies as a plan whose significant purpose is the avoidance or evasion of Federal income tax. As such, the substantial authority or the adequate disclosure/reasonable basis exceptions are not applicable in this case.

Assuming, *arguendo*, that the transaction was not a tax shelter, Midcoast has still failed to show that substantial authority existed for its tax position or that it adequately disclosed the relevant facts of the transaction and had a reasonable basis for its tax position. "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard." Treas. Reg. § 1.6662-4(d)(2). For substantial authority to exist, "the weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment." Treas. Reg. § 1.6662-4(d)(3)(i); see also *Klamath*, 472 F. Supp. 2d at 900. Here, the weight of authorities does not support Midcoast's deductions at issue. Indeed, the weight of authorities counseled against the use of an intermediary in this manner. *See* Part III.A, *supra*. These authorities are more persuasive than those on which Midcoast did not adequately disclose the relevant facts surrounding the deductions at issue. As such, neither exception under section 6662 applies to immunize Midcoast from the 20 percent penalty assessed by the Government.

Finally, the court finds that Midcoast cannot avail itself of the reasonable cause/good faith exception under section 6664. The evidence in the record reflects a knowing participation by Midcoast in a scheme to obfuscate the real transaction at issue. While reliance on the tax advice of professionals will typically satisfy the requirements of section 6664, the court finds that Midcoast's reliance on PWC under the facts of this case to be unreasonable.

IV. Conclusion

Accordingly, and for the reasons explained above, it is hereby

ORDERED that Defendant's motion for summary judgment (Doc. 23) is GRANTED; and, it is further

ORDERED that Plaintiffs' motion for summary judgment (Doc. 24) is DENIED.

SIGNED at Houston, Texas, this 31st day of March, 2008.

Melinda Harmon

United States District Judge

FOOTNOTES

¹ According to the promotional materials provided to Langley, Fortrend is an investment bank specializing "in structuring and managing economic transactions that accomplish specific tax or accounting objectives" by providing "unique" and "creative" planning techniques. (Gov't Ex. 26, Doc. 23).

² Although Midcoast agreed to pay \$15 million, it escrowed only \$14 million, which subjected K-Pipe to the \$1 million risk should the closings be delayed. When asked about this discrepancy, Gary Wilson ("Wilson") from PWC testified that K-Pipe's contractual risk would be a "favorable fact" should the Government challenge K-Pipe's participation. (Wilcox Dep., dated Feb. 19, 2007, at 146-47, Doc. 23).

³ Indeed, in November 2004, Langley filed suit against Fortrend, K-Pipe, Midcoast, and others in the United States District Court for the District of Kansas, *Langley v. Fortrend Int'l, L.L.C., et al.*, Cause No. 04-2546-JWL, after the Government challenged the Bishop Stock sale. (See Kaitson Aff. Ex. 2, Doc. 26).

⁴ There is no evidence in the record that Langley entered into a separate escrow agreement.

⁵ The IRS subsequently audited K-Pipe Group and disallowed these losses.

⁶ Enbridge Midcoast Energy Inc., formerly known as Midcoast Energy Resources, Inc., filed the original complaint. (PI.'s Compl., Doc. 1). On April 20, 2006, Enbridge Energy Company, Inc. and Enbridge Midcoast Energy, L.P., formerly known as Enbridge Midcoast Energy, Inc., formerly known as Midcoast Energy Resources, Inc., filed an amended complaint. (PIs.' Am. Compl., Doc. 10). Plaintiffs are collectively herein referred to as "Midcoast."

⁷ This particular provision was substantively amended in 2004 and 2005. Unless otherwise noted, the court cites to the provision as it existed before the 2004 amendments, which covers the tax years at issue in this case.

^a For non-corporate taxpayers, an understatement of taxes attributable to a tax shelter removes the adequate disclosure/reasonable basis exception, but the substantial authority exception remains applicable if the taxpayer can show that he reasonably believed that the tax treatment claimed was more likely than not the proper treatment. *See* I.R.C. 6662(d)(2)(C)(i)(II).

END OF FOOTNOTES

Tax Analysts Information

Code Section: Section 331 -- Gain or Loss in Liquidations; Section 338 -- Stock Purchase/Asset Purchase; Section 1001 -- Gain or Loss; Section 1012 -- Cost Basis; Section 6662 -- Accuracy-Related Penalty; Section 6664 -- Penalty Definitions and Special Rules

Jurisdiction: United States

Subject Area: Capital gains taxation Corporate taxation Penalties Institutional Author: United States District Court for the Southern District of Texas Author: Harmon, Melinda Document Number: Doc 2008-7171 [PDF] Tax Analysts Reference: 2008 TNT 64-9

This document was not intended or written to be used, and it cannot be used, for the purpose of avoiding U.S. federal, state or local tax penalties.

Exhibit 20

FOR INTERNAL USE ONLY

WTS MEETING

Topic: "Midco" Transaction Update based on Enbridge Energy and Notice 2008-20

Presenter: Mark Boyer Group: WNTS M&A Tax Phone Number: 202 414-1629

WTS Meeting Date: 5/13/2008

Taxpayer Profile (What type of taxpayer/company is affected by this issue?)

Corporations that participate in M&A transactions, especially acquisitions in which certain non-strategic assets of the target corporation are sold and some portion of the gain recognized is offset with attributes of the target and/or the acquiring company.

Summary of Issue/Guidance

<u>Enbridge Energy</u> is a District Court (S.D. Texas) decision against the taxpayer (Summary Judgment sustaining tax, interest and penalties) that sued for refund based upon the benefit related to obtaining a step-up in the basis of assets acquired in a highly structured transaction. As depicted on the attached diagram, the transaction (11/99) involved the sale by an individual shareholder of all the stock of a wholly-owned corporation to another corporation owned by an affiliate of Fortrend, an investment bank. The target liquidated tax-free into the acquiring corporation via merger and the acquiring corporation sold the assets of the target in a taxable transaction to the taxpayer. The record indicates that the Seller always acted in a manner consistent with selling stock, including engaging an investment banker to conduct a modified auction for the sale of stock. The record also indicates that the buyer of the assets, in conjunction with its tax advisor (PwC), contacted Fortrend to assist in structuring the overall transaction and participated in all the transactions undertaken by the parties.

As a result of transactions of the type discussed in the <u>Enbridge Energy</u> case, the IRS has issued a number of Notices (2001-16 and 2008-20) and other guidance requiring the reporting of certain "Midco" transactions.

APP1381



Take-Aways to Discuss with Clients

- 1. Court applied Substance over form principles based on Conduit Theory (<u>Court Holding Co.</u> and other authorities). The Step Transaction and Economic Substance doctrines were mentioned but the Court did not need to address.
- 2. In <u>Enbridge Energy</u>, the benefit of the structure was denied to the purchaser of assets. In <u>Blueberry Land Co.</u>, a prior Tax Court decision affirmed by the 5th Circuit, the court respected the purchase of assets resulting in a gain to the Seller. The difference in the tax consequences was largely dictated by the facts of the transaction. See Peaslee article for more detail on this point.
- **3.** Notwithstanding the business motivation for a "sale", there needs to be more than a tax avoidance motive for introducing a tax indifferent party to the transaction.
- 4. 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...

Is there a business solution related to this issue? If so, what is the idea number?

I do not expect that many of our clients will have "Midco" transactions pending resolution although there are two we know of:

Chicago -- Confidential Taxpayer Info Boston -- Confidential Taxpayer Info

These two cases are docketed in Tax Court. As you may know, the IRS has asserted Transferee liability in some of the Midco cases and (based on the docket sheet) it appears that Transferee liability has been asserted in each of these cases. As the docket for Tax Court does not allow access to documents on-line, no additional information is available.

Thanks to Corina Trainer and Jennifer Breen for this information.

WNTS Service Offering: There are a number of transactions in which Target stock is acquired for business reasons and some portion of the Target's assets are sold at a gain. Notwithstanding section 384 and section 362(e), certain attributes, *e.g.*, section 163(j) carryover amount, may be available to offset the gain. PwC is well positioned to discuss such transactions and to assist in a determination as to whether such a transaction is substantially similar to a "Midco" transaction.

The IRS issued Notice 2008-20 on 1/17/2008 that provides:

SECTION 3. DISCUSSION

.01 Components of an Intermediary Transaction Tax Shelter

An Intermediary Transaction Tax Shelter involves the use of an intermediary (M) (which

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can be one or more persons) in facilitating the transaction. However, the Service has received information and comments from taxpayers suggesting that identifying the transaction based on the role of an entity that appears to be an intermediary <u>may result in over-disclosure or under-disclosure of the transaction</u> depending on the circumstances of the transaction. To address these concerns, this notice identifies the four necessary components in an Intermediary Transaction Tax Shelter from the perspective of the target corporation, its shareholders, and the purchasers of the target corporation's assets.

1. A corporation (T) directly or indirectly (e.g., through a pass-through entity or a member of a consolidated group of which T is a member) owns assets the sale of which would result in taxable gain and, as of the time of the stock disposition described in component two, T (or the consolidated group of which T is a member) has insufficient tax benefits to eliminate or offset such taxable gain (or the tax) in whole or in part. The tax that would result from such sale is hereinafter referred to as <u>T's Built-in Tax</u>. In determining whether T's (or the consolidated group's) tax benefits are insufficient for purposes of the first sentence, the following tax benefits shall be excluded: (i) any tax benefits attributable to a listed transaction under <u>§1.6011-4(b)(2)</u>, and (ii) any tax benefits attributable to built-in loss property acquired within 12 months before the stock disposition described in component two, to the extent such built-in losses exceed built-in gains in property acquired in the same transaction(s). All references to T in this notice include successors to T.

2. At least 50 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period.

3. Either within 12 months before, simultaneously, or within 12 months after the date on which X has disposed of at least 50 percent of the T stock (by vote or value) (excluding any time T is protected or hedged against price fluctuations), <u>all or most of T's assets</u> are disposed of (<u>Sold T Assets</u>) to one or more buyers (Y) in one or more transactions <u>in</u> which gain is recognized with respect to the Sold T Assets. Where a disposition of Sold T Assets is an intercompany transaction between members of a consolidated group, the disposition will not be a "transaction in which gain is recognized with respect to the Sold T Assets" for purposes of the preceding sentence until such gain must be taken into account under the rules of §1.1502-13.

4. <u>All or most of T's Built-in Tax</u> described in component one that would otherwise result from the <u>disposition of the Sold T Assets</u> described in component three is purportedly offset or avoided or not paid.

Exhibit 21

knowledge gebawey*

December 1, 2008

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

By Sean C Pheils

Rating: LoS: (U) Tax Useful Doc Type: Technical & Regulatory Guidance : WNTS Alert

Use Restriction: Internal use only -- U.S. Firm use only IRC Section: 6011, 6111, 6112

Contact: Corina M Trainer, Rochelle L Hodes

Relevant Geography:

North America, USA

Short Description:

Guidance on Intermediary Transaction Tax Shelters (Notice 2008-111)

Overview

The IRS today issued **Notice 2008-111**, clarifying Notice 2001-16 regarding Intermediary Transaction Tax Shelters. The 2001 Notice identified and described such a transaction as a listed transaction under Reg. sec. 1.6011-4(b)(2). The IRS states that the new Notice defines an intermediary transaction in terms of its plan and of more objective components.

A transaction is treated as an intermediary transaction with respect to a particular person, and not with respect to another person, only if (1) that person engages in the transaction pursuant to the "plan," (2) the transaction contains four objective components indicative of an intermediary transaction, (3) and no safe harbor exception described in the guidance applies to that person. The Notice provides definitions of "plan" and describes the four objective components. 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 in equity, as a transferee of property in respect of the unpaid tax obligation, which is defined in the Notice.

Notice 2008-111 supersedes Notice 2008-20.

Effective Date

The Notice is generally effective January 19, 2001. However, this Notice stats that it imposes no requirements with respect to any obligation under sections 6011, 6111, or 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16.

The IRS 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 consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action." The IRS seeks comments regarding the Notice 2008-111 definitions, components, and safe harbors "for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan."

For additional information, please contact Corina Trainer at 202.414.1328 or Rochelle Hodes at 202.312.7859.

Full text of Notice 2008-111: 🗍

WNTS 'Blue Sheet'



This content is based upon the writer's understanding of the facts and tax law existing on the date of **second second sec**

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Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

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

SECTION 2. DEFINITION OF THE PLAN

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

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

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

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

e.

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

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

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

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid. SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

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

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

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

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS;

PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

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

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

purposes with such an issuer.

Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

2

If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A). SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize 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. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

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Chief Counsel (Corporate). For further information regarding this notice contact Mr. Bates on (202) 622-7550 (not a toll free call). Part III - Administrative, Procedural, and Miscellaneous

Intermediary Transaction Tax Shelters

Notice 2008-111

SECTION 1. PURPOSE AND BACKGROUND

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

SECTION 2. DEFINITION OF THE PLAN

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

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

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

There are four components of an Intermediary Transaction, and a transaction must have all four components to be the same as or substantially similar to the listed transaction described in Notice 2001-16, even if the transaction is engaged in pursuant to the Plan. The four components are:

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

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

2. At least 80 percent of the T stock (by vote or value) is disposed of by T's shareholder(s) (X), other than in liquidation of T, in one or more related transactions within a 12 month period (Stock Disposition). The first date on which at least 80 percent of the T stock (by vote or value) has been disposed of by X in a Stock Disposition is the Stock Disposition Date.

3. Either within 12 months before, simultaneously, or within 12 months after the Stock Disposition Date, at least 65 percent (by value) of T's Built-in Gain Assets are disposed of (Sold T Assets) to one or more buyers (Y) in one or more transactions in which gain is recognized with respect to the Sold T Assets. For purposes of this component, transactions in which T disposes of all or part of its assets to either another member of the controlled group of corporations (as defined in § 1563) of which T is a member, or a partnership in which members of such controlled group satisfy the requirements of §1.368-1(d)(4)(iii)(B), will be disregarded provided there is no plan to

PwC-001376 APP1398 dispose of at least 65 percent (by value) of T's Built-in Gain Assets to one or more persons that are not members of such controlled group, or to partnerships not described herein.

4. At least half of T's Built-in Tax that would otherwise result from the disposition of the Sold T Assets is purportedly offset or avoided or not paid. SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

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

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

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

SECTION 5. SAFE HARBOR EXCEPTIONS FOR CERTAIN PERSONS;

PARTICIPATION GENERALLY

01. Safe Harbor Exceptions for Certain Persons

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

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

purposes with such an issuer.

Any Y, if the only Sold T Assets it acquires are either (i) securities (as defined in section 475(c)(2)) that are traded on an established securities market (within the meaning of § 1.453-3(d)(4)) and represent a less-than-five-percent interest in that class of security, or (ii) assets that are not securities and do not include a trade or business as described in § 1.1060-1(b)(2).

02. Participation

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If one of the foregoing safe harbor exceptions does not apply to a person, that person engaged in a transaction pursuant to the Plan, and the transaction has all four components described in section 3, the determination of whether the person participated in an Intermediary Transaction for purposes of § 1.6011-4 in any given taxable year is made under the general rule in § 1.6011-4(c)(3)(i)(A). SECTION 6. EFFECTIVE DATE; DISCLOSURE, LIST MAINTENANCE, AND REGISTRATION REQUIREMENTS; PENALTIES; OTHER CONSIDERATIONS

Transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 were identified as "listed transactions" under § 1.6011-4(b)(2) effective January 19, 2001. Accordingly, this Notice is generally effective January 19, 2001. However, this Notice imposes no requirements with respect to any obligation under § 6011, § 6111, or § 6112 due before December 1, 2008, not otherwise imposed by Notice 2001-16. Because this Notice supersedes Notice 2008-20, any disclosure filed pursuant to Notice 2008-20 will be treated as made pursuant to Notice 2001-16. Independent of their classification as listed transactions, transactions that are the same as, or substantially similar to, the transaction described in Notice 2001-16 may already be subject to the requirements of § 6011, § 6111, or § 6112, or the regulations thereunder.

Persons required to disclose these transactions under § 1.6011-4 and who fail to do so may be subject to the penalty under § 6707A. Persons required to disclose or register these transactions under § 6111 who have failed to do so may be subject to the penalty under § 6707(a). Persons required to maintain lists of investors under § 6112 who fail to provide such lists when requested by the Service may be subject to the penalty under § 6708(a). A person that is a tax-exempt entity within the meaning of § 4965(c), or an entity manager within the meaning of § 4965(d), may be subject to excise tax, disclosure, filing or payment obligations under § 4965, § 6033(a)(2), § 6011, and § 6071. Some taxable parties may be subject to disclosure obligations under § 6011(g) that apply to "prohibited tax shelter transactions" as defined by § 4965(e) (including listed transactions).

In addition, the Service may impose other penalties on persons involved in this transaction or substantially similar transactions (including an accuracy-related penalty under § 6662 or 6662A) and, as applicable, on persons who participate in the promotion or reporting of this transaction or substantially similar transactions (including the return preparer penalty under § 6694, the promoter penalty under § 6700, and the aiding and abetting penalty under § 6701).

Further, under § 6501(c)(10), the period of limitations on assessment may be extended beyond the general three-year period of limitations for persons required to disclose transactions under § 1.6011-4 who fail to do so. See Rev. Proc. 2005-26, 2005-1 C.B. 965.

The Service and the Treasury Department recognize 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. These taxpayers should consult with a tax advisor to ensure that their transactions are disclosed properly and to take appropriate corrective action.

SECTION 7. EFFECT ON OTHER DOCUMENTS

Notice 2001-16 is clarified. Notice 2008-20 is superseded.

SECTION 8. REQUEST FOR COMMENTS

The Service and the Treasury Department seek comments regarding the above definitions, components, and safe harbors for the purpose of reflecting more accurately which transactions are the same as or substantially similar to an Intermediary Transaction and which parties are engaging in a transaction pursuant to the Plan.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-111), Room 5203, PO Box 7604, Ben Franklin Station, Washington, DC 20044. Alternatively, comments may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to: CC:PA:LPD:PR (Notice 2008-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Comments may also be submitted electronically, via the following email address: Notice.Comments@irscounsel.treas.gov. Please include "Notice 2008-111" in the subject line of any electronic submissions. All comments received will be open to public inspection and copying.

DRAFTING INFORMATION

The principal author of this notice is Douglas C. Bates of the Office of Associate

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Chief Counsel (Corporate). For further information regarding this notice contact Mr. Bates on (202) 622-7550 (not a toll free call).

Exhibit 32

T.C. Memo. 2015-201

UNITED STATES TAX COURT

MICHAEL A. TRICARICHI, TRANSFEREE, Petitioner <u>v</u>. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 23630-12.

Filed October 14, 2015.

Michael Desmond, Bradley A. Ridlehoover, and Craig D. Bell, for petitioner.

<u>Heather L. Lampert</u>, <u>Julie Gasper</u>, <u>Katelynn Winkler</u>, <u>Candace Williams</u>, and <u>Robert Morrison</u>, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, <u>Judge</u>: In a notice of liability, the Internal Revenue Service (IRS or respondent) determined that petitioner is liable for \$21,199,347 plus interest as a transferee of the assets of West Side Cellular, Inc. (West Side). Petitioner was

[*2] the sole shareholder of West Side, a C corporation, until he sold his shares to an affiliate of Fortrend International LLC (Fortrend) in September 2003. The type of transaction in which he sold his shares is commonly called an "intermediary company" or "Midco" transaction. The underlying tax liabilities of West Side include a tax deficiency of \$15,186,570 and penalties of \$6,012,777 for 2003.

Midco transactions, a type of tax shelter, were widely promoted during the late 1990s and early 2000s. MidCoast Credit Corp. (MidCoast), which plays a supporting role in this case, and Fortrend, which plays the principal role, were leading promoters of Midco transactions. Both have been involved in numerous transactions previously considered by this Court.¹ In Notice 2001-16, 2001-1 C.B.

¹For Fortrend, see Slone v. Commissioner, T.C. Memo. 2012-57, vacated and remanded, __ F.3d __, 2015 WL 5061315 (9th Cir. Aug. 28, 2015); Salus Mundi Found. v. Commissioner, T.C. Memo. 2012-61, rev'd and remanded, 776 F.3d 1010 (9th Cir. 2014); Frank Sawyer Trust of May 1992 v. Commissioner, T.C. Memo. 2011-298, rev'd and remanded, 712 F.3d 597 (1st Cir. 2013); Diebold v. Commissioner, T.C. Memo. 2010-238, vacated and remanded sub nom. Diebold Found., Inc. v. Commissioner, 736 F.3d 172 (2d Cir. 2013). For MidCoast, see Stuart v. Commissioner, 144 T.C. __ (Apr. 1, 2015); Cullifer v. Commissioner, T.C. Memo. 2014-208; Hawk v. Commissioner, T.C. Memo. 2012-259; Feldman v. Commissioner, T.C. Memo. 2011-297, aff'd, 779 F.3d 448 (7th Cir. 2015); Starnes v. Commissioner, T.C. Memo. 2011-63, aff'd, 680 F.3d 417 (4th Cir. 2012); Griffin v. Commissioner, T.C. Memo. 2011-61. Samyak Veera, a principal of MidCoast, has been indicted for his role in promoting these arrangements. United States v. Veera, No. 12-444 (E.D. Pa. Oct. 1, 2013) (superseding indictment alleging Veera's involvement in MidCoast schemes to evade taxes by using fraudulent losses to eliminate target's gains).

[*3] 730, <u>clarified by</u> Notice 2008-111, 2008-51 I.R.B. 1299, the IRS listed Midco transactions as "reportable transactions" for Federal income tax purposes.

Although Midco transactions took various forms, they shared several key features, well summarized by the Court of Appeals for the Second Circuit in <u>Diebold Found. Inc. v. Commissioner</u>, 736 F.3d 172, 175-176 (2d Cir. 2013), <u>vacating and remanding</u> T.C. Memo. 2010-238. These transactions were chiefly promoted to shareholders of closely held C corporations that had large built-in gains. These shareholders, while happy about the gains, were typically unhappy about the tax consequences. They faced the prospect of paying two levels of income tax on these gains: the usual corporate-level tax, followed by a shareholder-level tax when the gains were distributed to them as dividends or liquidating distributions. And this problem could not be avoided by selling the shares. Any rational buyer would normally insist on a discount to the purchase price equal to the built-in tax liability that he would be acquiring.

Promoters of Midco transactions offered a purported solution to this problem. An "intermediary company" affiliated with the promoter--typically, a shell company, often organized offshore--would buy the shares of the target company. The target's cash would transit through the "intermediary company" to the selling shareholders. After acquiring the target's embedded tax liability, the "intermedi[*4] ary company" would plan to engage in a tax-motivated transaction that would offset the target's realized gains and eliminate the corporate-level tax. The promoter and the target's shareholders would agree to split the dollar value of the corporate tax thus avoided. The promoter would keep as its fee a negotiated percentage of the avoided corporate tax. The target's shareholders would keep the balance of the avoided corporate tax as a premium above the target's true net asset value (i.e., assets net of accrued tax liability).

In due course the IRS would audit the Midco, disallow the fictional losses, and assess the corporate-level tax. But "[i]n many instances, the Midco is a newly formed entity created for the sole purpose of facilitating such a transaction, without other income or assets and thus likely to be judgment-proof. The IRS must then seek payment from other parties involved in the transaction in order to satisfy the tax liability the transaction was created to avoid." Id. at 176.

In a nutshell, that is what happened here. Petitioner engaged in a Midco transaction with a Fortrend shell company; the shell company merged into West Side and engaged in a sham transaction to eliminate West Side's corporate tax; the IRS disallowed those fictional losses and assessed the corporate-level tax against West Side; but West Side, as was planned all along, is judgment proof. The IRS accordingly seeks to collect West Side's tax from petitioner as the transferee of

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[*5] West Side's cash. We hold that petitioner is liable for West Side's tax under the Ohio Uniform Fraudulent Transfer Act and that the IRS may collect West Side's tax liabilities in full from petitioner under section $6901(a)(1)^2$ as a direct or indirect transferee of West Side. We accordingly rule for respondent on all issues.

FINDINGS OF FACT

The parties filed stipulations of facts with accompanying exhibits that are incorporated by this reference. At the time the Midco transactions were executed, petitioner resided in Ohio. He moved shortly thereafter to Nevada, and he resided in Nevada at the close of the 2003 taxable year and when he petitioned this Court.

Petitioner graduated from Case Western Reserve University and embarked on a career in the cellular telephone (cell phone) business. He incorporated West Side in 1988 as a C corporation. Petitioner was the president and sole shareholder of West Side, and he and his wife, Barbara Tricarichi, served as its directors.

Although petitioner had no formal tax training, he displayed familiarity with tax concepts. At trial he spoke easily about C corporations and S corporations, corporate tax rates, and other tax matters. He explained that he organized West

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²Unless otherwise noted, all statutory references are to the Internal Revenue Code as in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure. We round all dollar amounts to the nearest dollar.

[*6] Side as a C corporation because he thought it might ultimately have more shareholders than an S corporation would be permitted to have.

In 1991 petitioner approached Verizon and other major cellular service providers with a proposal that West Side would become a reseller of cell phone services. From 1991 through 2003 West Side engaged in various telecommunications activities in Ohio, including the resale of cell phone services. West Side had a retail presence in Ohio, customer and vendor relationships, goodwill, know-how, a workforce in place, trade names, and other tangible and intangible assets. At its peak West Side had about 15,000 subscribers throughout Ohio.

Beginning in 1991, West Side purchased network access from the major cellular service providers in order to serve its customers. Petitioner soon came to believe that certain of these providers were discriminating against West Side. In 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP (Hahn Loeser), to file a complaint with the Public Utilities Commission of Ohio (PUCO) against certain of these providers, alleging anticompetitive trade practices. The PUCO lawsuit was a "bet the company" matter for petitioner, and he took a handson role in the lengthy litigation that ensued. Hahn Loeser lawyers described him as a constant presence at the firm throughout this period.

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[*7] The PUCO ruled in West Side's favor on the liability issue and the Ohio Supreme Court affirmed that decision. In early 2003 West Side returned to the Court of Common Pleas to commence the damages phase of the litigation. Not long thereafter a settlement was reached, pursuant to which West Side ultimately received, during April and May 2003, total settlement proceeds of \$65,050,141. In exchange West Side was required to terminate its business as a retail provider of cell phone service and to end all service to its customers as of June 10, 2003. Petitioner's "Tax Problem"

Anticipating a large settlement, petitioner began to regret his decision, 15 years earlier, to organize West Side as a C corporation. He asked Jeffrey Folkman, a Hahn Loeser tax partner, to investigate how to "maximize whatever after-tax proceeds were available" from the anticipated settlement. Petitioner's goal was to "pay less tax than what the straight up, you know, 35% or whatever the corporate tax rate was" and avoid the two-level tax on the settlement proceeds.

Mr. Folkman had experience with MidCoast and thought it might help solve petitioner's problem. He arranged a meeting on February 19, 2003, with petitioner and MidCoast representatives. In preparation for this meeting, Hahn Loeser attorneys devoted five days of research and discussion to the "sham transaction" doctrine, "reportable transactions," and Notice 2001-16. Their billing records [*8] describe Notice 2001-16 as addressing (among other things) a transaction involving a "shareholder who wants to sell stock of a target" and "an intermediary corporation." At the February 19 meeting, MidCoast's representatives explained to petitioner that it was in the "debt collection business" and that, as part of its business model, it purchased companies that "had large tax obligations."

Shortly after the meeting with MidCoast, petitioner's brother, James Tricarichi (James), introduced him to Fortrend. On February 24, 2003, petitioner received a letter from Fortrend; he subsequently had several conference calls and at least one face-to-face meeting with Fortrend representatives. Petitioner understood that Fortrend and MidCoast were both involved with "distressed debt receivables" and had basically the same business model. Fortrend told petitioner that it would purchase his West Side stock and would offset the taxable gain with losses, thereby eliminating West Side's corporate income tax liability.

MidCoast and Fortrend each expressed interest in acquiring petitioner's West Side stock, and each made an offer proposing essentially the same transactional structure. An intermediary company would borrow money to purchase the stock. The cash held by West Side would be used immediately to repay the loan. The cash petitioner received from the intermediary company would substantially exceed West Side's net asset value. The intermediary company would receive a

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[*9] fee equal to a negotiated percentage of West Side's tax liabilities. And after the sale closed, the intermediary company, after merging into West Side, would use bad debt deductions to eliminate those tax liabilities.

Because petitioner regarded MidCoast and Fortrend as competitors, he began negotiating with both in the hope of stirring up a bidding war. James arranged further conference calls with both companies. Rather than compete, MidCoast secretly agreed with Fortrend to step away from the transaction in exchange for a fee of \$1,180,000 (ultimately paid by West Side on September 14, 2003). MidCoast's final offer was adjusted to make it seem unattractive, and petitioner therefore chose to pursue discussions with Fortrend in order to "maximize" his profits. Bringing in PricewaterhouseCoopers

James recommended that petitioner retain PricewaterhouseCoopers (PwC) to advise him about the proposed stock sale. Acting as a conduit between petitioner and PwC, James sent a letter dated April 8, 2003, to PwC partner Richard Stovsky. This letter requested advice concerning a stock sale to MidCoast or Fortrend and a fallback strategy to mitigate petitioner's tax liability if the stock sale did not occur. PwC sent petitioner a draft engagement letter on April 10, 2003.

By this time petitioner had had extensive discussions with Mr. Folkman about Notice 2001-16, and the risk that the contemplated stock sale would give [*10] rise to a "reportable transaction." Upon receipt of PwC's draft engagement letter, petitioner reacted negatively to the following sentence: "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." Petitioner struck this sentence from the engagement letter, initialed the change, and sent the draft back to PwC.³

Petitioner testified that he struck this sentence from the draft engagement letter because he wanted to ensure that PwC would thoroughly investigate all relevant issues. The Court did not find this testimony credible. Mr. Stovsky's draft engagement letter stated that PwC would investigate the relevant issues; the sentence about "reportable transactions" was included as a matter of PwC's due diligence to ensure that the client disclosed all relevant facts to it. The Court finds that petitioner struck this sentence from the draft engagement letter because he wanted to keep the paper trail free, to the maximum extent possible, of any references to "reportable transactions."

Working with tax professionals from several PwC offices, Mr. Stovsky prepared an internal memorandum addressing the proposed sale of West Side stock to Fortrend or MidCoast. This memorandum was revised multiple times as the nego-

³Petitioner's effort to strike this language from the engagement letter was ultimately unsuccessful. Mr. Stovsky insisted on retaining this language and, after further negotiations, petitioner acquiesced.

[*11] tiations evolved, and various drafts were discussed with petitioner and his advisers. The first draft of the memorandum, dated April 13, 2003, stated the following assumptions about the proposed transaction:

- [Buyer will] borrow \$36,000,000 and purchase 100% of the Westside shares outstanding from * * * [petitioner]. * * *
- [Buyer will] contribute to Westside * * * high basis/low fair market value property (the assumption is that these are delinquent receivables).
- Westside is now in the business of purchasing "distressed/chargedoff" credit card debt * * * at pennies on the dollar and collecting on this debt.
- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purchases is apparently difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the \$40,000,000 cash in Westside will be distributed out of Westside and used by * * * [the buyer] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock).
- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by * * * [the buyer]. The deduction offsets the taxable income created within Westside upon the receipt of the \$65,000,000 from the legal verdict.
- Westside, now a charged off debt business, utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected.
- The suggested result, from a federal tax perspective, is as follows:

[*12] • [Petitioner] recognizes long-term capital gain upon the sale of his shares in Westside * * *.

• Westside offsets the taxable income from the legal verdict with the write off of high basis property.

The memorandum notes that petitioner planned to move from Ohio to a State without an income tax so that there would be no State tax on his gains.

PwC understood that Notice 2001-16 applied to Midco transactions described therein and to "substantially similar" transactions. Marginal notes on the memorandum also suggest PwC's understanding that the term "substantially similar" was to be broadly construed. But PwC concluded that "a position can be taken" that the stock sale would not be a reportable transaction. This was because "[a] typical 'Midco' transaction [has] 3 parties (this transaction only has 2), and a typical 'Midco' transaction results in an asset basis step up and the associated amortization deductions going forward (this transaction does not have these characteristics)."

The memorandum concluded that the proposed transaction was not without risk. It noted a particularly high level of risk in the "high basis/low value" debt receivable strategy that the buyer proposed to eliminate West Side's tax liabilities. PwC characterized this as a "very aggressive tax-motivated" strategy and indicated that the IRS would likely challenge the deductibility of the bad debt loss expected [*13] to be reported by West Side after the stock sale. Pointedly absent from the memorandum is any indication that PwC believed this strategy was "more likely than not" to be successful. Regardless, the memorandum suggested that "this is not * * * [petitioner's] concern" since the result would be a corporate tax liability and not petitioner's liability. The memorandum noted that PwC had provided no formal written advice to petitioner but had discussed its conclusions orally with him.

Formation of LXV

Petitioner's representatives communicated with Fortrend after meeting with PwC. During these conversations Fortrend made clear that it did not want to acquire West Side's accounts receivable or any of its other operating assets. Rather, Fortrend wanted all operating assets stripped out of West Side before the closing so that West Side would be left with nothing but cash and tax liabilities.

In order to meet Fortrend's requirements, petitioner and three West Side employees formed LXV Group, LLC (LXV), an Ohio limited liability company, on May 2, 2003, to acquire West Side's operating assets. Each contributed \$25,000 for his respective 25% interest in LXV. As mandated by the PUCO settlement agreement, West Side had to discontinue providing cell phone service to its customers by June 10, 2003. On June 11, 2003, LXV purchased all of West [*14] Side's operating assets, namely, its goodwill and its "revenue producing wireless customer base, accounts receivable, Trade names, Trade marks, chattels, fixtures, software and equipment" used in the operation of West Side's business.

The purchase price that LXV paid for these assets was \$100,044. That amount was substantially less than the sum of West Side's net physical assets and accounts receivable (74,564 + 166,940 = 241,504) as stated on West Side's balance sheet.⁴ The parties to this transaction thus appear to have attached a value of zero to West Side's wireless customer base, trade marks, and trade names. Mr. Stovsky voiced concern that if fair market value were not paid for these assets, petitioner might face risk because of "the transferee liability issue." Despite this warning, petitioner did not obtain a valuation of the assets thus transferred.

Petitioner testified that his motivation for this sale was to "continue to service West Side's customers." The Court did not find this testimony credible. The parties' placement of zero value on West Side's intangible assets, including its wireless customer base, trade name, and trade marks, belies any intention to serve those customers in the future. Indeed, it is not clear how LXV could continue to

⁴West Side's balance sheet at the relevant time listed \$302,357 in assets (less \$227,793 in accumulated depreciation) and accounts receivable of \$50,936 and \$116,004. The assets consisted of computers, software, furniture/fixtures, office equipment, shop equipment, and leasehold improvements. LXV did not assume any of the liabilities reflected on West Side's balance sheet.

[*15] serve West Side's cell phone customers because West Side's principals, who were also LXV's principals, were barred after June 10, 2003, from conducting any form of cell phone business. The Court finds as a fact that petitioner arranged the sale of West Side's operating assets to LXV in order to comply with Fortrend's requirement that West Side have nothing left in it except tax liabilities and cash. Negotiation of the Stock Purchase Agreement

The parties adopted as their working assumption that West Side's accrued tax liability resulting from the \$65 million PUCO settlement would not be paid. Since West Side at closing was to have only cash and tax liabilities, and since cash has a readily ascertainable value, the major item for negotiation was how to carve up the corporate tax liability thus avoided. The parties referred to this exercise as determining the "Fortrend premium." Petitioner actively participated in the negotiation of this point. Neither Hahn Loeser nor PwC participated in the negotiation of the stock purchase price or the "Fortrend premium."

The trial record sheds little light on the early stages of the negotiations, when MidCoast was still involved. During later stages of the negotiations, the dollar amount of the "Fortrend premium" varied, but each iteration of the agreement contained the same formulaic calculation. Fortrend would pay petitioner the amount of cash remaining in West Side at the closing, less 31.875% of West [*16] Side's total Federal and State tax liability for 2003. In other words, the "Fortrend premium" equaled 31.875% of West Side's accrued 2003 tax liability. This left petitioner with a premium, above and beyond West Side's closing net asset value, equal to 68.125% of its accrued 2003 tax liability.

At two points in his testimony, petitioner stated that he did not understand the "Fortrend premium" to have any correlation to West Side's tax liabilities. The Court did not find this testimony credible. Petitioner testified that he participated in negotiating Fortrend's fee, and numerous spreadsheets prepared by his brother explicitly state that Fortrend's fee was to equal 31.875% of West Side's accrued tax liabilities for 2003. Confronted with this evidence, petitioner became visibly uncomfortable. The Court finds as a fact that petitioner knew at all times that the "Fortrend premium" would be computed as a negotiated percentage of West Side's 2003 corporate tax liability.

In preparation for the stock sale, Millennium Recovery Fund, LLC (Millennium), a Fortrend affiliate incorporated in the Cayman Islands, created Nob Hill, Inc. (Nob Hill), a shell company also incorporated in the Cayman Islands. Nob Hill was to be the "intermediary company" that would purchase the West Side stock. John McNabola was the sole officer of Millennium and Nob Hill. [*17] The Hahn Loeser lawyers negotiated with Fortrend the technical details of the stock purchase agreement. Nob Hill provided covenants aimed at mitigating the risk that the transaction would be characterized as a "liquidation" of West Side. Nob Hill represented that West Side would remain in existence for at least five years after the closing, would "at all times be engaged in an active trade or business," and would "maintain a net worth of no less than \$1 million" during this five-year period. (None of these representations was substantially honored.)

Nob Hill also provided purported tax warranties. The agreement represented that Nob Hill would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side] attributable to income earned during the [2003] tax year." The agreement did not specify how Nob Hill would "cause" West Side to satisfy its 2003 tax liabilities or explain the strategy it would use to offset West Side's gain from the \$65 million PUCO settlement. Nob Hill agreed to indemnify petitioner in the event of liability arising from breach of its representation to "satisfy fully" West Side's 2003 tax liability. Petitioner's expert, Wayne Purcell, admitted that "there can be problems" enforcing warranties and covenants against offshore entities like Nob Hill that have no assets in the United States. [*18] Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Instead, the parties negotiated a statement that Nob Hill "has no intention" of causing West Side to engage in a listed transaction.

Petitioner Accepts Fortrend's Offer

A letter of intent dated July 22, 2003, set forth the terms on which Nob Hill proposed to acquire petitioner's stock. It stated a tentative purchase price of \$34.9 million, subject to fine-tuning based on West Side's final cash position. The letter indicated that West Side would deposit \$50,000 in escrow to cover fees should the transaction fail to close.

After the transfer of West Side's operating assets to LXV, West Side's balance sheet reflected total assets of \$40,577,151, including \$39,949,373 in cash, a \$577,778 loan receivable from petitioner, and the \$50,000 receivable from the escrow agent. West Side's aggregate 2003 tax liabilities were estimated to be \$16,853,379. West Side's net asset value as of late July--that is, its assets minus its accrued tax liability--was thus \$23,723,772. Nob Hill offered to pay petitioner \$34.9 million for his stock--\$11.2 million more than West Side was worth--in ex-

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[*19] change for a fee (the "Fortrend premium") comfortably in excess of \$5 million. Petitioner decided to accept this offer.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with making sure he gets paid. Mr. Purcell agreed, however, that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Hahn Loeser's bankruptcy lawyers advised that petitioner needed to assure himself that Nob Hill and Fortrend would live up to their postclosing obligations. And Mr. Purcell agreed that "due diligence did require * * * [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liability. Petitioner was evasive when asked how he expected Fortrend to pull off this feat; he testified as to his belief that Fortrend "had some sort of tax reduction process" that would somehow "use bad debt to reduce tax liability." PwC specifically declined to provide assurance that Fortrend's bad debt strategy was "more likely than not" to succeed.

[*20] <u>Preparation for the Closing</u>

The stock purchase transaction was carefully structured to ensure that Fortrend and its affiliates made no real outlay of cash. Fortrend planned to borrow the entire \$34.9 million tentative purchase price: \$5 million from Moffatt International (Moffatt), a Fortrend affiliate, and \$29.9 million from Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A. (Rabobank), a Dutch bank.⁵ West Side's cash would be used to repay these loans immediately, so that the nominal lenders bore no risk.

The financing process began on August 13, 2003, when Fortrend mailed Chris Kortlandt of Rabobank, requesting a \$29.9 million short-term loan. Two weeks later, Mr. Kortlandt requested internal approval of this loan, with Nob Hill as the nominal borrower. Mr. Kortlandt understood that West Side would be required to have cash in excess of \$29.9 million on deposit with Rabobank when the stock purchase closed. He therefore considered the risk of nonpayment of the loan

⁵The \$29.9 million loan was provided through a Rabobank subsidiary, Utrecht-America Finance Co. For simplicity, we will refer to these entities collectively as Rabobank. Rabobank frequently partnered with Fortrend in executing Midco deals. It has been involved in numerous transactions previously considered by this Court. <u>See, e.g., Salus Mundi Found.</u>, T.C. Memo. 2012-61; <u>Slone</u>, T.C. Memo. 2012-57; <u>Frank Sawyer Trust of May 1992</u>, T.C. Memo. 2011-298; <u>Diebold</u>, T.C. Memo. 2010-238; <u>LR Dev. Co. LLC v. Commissioner</u>, T.C. Memo. 2010-203.

[*21] to be essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on collateral: R-1 (cash)." Rabobank uses the R-1 risk rating to denote a loan that is fully cash collateralized.

On August 21, 2003, petitioner received instructions to open at Rabobank an account for West Side with account number ending in 1577, to which West Side's cash would eventually be transferred. To receive the cash proceeds from the stock sale, petitioner opened an individual Rabobank account with account number ending in 1595. To shuttle cash at the closing, Nob Hill opened a Rabobank account with account number ending in 1568.

In connection with the Rabobank financing, Mr. McNabola planned to execute two sets of documents at the closing. He would sign the first set on behalf of Nob Hill as its president. He would sign the second set on behalf of West Side as its postclosing president-to-be.

The Nob Hill documents to be executed by Mr. McNabola included a promissory note for \$29.9 million, a security agreement, and a pledge agreement. Pursuant to the security agreement, Nob Hill granted Rabobank a first priority security interest in West Side's Rabobank account to secure Nob Hill's repayment obligation. Pursuant to the pledge agreement, Nob Hill granted Rabobank a first [*22] priority security interest in the West Side stock and the stock sale proceeds as collateral securing Nob Hill's repayment obligation.

The West Side documents to be executed by Mr. McNabola included security and guaranty agreements in favor of Rabobank and a "control agreement." West Side unconditionally guaranteed payment of Nob Hill's obligations to Rabobank, and the security agreement granted Rabobank a first priority security interest in the West Side Rabobank account. The "control agreement" gave Rabobank control over West Side's account--including all "cash, instruments, and other financial assets contained therein from time to time, and all security entitlements with respect thereto"--to ensure that West Side did not default on its commitments.

As petitioner's UCC expert, Barkley Clark, correctly noted, Mr. McNabola as Nob Hill's president could not grant Rabobank a perfected security interest in West Side's assets until Nob Hill acquired West Side's stock. And Mr. McNabola as West Side's president could not grant Rabobank a perfected security interest in West Side's assets until he became West Side's president. At the closing, however, all of these documents were to become effective simultaneously with the funding of the Rabobank loan, the payment of the stock purchase price, and the resignation of West Side's former officers and directors. These agreements effectively gave Rabobank a "springing lien" on West Side's cash at the moment it [*23] funded the loan. For all practical purposes, therefore, the Rabobank loan was fully collateralized with the cash in West Side's Rabobank account, consistently with the R-1 risk rating that Rabobank assigned to that loan.

The Closing

The closing was scheduled for September 9, 2003. The final stock purchase price was to be \$34,621,594 in cash plus a \$577,778 check payable to petitioner to zero out his shareholder loan. On September 8, Fortrend deposited the \$5 million "loan proceeds" from Moffatt into Nob Hill's Rabobank account. Also on September 8, petitioner deposited West Side's \$39,949,373 ending cash balance into West Side's Rabobank account. The funds in these accounts earned overnight interest of \$135 and \$1,076, respectively.

On September 9, 2003, the following events occurred. Nob Hill's Rabobank account was credited with the \$29.9 million Rabobank loan proceeds and \$35 million in cash from West Side's Rabobank account. From this account, Nob Hill transferred \$34,621,594 into petitioner's Rabobank account; transferred \$29.9 million to repay the Rabobank loan (which bore no interest); transferred \$5 million to repay the Moffatt loan (which bore no interest); transferred \$150,000 to cover Rabobank's fees; and transferred \$150,000 to West Side's Rabobank account. Petitioner immediately withdrew the entire balance of his Rabobank account and [*24] deposited it into a personal account at Pershing Bank. When the dust settled at the end of the day, petitioner's Rabobank account had a balance of zero; petitioner's Pershing Bank account had a balance of \$34,621,594; West Side's Rabobank account had a balance of \$5,100,450; and Nob Hill's Rabobank account had a balance of \$78,541.

The next day, Nob Hill merged into West Side with West Side surviving. The \$5,100,450 remaining in West Side's Rabobank account and the \$78,541 remaining in Nob Hill's Rabobank account were later transferred into a West Side account at the Business Bank of California. West Side eventually transferred \$4,766,000 out of that account to Fortrend affiliates and various promoters, including MidCoast, which on September 14, 2003, received the promised \$1,180,000 for stepping away from the transaction. By late 2004, West Side's bank accounts had been drained of funds and were closed.

The Bad Debt Strategy

The background of Fortrend's strategy for eliminating West Side's 2003 tax liability begins in 2001. On March 7, 2001, United Finance Co. Ltd. (United Finance) purportedly contributed a portfolio of charged-off Japanese debt (Japanese debt portfolio) to Millennium in exchange for Millennium class B shares. (Millennium eventually became Nob Hill's, and then West Side's, parent.) The Japan[*25] ese debt portfolio was valued at \$137,109. Two days later, United Finance sold the Millennium class B shares it had just acquired to Barka Limited, another Cayman Islands entity, for \$137,000. Although Millennium had acquired the Japanese debt portfolio with property worth only \$137,000, it claimed that its tax basis in that Portfolio was \$314,704,037 as of June 30, 2003.

On November 6, 2003, Millennium contributed to West Side a subset of the Japanese debt portfolio, consisting of two defaulted loans (Aoyama loans). The Aoyama loans had a purported tax basis of \$43,323,069. Between November 6 and December 31, 2003, West Side wrote off the Aoyama loans as worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003, West Side claimed a bad debt deduction of \$42,480,622 on account of that writeoff.

There is no evidence that West Side conducted meaningful business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Although Nob Hill had represented that West Side would "maintain a net worth of no less than \$1 million" during the five-year period following the closing, West Side did not do so. The following table shows West Side's asset balances as reported to the IRS:

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[*26]	<u>Tax year</u>	Asset balance as of 12/31
	2003	\$1,829,395
	2004	313,300
	2005	1,171,609
	2006	942,589
	2007	-0-

Petitioner offered no evidence to show that the actual value of West Side's assets corresponded to these reported amounts. Given Fortrend's track record, we do not take these reported amounts at face value.

West Side's Tax Returns and IRS Audit

West Side's Form 1120 for 2003 described it as incorporated in the Cayman Islands, doing business in Ireland, and having its address in Las Vegas, Nevada. It described its parent, Millennium, as incorporated in the Cayman Islands and doing business in Ireland. West Side reported for 2003 total income of \$66,116,708 and total deductions of \$67,840,521. The deductions included salaries and wages of \$8,315,605, other deductions of \$16,542,448, and bad debt losses of \$42,480,622.

On January 9, 2006, West Side filed Form 1120X, Amended U.S. Corporation Income Tax Return, for 2003. Apart from correcting minor errors and listing a new address in Reno, Nevada, the amended return did not differ materially from the original. Both returns were prepared using the accrual method of accounting. [*27] The IRS examined West Side's 2003 return. During the examination, the IRS was unable to find any assets or current sources of income for West Side; a March 28, 2008, memorandum details the steps the IRS took in search thereof. At the conclusion of the audit, the IRS disallowed the \$42,480,622 bad debt deduction and \$1,651,752 of the deduction claimed for legal and professional fees, on the ground that these fees were incurred in connection with a transaction entered into solely for tax avoidance.

West Side's authorized representative executed successive Forms 872, Consent to Extend the Time to Assess Tax, that extended to December 31, 2009, the time for assessing West Side's 2003 tax liability. On February 25, 2009, the IRS mailed a timely notice of deficiency to West Side determining a deficiency of \$15,186,570 and penalties of \$61,851 and \$5,950,926 under section 6662(a) and (h), respectively. West Side did not petition this Court and, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of deficiency, plus accrued interest. On April 5, 2011, West Side's corporate charter was canceled by the Ohio secretary of state.

Notice of Transferee Liability

Petitioner and Barbara Tricarichi jointly filed Form 1040, U.S. Individual Income Tax Return, for 2003 showing a Nevada address. This return reported a [*28] tax liability of \$5,303,886, resulting chiefly from gain on the sale of petitioner's West Side stock. On Schedule D, Capital Gains and Losses, petitioner reported the proceeds from this sale as \$35,199,357, reflecting both the cash he received and the \$577,778 check, resulting in a long-term capital gain of \$35,170,793.

The IRS did not audit petitioner's Form 1040, but it did open a transfereeliability examination concerning West Side's 2003 tax liabilities. Upon completion of that examination, the IRS sent petitioner a Letter 902-T, Notice of Liability. This notice of liability was timely mailed to petitioner on June 25, 2012.⁶ The notice determined that petitioner is liable as transferee for the following liabilities of West Side:

⁶In his petition, petitioner challenged the timeliness of the notice of liability. The Commissioner generally must assess transferee liability within one year after expiration of the period of limitations on the transferor, but the applicable period of limitations may be extended by agreement. <u>See sec. 6901(c) and (d)</u>. Petitioner executed successive Forms 977, Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary, extending to June 30, 2012, the time for assessing transferee liability against him, and the notice of liability was timely issued on June 25, 2012. Petitioner abandoned in his posttrial briefs any challenge to the timeliness of the notice of liability, and that argument is thus deemed conceded.

[*29]	Penalty	Penalty
Deficiency	sec. 6662(a), (d)	sec. 6662(h)
\$15,186,570	\$61,851	\$5,950,926

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Petitioner timely petitioned this Court for review of the notice of liability.⁷

OPINION

I. Legal Standard and Burden of Proof

Petitioner resided in Nevada when he filed his petition. The parties have stipulated that any appeal of this case will lie to the U.S. Court of Appeals for the Ninth Circuit. <u>See sec. 7482(b)(1)(A); Golsen v. Commissioner</u>, 54 T.C. 742, 757 (1970), <u>aff'd</u>, 445 F.2d 985 (10th Cir. 1971). That Court has held that "the tax decisions of other circuits should be followed unless they are demonstrably erroneous or there appear cogent reasons for rejecting them." <u>Popov v. Commissioner</u>, 246 F.3d 1190, 1195 (9th Cir. 2001) (quoting <u>Unger v. Commissioner</u>, 936 F.2d

⁷In addition to the amounts listed in the notice of liability, petitioner proposed as a finding of fact (to which respondent did not object) that respondent determined "assessed interest" of \$8,475,655 as well as "accrued interest and penalties" of \$12,362,425. In their posttrial briefs the parties have not addressed the proper computation of interest or the existence of penalties other than those determined by respondent under section 6662(a), (d), and (h). We will accordingly enter decision in this case under Rule 155.

[*30] 1316, 1320 (D.C. Cir. 1991), <u>aff'g</u> T.C. Memo. 1990-15), <u>aff'g in part, rev'g</u> in part and remanding T.C. Memo. 1998-374.

Under section 6901, the Commissioner may proceed against a transferee of property to assess and collect Federal income tax, penalties, and interest owed by a transferor. Respondent contends that petitioner, as transferee, is liable for the unpaid 2003 Federal tax liabilities of West Side. Petitioner contends that Nob Hill purchased his stock moments before it received West Side's cash; that Rabobank and Moffat were the source of the cash used to purchase his stock; and that he thus received no "transfer" from West Side that could make him liable as its "transferee."

Section 6901 does not impose substantive liability on the transferee but simply gives the Commissioner a remedy or procedure for collecting an existing liability of the transferor. <u>Commissioner v. Stern</u>, 357 U.S. 39, 42 (1958). To take advantage of this procedure, the Commissioner must establish an independent basis under applicable State law for holding the transferee liable for the transferor's debts. Sec. 6901(a); <u>Commissioner v. Stern</u>, 357 U.S. at 45; <u>Hagaman v. Commissioner</u>, 100 T.C. 180, 183 (1993). State law thus determines the transferee's substantive liability. <u>Ginsberg v. Commissioner</u>, 305 F.2d 664, 667 (2d Cir. 1962), <u>aff'g</u> 35 T.C. 1148 (1961). In this respect, section 6901 places the Commissioner [*31] in "precisely the same position as that of ordinary creditors under state law." <u>Starnes v. Commissioner</u>, 680 F.3d 417, 429 (4th Cir. 2012), <u>aff'g</u> T.C. Memo. 2011-63. The parties agree that the State law applicable here is that of Ohio, where petitioner resided, West Side did business, and the principal transactions occurred. <u>See Commissioner v. Stern</u>, 357 U.S. at 45; <u>Estate of Miller v. Commis-</u> sioner, 42 T.C. 593, 598 (1964).

Once the transferor's own tax liability is established, the Commissioner may assess that liability against a transferee under section 6901 only if two distinct requirements are met. First, the transferee must be subject to liability under applicable State law, which includes State equity principles. Second, under principles of Federal tax law, that person must be a "transferee" within the meaning of section 6901. <u>See Diebold Found., Inc.</u>, 736 F.3d at 183-184; <u>Starnes</u>, 680 F.3d at 427; Swords Trust v. Commissioner, 142 T.C. 317, 336 (2014).

The Commissioner bears the burden of proving that a person is liable as a transferee. Sec. 6902(a); Rule 142(d). The Commissioner does not have the burden, however, "to show that the taxpayer was liable for the tax." Sec. 6902(a). Under normal burden-of-proof rules, therefore, petitioner has the burden of proving that West Side is not liable for the \$21,199,347 of tax and penalties that the IRS assessed against it for 2003. Rule 142(a)(1), (d); <u>Welch v. Helvering</u>, 290

[*32] U.S. 111, 115 (1933); see <u>United States v. Williams</u>, 514 U.S. 527, 539 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); <u>L.V. Castle Inv. Grp., Inc. v. Commissioner</u>, 465 F.3d 1243, 1248 (11th Cir. 2006).

The burden of proof on factual issues may be shifted to the Commissioner if the taxpayer introduces "credible evidence" with respect thereto and satisfies other requirements. Sec. 7491(a)(1) and (2). Petitioner asked that we shift to respondent the burden of proof with respect to West Side's 2003 tax liability. We decline this request. Petitioner introduced no "credible evidence" concerning the \$42,480,622 bad debt deduction that generated West Side's 2003 deficiency. In any event, it does not matter who bears the burden of proof because the preponderance of the evidence favors respondent's position as to all material facts.⁸

II. West Side's 2003 Federal Tax Liability

In the notice of deficiency to West Side, the IRS disallowed a deduction of \$1,651,752 for legal and professional fees and a deduction of \$42,480,622 for bad

⁸Whether the burden has shifted matters only in the case of an evidentiary tie. <u>See Polack v. Commissioner</u>, 366 F.3d 608, 613 (8th Cir. 2004), <u>aff'g</u> T.C. Memo. 2002-145. In this case, we discerned no evidentiary tie on any material issue of fact. <u>See Payne v. Commissioner</u>, T.C. Memo. 2003-90, 85 T.C.M. (CCH) 1073, 1077 (2003).

[*33] debts. The notice also determined an accuracy-related penalty of \$61,851 and a penalty of \$5,950,926 for a "gross valuation misstatement" under section 6662(h).

The deduction for legal and professional fees was disallowed on the ground that these fees were incurred in connection with a tax-avoidance transaction. We conclude below that the transaction by which Nob Hill acquired petitioner's West Side stock was indeed entered into for the sole purpose of tax avoidance. Petitioner provided no evidence to establish that any of the disallowed professional fees were incurred in connection with some other, legitimate, transaction. Petitioner has thus failed to carry his burden of proving that any portion of these fees constituted deductible business expenses of West Side under section 162. <u>See Agro Sci. Co. v. Commissioner</u>, 934 F.2d 573, 576 (5th Cir. 1991), <u>aff'g</u> T.C. Memo. 1989-687; <u>Simon v. Commissioner</u>, 830 F.2d 499, 500-501 (3d Cir. 1987), <u>aff'g</u> T.C. Memo. 1986-156; <u>Cullifer v. Commissioner</u>, T.C. Memo. 2014-208, at *45.

West Side's claimed \$42,480,622 bad debt loss was based on the assertion that the two Aoyama loans had a tax basis of \$43,323,069. That assertion is preposterous because those loans were a subset of a larger portfolio of loans that had [*34] a tax basis of approximately \$137,000. Petitioner introduced no credible evidence to substantiate the basis claimed.⁹

Petitioner does not seriously dispute West Side's liability for the \$61,851 accuracy-related penalty.¹⁰ For returns filed on or before August 17, 2006, a "gross valuation misstatement" exists where the basis claimed equals or exceeds 400% of the correct amount. Sec. 6662(h)(2); sec. 1.6662-5(e)(2), Income Tax Regs. Claiming a tax basis of \$43,323,069 for the Aoyama loans, which had an actual basis of substantially less than \$137,000, is unquestionably a "gross valuation misstatement." Apart from challenging the deficiency on which the penalty is based, petitioner introduced no evidence to show that respondent's

⁹Petitioner argues that a memorandum solicited by Millennium from the Seyfarth Shaw law firm was sufficient to substantiate the bad-debt deduction. We give no weight to that memorandum. It was based on assumed facts provided by Mr. McNabola; those assumed facts are contradicted by the record evidence in this case; and the memorandum explicitly states that no one but Millennium can rely upon it. Seyfarth Shaw gained notoriety for issuing bogus tax-shelter opinions, and this document seems par for the course. <u>See, e.g., Kenna Trading, LLC v.</u> <u>Commissioner</u>, 143 T.C. 322 (2014), <u>aff'd</u>, 728 F.3d 676 (7th Cir. 2013); <u>Superior Trading, LLC v. Commissioner</u>, 137 T.C. 70 (2011); <u>Rogers v. Commissioner</u>, T.C. Memo. 2014-141; <u>Rogers v. Commissioner</u>, T.C. Memo. 2011-277, <u>aff'd</u>, 728 F.3d 673 (7th Cir. 2013); <u>Sterling Trading, LLC v.</u> United States, 553 F. Supp. 2d 1152 (C.D. Cal. 2008).

¹⁰Petitioner disputes his liability for the penalties principally on the ground that the penalties for which West Side is liable cannot be collected from him as its transferee. We address this argument <u>infra pp. 61-63</u>.

[*35] calculation of a section 6662(h) penalty of \$5,950,926 was incorrect. Petitioner has thus failed to prove that respondent erred in determining against West Side for 2003 a tax deficiency of \$15,186,570 and penalties of \$61,851 and \$5,950,926 under section 6662(a) and (h), respectively.

III. <u>Petitioner's Liability as Transferee of West Side</u>

Section 6901 permits the Commissioner to assess tax liability against a person who is "the transferee of assets of a taxpayer who owes income tax." Salus Mundi Found. v. Commissioner, 776 F.3d 1010, 1017 (9th Cir. 2014), rev'g and remanding T.C. Memo. 2012-61. To impose that liability on a transferee, a court must first determine whether "the party [is] substantively liable for the transferor's unpaid taxes under state law," and next determine whether that party is a "transferee" within the meaning of section 6901. Slone v. Commissioner, __ F.3d __, 2015 WL 5061315, at *2 (9th Cir. Aug. 28, 2015) vacating and remanding T.C. Memo. 2012-57; see Commissioner v. Stern, 357 U.S. at 44-45. The two prongs of this inquiry are independent of one another. See Feldman v. Commissioner, 779 F.3d 448, 458 (7th Cir. 2015), aff'g T.C. Memo. 2011-297; Salus Mundi Found., 776 F.3d at 1012; Diebold Found., Inc., 736 F.3d at 185; Frank Sawyer Trust of May 1992 v. Commissioner, 712 F.3d 597, 605 (1st Cir. 2013), aff'g T.C. Memo. 2011-298; Starnes, 680 F.3d at 429.

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[*36] A. <u>Petitioner's Substantive Liability Under Ohio Law</u>

In deciding matters of State law, we are generally guided by the decisions of the State's highest court. If there is no relevant precedent from the State's highest court, but there is relevant precedent from an intermediate appellate court, "the federal court must follow the state intermediate appellate court decision unless the federal court finds convincing evidence that the state's supreme court likely would not follow it." Ryman v. Sears, Roebuck & Co., 505 F.3d 993, 994 (9th Cir. 2007); see Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967) (Federal court should apply what it "find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); Swords Trust, 142 T.C. at 342; Estate of Young v. Commissioner, 110 T.C. 297, 300, 302 (1998). "Only where no state court has decided the point in issue may a federal court make an educated guess as to how that state's supreme court would rule." Flintkote Co. v. Dravo Corp., 678 F.2d 942, 945 (11th Cir. 1982) (quoting Benante v. Allstate Ins. Co., 477 F.2d 553, 554 (5th Cir. 1973)).

In 1990 Ohio enacted the Uniform Fraudulent Transfer Act of 1984 (UFTA) as chapter 1336 of its Commercial Transactions Code. <u>See</u> Ohio Rev. Code secs. 1336.01 to 1336.12 (hereafter OUFTA; all references to the OUFTA are to the version in effect during 2003). Forty-three States and the District of Columbia

[*37] have adopted the UFTA in whole or in part. The version of the UFTA that Ohio adopted corresponds almost verbatim to the uniform law.

When interpreting Ohio statutes derived from uniform or model laws, the Ohio Supreme Court has regularly consulted opinions from sister State courts interpreting parallel provisions of their own statutes. See Stein v. Brown, 480 N.E.2d 1121 (Ohio 1985) (discussing other States' treatment of the Uniform Fraudulent Conveyance Act (UFCA), the UFTA's predecessor); Ohio Ins. Guar. Ass'n v. Simpson, 439 N.E.2d 1257 (Ohio Ct. App. 1981) (noting relevance of opinions from courts of other States when interpreting model or uniform laws).¹¹ Federal Courts of Appeals for five different Circuits, examining Midco transactions similar to that here, have recently issued opinions interpreting state laws that substantially incorporate the UFTA or its predecessor. See supra p. 2 and note 1. We believe that the Ohio Supreme Court would give proper regard to these decisions, and to the State court precedents on which they are based, when interpreting parallel provisions of the OUFTA.

¹¹Ohio Supreme Court opinions considering the treatment of uniform acts by courts of other States include <u>Al Minor & Assoc., Inc. v. Martin</u>, 881 N.E.2d 850 (Ohio 2008) (Uniform Trade Secrets Act); <u>Cruz v. Cumba-Ortiz</u>, 878 N.E.2d 620 (Ohio 2007) (Uniform Interstate Support Act and Uniform Reciprocal Enforcement of Support Act); <u>Erie Ins. Grp. v. Fisher</u>, 474 N.E.2d 320 (Ohio 1984) (Uniform Declaratory Judgments Act); <u>Levi v. Levi</u>, 166 N.E.2d 744 (Ohio 1960) (Uniform Reciprocal Enforcement of Support Act).

[*38] The Ohio Supreme Court has emphasized that the OUFTA is a remedial statute that should be liberally construed to protect creditors. <u>See Wagner v.</u> <u>Galipo</u>, 553 N.E.2d 610, 613 (Ohio 1990); <u>Locafrance United States Corp. v.</u> <u>Interstate Distrib. Servs., Inc.</u>, 451 N.E.2d 1222, 1225 (Ohio 1983) (interpreting the OUFTA's predecessor). The OUFTA defines "transfer" very broadly to include "every direct or indirect, absolute or conditional, and voluntary or involuntary method of disposing of or parting with an asset or an interest in an asset." OUFTA sec. 1336.01(L). Respondent argues that petitioner is a liable as a "transferee" of West Side's cash under four distinct sections of the Ohio statute. <u>See id.</u> secs. 1336.04(A)(1) and (2), 1336.05(A) and (B). The first of these is an actual fraud provision; the latter three are constructive fraud provisions.

OUFTA section 1336.04(A)(1), the actual fraud provision, applies in the case of any creditor regardless of whether his "claim * * * arose before or after the transfer was made." A transfer is fraudulent under this provision if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." The statute sets forth 11 nonexclusive "badges of fraud" that may give rise to an inference of actual fraudulent intent. <u>See id.</u> sec. 1336.04(B).

Two of the constructive fraud provisions apply in the case of a creditor "whose claim arose before the transfer was made." <u>Id.</u> secs. 1336.05(A) and (B). [*39] Section 1336.05(A), the provision most relevant here, provides that "[a] transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor "was insolvent at that time or * * * became insolvent as a result of the transfer." This provision applies regardless of a transferor's or transferee's actual intent. <u>See Sease v. John Smith Grain Co.</u>, 479 N.E.2d 284, 287 (Ohio Ct. App. 1984) (holding that with respect to the OUFTA's predecessor, "[n]either the intent of the debtor nor the knowledge of the transferee need be proven"); <u>Nelson v.</u> <u>Walnut Inv. Partners, L.P.</u>, 2011 U.S. Dist. LEXIS 75534 (S.D. Ohio 2011) (same).

The third constructive fraud provision applies whether the creditor's claim arose "before or after the transfer was made." OUFTA sec. 1336.04(A). "A transfer made * * * by a debtor is fraudulent as to [such] a creditor" if the debtor made the transfer "without receiving a reasonably equivalent value in exchange" and either: (1) "[t]he debtor was engaged * * * [in a] transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction," or (2) "[t]he debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." <u>Ibid.</u> This provision likewise applies regardless of the debtor's [*40] intent or transferee's actual knowledge. If the stated conditions of any constructive fraud provision are met, "the transfer is fraudulent as a matter of law." See Sease, 479 N.E.2d at 288.

1. <u>Petitioner's Status Under Ohio Law as a "Transferee"</u>

Under all four OUFTA provisions, a "transfer" of some kind must have been made from West Side as tax debtor to petitioner as transferee. This issue is the focus of the parties' dispute and its resolution affects analysis of the other OUFTA tests. We may thus conveniently discuss it first.

Petitioner insists that he was not literally a transferee of West Side's cash. According to petitioner, the cash he got came from Nob Hill, and the sources of that cash were the "loans" from Rabobank and Moffat. Nob Hill supposedly did not get West Side's cash, which it used to repay those "loans," until later that same day. For this reason, petitioner contends that he received no West Side assets that could subject him to liability as a fraudulent transferee under Ohio law.

Respondent contends that Ohio law would treat petitioner in substance as the transferee of West Side's cash. We agree with respondent for at least two reasons, each of which constitutes an alternative ground for sustaining his position. First, the "loans" from Rabobank and Moffat were shams, and West Side was the true source of the cash petitioner received. Second, the stock sale transaction would be

[*41] recharacterized under Ohio law as a de facto liquidation of West Side, with petitioner receiving in exchange for his stock a \$35.2 million liquidating distribution.¹²

a. <u>Sham Loans</u>

In order to "finance" the purchase of West Side's stock from petitioner, Nob Hill "borrowed" \$29.9 million from Rabobank and \$5 million from Moffatt, a Fortrend affiliate. Ohio courts have consistently allowed finders of fact, in appropriate circumstances, to disregard transactions as shams. <u>See, e.g., Rowe v. Standard</u>

¹²Respondent advances the "economic substance" and "substance over form" doctrines as additional theories to support his position, contending that the Ohio courts would disregard the form of the Midco transaction because it was not a true multiparty transaction, had no business purpose, and was engineered for the sole purpose of avoiding West Side's Federal and Ohio tax liabilities. The Ohio courts have recognized and employed both doctrines. See, e.g., First Banc Grp., Inc. v. Lindley, 428 N.E.2d 427, 428 (Ohio 1981) (affirming decision of Ohio Board of Tax Appeals and agreeing that "[t]o hold otherwise would allow form to control over substance"); Bloomingdale v. Stein, 42 Ohio St. 168 (Ohio 1884) (concluding in fraudulent transfer case that equity "look[s] through the form to the substance of the transaction"); Macior v. Limbach, 620 N.E.2d 227, 229 (Ohio Ct. App. 1993) (citing Humana, Inc. v. Commissioner, 881 F.2d 247, 255 (6th Cir. 1989), aff'g in part, rev'g in part 88 T.C. 197 (1987)) (employing Federal "economic substance" doctrine). The "business purpose" petitioner now alleges for the Midco transaction--to generate greater after-tax profit for West Side's sole shareholder--is not cognizable under these two doctrines because it is simply a corollary of the tax-avoidance scheme. And the facts we find to support respondent's position on the "sham loan" and "de facto liquidation" theories also show that the Midco transaction lacked economic substance. In view of our disposition, however, we need not address these alternative theories as an independent justification for respondent's submission that petitioner is liable as a transferee under Ohio law.

[*42] <u>Drug Co.</u>, 9 N.E.2d 609, 613 (Ohio 1937) ("Of course a lease, valid on its face, may be a mere sham or device to cover up the real transaction; but such a subterfuge will not be permitted to become a cloak for illegal practices. The courts will always pierce the veil to discover the real relationship."); <u>Selanders v.</u> <u>Selanders</u>, 2009 WL 1365226, at *11 (Ohio Ct. App. 2009) (affirming the trial court's decision and agreeing that "the entire transaction was quite possibly no-thing more than a sham"); <u>Galley v. Galley</u>, 1994 WL 191431, at *5 (Ohio Ct. App. 1994) ("When that reason for the transfer of property * * * is disregarded as a sham, the * * * [finder of fact] could well conclude that the transfer was a fraud-ulent transfer[.]"); <u>Phillips v. Phillips</u>, 1994 WL 179950 (Ohio Ct. App. 1994). We believe that an Ohio court would disregard as shams the "loans" purportedly extended by Rabobank and Moffat.

The Rabobank "loan" should be disregarded as a sham for at least three reasons. First, this "loan" was extended and repaid the same business day, literally moments after Nob Hill received the alleged loan proceeds. The essence of a loan is an extension of credit. It is obvious that the parties to this transaction did not desire to receive from Rabobank, and that Nob Hill did not in fact receive, a true extension of credit. [*43] Second, the "loan" by its terms did not bear interest. Instead, Rabobank received a "fee" of \$150,000. This fee cannot represent interest: Since the "loan" was outstanding for less than a day, this fee would translate to annual interest of \$54,750,000, almost twice the magnitude of the "loan." What Rabobank received was not interest on a loan but a fee for facilitating a tax shelter transaction. Rabobank was presumably able to charge such an outlandish fee because (1) from its vantage point, it was incurring reputational or business risks by accommodating a questionable transaction and (2) from petitioner's vantage point, the fee was being paid by the U.S. Treasury and not by him.

Third, the Rabobank "loan" was fully collateralized by the cash in West Side's Rabobank account. Nob Hill's credit application described the risk rating on this loan as "N/A, or based on collateral." ("N/A" presumably means "not applicable.") Rabobank gave the loan an R-1 risk rating, which denotes a loan that is fully cash collateralized. The documents executed at the closing gave Rabobank control over West Side's Rabobank account and a "springing lien" on West Side's cash the moment it funded the loan. Cash is fungible, and the consideration used to pay petitioner for his stock came in substance from West Side.

For essentially the same reasons, the \$5 million "loan" extended by Moffat must also be disregarded as a sham. Like the Rabobank loan, it bore no interest;

[*44] instead, Fortrend received a \$5 million fee for assembling the entire tax shelter package. This "loan" did not represent a true extension of credit. It was simply an overnight shuffling of funds between two Fortrend entities designed to facilitate a tax-avoidance transaction.

We conclude that an Ohio court would apply the sham transaction doctrine to these loans, and we find that both loans were in fact shams. The totality of the circumstances shows that the nominal lenders provided these funds, not as bona fide extenders of credit, but simply as accommodation parties recruited by Fortrend to conceal the true nature of what was happening. What actually happened is that Rabobank electronically transferred cash from West Side's Rabobank account through Nob Hill's Rabobank account into petitioner's Rabobank account; the "loans" were utterly unnecessary and had no purpose except obfuscation. Since both loans were shams, Rabobank's transfer of funds from West Side's account into petitioner's account constituted a "direct or indirect * * * method of disposing of or parting with an asset." <u>See</u> OUFTA sec. 1336.01(L). Petitioner was thus was a "transferee" of West Side under Ohio law.

b. <u>De Facto Liquidation of West Side</u>

Respondent alternatively contends that the transfers among West Side, Nob Hill, and petitioner should be collapsed and recharacterized under Ohio law as a [*45] partial or complete liquidation of West Side, with petitioner receiving in exchange for his shares a \$35.2 million liquidating distribution (\$34.6 million of cash plus a check for \$577,778). Although the Ohio courts have not addressed this precise scenario, judicial interpretations of fraudulent transfer provisions similar to Ohio's establish that such transactions may be "collapsed" if the ultimate transferee had constructive knowledge that the debtor's debts would not be paid.

The Court of Appeals for the Ninth Circuit recently addressed the application of New York's fraudulent transfer provisions to a Midco transaction resembling that here. It concluded that multiple transfers could be collapsed under State law if the conduct of the ultimate transferees "show[ed] that they had constructive knowledge of the fraudulent scheme." <u>Salus Mundi Found.</u>, 776 F.3d at 1020. Addressing the application of New York law to that same Midco transaction in <u>Diebold Found.</u>, Inc., the Court of Appeals for the Second Circuit held that multiparty transactions can be collapsed where the debtor's property is "reconveyed * * * for less than fair consideration" and the ultimate transferee had "constructive knowledge of the entire scheme." 736 F.3d at 186.

The Court of Appeals for the Fourth Circuit, addressing the application of North Carolina's UFTA provisions to another Midco transaction, similarly ruled that multiple transfers can be collapsed if the ultimate transferee has constructive

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[*46] knowledge that the debtor's tax liabilities will not be paid. If the ultimate transferees are on "inquiry notice" and fail to conduct a sufficiently diligent investigation, "they are charged with the knowledge they would have acquired had they undertaken the reasonably diligent inquiry required by the known circumstances." Starnes, 680 F.3d at 434.

The Ohio courts have regularly consulted and followed the decisions of sister courts when interpreting the provisions of model laws, including the OUFTA's predecessor. <u>See supra pp. 36-37</u> and note 11. The North Carolina UFTA provisions governing constructive fraud are substantially identical to Ohio's, and New York's fraudulent transfer provisions are similar in material respects. We conclude that the Ohio Supreme Court, if confronted with this question, would find persuasive and would follow these three Federal decisions and the state court precedents on which they are based. The transfers at issue here may thus be collapsed under the OUFTA if petitioner had constructive knowledge that West Side's Federal and Ohio tax liabilities would not be paid.¹³

¹³Petitioner argues that Ohio law does not permit transactions to be collapsed, citing <u>Official Comm. of Unsecured Creditors of Grand Eagle Cos. v. Asea</u> <u>Brown Boveri, Inc.</u>, 313 B.R. 219, 230 (N.D. Ohio 2004) (declining to collapse a leveraged buyout where there was "no evidence of knowledge on the part of the Lenders that the acquisition would harm future creditors"). This case is inapposite because petitioner had at least constructive knowledge that Fortrend's tax-(continued...)

[*47] Petitioner argues that he was not aware of Fortrend's "plan as a whole" to avoid West Side's income taxes. If this is true, it is irrelevant. Finding that a person had constructive knowledge does not require that he have actual knowledge of the plan's minute details. It is sufficient if, under the totality of the surrounding circumstances, he "should have known" about the tax-avoidance scheme. <u>HBE</u> Leasing Corp. v. Frank, 48 F.3d 623, 636 (2d Cir. 1995).

Constructive knowledge also includes "inquiry knowledge." "Inquiry knowledge" exists where the transferee was "aware of circumstances that should have led * * * [him] to inquire further into the circumstances of the transaction, but * * * [he] failed to make such inquiry." <u>HBE Leasing Corp.</u>, 48 F.3d at 636. Some cases define constructive knowledge as the knowledge that ordinary diligence would have elicited, while other cases require more active avoidance of the truth. <u>Diebold Found., Inc.</u>, 736 F.3d at 187. We need not decide which of these formulations is appropriate because petitioner had "constructive knowledge" under either standard.

Petitioner's "due diligence" expert, Mr. Purcell, testified that a seller who receives an all-cash offer for his stock is mainly concerned with ensuring that he

 13 (...continued)

avoidance scheme would harm two creditors, the United States and Ohio.

[*48] gets paid. But he agreed that a seller in petitioner's position must nevertheless exercise a certain level of due diligence. Specifically, echoing the contemporaneous advice of Hahn Loeser's bankruptcy lawyers, Mr. Purcell testified that "due diligence did require [petitioner] and his advisors to investigate Fortrend's plans" for eliminating West Side's 2003 tax liabilities.

Neither petitioner nor his advisers performed any due diligence into Fortrend or its track record. Neither petitioner nor his advisers performed any meaningful investigation into the "high basis/low value" scheme that Fortrend suggested for eliminating West Side's accrued 2003 tax liabilities. Petitioner and his advisers were clearly suspicious about Fortrend's scheme. But instead of digging deeper, they engaged in willful blindness and actively avoided learning the truth.

Petitioner and his advisers knew that the transaction Fortrend was proposing was likely a "reportable" or "listed transaction." Before meeting with Fortrend, Hahn Loeser lawyers spent several days researching Notice 2001-16, "reportable transactions," "sham transactions," and transactions involving "an intermediary corporation." PwC insisted on including in its engagement letter a requirement that petitioner advise it if he determined "that any matter covered by this Agreement is a reportable transaction." Petitioner attempted to strike this sentence from the engagement letter, evidencing his active avoidance of learning the truth.

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[*49] PwC advised petitioner orally that "a position can be taken" that the proposed stock sale would not be a reportable transaction. In tax-speak, this translates to a low level of confidence on PwC's part.¹⁴ Petitioner's lawyers attempted to include in the stock purchase agreement a provision prohibiting West Side from engaging in a "listed transaction" after Fortrend acquired West Side. Fortrend refused to agree to this provision. Any reasonably diligent person would infer from this refusal that a "listed transaction" was very likely what Fortrend, a tax shelter promoter, had in mind.

Though alerted by these warning signs, petitioner and his advisers failed to conduct a diligent inquiry into the "high basis/low value" debt strategy that Fortrend proposed for eliminating West Side's tax liabilities. PwC had advised that this appeared to be "a very aggressive tax-motivated strategy" that was "subject to IRS challenge." PwC specifically declined to give "more likely than not" assurance on this point. Petitioner turned his back on this red flag. He testified that

¹⁴Under regulations in effect during 2003, "[a] position * * * [was] considered to have a realistic possibility of being sustained on its merits" if a wellinformed tax professional would conclude that it had "approximately a one in three, or greater, likelihood of being sustained on its merits." Sec. 1.6694-2(b)(1), Income Tax Regs. Stating that "a position can be taken" suggests a lower level of confidence than this. Virtually any position "can be taken."

[*50] Fortrend's tax-elimination strategy was of no concern to him because "that was their business."

Mr. Purcell testified that petitioner could not have sought an opinion from PwC concerning Fortrend's bad debt strategy because, as of the closing date, Fortrend had put no specific high-basis/low-value plan on the table. The Court did not find this testimony persuasive. If ordinary diligence required petitioner and his advisers to investigate Fortrend's plan, as Mr. Purcell admitted, ordinary diligence required them to dig more deeply into what Fortrend's bad-debt strategy was. Fortrend obviously had to know, as of September 9, 2003, how it envisioned eliminating a \$16.9 million corporate tax liability in fewer than 12 weeks. Reasonable diligence required petitioner and his advisers to insist that Fortrend explain its debt reduction strategy in sufficient detail to enable PwC to evaluate it.

Numerous other features of Fortrend's proposal raised red flags that demanded further inquiry. Fortrend offered to pay petitioner \$11.2 million more than the net book value of West Side--representing a premium of 47%--while insisting that West Side's assets be reduced to cash. Petitioner was a sophisticated entrepreneur who had built a company and knew how to value a business. It should have provoked tremendous skepticism to discover that Fortrend was [*51] willing to pay a 47% premium to acquire cash, which by definition cannot be worth more than its face value.

The business purpose alleged for the transaction, moreover, made absolutely no sense. Petitioner and his advisers were told that Fortrend intended to put West Side into the "distressed debt" business. "[T]he business purpose for the acquisition," according to PwC's memo, was "based on the new business' need for cash to purchase the charged-off credit card debt as commercial financing for such purposes is apparently difficult."

This explanation demanded further inquiry from any reasonably diligent person. In order to purchase West Side's stock, Fortrend needed to have cash or be able to borrow cash. If Fortrend had cash or could easily borrow cash, why would it want to acquire West Side in order to get cash? Moreover, as PwC noted in a parenthetical, "most of the \$40,000,000 cash in Westside will be distributed out of Westside and used by * * [Fortrend] to pay back the cash borrowed to purchase * * * [petitioner's] Westside stock." Since there was going to be precious little cash left in West Side after the deal closed, the "business purpose" alleged for the transaction did not pass the straight-face test.

The icing on the cake was the manner in which the purchase price was determined. Numerous spreadsheets prepared by petitioner's brother explicitly

[*52] state that the purchase price would equal West Side's closing cash balance plus 68.125% of its accrued tax liabilities. A sophisticated businessman like petitioner should have been curious as to why the purchase price for his company was being computed as a percentage of its tax liabilities, and why this was the only number that Fortrend seemed to care about. In effect, Fortrend was offering to assume a \$16.9 million tax liability in exchange for a \$5 million fee. Because the economics of the deal made it obvious that Fortrend was not going to pay West Side's tax liabilities, this fact alone put petitioner on "inquiry knowledge."¹⁵

Petitioner testified that he had no contemporaneous understanding that the "Fortrend premium" was correlated to West Side's accrued tax liabilities. The Court did not find this testimony credible. Petitioner actively participated in nego-

¹⁵In the stock purchase agreement, Nob Hill represented that it would "cause * * * [West Side] to satisfy fully all United States * * * taxes, penalties and interest required to be paid by * * * [West Side]." This representation was not worth the paper it was printed on. Petitioner and his advisers knew that Nob Hill was a shell corporation, that West Side would have virtually no assets left after the closing, and that neither would have the wherewithal to pay a \$16.9 million tax liability. And because Nob Hill and Millennium (its parent) were offshore companies with no U.S. assets, this representation was completely unenforceable. The language in the stock purchase agreement allocating West Side's 2003 tax obligation to Nob Hill did not relieve petitioner of his duty to inquire. <u>See Diebold</u> <u>Found., Inc.</u>, 736 F.3d at 189 ("[T]he knowledge requirement for collapsing a transaction was designed to 'protect[] innocent creditors or purchasers for value.' * * * It was not designed to allow parties to shield themselves, when having knowledge of the scheme, by simply using a stock agreement to disclaim any responsibility." (quoting <u>HBE Leasing Corp.</u>, 48 F.3d at 636)).

[*53] tiating Fortrend's fee. When confronted with his brother's spreadsheets that invariably compute Fortrend's fee as 31.875% of West Side's tax liabilities, petitioner became visibly uncomfortable. Petitioner's evasive testimony is further evidence that he had at least constructive knowledge that Fortrend planned to use a tax-avoidance scheme to eliminate West Side's tax liability.

To conclude that the totality of these circumstances did not give rise to constructive knowledge on petitioner's part "would do away with the distinction between actual and constructive knowledge." <u>Diebold Found., Inc.</u>, 736 F.3d at 189. And to relieve petitioner and his advisers of the duty to inquire, when the surrounding circumstances cried out for such inquiry, "would be to bless the willful blindness the constructive knowledge test was designed to root out." <u>Ibid.</u> We find as a fact that petitioner had constructive knowledge that Fortrend intended to implement an illegitimate scheme to evade West Side's accrued tax liabilities and leave it without assets to satisfy those liabilities. The various steps of the Midco transaction may thus be "collapsed" in determining whether petitioner was a "transferee" of West Side under Ohio law.¹⁶

¹⁶As the Second Circuit explained in <u>Diebold Found., Inc.</u>, "collapsing" the transactions in this way requires, not only that the ultimate transferee have "constructive knowledge of the entire scheme," but also that the debtor's property "be reconveyed * * * for less than fair consideration." 736 F.3d at 186. We address (continued...)

[*54] The remaining question is whether these steps, once collapsed, yield a de facto "liquidation" of West Side from which petitioner received a \$35.2 million liquidating distribution. Petitioner appears to believe that, for this to occur, there must have been a <u>complete</u> liquidation of West Side. We do not see the logic of this position: under state corporate law, as well as under Federal tax law, a corporation can be the subject of either a partial or a complete liquidation.¹⁷ In either event, petitioner received a \$35.2 million liquidating distribution upon surrendering his stock. We fail to see how it matters which kind of liquidation it was.

In any event, we find as a fact that West Side was in substance completely liquidated. There is no evidence that West Side conducted any bona fide business operations after September 10, 2003. It had no employees after that date. It reported no gross receipts, income, or business expenses relating to its supposed

¹⁶(...continued) the absence of "fair consideration" below in discussing the requirements of OUFTA section 1336.05. <u>See infra pp. 58-59</u>.

¹⁷See, e.g., sec. 302(b)(4)(B), (e) (defining "partial liquidation"); <u>Armstrong v. Marathon Oil Co.</u>, 513 N.E.2d 776 (Ohio 1987) (noting that corporation was considering complete or partial liquidation to prevent hostile takeover); <u>Cleveland Tr. Co. v. Hickox</u>, 167 N.E. 592, 595-596 (Ohio Ct. App. 1929) ("If there is liquidation of a corporation, partial or complete, the determining element of the transaction is whether the stockholders surrender and cancel the stock which is given in exchange[.]"); 18B Am. Jur. 2d Corporations sec. 1064 (noting that shareholders' right to receive accumulated dividends on liquidation applies identically in partial and complete liquidations).

[*55] "debt collection" business. There is no evidence that it made any effort to collect the Aoyama loans or contracted with any third party to do so. Those loans were not operational assets of a business; they were simply tools for implementing a sham tax-avoidance scheme. In reality, West Side was nothing but a shell company immediately after the Midco deal closed.

At the insistence of petitioner's lawyers, West Side was kept in formal existence for several years. It filed tax returns; it cut checks to Fortrend affiliates; and it maintained a nominal cash balance. But keeping West Side in notional existence was simply a charade designed to create a defense to the precise argument the IRS is advancing here, an argument that petitioner and his attorneys knew the IRS would advance if this Midco transaction came to its attention. Such lawyerly stratagems cannot hide the fact that West Side had been liquidated in substance. It continued as a Potemkin village intended to deceive the IRS, just as the original was designed to fool Catherine the Great.

In sum, we find that petitioner had constructive knowledge of Fortrend's tax-avoidance scheme; that the multiple steps of the Midco transaction must be collapsed; and that collapsing these steps yields a partial or complete liquidation of West Side from which petitioner received in exchange for his stock a \$35.2 million liquidating distribution. <u>See Salus Mundi Found.</u>, 776 F.3d at 1019-1020

[*56] (following the Second Circuit's analysis to the same effect in <u>Diebold</u> <u>Found., Inc.</u>). Under the OUFTA, petitioner is thus a direct transferee of West Side's assets under respondent's "de facto liquidation" theory as well as under the "sham loan" theory discussed previously.¹⁸

2. <u>Petitioner's Liability Under Ohio Law as a "Transferee"</u>

OUFTA section 1336.05(A) provides that a transfer is fraudulent with respect to a creditor where: (1) the creditor's claim arose before the transfer; (2) the transferor did not receive "a reasonably equivalent value in exchange for the transfer"; and (3) the transferor became insolvent as a result of the transfer. We find that all three of these elements are satisfied here. Petitioner is thus liable as a transferee of West Side under Ohio law.

a. <u>When the IRS Claim Arose</u>

During April and May 2003, West Side received proceeds of \$65 million from the PUCO settlement. This yielded a large gain that generated a tax liability of approximately \$16.9 million. West Side thus had an accrued tax liability of

¹⁸Respondent advances the alternative contention that Nob Hill was a direct transferee of West Side and that petitioner has transferee-of-transferee liability as a subsequent transferee of Nob Hill. <u>See sec. 6901(c)(2)</u>; <u>Frank Sawyer Trust of May 1992 v. Commissioner</u>, T.C. Memo. 2014-59 (finding transferee-of-transferee liability). Because we find that petitioner is liable as a direct transferee of West Side, we need not consider respondent's alternative position.

[*57] approximately \$16.9 million before September 9, 2003, the day the Midco deal closed.

The OUFTA defines the term "claim" expansively to mean "a right to payment." <u>Id.</u> sec. 1336.01(C). A right to payment constitutes a claim regardless of whether it is "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." <u>Ibid.</u> A "creditor" is any person who has a "claim." <u>Id.</u> sec. 1336.01(D). Given this broad definition, transfers are fraudulent as to creditors whose claims have not been finally determined, and even as to creditors whose claims are not yet due. <u>See Zahra Spiritual Tr. v. United States</u>, 910 F.2d 240, 248 (5th Cir. 1990). Because "unmatured tax liabilities are taken into account in determining a debtor's solvency, they are 'claims' and should be treated as such under the expansive definition of the term 'claim'" in the UFTA. <u>Stuart v. Commissioner</u>, 144 T.C. __, __ (slip op. at 15) (Apr. 1, 2015).

Petitioner does not seriously dispute that the IRS had a "claim" against West Side before the stock sale. Rather, he argues that the IRS had no claim against <u>Nob Hill</u> when his stock was purchased because West Side had not yet transferred its cash into Nob Hill's Rabobank account. The precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various [*58] transactions must be collapsed for purposes of determining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, it is irrelevant in what order the subsidiary transfers are thought to have occurred.

West Side's Federal tax liability had accrued by late May 2003. The IRS had a claim against West Side at that time. The transfer of West Side's assets to petitioner occurred on September 9, 2003. Respondent's claim thus "arose before the transfer was made." OUFTA sec. 1336.05(A).

b. "<u>Reasonably Equivalent Value</u>"

OUFTA section 1336.05(A) imposes, as a second condition of liability, that the debtor not have received "a reasonably equivalent value in exchange for the transfer." Whether the debtor received "reasonably equivalent value" is a question of fact. <u>See Shockley v. Commissioner</u>, T.C. Memo. 2015-113, at *50.

On September 9, 2003, West Side consisted of nothing but cash and tax liabilities. The value of petitioner's stock thus equaled West Side's net asset value, which was about \$23.7 million (cash equivalents of \$40.6 million minus accrued tax liabilities of \$16.9 million). West Side transferred \$35.2 million to petitioner in exchange for his shares. Since his shares were worth only \$23.7 million, West [***59**] Side did not receive "a reasonably equivalent value in exchange for the transfer." OUFTA sec. 1336.05(A).

The only other thing West Side got at the closing was a representation from Nob Hill that it would "cause" West Side to pay its 2003 tax liabilities in full. As we have found previously, this representation was not worth the paper it was printed on. Nob Hill was a shell company, incorporated offshore, with no assets in the United States (or anywhere else). Nob Hill's parent, Millennium, was also a Cayman Islands company with no assets in the United States. Both were affiliates of a tax shelter promoter. The value of Nob Hill's promise was zero.

c. <u>West Side's Insolvency</u>

OUFTA section 1336.05(A) imposes, as a third condition of liability, that the debtor making the transfer "was insolvent at that time or * * * became insolvent as a result of the transfer." Petitioner asserts that West Side was solvent when he received Nob Hill's cash because, at that moment, West Side had not yet transferred its cash to Nob Hill. Thus, West Side supposedly had assets in excess of its tax liabilities when the transfer to petitioner occurred.

As with petitioner's argument about when the IRS claim arose, the precise timing of the back-to-back cash transfers is immaterial under our analysis. We have found that the various transactions must be collapsed for purposes of deter[*60] mining the OUFTA's proper application. Because collapsing the transactions yields a transfer of cash from West Side to petitioner, West Side's solvency must be judged on that basis.

Under OUFTA sections 1336.02 and .05, solvency is measured at the time of the transfer. A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. <u>Id.</u> sec. 1336.02(A)(1). Following the transfer of \$35.2 million to petitioner, West Side was left with tax liabilities of \$16.9 million and assets of \$5.1 million (consisting of a Rabobank account soon to be emptied by payments to tax shelter promoters). West Side thus "became insolvent as a result of the transfer." <u>Id.</u> sec. 1336.05(A).

In sum, we find that the IRS claim arose before West Side's assets were transferred to petitioner; that West Side made this transfer without having received "a reasonably equivalent value in exchange"; and that this transfer caused West Side to become insolvent. Petitioner is thus liable for West Side's tax debts under OUFTA section 1336.05(A).¹⁹

¹⁹The result would be the same if the IRS' claim were thought to have arisen after West Side's assets were transferred to petitioner. OUFTA section 1336.04(A)(2) provides that a transfer is fraudulent with respect to a present <u>or</u> <u>future</u> creditor if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and if (among other things) the debtor "intended to incur, or believed or reasonably should have believed that he would (continued...)

[*61] 3. <u>Petitioner's Liability Under Ohio Law For Penalties</u>

Even if he can be held liable for West Side's unpaid tax, petitioner contends that the penalties assessed against West Side cannot be collected from him as its "transferee" under Ohio law. According to petitioner, "the distressed debt transaction giving rise to those penalties was not entered into until after petitioner sold his stock and petitioner had nothing whatsoever to do with that transaction." In support of this proposition he relies on <u>Stanko v. Commissioner</u>, 209 F.3d 1082 (8th Cir. 2000), <u>rev'g</u> T.C. Memo. 1996-530.

In <u>Stanko</u>, the Eighth Circuit interpreted Nebraska law in effect before 1989, when Nebraska adopted the UFTA. <u>See id.</u> at 1084 n.1. The Court reasoned that "penalties for negligent or intentional misconduct by the transferor that occurred many months after the transfer * * * are not * * * existing at the time of the transfer." <u>Id.</u> at 1088. The Eighth Circuit concluded that "[a] creditor whose debt did not exist at the date of the * * * [transfer] cannot have the conveyance

¹⁹(...continued)

incur, debts beyond his ability to pay as they became due." As discussed in the text, West Side did not receive "a reasonably equivalent value in exchange" for its transfer to petitioner. And if the IRS claim were regarded as arising after, rather than before, this transfer, West Side knew that it would incur tax debts "beyond * * * [its] ability to pay as they became due." <u>Ibid.</u> In view of our disposition, however, we need not discuss in any detail petitioner's liability under this alternative provision. We likewise need not decide whether petitioner would be liable under the OUFTA's "actual fraud" provision.

[*62] declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time." <u>Id.</u> at 1087 (quoting <u>U.S. Nat'l Bank of Omaha v. Rupe</u>, 296 N.W.2d 474, 476 (Neb. 1980)).

We find the <u>Stanko</u> case to have no application here. The instant case is governed by Ohio law, and the governing Ohio law differs from the pre-UFTA Nebraska statute that the Eighth Circuit was construing. The OUFTA defines "claim" expansively to include any "right to payment" even if it is "unliquidated" and "unmatured." OUFTA sec. 1336.01(C). The IRS may thus have a "claim" for the penalties whether or not they are thought to have been "existing at the time of the transfer." <u>Stanko</u>, 209 F.3d at 1088. The OUFTA, moreover, does not require proof that the transfer was made to defraud specific creditors; nor does it require proof that the debts in question "were in contemplation at the time" the assets were conveyed. Id. at 1087.

Finally, the OUFTA provides that a transfer may be held fraudulent as to future as well as present creditors. Liability as to future creditors exists if the transfer was made without the debtor's receiving "a reasonably equivalent value in exchange" and the debtor "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became [*63] due." OUFTA sec. 1336.04(A)(2)(b). Thus, even if respondent's claim for the penalties were regarded as not being "in existence" on the date of the transfer, petitioner would have transferee liability to the IRS under OUFTA section 1336.04(A)(2) in its capacity as a "future creditor" with respect to those penalties. See supra pp. 60-61 and note 19.

For these reasons, we conclude that petitioner is liable under Ohio law as a transferee both with respect to West Side's unpaid tax deficiency and with respect to the penalties properly assessed against it. We have reached the same conclusion concerning transferee liability for penalties under the fraudulent transfer laws of other States. <u>See, e.g., Kreps v. Commissioner</u>, 42 T.C. 660, 670 (1964) (New York law), <u>aff'd</u>, 351 F.2d 1 (2d Cir. 1965); <u>Cullifer</u>, T.C. Memo. 2014-208, at *30, *74 (Texas law); <u>Feldman v. Commissioner</u>, T.C. Memo. 2011-297, 102 T.C.M. (CCH) 613, 623 (Wisconsin law).²⁰

²⁰In <u>Frank Sawyer Trust of May 1992 v. Commissioner</u>, T.C. Memo. 2014-128, at *10-*11, this Court cited <u>Stanko</u>, 209 F.3d. at 1088, in holding that a transferee was not liable for accuracy-related penalties assessed against the transferors. The facts of the instant case, which must be evaluated under Ohio law, differ substantially from those of <u>Frank Sawyer Trust</u>, which involved Massachusetts law. The First Circuit accepted our "factual finding that the Trust lacked knowledge--actual or constructive--of the new shareholders' tax avoidance intentions." <u>Frank Sawyer Trust of May 1992</u>, 712 F.3d at 599. Here, we have found that petitioner had at least constructive knowledge that West Side's tax liabilities would not be satisfied.

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[*64] B. <u>Petitioner's Status as a "Transferee" Under Federal Law</u>

Whether a person is a "transferee" within the meaning of section 6901 is "undisputedly [a question] of federal law." <u>Starnes</u>, 680 F.3d at 427; <u>see Slone</u>, _____F.3d ____, 2015 WL 5061315; <u>Feldman</u>, 779 F.3d at 458. "Transferee" is an expansive term that includes a "donee, heir, legatee, devisee, and distributee." Sec. 6901(h). The term also includes "the shareholder of a dissolved corporation," "the successor of a corporation," and "the assignee * * * of an insolvent person." Sec. 301.6901-1(b), Proced. & Admin. Regs.

In determining "transferee" status for Federal law purposes, the Ninth Circuit has recently held that a court must consider whether to disregard the form of the transaction by which the transfer occurred. <u>See Slone</u>, _____ F.3d at ___, 2015 WL 5061315, at *5. "[F]or purposes of transferee liability under § 6901," the Ninth Circuit ruled, relevant precedent requires that the court "look through the form of a transaction to consider its substance." <u>Id.</u> at ___, 2015 WL 5061315, at *4. Analyzing a transaction similar to that here, the Ninth Circuit explained in Slone:

[W]hen the Commissioner claims a taxpayer was "the shareholder of a dissolved corporation" for purposes of 26 C.F.R. § 301.6901-1(b), but the taxpayer did not receive a liquidating distribution if the form of the transaction is respected, a court must consider the relevant subjective and objective factors to determine whether the formal transaction "had any practical economic effects other than the creation of income tax losses." [*65] <u>Id.</u> at ___, 2015 WL 5061315, at *5 (quoting <u>Reddam v. Commissioner</u>, 755
F.3d 1051, 1060 (9th Cir. 2014), aff'g T.C. Memo. 2012-106).²¹

In performing this "substance over form" inquiry, the Ninth Circuit does not engage in a rigid two-step analysis. Rather, it focuses "holistically on whether the transaction had any practical economic effects other than the creation of income tax losses." <u>Id.</u> (quoting <u>Reddam</u>, 755 F.3d at 1060). Following a commonsense review of the transaction, if the court concludes that the transaction lacks a nontax business purpose, has no economic substance, and was entered into solely to generate illegitimate tax benefits, the Commissioner may disregard the form the parties have selected and tax the transaction on the basis of its underlying economic substance. Id. at __, 2015 WL 5061315, at *5-*6.

For the reasons discussed previously, we find that the transaction by which Nob Hill "purchased" petitioner's West Side stock relied on sham transactions, had no economic substance, had no bona fide business purpose, and was entered into solely to evade West Side's Federal and Ohio tax liabilities. <u>See supra p. 40</u>

²¹At least two other Circuits have previously ruled similarly. <u>See Feldman</u>, 779 F.3d at 454-457 (7th Cir. 2015); <u>Owens v. Commissioner</u>, 568 F.2d 1233 (6th Cir. 1977) ("[T]he law does not permit a taxpayer * * * to cast transactions in forms when there is no economic reality behind the use of the forms. 'The incidence of taxation depends on the substance of a transaction.'" (quoting <u>Commissioner v. Court Holding Co.</u>, 324 U.S. 331, 334 (1945))), <u>aff'g in part,</u> <u>rev'g in part</u>, 64 T.C. 1 (1975).

[*66] and note 11 and pp. 41-55. We therefore disregard the form of the transaction and find that petitioner in substance was a direct recipient of West Side's cash, i.e., as a "distributee," "the shareholder of a dissolved corporation," or "the assignee * * * of an insolvent person." Sec. 6901(h); sec. 301.6901-1(b), Proced. & Admin. Regs. In any of those capacities, he was a "transferee" of West Side within the meaning of section 6901.

IV. <u>Respondent's Collection Efforts</u>

In certain circumstances the IRS may be required to show that it exhausted all reasonable efforts to collect the tax liability from the transferor before proceeding against the transferee. <u>See Sharp v. Commissioner</u>, 35 T.C. 1168, 1175 (1961); <u>Shockley v. Commissioner</u>, T.C. Memo. 2015-113, at *54; <u>Kardash v.</u> <u>Commissioner</u>, T.C. Memo. 2015-51, at *22-*24; <u>Zadorkin v. Commissioner</u>, T.C. Memo. 1985-137, 49 T.C.M. (CCH) 1022, 1028 (1985). The reasonableness of the IRS' collection efforts against the tax debtor must be assessed in the light of the facts of the particular case. Where "the transferor is hopelessly insolvent, the creditor is not required to take useless steps to collect from the transferor." Zadorkin, 49 T.C.M. (CCH) at 1028.

In 2008, during the course of its examination of West Side, the IRS searched for any existing West Side assets upon which to levy. Unsurprisingly, it

[*67] found none. In 2008, as in late September 2003, West Side had no meaningful assets. What little cash it had post closing was quickly dissipated by payments to Fortrend, MidCoast, and their tax shelter promoter affiliates. Millennium, West Side's postclosing parent, was likewise immune from IRS collection efforts because it was a Cayman Islands company with no assets in the United States. We find that the IRS acted completely reasonably in declining to take further, useless, steps to collect this liability from West Side.

Petitioner also argues that the IRS failed to make collection efforts against Moffatt, whose \$5 million "loan" was allegedly repaid with some of West Side's cash. We have already determined that the Moffatt loan was a sham. In substance, West Side's cash went directly to petitioner, and the Moffatt "loan" was simply an overnight shuffling of funds between two Fortrend affiliates. Under these circumstances, it is not certain that Moffatt was a transferee of West Side.

Even if Moffatt were thought to be a transferee of West Side, collection efforts against it would almost certainly have been futile. As far as the trial revealed, Moffatt was a shadowy entity that appeared and quickly disappeared. There is no evidence in the record about what assets Moffatt had or where they were. It is a fair assumption that Fortrend established this affiliate, like Nob Hill, [*68] Millennium, and its other affiliates, in a manner that effectively immunized them from the reach of U.S. tax authorities.

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In any event, the IRS is not required to pursue collection efforts against Transferee A before seeking to collect from Transferee B. "Transferee liability is several" under section 6901. <u>Alexander v. Commissioner</u>, 61 T.C. 278, 295 (1973); <u>Cullifer v. Commissioner</u>, T.C. Memo. 2014-208, at *74 (same). "It is well settled that a transferee is severally liable for the unpaid tax of the transferor to the extent of the assets received and other stockholders or transferees need not be joined." <u>Estate of Harrison v. Commissioner</u>, 16 T.C. 727, 731 (1951) (citing <u>Phillips v. Commissioner</u>, 283 U.S. 589 (1931) (construing predecessor statute)). "In the event that one transferee is called upon to pay more than his pro rata share of the tax, he is left to his rights of contribution from the other transferees." <u>Id.</u> Petitioner is free to pursue against Moffat any right of contribution he may have.

We accordingly conclude (1) that petitioner is liable under Ohio law for the full amount of West Side's 2003 tax deficiency and the penalties and interest in connection therewith and (2) that the IRS may collect this aggregate liability from petitioner as a "transferee" under section 6901. <u>See</u> OUFTA sec. 1336.08(B); <u>Shussel v. Werfel</u>, 758 F.3d 82 (1st Cir. 2014) (discussing the calculation of

[*69] prejudgment interest on transferee liability), <u>aff'g in part, rev'g in part and</u> remanding T.C. Memo. 2013-32.

To reflect the foregoing,

Decision will be entered under

<u>Rule 155</u>.

Exhibit 38



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



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PWC-WS 1206

TRICAR-NV0046631 APP1476

PRICEWATERHOUSE COOPERS 🛽

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

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PWC-WS 1207

TRICAR-NV0046632 APP1477

PRICEWATERHOUSE COOPERS

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.

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.

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(2)

PWC-WS 1209

TRICAR-NV0046633 APP1478



Yours very truly,

1LLP l~

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

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

B

Date: _ 4/25/03

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PWC-WS 1210

TRICAR-NV0046634 APP1479

PER DISCUSSION W/ M. THICANICHI

1. HE UNDERSTANDS AND AGREE THAT THIS IS REQUIRED

2. FEES : PUL AGREES TO BILL MONTHLY SO THAT TRICAM LAN BE UP-TO-DATE ON FEES INCURRED. HE UNDERSTANDS THE FEES MAY EXACED \$20,000.

- DISENSSED W/ KON PADGETT

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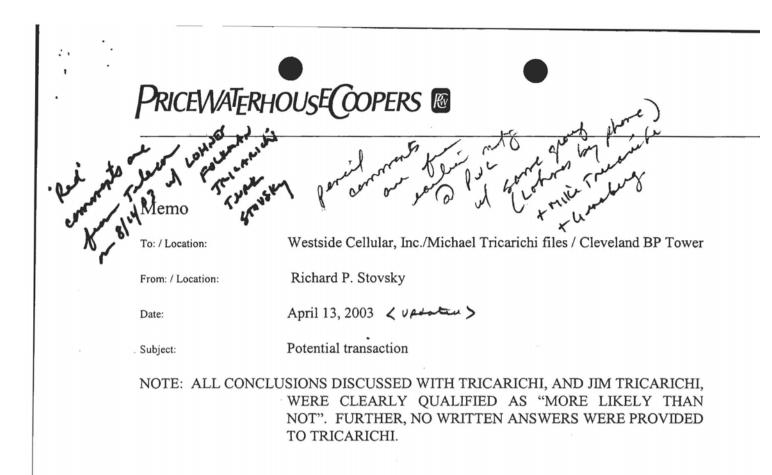
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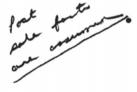
APP1480
Docket 82371 Document 2021-08767

Exhibit 51



Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict (SETTLEMENT?) in the amount of \$65,000,000. Westside is contemplating the following transaction with Newes:



New shareholders borrow approximately \$36,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$40,000,000 of cash (\$65,000,000 of cash from the legal verdict less bonus payments to employees of \$13,000,000 and attorney's fees of \$12,000,000), small accounts receivable, and minor furniture/fixtures/compute equipment (see attached).

- New shareholders contribute to Westside, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Westside is now in the business of purchasing "distressed/charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt



PWC-WS 0600

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- The business purpose for the acquisition of Westside is based on the new business' need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash (note that most of the \$40,000,000 cash in Westside will be distributed out of Westside and used by the new shareholders of Westside to pay back the cash borrowed to purchase Tricarichi's Westside stock)
- Westside writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by the new shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the \$65,000,000 cash from the legal verdict. As stated above, the new shareholders of Westside receive from Westside cash to pay the loan from the bank used to purchase Tricarichi's shares in Westside

• Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

The suggested result, from a federal tax perspective, is as follows:

Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside (THE ASSUMPTION IS THAT ALL OF TRICARICHI'S STOCK HAS BEEN HELD FOR THE REQUISITE LONG-TERM HOLDING PERIOD)

Westside offsets the taxable income from the legal verdict with the write off of high basis property

Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

1. Will the transaction be respected for federal income tax purposes? TIME LOHNES, WNTS PARTNER, WAS INTEGRALLY INVOLVED IN THE ANALYSIS OF THIS TRANSACTION FROM MIKE TRICARICHI'S PERSPECTIVE. AFTER CONSULTING WITH OTHER MEMBERS OF WNTS, AND RESEARCHING THE TRANSACTION, LOHNES CONCLUDED THAT THE RISK TO TRICARICHI WAS THE IRS' RECHARACTERIZATION OF A POROTION OF THE PROCEEDS RECEIVED FROM THE PURCHASER AS FOLLOWS:

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PWC-WS 0601 (2)

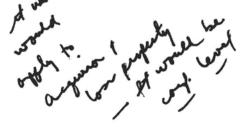
PRICEWATERHOUSE COPERS I AMOUNT RECEIVED BY TRICARICHI: \$36,000,000 AMOUNT THAT TRICARICHI WOULD HAVE RECEIVED HAD HE NOT SOLD THE STOCK, BUT INSTEAD LIQUIDATED WESTSIDE: WESTSIDE GROSS INCOME: \$65,000,000 LESS ATTORNEY'S FEES & BONUSES: (\$25,000,000) AXABLE INCOME: \$40,000,000 ORPORATE FEDERAL TAX RATE: 34% FEDERAL TAX: \$13,600,000 AMOUNT AVAILABLE FOR LIQ. DIST .: \$26,400,000 \$34,000,000 COMPARE WITH ACTUAL PROCEEDS \$ 1,600,000 AMOUNT RECHARACT. AS ORD. INC. LOHNES AND STOVSKY POINTED OUT TO TRICHARICHI THAT ONE ALTERNATIVE WOULD BE TO FILE THE 1040 WITH THIS ORDINARY INCOME

ELEMENT, THEN IMMEDIATELY FILE A CLAIM FOR REFUND. HOWEVER, TRICARICHI INDICATED THAT HE WOULD NOT BE INCLINED TO DO SO, AND THAT THE STOCK SALE AGREEMENT WOULD PROBABLY PROHIBIT HIM FROM DOING SO. IN ADDITION, LOHNES CONCLUDED THAT ANY 269 ISSUES WOULD BE THE PURCHASER'S PROBLEM, NOT TRICARICHI'S. LOHNES ALSO STATED THAT THE DEDUCTION THE CORPORATION WAS TAKING FOR THE WRITE OFF OF THE HIGH BASIS/LOW VALUE PROPERTY CONTRIBUTED TO WESTSIDE (TO OFFSET THE TAXABLE INCOME IN WESTSIDE RELATIVE TO THE LEGAL VERDICT) WAS SUBJECT TO IRS CHALLENGE (THE IRS COULD PUSH THE DEDUCTION TO THE TIME PERIOD WHEN IT WAS IN THE HANDS OF THE CONTRIBUTING SHAREHOLDER). FURTHER, THE CHARACTER OF THAT LOSS, VS. THE CHARACTER OF THE TAXABLE INCOME FROM THE LEGAL VERDICT MAY NOT MATCH. HOWEVER, THIS IS NOT TRICARICHI'S CONCERN AS THE RESULT WOULD BE A CORPORATE TAX LIABILITY, NOT A SELLING SHAREHOLDER LIABILITY (AND, PER THE DISCUSSION BELOW, TRICARICHI HAS NOT SUCCESSOR/TRANSFERREE LIABILITY FOR WESTSIDE TAXES).

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Docket No. 23630-12



PWC-WS 0602

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2. Will the transaction be a reportable transaction? LOHNES CONCLUDED THAT A POSITION CAN BE TAKEN THAT THIS IS NOT A REPORTABLE TRANSACTION. TYPICAL "MIDCO" TRANSACTIONS HAVE 3 PARTIES (THIS TRANSACTION HAS ONLY 2), AND TYPICAL MIDCO TRANSACTIONS RESULT IN AN ASSET BASIS STEP UP AND THE ASSOCIATED AMORTIZATION DEDUCTIONS GOING FORWARD (THIS TRANSACTION DOES NOT HAVE THESE CHARACTERISTICS).

- 3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the \$65,000,000 legal verdict (less the deductions for attorneys fees and bonuses) (assuming Westside does not have cash sufficient to cover the tax liability)? PER LOHNES AND DON ROCEN (OF WNTS), TRICARICHI SHOULD HAVE NO SUCCESSOR/TRANSFEREE LIABILITY FOR ANY CORPORATE LEVEL TAX AS HE TOOK NOTHING OUT OF WESTSIDE. AT THE TIME TRICARICHI SOLD WESTSIDE, IT WAS A SOLVENT CORPORATION. TRICARICHI WAS NOT THE TRANSFEREE OF ANY WESTSIDE ASSET. ROCEN TO PROVIDE NOTES MESSAGE.
- 4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision) CALCULATION NEEDED. NOTE THAT SECTION 341 MAY BE REPEALED BY THE NEW TAX LAW. FURTHER, PER JIM BANKS, THE \$65,000,000 TAXABLE INCOME WAS RECOGNIZED (EVEN THOUGH IT WILL ULTIMATELY BE OFFSET WITH DEDUCTIONS SO THAT NO TAX WILL BE INCURRED).
- 5. Westside is planning to pay significant bonuses (total of \$13,000,000) to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive \$2,500,000 (regular compensation \$81,000), employee B will receive \$2,000,000 (regular compensation \$80,000), employee C will receive \$1,500,000 (regular compensation \$76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the \$65,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible? PER JIM CONNOR OF WNTS, THESE BONUSES WILL BE DEDUCTIBLE SINCE THEY ARE PAID FOR COMPENSATORY REASONS.

Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004? SEE THE STATE TAX MEMO WRITTEN BY DAVID COOK AND RAY TURK OF SALT.

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PWC-WS 0603

(4)

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Note

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7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes? PER PARAGRAPH 3 ABOVE, TRICARICHI SHOULD BE SUBJECT TO NO CORPORATE LEVEL TAX.

8. OPEN ITEMS: Section 341 analysis; Section 384 analysis; Section 453 and 453A analysis and conversation with attorney to ensure the appropriate language is in place in the agreements (note, escrow and Stock Sale) to ensure installment sale treatment for federal tax purposes; representations in Stock Sale agreement re: Tricarichi has no liability for any corporate level taxes; when it is the part.

> EXHIBIT 25-J Docket No. 23630-12 Page 5 of 12

(5) PWC-WS 0604

PriceWATerhouse Coopers 🗃

Memo

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

From: / Location:

To: / Location:

Richard P. Stovsky

Date:

April 13, 2003

Subject:

Potential transaction

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately \$60,000,000. Westside is contemplating the following transaction with Newco:

Newco shareholders borrow approximately \$52,000,000 and purchase 100% of the Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% shareholder. Westside's balance sheet consists of \$60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment.

- Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables)
- Newco is in the business of purchasing "charged off" credit card debt from credit card issuers at pennies on the dollar, and collecting on this debt
- The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash
- Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the

EXHIBIT 25-J Docket No. 23630-12 Page 6 of 12 EXHIBIT 31-J

PWC-WS 0700

TRICAR-NV0046624 APP1487

PRICEWATERHOUSE COPERS @

Memo

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

From: / Location: Richard P. Stovsky

Date:

April 13, 2003

Subject:

Potential transaction

Facts:

Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately \$60,000,000. Westside is contemplating the following transaction with Newco:

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EXHIBIT 25-J Docket No. 23630-12 Page 7 of 12

PWC-WS 0701



\$60,000,000 cash from the legal verdict. The shareholders of Newco receive from Newco cash to pay the loan from the bank used to purchase Tricarichi's shares in Westside

• Westside, now a charged off debt business utilizes "cost recovery tax accounting" which, apparently, results in tax deductions as a portion of the purchased credit card debt is collected

• The suggested result, from a federal tax perspective, is as follows:

Tricarichi recognizes a long-term capital gain upon the sale of his shares in Westside

Westside offsets the taxable income from the legal verdict with the write off of high basis property

Westside operates, on an ongoing basis (represents that it will be in this business for a minimum of six years), a charged off credit card debt collection business

Issues for discussion:

.,

- 1. Will the transaction be respected for federal income tax purposes?
- 2. Will the transaction be a reportable transaction?
- 3. Does Tricarichi have any liability for the federal income tax liability of Westside should the IRS challenge the write off of assets within Westside that is intended to offset the taxable income from the \$60,000,000 legal verdict (assuming Westside does not have cash sufficient to cover the tax liability)?
- 4. Is there any federal tax provision the would convert Tricarichi's long term capital gain into ordinary income (i.e. the Collapsible Corporation provisions, any other provision)
- 5. Westside is planning to pay significant bonuses to certain non-shareholder employees unrelated to Tricarichi. In particular, employee A will receive \$2,500,000 (regular compensation \$81,000), employee B will receive \$2,000,000 (regular compensation \$80,000), employee C will receive \$1,500,000 (regular compensation \$76,000). These bonuses are, presumably, for past services during the period in which Westside was in the litigation that yielded the \$60,000,000 verdict (when Westside could only afford to pay modest compensation). Will these bonuses be deductible?

EXHIBIT 25-J Docket No. 23630-12 Page 8 of 12

PWC-WS 0702

(2)



- 6. Tricarichi is planning to move from Ohio to a non-taxing state so that the gain will escape state taxation. What steps are necessary to accomplish this goal? Will an installment sale effectively defer the gain into 2004 if Tricarichi cannot relocate until 2004?
- 7. Are any other tax areas applicable such as the Accumulated Earnings Tax provisions, the Personal Holding Company provisions, etc? If so, which party bears the burden for such tax? Would Tricarichi be liable for such taxes?

PWC-WS 0703

EXHIBIT 25-J Docket No. 23630-12 Page 9 of 12

" prily almphistic to store" ", -Befacto /iguidat - Miblo (PRICEWATERHOUSE COPERS 🛛 MIDLE George 2001-10 substituting Similar -broudly construed ? mindes 258 Frupp 193 Memo Westside Cellular, Inc./Michael Tricarichi files / Cleveland BP Tower at ovd To: / Location: · fontran - nu advene · Mid coast · Mid coast · Mid coast · Mid clain · Mund · Mu 10 Understand From: / Location: Richard P. Stovsky (39.6 or [3 Date: April 13, 2003 Potential transaction Subject: Millo Pis Age Facts: Westside Cellular, Inc. (Westside), a "C" Corporation, has been awarded a legal verdict in the amount of approximately \$60,000,000. Westside is contemplating the following transaction - Dent Mar with Newco: my deprec Newco shareholders borrow approximately \$52,000,000 and purchase 100% of the ratemi - Net tonin to Westside shares outstanding from Michael Tricarichi ("Tricarichi"), the 100% M-B-tahlish with shareholder. Westside's balance sheet consists of \$60,000,000 cash, small accounts receivable, and minor furniture/fixtures/compute equipment. Newco shareholders contribute to Newco, in an Internal Revenue Code Section 351 transaction, high basis/low fair market value property (the assumption is that these are delinquent receivables) Newco is in the business of purchasing "charged off" credit card debt from credit card • issuers at pennies on the dollar, and collecting on this debt The business purpose for the acquisition of Westside is based on Newco's need for cash to purchase the charged off credit card debt as commercial financing for such purchases is, apparently, difficult. Westside's cash and accounts receivable will provide such needed cash Newco writes off (apparently deductible for federal income tax purposes) some of the high basis/low fair market value property contributed by its shareholders. This deduction offsets the taxable income created within Westside upon the receipt of the EXHIBIT 25-J Docket No. 23630-12 - Minu Page 10 of 12 - A WWW PWC-WS 0714

TRICAR-NV0046628 APP1491

PRICEWATERHOUSE COOPERS 1

\$60,000,000 cash from the legal verdict. The shareholders of Newco receive from Newco cash to pay the loan from the bank used to purchase Tricarichi's shares in (Westside

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EXHIBIT 25-J Docket No. 23630-12 Page 11 of 12

PWC-WS 0715

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PRICEWATERHOUSE COOPERS 1

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PHL - lansvit incore out ptk income -interst caused my be, but out over 60%. AA - ? no accumulation - free claim has always been in Company

EXHIBIT 25-J Docket No. 23630-12 Page 12 of 12 (3)

PWC-WS 0716

TRICAR-NV0046630 APP1493

Exhibit 67

 To:
 Scott F. Hessell[SHessell@SPERLING-LAW.COM]

 Cc:
 Hart Randy[randyjhart@gmail.com]; Tricarichi Michael[mtricarichi@aol.com]

 From:
 Michael J. Desmond[michael@desmondtaxlaw.com]

 Sent:
 Thur 10/22/2015 3:07:30 PM (UTC)

 Subject:
 Re: PwC Documents: 1 of 2

 Pwc Engagement Letter (FULL).pdf

ATT00002.html

This version has the term sheet attached. Mike

PRICEWATERHOUSE COPERS 🛽

PricewaterhouseCoopers LLP BP Tower, 27th Floor 200 Public Square Cleveland OH 44114-2301 Telephone (216) 875 3090 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

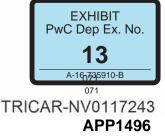
You have requested that PricewaterhouseCoopers perform tax research and evaluation services.

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



PRICEWATERHOUSE COPERS 🛽

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

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IER DISEUSSION OF H. TRICANCERI : 1. HE UNDERSTANDS AND AGREES THAT THIS is REQUIRED

2. FEES : PUR AGREES TO BILL MONTHLY SO THAT TRICAMULA CAN BE UP-TO-DATE ON FEES INCURRED. HE UNRENSTANDS THE FEES MAY EYREED \$20,000.

- DISCUSSED W/ ADD PADGETS

073 TRICAR-NV0117245 APP1498

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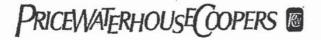
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Code section 6112 require that we maintain lists of certain client engagements where we are material advisors to clients that have participated in either a reportable transaction or a transaction that is required to be registered with the IRS as a 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 61.11, 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 EXCEDE \$ 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)

PRICEWATERHOUSE COOPERS CO

Yours very truly,

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A 1.

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 APP1500

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.

Electronic Communications

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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.

Engagement Limitations

5.

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 PricewaterbouseCoopers 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 eivil 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 terminute 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.

. 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. PricewaterbouseCoopers 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

PRICEWATERHOUSE COOPERS 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 PRICEWATERHOUSE COOPERS BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INDIRECT, EXCEMPLARY, PUNITIVE, LOST PROFITS OR SIMILAR DAMAGES, EVEN IF WE HAVE BEEN APPRISED OF THE POSSIBILITY THEREOF.

. 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 A greement 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

077 TRICAR-NV0117249 APP1502 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

TRICAR-NV0117250

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APP1503

Exhibit 69

Capital	Reporting	Company
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	IN THE UNIT	ED STATE:	S TAX CC	URT	
In the Mat	ter of:)		
MICHAEL A.	TRICARICHI,))		
Peti	tioner,))		
V.))Docket	No:	23630-12
COMMISSION	IER OF INTERNAL I	REVENUE,))		
Resp	oondent.)		
Pages:	1 through 100				
Place:	Washington, DC				
Date:	June 9, 2014				

	88
1	Discount Cellular, and we maintained well, LXV
2	maintained customer service for the base and they
3	continued to do the billing and the collecting and
4	that kind of thing.
5	Q So how long did that whole process take to
6	play out, then? The LXV
7	A I want to say I want to say with the two
8	different buyers, probably about three years, three
9	or four years, something like that.
10	Q Okay. So you told us about the customer
11	base and trying to manage the customer base. Were
12	you also thinking at the time about what to do about
13	what to do with Westside as a corporate entity?
14	A Yeah. We were going we knew what we
15	were going to do with it. We were going to make it a
16	real estate investing operation. I had previous
17	as I told you before, I had previous real estate
18	experience in managing apartments and stuff like
19	that.
20	So we were looking for things to buy, real
21	estate, you know, things like that. And so we had a
22	number of options that we could pursue.
23	I had Hahn Loesure came to us and said we
24	want to do some planning as far as your tax
25	liabilities go for the Cellnet and Westside. I think

89 at that time Westside had about \$40 million left from 1 2 paying Hahn Loesure and paying the bonuses, et cetera. 3 4 So one of the things we looked at was converting it back to a sub S, which wasn't really an 5 option. We looked at the possibility of closing it, 6 which wasn't really an option. And we also looked at 7 the opportunity of selling it. 8 9 Q So I think you alluded to this, but just to ask you directly. Taxes, was that an important 10 11 consideration for you at the time? 12 А It was. It was. Because it was a C corporation if I took any money out of it or if I 13 closed it, I would be double-taxed. I would be --14 15 the corporation would owe the tax and then I would 16 owe tax on the money that I took out of it. So that 17 was never a consideration. Closing the corporation down was never really a viable consideration. 18 19 Okay. And did you, personally, look into Ο the tax issues or how did you -- how did you --20 I hired -- first I hired Hahn Loesure 21 Α No. 22 to give me advice on the tax issues separate and 23 apart from the litigation that they were doing with 24 the carriers. And then they came up with this entity 25 called Midcoast. And they had told me that they had

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1	did they had done a couple of deals with Midcoast
2	and they were good deals and I should look at that.
3	So we had a meeting at Hahn Loesure with a
4	representative from Midcoast and he made a pitch to
5	us. And, you know, we nodded our head and said,
6	Okay, that sounds like an interesting idea.
7	And my brother Jim, who was doing some
8	accounting work for us at the time, I believe was at
9	that meeting as well. He talked to another
10	accountant that he knew, a guy by the name of Don
11	Jasco (phonetic). And he talked to a guy by the name
12	of Gary Zwick.
13	And Gary Zwick had some affiliation with
14	this company called Fortrend. So when my brother and
15	Jasco talked to Zwick and said, Oh, we've got a guy
16	for you, we've got the company that does what
17	Midcoast does.
18	So my brother Jim or I don't know who
19	made the contact with Fortrend, but ultimately, we
20	had a meeting with Fortrend, as well. And, you know,
21	basically now we've got two companies who are
22	interested in purchasing Westside.
23	Q Okay. Let me take you back to just one
24	point you made earlier. You mentioned the prospect
25	or possibility of real estate investments.

Capital	Reporting	Company
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	IN THE UNI	TED STATE	S TAX CO	OURT	
In the Mat	ter of:)		
MICHAEL A.	TRICARICHI,)		
Peti	tioner,))		
V.))Docket	No:	23630-12
COMMISSION	ER OF INTERNAL	REVENUE,))		
Resp	ondent.))		
Pages:	101 through 2	01			
Place:	Washington, D	С			
Date:	June 9, 2014				

120 that. 1 2 MR. DESMOND: Okay. BY MR. DESMOND: 3 4 Going back, then, to the Fortrend offer, Q Mr. Tricarichi, we've talked about the \$65 million 5 and the tax consequences surrounding that 6 consideration between PWC. 7 Did you have any understanding as to what 8 9 was going to happen to the taxes, whatever that 10 amount might be, that Westside might owe? 11 А Fortrend was going to make sure that the taxes got satisfied. 12 13 Do you know how they were going to make 0 sure the taxes got satisfied? 14 15 No. That was why I hired the outside А 16 experts. 17 0 Okay. Did your advisers look into that for 18 you? 19 Α I believe they did. To some -- to some 20 degree I think PWC did. 21 Q Okay. And you mentioned earlier this -well, let me come back to that in just a second. But 22 were the specific terms in Exhibit 1-J, the stock 23 purchase agreement, that addressed the taxes that you 24 25 recall?

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1	A The only term that addressed the taxes was
2	that they were taking they took the tax obligation
3	for anything any income that came in after the 1st
4	of January of 2003.
5	Q Okay. And if I could have you look at page
6	23 of Exhibit 1-J. And in particular I'm looking at
7	Section 5.2. Are you familiar with that
8	particular
9	A Yes.
10	Q agreement? And what is Section 5.2?
11	It's got two subparts. But starting with Subpart A,
12	what does that provision tell us?
13	A Subpart A is basically what I just said.
14	That they, being Fortrend, were responsible for
15	preparing I'm sorry.
16	We were responsible for preparing a pre
17	a pretax whatever you want to call it and they were
18	responsible for anything here. I'll read the
19	line.
20	It says: Subject to Section such and such,
21	buyer shall cause company to prepare and file timely
22	at their own cost and expense all returns for taxes
23	required to be filed by a company in respect to
24	periods ending after closing date. Buyer shall cause
25	company to satisfy all United States federal, state,

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1	local, and franchise taxes, penalties, and interest
2	required to be paid by a company attributable to
3	income earned during the tax year January 1st, 2003,
4	and for all tax years thereafter.
5	So Fortrend was committing to us that they
6	were responsible for making sure that anything any
7	income that was triggered from January 1st, 2003,
8	forward, they were going to take care of the tax on
9	that.
10	Q Does this agreement say anywhere how
11	they're going to do that?
12	A No, it doesn't.
13	Q Does it say anywhere that they have to take
14	some specific steps or any transactions? Does it
15	tell them
16	A Like a specific strategy or something?
17	Q Correct.
18	A No. There's nothing like that.
19	Q Okay. So as far as you knew, they could
20	have cut a check to pay for the tax?
21	A If that was what they wanted to do, sure.
22	Q Okay. But it's their responsibility?
23	A Either way this agreement provided that
24	they would satisfy whatever taxes were due.
25	Q And read it if you want to, but

175 And what did they say? 1 Q 2 Well, part of it was proprietary. They Α weren't telling us what they were going to do as far 3 4 as minimizing the tax goes. They had a couple of I think -- I think PWC looked at one of 5 options. 6 them. 7 But we had nothing in the purchase agreement that spoke to a specific thing that they 8 were going to do after they purchased the company. 9 10 There was nothing -- all -- the only thing we had in 11 the agreement was they were going to satisfy the tax obligation of Westside. 12 13 0 Okay. Okay. They didn't say how they were going 14 Α to do it. They just said they were going to do it. 15 And we had a lot of reps and warrants to that effect. 16 17 0 Thank you. Can you turn to Exhibit 26-J, 18 please? 19 Α 26-J, got it. 20 Q This is the letter of intent from Nob Hill 21 Holdings to you. 22 Α Yes. And Nob Hill Holdings is the acquisition 23 Ο company that Fortrend used; is that correct? 24 25 А That's my understanding.