No. 82371

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

v.

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

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

MICHAEL TRICARICHI'S APPENDIX

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CHRONOLOGICAL INDEX

ALPHABETICAL INDEX

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:

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DATED this 26th day of March, 2021.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSE COOPERS, LLP, COÖPERATIEVE RABOBANK U.A., UTRECHT-AMERICA FINANCE CO., SEYFARTH SHAW LLP and GRAHAM R. TAYLOR, Defendants.	CASE NO. A-16-735910-B DEPT NO. XV **ORDER REGARDING DEFENDANT PRICEWATERHOUSECOOPERS LLP'S MOTION FOR SUMMARY JUDGMENT**

Defendant PricewaterhouseCoopers LLP's (PwC's) Motion for Summary Judgment came on for hearing before this Court on May 10, 2017. Todd L. Moody and Scott F. Hessell appeared on behalf of Plaintiff Michael A. Tricarichi. Patrick G. Byrne, Peter B. Morrison and Winston P. Hsiao appeared on behalf of Defendant PwC.

The COURT CANNOT FIND, based on the record presently before it, that genuine issues of material fact exist, regardless of which state's law applies in this case.

The COURT NOTES that Mr. Tricarichi affirmatively says in his Affidavit on page 3, lines 10-12, "PwC's work and advice to me about proceeding with the Fortrend transaction extended into August 2003 . . . ."

THE COURT FINDS NRCP 56(f) relief as set forth in paragraph 10 of Mr. Tricarichi's Affidavit is appropriate.

Having considered the same and good cause appearing,

IT IS HEREBY ORDERED that Defendant PwC's Motion for Summary Judgment is DENIED without prejudice solely based on NRCP 56(f).

IT IS FURTHER ORDERED that Plaintiff is entitled to limited discovery necessary to oppose PwC's motion for summary judgment as set forth in Paragraph 10 of Mr. Tricarichi's Affidavit, which requested PwC documents and testimony regarding the Bishop and Marshall transactions; PwC's review, promotion or advocacy of, or other advice regarding transactions similar to Mr. Tricarichi's transaction with Fortrend, and the reasons why PwC did not make Mr. Tricarichi aware of those transactions.

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IT IS FURTHER ORDERED that the parties shall meet and confer in good faith regarding the appropriate scope of the limited discovery necessary to oppose summary judgment, and if there is a dispute, the parties may seek a decision from the Court.

DATED: May 30 2017

DISTRICT COURT JUDGE

Submitted by:

/s/ Todd W. Prall

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI, Plaintiff, v. PRICEWATERHOUSECOOPERS, LLP, ET AL., Defendants.	CASE NO. A-16-735910-B DEPT NO. XI **APPENDEX OF EXHIBITS IN SUPPORT OF PLAINTIFF MICHAEL TRICARICHI'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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CERTIFICATE OF SERVICE

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

ALL PARTIES ON THE E-SERVICE LIST

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

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

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transaction that involves the sale of stock by one company to an intermediary or Midco company and then the intermediary assumes the target company's corporate tax obligations, okay?

A Okay.

MR. LANDGRAFF: And I'll just have a running objection to that based on the testimony so far if that's okay, Scott.

MR. HESSELL: That's fine.

MR. LANDGRAFF: Rather than object every time you use the term.

MR. HESSELL: And your objection is what?

MR. LANDGRAFF: Is that Mr. Stovsky says that that's not what he, you know, believes a Midco to be or what the -- what the standard -- what the notice provides.

MR. HESSELL: Yeah, and that's fine. I just want to understand that we're on the same page about what I'm referring to when I describe a Midco transaction, regardless of what he or PwC's view is of whether it qualifies.

BY MR. HESSELL:

Q Are we on the same page, Mr. Stovsky?

A Yes.

Q And on behalf of PwC in 2003, you advise

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Mr. Tricarichi that the Westside transaction was not a Midco transaction under Notice 2001-16, correct?

A We advised that on a more-likely-than-not basis it was not a Midco transaction.

Q And you used those words, "more likely than not," when you communicated to Mr. Tricarichi?

A Based on my notes in the file, yes.

Q That's not what I asked you. I asked whether, as you're sitting here today, you used -- your testimony under oath is that when you advised Mr. Tricarichi that the transaction -- the Westside transaction was not a Midco under Notice 2001-16, you recall using the words "more likely than not"?

A I don't -- as I sit here today, I don't recall specifically reciting those words.

Q I take it as you're sitting here today, you also don't recall having explained to Mr. Tricarichi what the significance of more likely than not might mean in the context of the conclusions and opinions given by PwC in the context of this transaction?

MR. LANDGRAFF: Object to the form.

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BY THE WITNESS:

A As I sit here today, I don't recall specifically.

BY MR. HESSELL:

Q Is it also true --

MR. HESSELL: I'm sorry, did someone else just speak, or was that just feedback?

THE TECHNICIAN: That was just feedback.

BY MR. HESSELL:

Q Is it fair to say also as you're sitting here today that with respect to the other conclusions that PwC made to Mr. Tricarichi about the Westside transaction, you don't recall actually using those terms "more likely than not"?

A I don't specifically recall the conversations.

Q Right. So as you're sitting here today, you do not have a recollection of having used the terms "more likely than not" with respect to the other advice that Mr. Tricarichi received from PwC in the context of the Westside transaction, correct?

MR. LANDGRAFF: Objection, form.

THE WITNESS: I'm sorry?

MR. LANDGRAFF: Go ahead. I just

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objected. Go ahead.

BY THE WITNESS:

A As I sit here today, 17 years from the -- the time of services performed, I can't recall specific conversations.

BY MR. HESSELL:

Q Okay. After -- sorry. Strike that.

Did the advice that you gave Mr. Tricarichi on various conclusions with respect to the Westside transaction all take place in a single conversation?

A No.

Q So your advice on different topics with respect to the Westside transaction happened in multiple conversations over the course of the transaction?

A Based on my notes in the file, that's correct.

Q And with respect to the -- I refer to it as the Stovsky memo to the file. Do you know what I'm referring to, the memo dated April 13th of 2003?

A Yes.

Q And with respect to that Stovsky memo, did you -- do you recall adding notes to that memo

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following your conversations with Mr. Tricarichi?
A I don't specifically recall when I wrote notes, but it's clear that I have notes on that memo.
Q Some of them -- and what you're referring to now when you say you have notes on the memo are the handwritten notes in -- in the margins?
A Handwritten as well as typed.
Q All right. Do you know at what point in time you added the notation that's in all caps at the top of the memo about how the conclusions of PwC are at a more-likely-than-not level of opinion?
A I don't recall at the time.
Q So as you're sitting here today, you can't say whether that notation at the top of the Stovsky memo was added following an actual conversation with Mr. Tricarichi, correct?
A Correct.
Q Why didn't PwC issue a written opinion in -- regarding its conclusions with respect -- with respect to the Westside transaction?
A We weren't engaged to issue a written opinion.
Q Well, did you ever propose to

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Mr. Tricarichi that it might be a good idea that he received a written opinion from PwC?
A I can't recall. Sometimes our advice is written, sometimes it's oral, verbal.
Q But there -- you do agree with me that there's nothing in the engagement agreement that would have prohibited PwC from providing its conclusions in writing, correct?
A Correct. And there's also nothing in the engagement agreement that would require a written -- a written submission to Mr. Tricarichi.
Q No one for Mr. Tricarichi ever advised PwC that it did not want to receive PwC's advice or conclusions regarding the Westside transaction in writing, correct?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A No one from Mr. Tricarichi's team requested -- I can't recall if anybody advised us not to issue a written document.
BY MR. HESSELL:
Q I just want to be clear. As you sit here today, you have no recollection of anyone from Mr. Tricarichi's team demanding that PwC's advice only be provided orally, correct?

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A As I sit here today, I don't recall anybody demanding it be orally, nor do I recall anybody requesting it to be in writing. We -- we don't provide services that aren't requested.
Q Well, is there any reason why PwC couldn't have proposed to Mr. Tricarichi that the advice be provided in writing?
A There's no reason other than we were engaged to provide specific services and provided those services.
Q I understand that you were engaged to provide those services, but I think we both agree that the engagement agreement is silent on whether there were writing -- whether the advice should be provided in writing or orally, correct?
A I agree --
MR. LANDGRAFF: Object --
BY THE WITNESS:
A -- silent.
I agree it's silent as to that, but if -- if Mr. Tricarichi or his team wanted something in writing, they could have requested it.
BY MR. HESSELL:
Q But how would Mr. Tricarichi have known to ask for PwC's advice to be provided in writing?

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MR. LANDGRAFF: Object to the form.
BY MR. HESSELL:
Q Strike that. That's a bad question.
We do agree, right, that you did not share with Mr. Tricarichi the -- what I refer to as the Stovsky memo or any of the various iterations of it, correct?
A Correct.
Q And you also didn't ever communicate to Mr. Tricarichi or anyone on his team that you were preparing an internal memo stating -- setting forth what the basis for your opinions -- PwC's opinions were in connection with the Westside transaction, correct?
A I don't believe I mentioned that, but I can't recall specifically.
Q Have there been times in your practice at PwC where you have recommended to clients that it is in their interest to receive PwC's advice in writing even if not requested specifically by the clients?
A As I sit here today, I can't recall that happening, no.
Q In every instance where you've been involved in PwC providing advice in writing, the

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Q And prior to obtaining that title, vice chairman, you also held several other leadership positions at PwC before that, correct?
A Correct.
Q Throughout -- in total, it looks like you spent almost 35 years at PwC?
A Yes.
Q Virtually all of your professional career, right?
A Right.
Q And throughout the entire period of time that you were employed at PwC, you were both a licensed CPA and a licensed attorney, correct?
A I was a licensed attorney but didn't practice law. And I was a licensed CPA, I believe, since 1986 is when I got my license.
Q When you say you were a licensed attorney but you didn't practice, what do you mean by that?
A I took the bar in 1983, passed the bar exam, and was admitted to the bar but didn't practice law.
Q Meaning you didn't work at a law firm?
A I didn't work at a law firm and I didn't practice law at PwC.
Q But you did go through the exercise of

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maintaining your active legal license while employed at PwC, right?
A Correct.
Q Took the CLE requirements that was necessary to maintain your law license throughout the period of time you were employed at PwC?
A Yes.
Q And you're still both a licensed lawyer and a licensed CPA today, right?
A Yes.
Q I take it you're a member of the Ohio bar?
A Yeah -- yes.
Q You're also a member of the CPA equivalent in Ohio?
A Yes.
Q You've never been admitted to the Nevada bar or the Nevada CPA licensure, correct?
A Correct.
Q Would you tell me which PwC employees worked on the Tricarichi matter.
A When you say "employees," partners as well as employees? Tim Lohnes, Ray Turk, David Cook, Don Rocen.
There were others; I just can't recall exactly who as I sit here.

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Q Is there anyone else as you sit here today that you recall playing a substantial role in the advice PwC gave to Mr. Tricarichi in the context of the Westside transaction?
A I don't know what you mean by "substantial," but the -- the people I named provided a significant portion of the services.
Q All right. And what was -- (garbled audio) -- role in connection with Mr. -- with the advice PwC gave Mr. Tricarichi on the Westside transaction?
MR. LANDGRAFF: Apologies, Scott, can --
MS. REPORTER: I'm sorry --
MR. LANDGRAFF: Michelle and I had the same problem. Can you try that again, Scott. Sorry.
BY MR. HESSELL:
Q What was the role of Mr. Lohnes with respect to Mr. -- the Westside transaction and the advice PwC gave?
A Tim Lohnes was a member of our Washington National Tax Group and he led the technical work relative to the federal tax side of the engagement.
Q Was Mr. Lohnes -- (garbled audio).

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It was Mr. Lohnes who analyzed whether the Westside transaction could be recharacterized as something other than a stock sale for federal tax implications, correct?
A Yes.
Q Was there anybody else other than Mr. Lohnes who was involved in the advice by PwC that the transaction would not be recharacterized by the IRS as anything other than a sale of stock?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Can you repeat that.
BY MR. HESSELL:
Q Sure. Was there anybody else at PwC besides Mr. Lohnes who was involved in the advice by PwC that the transaction would not be recharacterized as anything other than a stock sale for federal tax implications?
MR. LANDGRAFF: Same objection.
BY THE WITNESS:
A I don't know if there was anybody else that Tim Lohnes discussed the matter with. There may have been, so I can't really answer that. So I don't know if anybody else would have provided that determination.

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Q -- from a system?
A I'm sorry?
Q That you didn't pull it from a system?
MR. LANDGRAFF: Objection.
BY THE WITNESS:
A Yeah, I just don't recall exactly what I did.
BY MR. HESSELL:
Q Sorry, that question, I kind of cut it off so let me try it again.
Your best recollection is that you created the Tricarichi invoice details that are reflected in PX Number 1?
A That's my best recollection, correct.
Q And you would have done that after either knowing what the partners were doing or consulting with them?
A Yes.
Q Do you know what work Mr. Lohnes did to come to the conclusions that he did in the context of the Westside transaction?
A Mr. Lohnes -- you mean the specific work that he did?
Q Right.
A No.

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Q Do you know what specific work Mr. Rocen did to come to his conclusion that Mr. Tricarichi should not face any personal liability associated with the Westside transaction?
MR. LANDGRAFF: Object to the form as to the characterization.
BY THE WITNESS:
A Mr. Rocen?
BY MR. HESSELL:
Q Yeah.
A I don't know who you're referring to.
Q Did I mispronounce his name?
A Oh --
Q Mr. Rocen.
A -- Mr. Rocen. Sorry.
Don Rocen was a member of our National Tax practice. He was the -- formerly assistant commissioner of the IRS. I think he was deputy general counsel. I don't know what specifically he did to form his conclusion.
Q As -- as reflected on PX 1, it appears that the total amount of time that Mr. Rocen worked on the Westside transaction was two and a half hours, correct?
A Yes, that's the time that he recorded.

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Q And you're not aware that he worked more than two and a half hours as reflected in PX 1, correct?
A I'm not aware, no.
Q And as you sit here today, you don't specifically know what work Mr. Rocen did to come to the conclusions he did with respect to the Westside transaction, correct?
A Well, Mr. Rocen was an expert in his area so --
Q I know --
A -- so I --
Q I know his qualifications and --
MR. LANDGRAFF: Let him finish. Let --
BY THE WITNESS:
A Let me finish. So I don't -- I don't specifically know the work that he did to form his conclusions on this transaction, but he was an expert in the area.
BY MR. HESSELL:
Q Right. So -- and just to be clear, you have no personal knowledge of what work he did in the two and a half hours that he billed with respect to the Westside transaction, correct?
A I don't. And I also don't know what work

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he did becoming an expert in the area that was not charged to our client.
Q All right. And you're not aware of any document, email, memo that Mr. Rocen created with respect to the work that he did on the Westside transaction, correct?
A Correct.
Q You've never seen an email from Mr. Rocen communicating what the basis for his advice was in the context of the Westside transaction, correct?
A I didn't -- I have not received it or never received an email, correct.
Q Have you ever seen any work product from the files of Mr. Rocen with respect to the Westside transaction?
A No.
Q Do you have any idea why that is?
A I don't.
Q Prior to the Westside transaction, you personally had never been involved in advising a client regarding a Midco transaction, correct?
A I can't recall if it was prior to the transaction or not, but I had one other client that had been looking at a transaction that was assessed or was starting to be assessed relative

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to a third-party transaction, but it never materialized.
Q What's your best recollection of when that took place?
A I really can't say.
Q And was PwC engaged to provide any advice on behalf of this other -- other client you're referring to?
A I just -- I can't recall. I know the transaction never materialized.
Q Can you tell me anything more about what role you played in connection with this other client?
A It was -- it was a client of mine, but I -- I can't recall any specifics other than that was a topic.
Q So is it fair to say that prior to Mr. Tricarichi's transaction, you had never been engaged by any other client to evaluate a Midco transaction?
A I just can't recall if it was before or after.
Q Right. I know. My -- my question is about whether you were actually engaged by the other client to perform any services in the

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context of that prior transaction.
A I can't specifically recall if we were separately engaged, but we had done some work around it.
Q What work around it?
A To the best of my recollection, we started to analyze the facts. And then the transaction, it ended up not materializing.
Q How would you determine whether it took -- whether this other transaction you're referring to took place before or after Mr. Tricarichi's transaction?
A I'd have to go back to PwC and see if there were any records of that. But I don't know -- it would have -- it would have been a long -- you know, at least 17 years ago, so I don't know if -- if I could determine that.
Q What role did you play in connection with this other transaction that you're referring to?
A If I recall correctly, I was the tax partner in the engagement and engaged experts from our National Tax practice to have discussions.
Q Who did you engage?
A I can't recall specifically.
Q Do you know how much time you spent on

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this other matter?
A I don't.
Q And you don't recall having billed the client?
A No, not as I sit here today I can't recall.
Q Prior to April 2003, had you ever been engaged to evaluate a transaction involving Fortrend?
A No.
Q Was either -- sorry. Strike that.
What was the name of the intermediary entity that was involved in this other transaction you're referring to?
A Oh, I can't recall if there was one.
Q What role was your client, in this other transaction, where were they in the structure of the proposed transaction? Were they the buyer or the seller or...
A I cannot recall, truly.
Q So as you sit here today, you cannot recall any advice that you had given a client regarding a Midco transaction prior to April of 2003, fair?
A Fair.

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Q And you certainly never represented to Mr. Tricarichi or any of his advisors that you had any personal expertise regarding Midco transactions, correct?
A Correct.
Q And as you sit here today, you don't hold yourself out as an expert regarding Midco transactions, correct?
A Correct.
Q Prior to April -- April of 2003, had you ever analyzed a transaction under Notice 2001-16?
A Not to my recollection, no.
Q Prior to April of 2003, had you ever been engaged to advise a client regarding transferee liability?
A Not to my recollection.
Q Had you ever heard of Fortrend prior to April of 2003?
A No.
Q In the context of Mr. Tricarichi's transaction, you didn't consult with the Midco subject matter expert or specialist at PwC, correct?
MR. LANDGRAFF: Object to the form.

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BY THE WITNESS:
A That's not correct. I consulted with Tim Lohnes.
BY MR. HESSELL:
Q But Mr. Lohnes, to your understanding -- strike that.
Was it your understanding in -- in 2003 that Mr. Lohnes had been identified as the subject matter expert at PwC regarding Midco transactions?
A There are numerous subject matter experts in -- in virtually all the areas that we have at our National Tax practice. He was one of them.
Q Have you ever seen Mr. Lohnes identified on any document from PwC as a subject matter expert on Midco transactions specifically?
A Not specifically, no.
Q But there are certain people who are identified by PwC as subject matter experts regarding Midco transactions, correct?
A I'm not sure what you're referring to. You may be referring to the point-person. So PwC would have a listing of point-people for various areas that we consult on at National Tax. Those point-people would be responsible for coordinating the effort, for instance. But we had numerous

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experts in the area providing advice.
Q I'm going to show you -- if you have in your binder --
MR. HESSELL: You don't have to put it on the screen, Michael, since he's looking at it in hard copy.
BY MR. HESSELL:
Q PX 2.
(WHEREUPON, Plaintiff's Exhibit No. 2 was presented to the witness.)
BY MR. HESSELL:
Q PX 2 appears to be the subject matter experts on reportable transactions at PwC as of April 6, 2003?
A Yes.
Q I take it you did not consult with PX 2 before identifying Mr. Lohnes as the person to give advice regarding the Midco transaction at issue in this case, correct?
A I'm sorry, you said I didn't consult with PX 2?
Q Right.
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I'm not sure what you mean.

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BY MR. HESSELL:
Q Well, my question is whether you looked to PX 2, which appears to be the document at PwC that identifies subject matter experts on certain reportable transactions before deciding who to engage on Mr. Tricarichi's behalf in evaluating the Westside transaction?
A I can't recall consulting with people on this list other than Bill Galanis as it relates to the Tricarichi transaction.
Q You do agree with me that PX 2, number 14 on the list of reportable transactions appears to identify that the subject matter experts at PwC regarding Notice 2001-16 transactions were Phil McCarty and Mark Boyer?
A That's -- yeah, that's what it says, but, again, those were the people that would have been coordinating our effort around that specific topic. There were numerous people that were subject matter experts providing services in those areas.
Q But you didn't consult with either Mr. McCarty or Mr. Boyer regarding the Westside transaction, correct?
A Not specifically. I consulted I believe

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with members of WNTS, or Washington National Tax, Ed Abahoonie who referred me to another person who then referred me to Mr. Lohnes.
Q All right. We'll get to that, and I've seen emails on that subject, but my questioning right now is just about the fact that in the -- in the context of Mr. Tricarichi's transaction in 2003, you didn't consult with PwC's Midco subject matter experts, at least as identified on PX 2, correct?
A I did --
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I did consult with -- with PwC's Midco subject matters experts but not the two people that are listed on this sheet.
BY MR. HESSELL:
Q And did you ever ask Mr. Lohnes what prior Midco experience he had had before bringing him onto the Tricarichi team for PwC?
A As I sit here today, I can't specifically recall, but I'm sure that we did have those discussions.
Q So what do you recall of Mr. Lohnes' prior Midco experience before he was engaged on the

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Tricarichi transaction?
A I -- as I -- as I said, I don't recall specifically.
Q As you sit here today, you don't know whether Mr. Lohnes had any prior Midco experience that you can identify before the Tricarichi transaction, correct?
MR. LANDGRAFF: Object --
BY THE WITNESS:
A As I sit here -- go ahead.
MR. LANDGRAFF: I just objected to the form. Just give me a second to object and then you can answer.
THE WITNESS: Okay.
BY THE WITNESS:
A As I sit here today -- can you repeat the question, please.
BY MR. HESSELL:
Q As you sit here today, you don't know whether Mr. Lohnes had any prior Midco experience that you can identify before the Tricarichi transaction, correct?
A As I sit here today, I can't identify any prior experience, but I knew that he had prior experience.

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Q How do you know that?
A Based on his expertise in the area and based on his -- he being referred by another WNTS member.
Q What expertise in -- in Midco transactions specifically are you aware that Mr. Lohnes had prior to engaging him on the Tricarichi matter?
A As I said, I -- I don't know of any specifically and nor would I because we wouldn't disclose other client names to another partner.
Q Well, how can you testify -- sorry. Strike that.
What expertise -- strike that.
So is it fair to say that you cannot identify any particular expertise that Mr. Lohnes had regarding Midco transactions prior to April of 2003?
A No, it's not fair to say that. It's fair to say I couldn't identify a specific matter or client.
Q Okay. So what -- other than a matter or a client, are you aware of Mr. Lohnes having any experience with Midco transactions prior to April of 2003?
A Yes, I was aware that he was an expert in the area.

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Q And how are you aware of that, because he told you?
A He told me and because of the referral that I referred to earlier.
Q Have you ever seen any document that reflects any work that Mr. Lohnes has done on any Midco transaction other than Mr. Tricarichi's?
A There would be no document to see for any work that people at PwC perform on other clients. So there -- there would be no document to see.
Q So the answer to my question is, no, you've never seen any document or email or memo by Mr. Lohnes that reflects work he has done on another Midco transaction besides Mr. Tricarichi's, correct?
A I've also never seen any memo or work for any other PwC partner for work they performed.
Q But I didn't ask you that. My question was whether it was fair to say that you have never seen any document, email, memo, or client matter that reflects that Mr. Lohnes had worked on any Midco transaction prior to Mr. Tricarichi's transaction, correct?
A Again, that's correct because there is no such document that I'm aware of.

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Q Have you ever seen Mr. Lohnes identified on any document you've seen as a subject matter expert on Midco transactions?
A I don't believe so.
Q And the person who referred you to Mr. Stovsky was Tim Throndson -- I'm sorry, I got that --
A To Mr. Lohnes?
Q Yeah. The person who referred you to Mr. Lohnes was Tim Thron- --
A Throndson. Tim Throndson.
Q And that's T-h-r-o-n-d-s-o-n?
A Correct.
Q And what do you recall of what Mr. Throndson told you about -- if anything, about Mr. Lohnes' prior Midco experience?
A I can't specifically recall other than the email that I saw recently that -- that I recall receiving from Mr. Throndson.
Q You do agree with me, by the way, that neither Mr. McCarty nor Mr. Boyer were ever consulted on Mr. Tricarichi's transaction at any time?
A I can't -- I don't know if they were or

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they weren't.
Q Well, as far as -- I'm sorry. Go ahead.
A Go ahead.
Q As far as you know, neither Mr. McCarty nor Mr. Boyer were ever consulted on any aspect of Mr. Tricarichi's transaction, correct?
A As far as I know.
Q Never heard from anybody who did work on Mr. Tricarichi's transaction that they consulted with either Mr. McCarty or Mr. Boyer regarding their expertise on Midco transactions, correct?
A I never heard that, correct. Although I -- that wouldn't be the -- that wouldn't be typical.
Q Do you know what the purpose of PX 2 is?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Well, the purpose of PX 2 would be to inform the general practice of who the contact people would be at National Tax for various topics.
BY MR. HESSELL:
Q Were you familiar with PX 2 in 2003?
A I can't specifically recall this -- this document, no.

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Q Was this a document that was available to you as far as you know?
A This and other similar documents, I -- you asked if I could recall this one specifically. I -- it's familiar, but I can't recall specifically.
Q All right. So whether you remember this exact format, you were generally familiar with this type of document at PwC in 2003 identifying subject matter experts in particular reportable transactions, correct?
A As well as other areas.
Q Right. And do you see at the top of PX 2 it says that "If you have a client issue regarding a listed or other reportable transaction, you should contact the appropriate subject matter expert," abbreviated "SME," right?
A That's -- that's what it states, correct.
Q It also says that "Noncompliance with the final disclosure and list maintenance regulations carry significant risk to the firm and our clients," correct?
A Correct. That's what it says.
Q And you did have a client issue regarding a listed or other reportable transaction in the

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context of the Westside transaction, correct?
A We were looking into and analyzing, evaluating, the Westside transaction.
Q Right. You were about -- one of the things that you were engaged by Mr. Tricarichi to do was to look at and evaluate whether it was a listed or reportable transaction under Notice 2001-16, correct?
A Well, we were engaged to provide research and evaluation services, and then we determined that that was one of the areas to look into.
Q Right. So PwC was generally engaged to evaluate the tax implications of the Westside transaction, right?
A To assess, yes.
Q And then after you started to assess the Westside transaction, you identified that one of the issues that PwC needed to evaluate was whether it was a listed or reportable transaction under Notice 2001-16, correct?
A Correct.
Q Mr. Tricarichi didn't tell you which tax issues you needed to assess or evaluate, correct?
A Correct.
Q I'm going to show you a document that I've

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marked as PX 40. It should be in your binder.
THE TECHNICIAN: Would you like me to pull it up on the screen?
THE WITNESS: I have it here.
MR. HESSELL: Then no.
BY THE WITNESS:
A It's Tab 40, right?
BY MR. HESSELL:
Q Yeah, Tab 40, which the court reporter or technician will mark as PX 40.
(WHEREUPON, Plaintiff's Exhibit No. 40 was presented to the witness.)
BY MR. HESSELL:
Q Do you have it there?
A Hold on.
Q Take your time.
A Yes, I have it.
Q PX 40 appears to be the bills that PwC sent Mr. Tricarichi regarding the Westside transaction, correct?
A Yes.
Q And were you the person at PwC who was responsible for actually sending these invoices to Mr. Tricarichi?
A You mean physically mailing --

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Q No, I mean responsible --
A Yes. Yes. Yep.
Q Responsible in that you might have directed somebody to actually physically mail them.
A Yes. Correct.
Q And I don't see any details on these bills that were sent to Mr. Tricarichi regarding the Westside transaction. Was that typical at the time?
A Yes.
Q So you didn't -- the bills you sent in 2003 to your clients, you didn't identify who worked on the matters or how many hours?
A Not typically, no.
Q I take it these bills were -- the amount of these bills was created by pulling the time entries that had been made by the various partners who worked on the matter during the preceding month?
A Yeah, as -- in general, that's the way it would -- it would be derived.
Q Well, let me -- rather than tell you how it was done, why don't you just tell me, what was your practice in or around 2003 for creating

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invoices like PX 40?
A I would review the time and -- and then invoice the client for the time that I felt was appropriate to charge.
Q And did you generally try to send the bills out in 30-day increments?
A That was the -- the goal. It didn't always happen that way.
Q And did you, as far as you know, actually send them to Mr. -- to Michael Tricarichi specifically at this address?
A As far as I know, yes.
Q By mail as far as you know?
A That's how we typically would send them.
Q I didn't see much in the way of email communication directly from you to Mr. Tricarichi. Do you know why that would be?
MR. LANDGRAFF: Object to the form as to why you didn't see it.
MR. HESSELL: Fair point.
BY MR. HESSELL:
Q Do you know why there is -- I'll withdraw the question.
Do you know why there -- sorry. Strike that.

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Did you have many direct communications with Mr. Tricarichi either via email or phone?
A I had several communications that I recall with Mr. Tricarichi via email -- I'm sorry, via phone call. I believe there was an in-person meeting. And of course I had numerous phone calls and email communication and meetings with Mr. Tricarichi's team.
Q And who did you -- who was the team that you interfaced with in the context of the Westside transaction for Mr. Tricarichi?
A Primarily Jeff Folkman from Hahn Loeser, the law firm. Jeff was the lawyer leading the transaction. And Jim Tricarichi.
Q And what role did Jim Tricarichi play in the context of this transaction from your perspective?
A Jim was integrally involved with the transaction and the work that we were doing.
Q In what way?
A He was one of our contact points. He was the one to reach out to us when the engagement began. And so he was on many, many calls and -- and emails if I recall correctly.
Q Before Mr. Tricarichi's transaction, had

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you reviewed Notice 2001-16 before?
I said "before" twice. Let me try to ask that again.
Prior to April of 2003, had you reviewed Notice 2001-16 in any -- in any way?
A As I sit here, I can't specifically recall, but I reviewed virtually all notices that came out from the IRS. So I believe I did.
Q Was there a process at PwC for how tax partners received notice that were issued by the IRS?
A There was -- there was a process where rulings and notices were distributed. There was also a process where every -- each morning I would read tax updates from the day before.
Q How did you receive those tax updates?
A Again, in 2003 I can't recall specifically. Likely through email or website transmission. Could have -- could have also been hard copy back then.
Q Do you -- besides -- we talked about Mr. Lohnes already, but are you aware of anyone else who worked on Mr. Tricarichi's transaction who had been involved in a Midco transaction before?

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MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A You said other than Mr. Lohnes?
BY MR. HESSELL:
Q Right.
A Not specifically, no.
Q It got kind of garbled on that one, so let me say, other than Mr. Lohnes, who we've already discussed, you're not aware of anyone else who worked on Mr. Tricarichi's transaction having been involved in a Midco transaction, right?
A From PwC?
Q Correct.
A No.
Q Don't know whether Mr. Rocen had any experience with Midco transactions prior to Mr. Tricarichi's, correct?
A No, I -- correct, I don't know.
Q Do you agree that in the 35 years or so that you were at PwC, you cannot recall any other transaction where a purchaser bought a corporation whose balance sheet included only cash and tax liabilities?
A I can't recall any others.
Q But that was the fact pattern here, right?

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Nob Hill paid for cash on hand at Westside plus the potential tax liabilities of Westside Cellular?
A Can you repeat that.
Q Sure. That -- in the Westside transaction, that was the fact pattern, correct? Nob Hill paid for the stock of Westside Cellular whose balance sheet included only cash on hand and the tax liabilities?
A Yeah, I can't recall specifically what was on the balance sheet. I guess I'd have to look at that.
Q Well, as you sit here today, are you aware of anything else on the balance sheet of Westside Cellular other than the cash on hand from the settlement it had obtained and the potential tax liabilities of Westside Cellular?
A No.
Q Did PwC ever communicate to Mr. Tricarichi how unusual this transaction was in that respect?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I don't -- I can't recall if we communicated on that point specifically.

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BY MR. HESSELL:
Q I take it you also didn't communicate to him in 2008 that you had never worked on another transaction at PwC involving the purchase of a corporation whose balance sheet included only cash and tax liabilities, correct?
A Can you repeat the question.
Q You didn't communicate to Mr. Tricarichi in 2008 that you had never worked on another transaction at PwC involving the purchase of a corporation whose balance sheet included only cash on hand and tax liabilities, correct?
A I don't recall communicating with Mr. Tricarichi in 2008 at all.
Q Not aware of anyone at PwC communicating with Mr. Tricarichi in 2008 that you had never worked on another transaction at PwC involving the purchase of a corporation whose balance sheet included only cash on hand and tax liabilities, correct?
A Correct, I'm not aware that anybody communicated that to Mr. Tricarichi from PwC.
Q And as far as you go, you did have communications with Mr. Tricarichi after the transaction was concluded, correct?

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A In two --
MR. LANDGRAFF: I just object to the form. Can you -- can you use a first name with the -- with Tricarichi?
MR. HESSELL: Ah, yes. Good objection.
BY MR. HESSELL:
Q So in -- well, let me just say it, in 2009, you had written communications with Michael Tricarichi, correct?
A Yes, 2009 I believe we did have written communications with Michael Tricarichi.
Q And it appears on that letter to Mr. Tricarichi that perhaps you had oral communications with Jim Tricarichi regarding the Westside transaction that preceded the letter, correct?
A I'd have to look at the letter.
Q All right. We'll get to it --
A Yeah. So --
Q -- later.
I asked you the question of whether you had communicated the unusual nature of this transaction in -- in 2008, and you said you had no communications with Mr. Tricarichi, so I want to just --

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A That's the date of the letter, so I would assume so.
Q I was going to say that -- is it consistent with your recollection that you would have sent him an engagement letter on or about April 10th, 2003?
A Yes. Based on the file, yes.
Q And is it also consistent with your recollection that Mr. Tricarichi didn't actually sign the engagement agreement until April 25th of 2003?
A That's the date that he -- that it was dated, so I would assume that's correct.
Q And what can you tell me about the handwritten notations that are contained on PX 29?
A Which ones specifically?
Q Well, there are only a couple of them so either one.
A On Page 1 there's a cross-out that --
Q Just to be clear, we're talking about the page that is Bates-labeled 46632 at the bottom?
A Yes. Yes.
There's a cross-out by Mr. Tricarichi. And then on Page that's labeled 46633, there's a handwritten note initialed by Mr. Tricarichi.

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Q And then you also -- there appears to be a handwritten note from you at the end --
A Yes.
Q -- about a discussion with Mr. Tricarichi?
A Yes.
Q And that's the page that's marked 46635?
A Yes.
Q And what can you tell me about the conversation you had with Mr. Tricarichi about the handwritten edits?
A If I recall correctly, the first note was related to the strikeout that Mr. Tricarichi had done on -- on Page 46632. And the second note was related to fees and his comment on Page 46633.
Q And as I -- as I read this negotiation, Mr. Tricarichi was striking on Page 1 of the PwC engagement agreement that PwC -- or, sorry, strike that.
That he, Mr. Tricarichi, agreed to advise you, PwC, if any matter covered by this agreement is a reportable transaction that's required to be disclosed?
A That's what he struck out, correct.
Q And as I understand the testimony, you told him that that provision had to be in the

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agreement?
A That's what my note says, correct.
Q And who is David Padgett --
A David --
Q Or, I'm sorry, Ron Padgett.
A Ron Padgett was one of my partners, and he was the local quality and risk management partner who looked at all engagement letters.
Q And --
A Or -- or -- or we consulted with for our engagement letters.
Q Why was it that PwC was asking Mr. Tricarichi to tell PwC if the transaction was a reportable transaction?
A That was, I believe, required language in our engagement letter.
Q Required by who?
A By the treasury regulations.
Q Okay. So at this time, had you determined whether the reportability of a transaction was within the scope of PwC's engagement for Mr. Tricarichi?
A I don't believe we determined at this time on April 10th.
Q You do agree with me, though, that PwC was

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not relying on Mr. Tricarichi to analyze whether the Westside transaction qualified as a -- as a listed or reportable transaction under Notice 2001-16, correct?
A Correct.
Q PwC did its own work in evaluating why -- whether, sorry, the Westside transaction constituted a listed or reportable transaction under Notice 2001-16, right?
A Right.
Q I mean, one of the reasons that Mr. Tricarichi engaged you was to evaluate that issue?
MR. LANDGRAFF: Object to the form.
MR. HESSELL: Strike that. I'll withdraw that. We've already talked about it.
BY MR. HESSELL:
Q When Mr. Tricarichi returned this letter to you signed, did it include any attached terms and conditions from PwC?
A I can't recall.
Q Well, if it did, would that have been in your file?
A Presumably, yes.
Q Did Mr. Tricarichi ever agree or

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acknowledge in any conversations that you had with him that he had received the PwC terms and conditions along with the engagement agreement?
A Not that I can recall, but that wouldn't be -- no, not that I can recall.
Q Do you remember ever having any discussions with Mr. Tricarichi where he expressly agreed and accepted the terms and conditions -- the form terms and conditions of PwC to go along with the engagement agreement?
A I don't recall conversations, but the terms and conditions are part of the engagement agreement. And if he didn't receive them, I would have assumed he would have asked for them.
Q Do you know whether Mr. Tricarichi received the PwC form terms and conditions along with the proposed engagement?
A Well, the proposed engagement letter he received obviously, and those terms and conditions were part of that letter.
Q But that's not what I asked you. I'm asking --
A Then repeat your question.
MR. LANDGRAFF: Yeah, that is what you asked him, just to be clear.

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MR. HESSELL: No, I didn't. I asked him does he know whether Mr. Tricarichi received the PwC form terms and conditions with the proposed engagement agreement.
MR. LANDGRAFF: Object, asked and answered.
Go ahead, Rich.
BY THE WITNESS:
A I know Mr. Tricarichi received the letter, and the terms and conditions were referenced in the letter and attached to the letter.
BY MR. HESSELL:
Q How do you know that they were attached to the letter sent to him?
A Well, the terms and conditions are part of the letter. Had he not -- well, so I always, as anybody else at PwC, included the terms and conditions with the letter.
And our control at PwC would be that if I gave a letter to one of our administration -- administrative people to process and there was an enclosure labeled on -- marked on the letter and it wasn't attached, they would come back in and -- and say, "We need the enclosure."
So I believe the letter was sent with the terms and conditions as it always is.
Q I get from everything that you just said that you can't say as you're sitting here today whether the letter that you sent to Mr. Tricarichi on or about April 10th, 2003, included the form terms and conditions from PwC, correct?
MR. LANDGRAFF: Object. Asked and answered.
BY THE WITNESS:
A Yes, I can say with certainty that the terms and conditions were attached to the letter.
BY MR. HESSELL:
Q How can you say that?
A Because my recollection is that they were, as they always are.
Q So there's never been an instance in your time at PwC where you send an engagement agreement out without the terms and conditions?
A Not to my knowledge, no.
Q Never heard from anybody else at PwC that they ever sent a letter out without the terms and conditions?
A I wouldn't hear from people on that topic.
Q And is there anything in the files that you've seen that indicates to you that PX 29 was

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sent with the terms and conditions from PwC?
A I haven't looked at that file in -- in years, but I do recall the terms and conditions being in the file with the engagement letter.
Q And when you say "with the engagement letter," what do you mean by that?
A Along -- as part of the engagement letter.
Q But there's no record that the actual engagement letter that was sent to Mr. Tricarichi included those terms and conditions, correct?
A It does -- such record doesn't exist at PwC.
Q So there is no record at PwC that can confirm whether the engagement agreement that you actually sent to Mr. Tricarichi included the terms and conditions, correct?
A There's no record of PwC that can confirm or -- or state otherwise in terms of the terms and conditions, there's no record.
MR. LANDGRAFF: Scott, if you're -- I don't know if you're pausing to change topics, but if you are, we've been going --
MR. HESSELL: We have. Just --
MR. LANDGRAFF: We've been going long enough that I need to go.

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would capture that information or ever disseminate it.
Q So I take it there -- there was no database or other means of communicating transaction -- negative transactional experiences that PwC clients had had to other PwC partners or clients?
A Correct.
Q Are you aware prior to being engaged by Mr. Tricarichi that Fortrend had paid a referral fee to PwC of almost $1 million in a prior transaction?
A I was not aware of that, no.
Q Do you know of any reason why the Quality and Risk Management group who performed the conflict check wouldn't have been able to identify a referral fee paid by Fortrend as a potential issue with the Westside engagement?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I'm not aware.
BY MR. HESSELL:
Q In 2008 or after, did you come to learn that PwC had received a referral fee -- referral fee from Fortrend in the context of an Enbridge --

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a transaction called Enbridge?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I just recently heard of a referral fee within the last couple weeks.
BY MR. HESSELL:
Q From who?
A From my attorney -- our attorney, Chris Landgraff.
Q So prior to the last couple of weeks, you were not aware that Fortrend had paid PwC a referral fee in the context of the Enbridge transaction?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct.
BY MR. HESSELL:
Q That was not a good question. Let me ask it -- I just want to be clear that until a couple weeks ago, you were not aware that For- -- Fortrend had paid PwC a referral fee in the context of the Enbridge transaction, correct?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct.

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BY MR. HESSELL:
Q Not -- you're not aware, I take it, that anybody at PwC ever communicated to Mr. Tricarichi that Fortrend had paid PwC a referral fee in the context of the Enbridge transaction, correct?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct.
BY MR. HESSELL:
Q Can you think of any reason why the Quality and Risk Management group would not have identified the payment of a referral fee by Fortrend to PwC as a potential conflict of interest on the Westside transaction?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I can't think of a reason why they would or wouldn't.
BY MR. HESSELL:
Q Well, don't you think Mr. Tricarichi had reason to expect that if Fortrend had paid PwC a referral fee prior to his transaction, that PwC would disclose that fact?
MR. LANDGRAFF: Object to the form.

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BY THE WITNESS:
A I'm -- PwC's client base is vast. I don't think that information would be available.
BY MR. HESSELL:
Q So as far as you understand it, when Quality and Risk Management performs a conflict check on a matter, they would not identify the payment of a fee by the counter-party to a PwC client?
A I can't -- I don't know.
Q I take it you're not prepared to tell me anything about how Quality and Risk Management performed conflict checks in or around 2003, fair?
A I'm sorry, you -- you froze.
Q Oh. I said you're not prepared to testify on behalf of PwC about what processes Quality and Risk Management used at all regarding the conflict check on the Westside engagement?
A I'm prepared to testify but I can't answer if I don't know.
Q Right. And I'm just trying to -- I know you would answer if I -- if you did know, and I'm just trying to be clear that you aren't -- as you're sitting here today, you're not prepared to answer questions about the processes at PwC that

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were performed on the Westside engagement because you don't know?
A Correct.
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct.
BY MR. HESSELL:
Q I'm going to have you take a look at Tab 35, which I'm marking as Plaintiff's Exhibit 35.
(WHEREUPON, Plaintiff's Exhibit No. 35 was presented to the witness.)
BY MR. HESSELL:
Q Are you there with me?
A Yes.
Q Is Plaintiff's Exhibit 35 your handwriting?
A I believe so.
Q What is -- what does this document reflect?
A It appears to be notes from a conversation I had with J.T. or Jim Tricarichi.
Q In or around June 25th of 2012?
A That's what it -- that's what it appears, yes.

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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?
A We must be -- we must have had a conversation regarding the matter.
Q Meaning like the tax court case and the Westside transaction?
A Correct.
Q And other than the things that are actually written down here, do you remember anything about that conversation?
A I don't.
Q Have you seen Tab 35 before or Plaintiff's Exhibit 35 before?
A Not -- I haven't seen it -- I can't recall seeing it, no.
Q Do you remember the circumstances that led to you having a conversation with Jim Tricarichi about the tax court case or the transaction in 2012?
A I don't specifically remember. We would talk from time to time and Jim would -- we had -- we had a -- we would talk from time to time not about the case and he must have brought this up.
Q Do you know whether you communicated the

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things that you wrote down here or he was communicating them back to you?
A It appears that he communicated these to me.
Q Why do you say that?
A Because it said that J.T. told his brother -- bro -- these three things. So he must have stated those to me -- oh, wait, I lost you -- he must have stated those things to me.
Q And the first point it says, "Attorney is the one who brought in the buyers therefore sue them" exclamation point?
A Jim must have said that to me and I wrote it down.
Q You didn't -- you didn't communicate to Jim that he should sue the lawyer who brought the buyer?
A No, the -- it appears to me that this is what Jim told his brother.
Q I see. What -- what about number two, "Only reason he approached PwC was because of his attorney"?
A Again, that's Jim's comment to me.
Q Was that consistent with what your recollection was of what transpired?

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A I -- I don't have specific recollection of it.
Q And then the third bullet point you're saying that Jim Tricarichi told Mike that "PwC warned MT about this" exclamation point, exclamation point?
A Right. Again, must have been a comment that Jim made.
Q Do you know what he was referring to when he said "warned MT about this"?
A I assume it related to the risk of the transaction.
Q But you don't know?
A No.
Q Do you remember anything else about this conversation besides what's written down here in Plaintiff's Exhibit 35?
A I don't.
Q Did you offer any input or analysis about any of these topics or anything else?
MR. LANDGRAFF: Object to --
BY THE WITNESS:
A Can you repeat that.
BY MR. HESSELL:
Q Yeah. Did you offer any response or

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analysis back to Jim Tricarichi on any of these subjects?
A I don't think so because I didn't speak of the matter at all.
Q You mean you just took -- you just listened and wrote notes down and didn't respond?
A Right. That -- that would have been my practice throughout.
Q Do you recall any other conversations with Jim Tricarichi from 2008 and on regarding this transaction or the tax court case?
A Not specifically. Jim and I would talk from time to time and I can't recall specific conversations or what was said specifically, but he would mention the matter.
Q Do you know where you would have kept in your file notes like this?
A No.
Q Do you know how these came to be produced in this litigation?
A I don't.
Q Following the closing of the transaction, did you continue to maintain hard copy files related to the Westside transaction, like at your actual office?

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A The files are kept -- were kept at the office, yes.
Q Could you still -- or I guess when you retired, did you still have files regarding the Westside transaction at your office?
A Yes.
Q Are they maintained like in a file drawer near your office, or were they maintained?
A They were, yes.
Q What about email communications regarding the Westside transaction; were those -- did you maintain those on a separate folder within your email system?
A No, I did not.
Q By the way, you -- you don't remember ever seeing any email communication from Don Rocen regarding his conclusions on this transaction, right?
A Correct.
Q I saw in the emails a reference that -- you saying that Don was going to send me some -- a note -- a notes, in all capped, communication but I haven't seen anything in the file. You're not aware of any such communication, right?
A Correct.

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MR. LANDGRAFF: Object to the form.
BY MR. HESSELL:
Q Take a look at PX 42.
(WHEREUPON, Plaintiff's Exhibit No. 42 was presented to the witness.)
BY THE WITNESS:
A Yes.
BY MR. HESSELL:
Q PX 42 is, again, an exhibit from the tax court case which appears to be a grouping of notes from PwC files. You can flip through them quickly if you want. I'm not going to ask you specific questions about every page. I'm really just interested in whose notes they are.
So if you look at the first page of PX 42, which ends in the Bates label 002, I assume these are your handwritten notes? Because it's on your letterhead or --
A Yes.
Q And is that your handwriting?
A Yes.
Q The -- the next few pages don't look like your handwriting, but I just want to confirm that that's -- that's the case?
A Different handwriting. It appears -- it

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appears to be different writing, but it's my writing.
Q Oh, so -- so this -- the handwriting -- or the pages on 3 -- PwC 200003 through -- through 11, are those -- is that all your handwriting?
MR. LANDGRAFF: It looks like the Bates numbers change a little bit --
BY THE WITNESS:
A I'm just looking, in the tab...
MR. HESSELL: What do you mean?
MR. LANDGRAFF: There's not a -- there's not a --
MR. HESSELL: Oh, I see. I see, yeah.
BY MR. HESSELL:
Q So let's say through 9.
A Through 9? Yes, my -- it appears to be my handwriting.
Q And then on the next page, which at the bottom is marked Exhibit 104-J, Page 9 of 73, that's also your handwriting?
A Yes.
Q Do you know from where these documents came from? I mean, like -- did you have a notebook on this matter or a legal pad?

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Q Okay. So because Mr. -- you have in your notes that Mr. Folkman identified for you that there is some risk, you're deducing that you also communicated what Mr. Lohnes had concluded about the highly aggressive nature of Fortrend's transaction to Mr. Folkman?
A The discussions we had were all-encompassing. We talked about the entire transaction numerous times with Mr. Folkman I'm sure.
Q And the next note down says, "We state"?
A "We stated that."
Q Do you know -- "we stated that there is no guarantee." And then it says, "Jim Tricarichi understands this."
A Right.
Q So is that the nature of the advice that you -- you see reflected in your notes that -- strike that.
In any event, we do agree that you didn't communicate to Mike Tricarichi or his representative in 2008 or afterwards that Mr. Lohnes had regarded Fortrend's contribution of credit card debt as a very aggressive tax-motivated transaction, right?

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A We didn't communicate in 2008 with -- with Mr. Tricarichi, correct.
Q Or afterwards?
A Or after.
Q And you didn't follow up with Fortrend -- I'm sorry. Strike that.
PwC didn't follow up with Fortrend regarding how their very aggressive tax-motivated transaction would work, right?
A Correct.
Q And you didn't advise -- sorry. Strike that.
Do you know how Mr. Lohnes came to the conclusion that Fortrend's transaction was a very aggressive tax transaction?
A I don't.
Q When he communicated that to you, what did you do in response?
A I -- I can't recall. I'd have to look at the -- at emails or any documentation of conversations that we had.
Q Ultimately, the conclusion that PwC reached, which is reflected on Page 3 at the bottom, was regardless of whether Westside -- sorry. Strike that.

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Regardless of whether Fortrend's transaction following closing was subject to challenge, it should not be Mr. Tricarichi's concern because Tricarichi has not successor or transfer liability -- transferee liability for Westside's taxes, right?
A Yes, subject to our more-likely-than-not level of confidence.
Q But you didn't tell Mr. Tricarichi -- Mike Tricarichi or Jim Tricarichi that "We're only 50.1 percent confident that you're not going to be subject to transferee or successor liability for Westside's taxes," right?
A Well, we said it was more likely than not.
Q No, you specifically remember as you're sitting here today that you communicated to Mr. Tricarichi that you only -- that PwC only had a 50.1 percent level of confidence about him not being exposed to successor or transferee liability?
A As I said earlier, as I sit here today, I can't recall a specific discussion and that's why I had my -- my notes.
Q I know, but as to the specific issue of successor and transferee liability, you don't know

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whether you used the term "more likely than not," right?
A Well, again, my note says all conclusions were qualified as more likely than not. So I -- I don't have specific recollection, no.
Q Did you communicate to Mr. Tricarichi that -- or his representatives that Lohnes -- Tim Lohnes had concluded that, quote, a position can be taken that the Westside transaction was not a reportable transaction?
A I don't recall communicating -- communicating that as I sit here today.
Q In fact, the -- the final conclusion that's reflected in PX 4 by Washington National office of PwC was that it's not a listed or reportable transaction, correct?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct. Again, subject to our level of confidence.
BY MR. HESSELL:
Q Was PX 4 maintained on the PwC -- a database of some sort at PwC, like a document management system of some sort?
A No.

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Q Maintained on your hard drive?
A Yeah, I guess.
Q Did you have a ShareDrive back in 2003?
A I can't recall if we did or we didn't.
Q Do you remember any discussion that you can testify to the jury about concerning the level of confidence that PwC had in the various conclusions that are reached in PX 4?
A I'm sorry, can you repeat that.
Q Yeah --
A Do I --
Q -- do you remember any specific discussion that you had internally at PwC regarding the level of confidence that PwC had in the various conclusions set forth here?
A No.
Q Was there any limitations that Mike Tricarichi put on the scope of work that PwC could perform to determine that the transaction would be respected from a federal tax perspective?
A No.
Q No one from -- no one -- neither Mike Tricarichi nor any of his representatives ever told anyone at PwC not to perform work that PwC thought needed to be done with respect to this

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matter, right?
A Correct.
Q Other than communicating that you -- if you exceeded $20,000 you had to bill him monthly, did Mr. Tricarichi or any of his representatives put a limit on how much PwC could spend in coming to the conclusion that the transaction would be respected?
A No.
Q You never heard from the client that you shouldn't do whatever you thought necessary to complete the engagement, right?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct. We -- we followed our -- our -- our assignment.
BY MR. HESSELL:
Q And I think you testified at the tax court trial that you were -- PwC was engaged by Mr. Tricarichi to identify tax issues and risk to him in the Westside transaction being proposed by Fortrend, correct?
A I'd have to look at the transcript.
Q Well, at Page 590 you were asked, "What type of tax research did he ask you to perform?"

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And you answered, "Well, he asked us to identify tax issues and risk in a transaction that they were proposing."
MR. LANDGRAFF: Can you show him the transcript if you're going to read from it.
BY MR. HESSELL:
Q I'm really -- it's not really about the tax court -- or what you testified to before. I'm just trying to confirm that that's, in fact, what PwC -- that PwC was, in fact, engaged by Mr. Tricarichi to identify tax issues and risks to Mr. Tricarichi in the Westside transaction, right?
A Yes.
Q And you did perform -- PwC did perform all of the work that it thought appropriate for the engagement, correct?
A Yes.
Q And as far as you know, so did everyone else at PwC who worked on this matter, right?
A Yes.
Q Have you seen any emails or time records or memos or notes that reflect what work Tim Lohnes did to come to the conclusions that are reflected in PX 4?
A Well, we had -- we had several emails, but

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I don't have -- what was the other things you listed?
Q Time records, memos to the file, or the like that would reflect what work he actually did.
A No.
Q None of the factual assumptions that are listed in the memo in PX 4 were -- were communicated to Mike Tricarichi, correct?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A The factual?
BY MR. HESSELL:
Q Yeah, the factual assumptions.
A I don't believe so.
Q And you didn't tell the client that PwC had not investigated the reasonableness of the assumptions that it was relying on to come to the conclusions it ultimately did, correct?
A Correct.
MR. HESSELL: I have to use the restroom and now would be as good a time as any to break for lunch. Is that okay with you?
THE WITNESS: Sure.
THE VIDEOGRAPHER: We are going off the record at 12:09.

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transactions that was issued on November 7 of 2003 at about 2:30 p.m., correct?
A Yes.
Q And I take it you got this in your inbox or email box?
A Yeah, I can't tell you exactly how it's communicated to us but I received it.
Q Well, how were tax source technical -- tax technical documents sent to partners?
A Yeah, I believe it was a -- it was an email to all tax partners.
Q All right. And then you in turn --
A Or all tax professionals probably.
Q Okay. And then you in turn forwarded it the next -- or a few days later to Mr. Lohnes, right?
A Yes.
Q And you asked to have him take a look at the items below regarding the Westside Cellular transaction, right?
A Correct.
Q And according to you in the email thread, it looks like there's no item that requires action by the selling shareholder. The items relates -- that relate would be the loss on a 351 transaction

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and third-party asset sale, right?
A Right.
Q And the selling shareholder in that sentence would be Mr. Tricarichi, right?
A Yes.
Q No -- in your initial assessment of the notice, you concluded that no action was required by Mr. Tricarichi in response to this notice, right?
A Well, I -- I said it looks like there is no so --
Q Right.
A -- I was looking to Tim for confirmation of our conclusion.
Q Did you do any -- like your own research or analysis of the Washington -- or the WNTS alert before you communicated to Mr. Lohnes a few days later?
A Well, I don't know what you mean by research. I'm sure I read it.
Q Well, other than reading the link, do you remember inquiring of anybody else or...
A I don't -- I don't remember that, but I do note on Page 2 that Tim Throndson is the person to contact who, again, was the person that referred

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me to Tim Lohnes.
Q I noted --
A I don't recall reaching out to him, no.
Q Okay. I noted that, too. And you -- you -- you anticipated my next question. You didn't reach out as far as you recall to Mr. Throndson or Ms. Trainer or anyone else in advance of communicating to Mr. Lohnes, right?
A Yeah, not to my recollection. Correct.
Q And Mr. Lohnes responds that he'll take a look and get back to you before the end of the week -- or by the end of the week, right?
A Yes.
Q And you did -- you and Mr. Thorn- -- you and Mr. Lohnes were considering whether this notice had an implication to Mr. Tricarichi and the Westside Cellular transaction, correct?
A Concerning whether our conclusion -- concerning confirming our conclusion.
Q And you did understand in 2003 and afterwards that the IRS sometimes issues notices after a transaction that the IRS makes retroactive, right?
A From time to time.
Q And in those scenarios, advice PwC may

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have given originally can change because of a retroactive IRS notice, right?
A It's conceivable.
Q And you were evaluating the transaction even -- you were evaluating the IRS notice in November 2003 even though the transaction had already closed in two-thousand -- in September of 2003, correct?
A We were confirming our conclusion based on the notice that had come out.
Q And you were confirming advice PwC had given even though you previously had testified that, in your view, your representation for Mr. Tricarichi was concluded --
A Correct.
Q -- already?
A Correct.
Q And you were doing that to make sure that there was no change in the advice that you had given that needed to be communicated to the client, correct?
MR. LANDGRAFF: Object --
BY THE WITNESS:
A I was doing that to confirm that there was no change in the advice that we provided. Hadn't

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determined what we would have done had it changed.
We had no obligation to reach out to our former client, either under our engagement letter or the standards, but we never got to that point that -- because our -- we confirmed our conclusion.
BY MR. HESSELL:
Q Had you in -- in November of 2003, had you looked into or investigated the issue of whether the AICPA standards required you to get back in touch with Mr. Tricarichi if a new notice or fact came out that -- that changed your prior advice?
A Can't recall that I researched the standard. I knew we had the -- the -- so I probably knew the standard generally. I can't -- I can't recall if I reviewed it because there was no need to because our level -- or our conclusion was confirmed.
Q I understand -- obviously I've seen some from the emails that you concluded in each of the instances where you relooked at Mr. Tricarichi's transaction that your advice didn't change. I understand that.
My question is whether you were doing it for your own benefit or whether you were doing it

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to contemplate whether you might have to contact the client?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I can't say. We never got to that -- to that point.
BY MR. HESSELL:
Q If there was an application to this new notice, you would have felt some obligation to communicate with the client, correct?
A I -- I don't think I would have felt any obligation to communicate with our former client, but I -- given the proximity to the transaction, I -- I likely would have reached out.
Q Mr. Korb -- you know Don Korb?
A I do.
Q You and he worked together at PwC --
A Years ago.
Q -- right?
Right? He -- he made the comment that -- that one aspect of your marketing acumen at PwC has been the effort by you to stay in touch with former clients by way of keeping abreast of new developments on transactions they would have participated in.

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Is that -- is that accurate?
MR. LANDGRAFF: Object to the form. He has no idea what Mr. Korb said.
MR. HESSELL: I just told him.
BY MR. HESSELL:
Q So you can answer.
MR. LANDGRAFF: Is the --
BY THE WITNESS:
A What's --
MR. LANDGRAFF: -- question whether he knows -- sorry, I'm not -- I'm not trying to be facetious. Is the question whether he knows that Mr. Korb said that or -- is that the --
MR. HESSELL: I asked whether he thought Mr. Korb's description was accurate. That was the question.
BY THE WITNESS:
A Well, I -- I try to keep abreast of a broad range of tax areas. It's -- you know, I -- I don't know if it's -- I can't say it's accurate or not. It's...
BY MR. HESSELL:
Q Well, have you -- at PwC have you coached other tax partners that one way of continuing to market yourself with clients who you're no longer

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providing services to is to stay abreast of the developments in transactions which they might have previously concluded and reach out to them?
A No, I can't say that I've done that.
Q Well, what have you advised client -- other PwC employees about in terms of marketing yourself to former clients with respect to transactions that are now concluded?
A I can't specifically think of anything that I've recommended to colleagues about concluded transactions and former clients.
Q So Mr. Korb just made that up?
A You know, I -- I'm -- I don't know where -- I don't know what he was referring to.
Q Well, if you and Mr. Lohnes had concluded that there was an application to this notice, you wouldn't have concealed that analysis from Mr. Tricarichi, right?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Can you be a little more specific?
BY MR. HESSELL:
Q Actually, I'll -- I'll withdraw and move on.
Have you ever had a situation arise where

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advice you gave a client was called into question by a subsequent IRS notice other than this transaction?

A I don't believe subsequent IRS information was called into question in this transaction nor can I remember it being called into question in any other transactions or work that I've done.

Q So you can't recall any other instance where you've gotten in touch with a client on a concluded transaction and advised them of a new court case or IRS notice or information regarding that concluded transaction?

A No, I can't recall of any -- any matter -- any case like that or any matter like that.

Q In any event, PX 11 appears to be Mr. Lohnes' response to you a few days later on November 14, 2003, right? The second email in PX 11.

A The second in the string, yes.

Q And in it he says -- Mr. Lohnes says on November 14th, 2003, that he's reviewed the -- this list for Westside Cellular and confirmed that it contains no items that would impact their transaction other than those we discussed previously, namely the Midco listed transaction.

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However, we concluded that the transaction undertaken by Westside was not substantially similar to the Midco listed transaction, right?

A Right.

Q Mr. Lohnes doesn't make any reference to the level of the confidence that PwC had with respect to whether the Westside transaction was substantially similar to a Midco, right?

A He does not.

Q You didn't correct him and say, oh, no, we only concluded that it was more likely than not that the transaction wasn't a listed transaction, did you?

A I did not.

Q And did you do anything further after Mr. Lohnes' response to determine whether you had any reason to reach back out to Mr. Tricarichi resulting from this notice?

A Did I do anything further? I don't believe so.

Q Didn't talk to anybody else, right?

A Not that I can recall.

Q Did you bill your time looking into whether the subsequent notice had any application to the Westside Cellular transaction?

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A No.

Q Did you inquire from Jim Tricarichi or Mike Tricarichi whether you could bill your time for taking a look at the subsequent notice?

A No.

Q You didn't have any communications with either Mr. Tricarichi or Jim Tricarichi -- sorry, you didn't have any communications with either Mike Tricarichi or Jim Tricarichi that you and Mr. Lohnes were looking at a subsequent IRS notice in November of 2003 with respect to Westside?

A I can't recall having any communication like that.

Q You didn't let them know that we were looking at the issue and we'll get back to you or anything at all?

A I -- I can't recall if I did or I didn't. I don't believe I did, but don't recall that conversation.

Q After the transaction closed, did you have any calls with Mike Tricarichi concerning the transaction?

A I don't believe so.

Q Did you have any communications with anyone at Hahn Loeser after closing of the

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transaction regarding the Westside deal?

A Not that I can recall.

Q All right. I think it's -- I think it's the next document, PX 12.

A Okay.

(WHEREUPON, Plaintiff's Exhibit No. 12 was presented to the witness.)

BY MR. HESSELL:

Q It's previously been marked as Plaintiff's Exhibit 12, a letter from the -- Alan Fox at PwC to -- I'm not going to even try to pronounce that name -- Lemanowicz --

A Yep.

Q -- at the IRS.

Do you see that?

A Yes.

Q A letter from Mr. Fox regarding a summons served on October 8, 2002, on PwC regarding Notice 2000-16; do you see that? That's a typo but...

A Yes.

Q Who is Mark Housel, by the way?

A I don't know.

Q Didn't have any contact with him in connection with Notice 2001-16 or any transactions?

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A I can't recall knowing that.
Q And I take it you didn't communicate to Mr. Tricarichi or his advisors those facts because you weren't aware of them?
A Correct.
Q And not aware of anybody else at PwC getting in touch with Mr. Tricarichi and advising him that the Franchise Tax Board had opened a promoter penalty exam of PwC and was asking for information about intermediary transactions, correct?
A I'm not aware of anyone at PwC, no.
Q PX 14.
(WHEREUPON, Plaintiff's Exhibit No. 14 was presented to the witness.)
BY MR. HESSELL:
Q A letter from you to Denise McCaskill at the IRS regarding the matter of Westside Cellular, Inc., dated February 22nd, 2008, correct?
A Yes.
Q Did you actually send a signed letter to Ms. McCaskill and this is just a copy of the unsigned version?
A I'm sure I sent a signed letter.
Q Was it your practice to keep a copy of the

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letter but not the actual signed one in your files?
A Yes.
Q And did you actually craft this response on your own or did you get assistance from counsel?
MR. LANDGRAFF: You can answer that "yes" or "no," but don't go any -- into any advice you may have received from an attorney.
BY THE WITNESS:
A You want to word it in a yes-or-no way?
BY MR. HESSELL:
Q It was a yes-or-no way I think.
A No, you said did I do it myself --
Q Oh --
A -- or did I get assistance from counsel.
Q Did you get assistance from an attorney in crafting this response?
A Yes.
Q Who was that?
A A member of the Office of General Counsel at PwC.
Q Do you know why the summons came to you?
A I don't.
Q Had PwC shared any information about the

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Westside or Mr. Tricarichi transaction with the IRS before responding to the summons?
A Not to my knowledge.
Q Did you have any communications with Mr. Tricarichi, Mike Tricarichi or Jim Tricarichi, in advance of responding to this summons?
A Yes.
Q In what form?
A We invited Mike Tricarichi and I believe Randy Hart in to review the material that we were sending to the IRS in response to the summons before we sent it.
Q And did they?
A Yes.
Q How did you invite them? Like, what manner of communication?
A I can't recall specifically.
Q And did you actually meet them, Randy and Mike Tricarichi, when they were reviewing the documents?
A I believe they came to our office and I provided the documents and they sat in a conference room.
Q But you didn't have any substantive communications with them other than saying hello

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and showing them the conference room?
A That's my -- that's my recollection, correct.
Q Do you know whether the matter for which documents were being sought in February of 2008 was the investigation of Westside's tax obligations as opposed to the transferee investigation of Mr. Tricarichi?
A I -- I don't know.
Q How long before the February 22nd letter went out did you have that interaction with Mr. Tricarichi and Mr. Hart about reviewing PwC's documents?
A I don't recall the specific date.
Q Was it a month before, two months before?
A Well, I think we received the -- the summons at the end of January, so it had to be between that -- the date that we received the summons and February 22nd.
Q Did you provide -- did PwC provide a copy of the documents it was producing to the IRS to Mr. Tricarichi and Mr. Hart at that time?
A Not at that time. At a later date they requested -- or Mr. Tricarichi requested it, so we sent it to him then.

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A I do.
Q And you received -- you're one of the PwC U.S. tax partners and received an IRS notice from Quality and Risk Management on or about March 3rd, 2008, right?
A Yes.
Q And you -- and you see that the -- in the QRM communication, it says that "This is a important request for information on a listed transaction that was recently identified by the IRS entitled Distressed Asset Trust Transaction.
"We must determine whether PwC was involved with any of these transactions -- with any transaction that is the same or substantially similar to the listed transaction identified in the notice below," right?
A Correct.
Q And you asked Mr. Lohnes to consider the message below as well as the one from California last week and whether it applies to Mr. Tricarichi or the Westside transaction, correct?
A Yes.
Q This is four years -- four-years-plus after Mr. Tricarichi's transaction closed, you and Mr. Lohnes are again conferring about a new IRS

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notice and whether it might apply, correct?
A Yes, we had just answered the summons so it was clearly top of mind. And when I saw this, I reached out to Tim to see if our -- just to confirm our conclusions.
Q And, just to be clear, because it doesn't expressly say, you were conferring with Mr. Lohnes about whether this March 2008 IRS notice might apply to Mike Tricarichi's Midco transaction, correct?
A Yes.
Q Why did you think it might apply?
A I didn't know whether it didn't or it didn't [sic], but something piqued my curiosity so I asked.
Q Yeah, but what piqued your curiosity in particular about distressed asset trusts?
A You know, I can't say but something did because I was -- the -- since the summons was just issued, the whole area was on my mind.
Q And the summons issuing created concern I imagine from your perspective about this particular transaction, correct?
A Incorrect. I was not concerned but I was just more aware.

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Q Well, what do you mean by that front of mind then; just that it was the -- one of the things that was on your mind because you had just done this document-gathering effort?
A Correct.
Q You weren't concerned that Mr. Tricarichi, if the transaction got investigated by the IRS, might later sue you or seek a tolling agreement?
A I was -- I was not concerned about that, no.
Q Were -- in or around this time, were others at PwC expressing concern about Midco transactions, in particular whether clients might turn around and sue PwC for advice regarding such transactions?
A My -- I was never -- I never heard that -- that being discussed, no.
Q Did you discuss the March 2008 IRS notice with anyone other than Mr. Lohnes?
A I don't believe so.
Q Did you do any research on your own to come to the conclusion that it didn't apply?
A I can't recall if I did or I didn't.
Q You didn't contact -- contact Elaine Church or Rochelle Hodes in QRM to determine

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whether the Westside transaction needed to be registered or listed under this Notice 2008-34, right?
A I did not.
Q Didn't contact whoever was the subject matter expert on DAT transactions to determine whether they thought the Westside transaction might apply?
A I did not.
Q Did you do anything else -- (audio garbled) -- email Mr. Lohnes and get his opinion?
A Did I do anything else...
Q To investigate whether this notice applied?
A Not that I can recall.
Q Did you review any documents produced to refresh your recollection about the transaction?
A I had just -- I had just reviewed the documents so I don't believe I reviewed them again.
Q Did you record your time in your time entry system to reflect the work you did looking at this notice and its potential application to Westside?

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A We record all of our time, every -- every hour. So my time was recorded into a non -- non-client, non-chargeable category I'm sure.
Q Is there a particular like -- we have a matter number that's like friends of the firm, kind of, nonbillable matters. Is there a particular code or entry that would identify those items?
A I can't recall specifically. We had numerous non-client codes, much to the chagrin of the firm.
Q Of course. Same here.
But your practice is to record every hour of the day you're in the office working into some matter number?
A Either -- it could be a client number, it could be admin, it could be practice development, it could have been just community involvement. You -- there's hundreds -- literally hundreds of codes.
Q Do you have tasks -- when you put those codes in, do you have to put tasks that you were working on that would identify in some way that you were looking at Westside again?
A No.

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Q In any event, Mr. Lohnes confirmed that he doesn't think the 2008 notice should apply either to the Westside transaction for the reasons he states in PX 16, right?
A Correct.
Q And you didn't go any further than that?
A Right.
Q PX 17.
(WHEREUPON, Plaintiff's Exhibit No. 17 was presented to the witness.)
BY MR. HESSELL:
Q You wouldn't have been on the -- you weren't part of tax core QRM?
A I was not.
Q So you wouldn't have received an email from Elaine Church regarding the Enbridge case and that a district court had concluded that a Midco transaction on which PwC provided advice was a sham?
A Correct, I would not have gotten that.
Q Did you hear -- did you -- prior to preparing for this deposition, did you hear in or around April of 2008 about the Enbridge tax court decision or --
A No.

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Q -- court decision?
A No.
Q There wasn't concern expressed amongst people at PwC in around that time that the -- that this was -- the Enbridge case was not a good situation because the court held that there wasn't even substantial authority for the positions taken?
A Not to me.
Q Didn't hear from anyone else at PwC that they were worried that -- that PwC would be hearing from the losing plaintiffs in the near future?
A No.
Q Prior to preparing for this deposition, did you -- did you know anything about the Enbridge case?
A I recall the Enbridge case. I didn't review it in anticipation of this deposition.
Q Oh, you didn't. When do you remember first learning about Enbridge?
A I couldn't tell you specifically.
Q You weren't involved in any -- in the Enbridge case itself, right, with the advice in connection with Midco's client or Enbridge?

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A Correct.
Q 19. PX 19.
(WHEREUPON, Plaintiff's Exhibit No. 19 was presented to the witness.)
BY THE WITNESS:
A All right.
BY MR. HESSELL:
Q Do you know who Mark Boyer is?
A I do.
Q Did you ever participate in this WTS meeting regarding the Enbridge Energy decision?
A No.
Q Have you ever seen this memo before?
A No, I don't believe I saw it in preparation.
Q Was there an effort in May of 2008 to -- at PwC to market PwC's expertise in being able to determine whether a particular transaction qualified as a Midco transaction?
A I don't recall of a -- of such an effort.
Q On Page 2 of PX 19, there's some takeaways to discuss with clients regarding the Enbridge case.
Do you see that?
A Yes.

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particular subject matter, or did you get notices from the Knowledge Gateway like into your email or otherwise?

A I can't recall if they pushed out notifications or not, but the Knowledge Gateway was a very voluminous resource for us.

Q Is it still (audio garbled) as of your retirement?

A I don't believe it was called Knowledge Gateway as -- as of my retirement. I can't recall exactly what it was called.

Q All right. In any event, you agree that in 2008 -- at the end of 2008, when a new notice came out regarding intermediary tax shelters, you reached out to Mr. Lohnes again to inquire whether it would change any of our prior analysis on the Westside transaction?

A Can you direct me to that.

Q 21. Plaintiff's Exhibit 21, the one right before.

(WHEREUPON, Plaintiff's Exhibit No. 21 was presented to the witness.)

BY THE WITNESS:

A Yes.

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BY MR. HESSELL:

Q Do you recall on or after Notice 2008-111 came out from the IRS on intermediary transaction tax shelters you reached out to Mr. Lohnes to determine whether it would change any of PwC's prior analysis of Westside, correct?

A Is that the question you just asked me?

Q I did, but it was broken up by referring you to the exhibit.

A Oh. Okay.

So, yes, I reached out to -- to Tim relative to 2008-111.

Q And whether it would change any of PwC's prior advice to Westside Cellular, correct?

A Reached out to -- to confirm our conclusion.

Q I'm just going based on how he responded to you that it -- it -- he agrees with your assessment that it shouldn't change any of our prior analysis and --

A Okay.

Q -- what I -- what I'm trying to determine is whether following issuance of Notice 2008-111, you were reaching out to Mr. Lohnes to determine whether that notice changed any of your -- PwC's prior analysis of the Westside transaction in particular?

A Yes, to confirm our conclusion.

Q And he says he agrees with your assessment. So what did you do in advance of calling Mr. Lohnes to determine whether Notice 2008-111 applied to the Westside transaction or did not?

A I can't recall --

Q How did you -- sorry.

A I can't recall what I did.

Q How did you get in touch with Mr. Lohnes?

A I presume either an email or phone call.

Q Well, there's no email, that's why I'm asking.

A Oh. Well, I presume I called him.

Q And given the timing, it looks like since Notice 2008-111 came out on December 1st and he's responding to you on December 2nd, I presume you got in touch with Mr. Lohnes soon after the IRS issued Notice 2008-111, right?

A It would appear that way, yes.

Q And did you -- why were you evaluating whether Notice 2008-111 might change any of your prior analysis of the Westside transaction advice?

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A Well, again, it was to confirm our conclusion. We had recently received the IRS summons, so it was on my mind, and I -- I reached out because it was -- you know, for those reasons.

Q Do you agree that it was important for you to consider whether the 2008 notice might change or confirm your prior advice to Mr. Tricarichi?

MR. LANDGRAFF: Object --

BY THE WITNESS:

A What --

MR. LANDGRAFF: -- to form.

BY THE WITNESS:

A I didn't get the first couple words.

BY MR. HESSELL:

Q I said do you agree that it was important for you and Mr. Lohnes to consider whether the 2008 Notice 111 might change or confirm your prior advice to Mr. Tricarichi?

MR. LANDGRAFF: Object to the form.

BY THE WITNESS:

A I don't know how important it was, but it was on my mind and so I reached out.

BY MR. HESSELL:

Q Ultimately you -- Mr. Lohnes agreed after reading the notice that it did not change PwC's

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prior advice to Mr. Tricarichi, correct?
A Our -- our prior conclusion, correct.
Q Do you know why he concluded that?
A I don't.
Q Do you know what -- what steps he took to investigate whether the new notice changed any of our -- any of PwC's prior analysis?
A No, I would have no way of knowing that.
Q Did you consult -- did you ask Mr. Lohnes what steps he took to determine whether the 2008-111 notice would change PwC's prior advice on the transaction?
A No, Tim Lohnes was -- was and is an expert in the area and I didn't question his -- you know, his actions.
Q You didn't consult with anyone else at PwC besides Mr. Lohnes regarding whether the 2008 notice changed PwC's prior advice, correct?
A Correct.
Q In December of 2008, had you worked on any other Midco transactions between Mr. Tricarichi's and -- strike that.
In December of 2008, other than ones we've already talked about, had you worked on any other Midco transaction?

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A No.
Q Is it fair to say that between 2003 and 2008, you had no other substantial Midco-related experience?
A Yes.
Q You weren't engaged by any other client between 2003 and 2008 to evaluate the applicability of IRS notices on Midco transactions, correct?
A Not -- not that I can recall.
Q Do you know why you concluded that 2008-111 didn't change your prior assessment as to Mr. Tricarichi's transaction?
A I don't.
Q Exhibit 43.
(WHEREUPON, Plaintiff's Exhibit No. 43 was presented to the witness.)
BY THE WITNESS:
A Yes.
BY MR. HESSELL:
Q A letter from you to Mr. Tricarichi in September of 2009?
A Yes.
Q Does looking at Exhibit 43 -- Plaintiff's Exhibit 43 help you refresh your recollection at

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all about what your discussion with Jim Tricarichi was?
A I don't recall --
MR. LANDGRAFF: Object to the form.
THE WITNESS: Sorry.
MR. LANDGRAFF: Object to the form.
Go ahead.
BY THE WITNESS:
A I don't recall the discussion with Jim Tricarichi, but he must have requested a copy of material that we had previously provided to -- to Mike Tricarichi and -- and his lawyer for review that we sent to the IRS.
BY MR. HESSELL:
Q I see here that this one -- Plaintiff's Exhibit 43 is actually -- contains a signature on it.
Do you see that?
A Yeah.
Q Do you know why this file copy from PwC actually has a signature on it but others don't?
A I don't.
Q Did you have any other communications with Mr. Tricarichi before or after this letter related to the tax court case or the transaction?

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A With Mike Tricarichi?
Q Yeah.
A Not that I can recall, no.
Q How about with Jim Tricarichi regarding the transaction after this date?
A I had periodic discussions or contact with Jim Tricarichi, but not about the transaction engagement.
Q How about -- with respect to the -- the intermediary transaction notices, did you consult any materials at PwC to assist in your analysis of whether the Westside transaction would now -- should now be regarded as reportable or listed?
A I can't recall what I did exactly.
Q Do you -- did you understand when you were looking at the various IRS notices that came out subsequent to the transaction that if you concluded that the transactions were listed or reportable, that PwC would have an affirmative obligation to the IRS to report them if the client did not?
MR. LANDGRAFF: Objection to form.
BY THE WITNESS:
A Can you repeat the question, please.

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BY MR. HESSELL:
Q Did you understand when you were reviewing the various notices and considering with Mr. Lohnes whether they applied to the Westside transaction, that if you concluded that they did apply, that PwC would have an affirmative listing or disclosure obligation to the IRS?
A No, I never -- because we confirmed our conclusion, I never went to that -- the next step in determining if we had a reporting responsibility.
Q But you did understand generally that if a transaction is identified by the IRS as a listed or reportable transaction, the accountant as well as the client has an affirmative obligation to maintain or dis -- list or disclose to the IRS, correct?
A Not --
MR. LANDGRAFF: Object --
BY THE WITNESS:
A Not necessarily -- I'm sorry.
MR. LANDGRAFF: I objected to form.
Go ahead.
BY THE WITNESS:
A Not necessarily. There were specific

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definitions and requirements for you to be -- for one to be required to report. So I hadn't done that analysis.
BY MR. HESSELL:
Q Have you had to do that analysis in any of your other matters?
A No.
Q Is this the only transaction that you've ever been involved in while at PwC that was subject to challenge successfully by the IRS in tax court?
A In tax court?
Q Or district court.
A In court?
Q Yeah.
A Yes.
Q Why do you say in Exhibit 43 that "These are -- I believe these are essentially the same materials provided to the IRS"?
A I don't know why I used that language.
Q You didn't -- didn't you just copy the entirety of the production that was made to the IRS and provide a copy to Mr. Tricarichi?
A Yes.
MR. HESSELL: Let's go off the record. We

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might be nearing the end here.
MR. LANDGRAFF: Okay. Can we take ten?
MR. HESSELL: Yes.
MR. LANDGRAFF: Thank you.
THE VIDEOGRAPHER: We are going off the record at 1515.
(WHEREUPON, a recess was had.)
THE VIDEOGRAPHER: We are back on the record at 1529.
BY MR. HESSELL:
Q Following the IRS notice in -- notice in 2008, both of them, you did not reach out to Mr. Tricarichi or any of his advisors and tell him that you were considering whether those notices changed PwC's prior advice, correct?
A Correct.
Q Nor did you reach back out to Mr. Tricarichi or any of his advisors with respect to any of the other notices we looked at that came out following closing of the transaction, right?
A Right.
Q PwC did not communicate to Mr. Tricarichi that they were considering whether those notices might have an implication on their prior advice, fair?

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A Correct.
Q Do you have any knowledge at all about PwC's role in another Midco transaction called Marshall?
A I don't.
Q Marshall -- Marshall & Associates?
A No.
Q You weren't aware in 2003 that PwC was advising another client about a similar Midco transaction involving Fortrend at the same time you were advising Mr. Tricarichi?
A I was not aware.
Q You weren't aware in 2008 of -- or thereafter of that -- of the fact that PwC had given advice to another client regarding a similar transaction at the same time?
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Was that a different question than the first question?
BY MR. HESSELL:
Q Yeah, this one was as of 2008 you --
A Oh, correct. I was not aware.
Q Was there no mechanism in place at PwC in 2003 that would tell a tax partner that you were

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Q I want you to turn to Exhibit -- Plaintiff's Exhibit 14 that you reviewed earlier with Mr. Hessell. This is the February 22nd letter -- February 22nd, 2008 letter from you to Ms. McCaskill at the IRS.

A Yes.

Q And in the middle of the letter you see the statement -- your statement that -- actually, it's the second and third sentence. You say, "Please note that PricewaterhouseCoopers, LLP, (PwC) was engaged by Michael Tricarichi and Westside Cellular, Inc., solely to perform state, local, and federal tax research and evaluation services related to the sale of Mr. Tricarichi's stock in Westside Cellular, Inc. PwC provided no services to Mr. Tricarichi or Westside Cellular, Inc. after this engagement."

What -- what did you mean by that?

A Just what it said.

Q Can you explain -- what -- what did you mean by the fact -- or by your statement that PwC provided no services to Mr. Tricarichi or Westside Cellular after the engagement.

MR. HESSELL: Objection, form.

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BY THE WITNESS:

A I'm not sure if it was in response to something in the summons, but -- or I was just stating a fact.

BY MR. LANDGRAFF:

Q When -- when did the engagement with Mr. Tricarichi end?

A Sometime in September of 2003.

Q So I want to go back to Exhibit 4, which is -- again, Plaintiff's Exhibit 4, which is the -- what Mr. Hessell referred to as the Stovsky memo. Are you -- do you have that exhibit in front of you?

A I do.

Q And you said -- you testified that you couldn't -- you couldn't specifically recall the, you know, exact conversation in which you provided your conclusions to Mr. Tricarichi or his representatives relating to the fact that your opinions were qualified as more likely than not.

Do you recall talking about that?

A Yes.

Q Do you have any doubt that you communicated to Mr. Tricarichi's representatives or to Mike Tricarichi that your conclusions were

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qualified as more likely than not?

MR. HESSELL: Objection, leading.

BY THE WITNESS:

A Although I don't recall the specific conversations, it's clear from my notes that I communicated that, so I have no doubt.

MR. LANDGRAFF: Let me just check one thing. I think that's all I've got. Let me just...

Thank you. That's all the questions I have.

MR. HESSELL: I have some follow-up. Hold on.

FURTHER EXAMINATION

BY MR. HESSELL:

Q Let's start with the last subject first.

The entire basis for your testimony that you qualified opinions based on -- or qualified your conclusions to Mr. Tricarichi is based on the statement in your letter, correct?

MR. LANDGRAFF: Object to the form.

BY THE WITNESS:

A Can you repeat the question. I'm sorry.

BY MR. HESSELL:

Q Sure. The whole -- the whole basis for

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your testimony here that you qualified PwC's conclusions to Mr. Tricarichi is the note in Plaintiff's Exhibit 4, which I call the Stovsky memo, that they --

A Uh --

Q -- more likely than not, correct?

A No, I think that's part of the basis, but we communicated risk throughout the -- the work that we did including the recommendations on the agreement.

Q I understand you communicated risk. My -- my question is specific to the level of the "more likely than not" verbiage.

And you have -- we've already -- I asked several times, you have no separate recollection of having communicated that language to Mr. Tricarichi other than the fact that it's written in that memo, correct?

A Correct.

Q And you can't say when in time you added that language into the memo?

A Correct.

Q And you agree with me that at no point in time did you ever use that "more likely than not" language in any email or written communication to

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Mr. Tricarichi or any of his advisors with respect to PwC's conclusions on the transaction?
A Not that I know of.
Q And you also agree with me that you haven't seen any written notes that you took of the conversations you had with Mr. Tricarichi and his advisors that reflect you used that "more likely than not" verbiage in communicating with the clients, correct?
A Correct.
MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A Correct.
BY MR. HESSELL:
Q When the IRS initiates an investigation of a PwC transaction like the February 2008 letter where it asks for documents, does that trigger any sort of internal review process about PwC's advice on the transaction?
A I don't -- I don't know. I contacted our Office of General Counsel. I don't know what they did other than guide me through the response.
Q So I take it then that you're not aware of any internal review process at PwC that was triggered by the summons request from the IRS on

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the Tricarichi transaction?
A I'm not aware -- I'm not aware of a review that was triggered by the summons.
Q Or by any -- I mean or by any of the subsequent events, the deposition or the trial testimony, none of that as far as you know triggered any sort of internal review of the work that was done on the Tricarichi transaction, correct?
A Yeah, I don't -- I don't know of -- I don't know either way if one was triggered.
Q Did -- did you at some point tell Mr. Tricarichi or his brother that PwC could not prepare Mike Tricarichi's tax returns associated with this transaction?
A I don't recall --
Q Did you tell Mr. Tricarichi that -- either Mr. Tricarichi or his -- or any of his representatives that you couldn't prepare the tax returns for either Mr. Tricarichi or Westside because you were already -- had already been engaged to prepare tax returns for somebody else in connection with the transaction?
A No, I don't recall that.
Q Had you prepared Mr. Tricarichi's tax

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returns prior to this transaction?
A No.
Q Do you know who did?
A No.
MR. HESSELL: Will you pull up -- Mike, will you pull up PwC Exhibit Number 9.
It's not in your binder, it's just going to be on the screen.
THE WITNESS: Okay.
(WHEREUPON, a document was presented to the witness.)
BY MR. HESSELL:
Q Do you agree with me that -- that these two documents, the first four pages which go up to the signature pages and then the next two pages -- or the next three pages which contain the terms and conditions are -- are actually separate documents?
A Yeah, the -- the terms and conditions that get attached to engagement letters are dependent on the type of engagement.
Q And why is it that PwC has separate terms and conditions with really small letters that it attaches -- or you say that are attached to these engagement agreements?

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MR. LANDGRAFF: Object to the form.
BY THE WITNESS:
A I couldn't say.
BY MR. HESSELL:
Q You see at the bottom --
MR. HESSELL: Can I take control of the document now, Michael.
BY MR. HESSELL:
Q Do you see at the bottom of the page here -- I think it's covered by the stamp on the first page, but on Page 2 of the engagement agreement and then Page 3, there are this notation here for the page numbers of the engagement in paren (indicating).
It's on Page 3 there and then on Page 2 here (indicating)?
A Yes, I see that.
Q And do you agree with me that that numbering does not continue on to the attachment of the terms and conditions?
It doesn't show 4 at the bottom of this page, and it -- which is Bates-labeled 459 or 5 -- it doesn't continue the numbering from the engagement agreement itself, right?
A Correct.

Exhibit 11

Transcript of Michael A. Tricarichi

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

Planet Depos
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introduce you to MidCoast, correct?
A No.
Q And as part of your discussions with Hahn Loeser and your brother Jim, you also learned about another potential buyer called Fortrend; is that correct?
A Yes.
MR. HESSELL: Object to the form of the question.
BY MR. LANDGRAFF:
Q And PwC did not introduce you to Fortrend; is that correct?
A I don't believe they did, no.
Q PwC was not at your initial meeting with Fortrend; is that correct?
A I don't think so, no.
Q And what was Fortrend's proposed role in the Westside transaction?
A I don't understand the question.
Q What did you understand that Fortrend was going to do?
A They were going to buy the stock of the company.
Q You chose to do the deal with Fortrend instead of with MidCoast, right?

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A Yes.
Q Why did you do that?
A Because Fortrend was going to pay us more money than MidCoast. Little did we know that they were the same entity.
Which is a brilliant strategy, I have to say.
Q Why do you say that?
A Because they could control the bids. It looked like there were two companies bidding for the stock, but they were in cahoots with one another, so you -- you thought you were doing well by negotiating and you really weren't.
Q One of Hahn Loeser's roles in working on the Westside sale was to identify the legal ramifications of selling your stock in Westside, right?
A Yeah, I think that's one of the things that they were -- they were doing.
Q And you mentioned Jeff Folkman. Jeff Folkman was a tax practitioner at Hahn Loeser?
A I believe so, yes.
Q He was a partner at Hahn Loeser; is that right?
A He was a partner, yeah.

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Q And Mr. Folkman and Hahn Loeser negotiated the deal with Fortrend for you; is that correct?
A They papered the deal. I don't know that they negotiated the deal. There were a lot of negotiations that were going on at the time with different people.
Q You agree that -- that Jeff Folkman was your lead negotiator of the terms of the stock purchase agreement between Westside and Nob Hill?
A Ultimately he wrote the agreement, but he got input from a number of sources including PwC.
Q PwC was not at the meeting where the price was negotiated with Fortrend; is that correct?
A I don't know. There were a couple of different prices from Pw- -- or, I'm sorry, from Fortrend over the time we were talking to them, and there were a number of meetings.
So I don't think so, but I -- you know, I leave the possibility open.
Q As you sit here today, you don't think -- you're leaving the possibility open, but you don't think PwC was an attendant at a meeting where a price was negotiated with Fortrend; is that fair?
A Yeah, I don't think they were, but I -- like I said, I -- I leave the possibility open.

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Q When were you first introduced to anyone at PwC?
A When? Sometime in 2003, mid 2003. Maybe earlier than mid. Maybe April.
Q Was Pw- -- did you ask PwC to find a buyer of Westside?
A To find a buyer? No.
Q What did you ask PwC to do?
A To basically second-opinion Hahn Loeser.
Q And can you explain what you mean by that, "second-opinion Hahn Loeser"?
A I was not familiar with this type of deal. I'd never heard of it before. It sounded pretty good. And they were -- they came in recommending it.
But it was a -- it was a big deal, and we felt that we needed a second opinion on the deal. So the first place I went was to my brother Tony. And Tony had told us -- told me that he was conflicted that -- he was with -- he's -- he was a partner at KPMG. And he told me that he was most likely -- they were most likely conflicted out because they had been doing work either for -- for -- either for Fortrend or for clients of Fortrend.

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So we were looking -- so we wanted another big four, big six -- I don't remember how many there were at the time -- accounting firms to look at it.

So my other brother, Jim, had a relationship with Rich Stovsky. I don't know what their exact relationship was, whether they were golfing buddies or whatever. But Jim suggested that we have -- we talk to Rich and maybe we could have PwC be the second opinion that we were looking for.

Q And what was the opinion itself that you were getting a second opinion on?

A Okay, what I was looking at at the time was basically two possibilities.

Possibility number one was leaving -- there was never a discussion of liquidating the company. There was a discussion about leaving the assets in the company and converting the company to a real estate investment company.

And in the event that we did that, we would have paid the tax that was owed -- the corporate tax that was owed. And the money would have remained in the company and the company would have made investments in various types of things.

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That was one possibility.

The other possibility was this stock sale, which we had never contemplated until Jeff Folkman brought it up. And then once he brought it up, we looked at it, but it was something that just -- you know, it was a very complicated thing. And I don't like do -- doing things that I don't grasp.

So we decided that we would have someone else look at it as well. And during that time, we had an accountant -- I'm trying to remember what his name was, Don something -- and he had a relationship with a guy by the name of Gary Zwick. And I think Gary Zwick had some sort of loose association with Fortrend.

So Don Jesco (phonetic) -- Don Jesco. So Don recommended that we talk to Gary Zwick and see if there was a competitive aspect on this stock purchase agreement.

So we talked to Gary Zwick, and there was another guy, Block I think his name was, but I don't remember what -- something Block. And we had a meeting with them, and they said basically that they were in the same business as MidCoast.

So we bounced back and forth between the two of them, and we finally got to the -- and I think that we had talked to Rich while we were bouncing back and forth.

So he came into the -- into the deal before we decide -- and this is my recollection -- before we decided specifically to go with Fortrend -- he may have come after we decided, I don't know. But we wanted a second opinion on the deal.

It was basically the same deal. The Fortrend deal and the MidCoast deal was the same thing, it was a stock purchase agreement. The only difference in my mind was the amount they were willing to pay for the stock.

And, like I said, at the time, I didn't realize that they were in cahoots with one another. Not that I should have realized it because they were separate companies. But -- you know, so that was -- that was the situation.

So Pricewaterhouse was brought in from the beginning to advise us on the transaction and primarily advise us as a thumbs up or a thumbs down.

Mainly speaking, what I -- what I told Rich Stovsky when I met with Rich Stovsky was I don't want -- if we do this deal -- "this deal" being with Fortrend or whoever we picked -- if I do this deal, I do not want this to bounce back on me, okay? There is no way that I'm going to do this deal even if there's a minute chance that it's going to bounce back on me. I said I'd rather pay the tax.

And that was what Stovsky was told at the time that we hired PwC.

Q Well, what --

A He was told that by me.

Q Okay. I didn't mean to interrupt you. Are you done with your answer?

A Yes.

Q What as -- and you said there was a -- you were looking for a second opinion. What was the opinion that Hahn Loeser gave you that you were looking for a second opinion on? From --

A Well, their --

Q -- PwC --

A -- opinion. I'm sorry.

Q I -- I --

A Finish.

Q -- stopped for -- let me ask it again. That was my fault.

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You mentioned that you were -- you were looking for a second opinion from PwC relating to an opinion that Hahn Loeser gave you. What was the opinion that Hahn Loeser gave you that you were looking for a second opinion on?

A Well, Hahn Loeser brought in MidCoast and they said it was a good deal. So that would have been the opinion, was it a good deal and what was the likelihood that it was going to crater.

Q And what do you mean by --

A Hahn -- since Hahn -- since Hahn Loeser brought them in, we assumed Hahn Loeser was recommending them.

We can't -- I can't imagine Hahn Loeser bringing in -- bringing in a potential buyer that they had reservations about.

Q When you say it was a good deal and that -- and wasn't going to crater, what do you mean by that?

A I mean it wasn't going to crater like it did.

Q What does "crater" mean? Meaning not do the deal? I mean --

A No, crater means after you do the deal there are negative ramifications.

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Q What did --

A Which there were.

Q What did Rich Stovsky tell you with respect to -- what was the second opinion that Rich Stovsky gave you?

A That it wasn't going to crater.

Q Rich Stovsky used those words with you?

A No, he didn't use those words. He told me that it was a good deal, go ahead and do it.

Q When did Rich Stovsky tell you it's a good deal, go ahead and do it?

A I don't remember exactly. Sometime before we did the deal. We did the deal in September.

Q And those are the words that you say Rich Stovsky used in telling you about the deal?

A Oh, yeah. Both -- similar words. I don't know if those were the exact words, but words to that effect, yes.

This more-likely-than-not crap that you -- you guys have been talking about in all these depositions is BS, okay? It's total BS. That was never discussed, that was never stated, that was never part of the employment, that was never -- never even mentioned by anyone including Rich Stovsky, okay?

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He was told I wanted assurance that this deal is going to be good and that nothing bad is going to happen if we do it. And that's what he was told.

And more likely than not is a figment of PwC's imagination because those words were never, and I repeat, never discussed, papered, they don't show up in an email, there's nothing.

Q Do you have -- do you have -- did you take any notes in what you claim today sitting here today that Rich Stovsky told you?

A Did I take any notes? No, I didn't take any notes. Did you give me any paper?

Q Did you write down at the time Rich Stovsky gave you the advice, did you write down what he told you?

A I may have. I don't know. I don't have it.

Q What happened to it if you may have?

A I don't know.

Q Did you send an email to anyone involved in the deal saying, "I just talked to Rich Stovsky and said the deal's not going to crater and it's a good deal and we can go ahead and do it"?

A I might have.

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Q Well, where is that email?

MR. HESSELL: Objection to the form of the question.

BY THE WITNESS:

A I can't tell you. Where is the -- where is the more likely than not? Show me that.

BY MR. LANDGRAFF:

Q You -- as you sit here today, is there a single piece of paper that you authored recounting your claimed conversation with Rich Stovsky about the deal?

A Number one, it's not a claimed conversation, okay? It was an actual conversation.

Number two, there were witnesses to the conversation. My brother Jim is one of them, okay? So I don't know what you're talking about.

Q Can you answer my question?

A I just answered it.

Q Is there a single piece of paper that you authored recounting your claimed conversation with Rich Stovsky about the deal?

A I don't think there's a single piece of paper either way.

Q So the answer to my question is, no, you

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can't identify a single piece of paper that you authored recounting your claimed conversation with Rich Stovsky about the deal; is that correct?
A The answer to my question is -- to your question is what I said. I don't think there's a single piece of paper either way.
Q You mentioned your brother Jim. Jim was -- Jim was your -- withdrawn.
Jim was the main contact with PwC for -- regarding your side of the Westside sale; is that fair?
A Yes.
Q And did Jim have your blessing to be the conduit between you and PwC?
A He was the conduit between me and Rich Stovsky.
Q And Rich Stovsky is who you communicated with at PwC, right?
A Yes.
Q Did Jim Tricarichi have your blessing to be the conduit between you and -- and Rich Stovsky relating to the Westside sale?
A Yes, he was the conduit between me and -- between Westside and Rich Stovsky.
Q And you trusted him with that role?

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A Yeah.
Q If you would turn -- it's probably in the first binder -- to Exhibit 9.
MR. LANDGRAFF: And I'll ask that Exhibit 9 be marked as PwC Exhibit 9.
MR. HESSELL: This one has already been marked, right?
MR. LANDGRAFF: I believe so, Scott. That's right.
(WHEREUPON, a certain document was marked PwC Deposition Exhibit No. 9, for identification.)
BY THE WITNESS:
A I got it.
BY MR. LANDGRAFF:
Q Do you have that in front of you, sir?
A I do.
Q Did you receive Exhibit 9?
A No.
Q What did you -- did you -- what didn't -- what part of Exhibit 9 did you not receive?
A I did not receive the page that's marked PwC-02 -- 002486.
Q Any other part of Exhibit 9 that you did not receive?
A Yes.

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Q And can you tell us what other pages you did -- you claim you did not receive?
A I don't -- I resent your using the words "you claim" and wish you wouldn't do that. PwC-002489 through 2491.
Q So it's your testimony that you did not receive the terms and conditions that are part of Exhibit 9; is that correct?
A It's my testimony that I didn't receive the pages that I just outlined.
Q Now -- so you did receive -- and Exhibit 9 has two copies of the first page because there's a -- there's a page that doesn't have any marking on it on Exhibit 9.
But the -- the second page of Exhibit 9 is a -- is the first page of a letter to you from PwC. And that ends in the Bates number 485; is that correct?
A The second page? Yeah, 485, that's the second page. That has my strikeout on it.
Q Okay. So you received -- you received the page ending in 485; is that fair?
A No, I made the page ending in 485. I received the page ending in 484.
Q Okay. So you received 484 and you

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marked -- your marking is shown on 485?
A Correct.
Q And then we'll talk about 486, but then you received -- or your marking shows up on Page 487; is that correct?
A That's correct.
Q And -- and then your signature appears on the Page 488; is that correct?
A That's correct.
Q Okay. So let's go back to Page 485 of Exhibit 9 that you said contains your strikeout.
A Yeah.
Q So on Page 485 of Exhibit 9, you -- it's your strikeout, you crossed out the statement on the -- on this page saying, quote, "You agree to advise us if you determine that any other matter covered by this agreement is a reportable transaction that is required to be disclosed under Section 1.6011-4."
Is that correct?
A That's correct.
Q Why did you strike that out?
A Because I didn't want Pricewaterhouse to have an out.
Q What do you mean by that?

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A I read it before I did the strikethrough, yeah.
Q You see the second sentence of the engagement agreement on Page 485 of Exhibit 9, it says, "This engagement letter and the" -- bold -- "attached terms of engagement to provide tax services (collectively this, quote, agreement, end quote) set forth an understanding of the nature and scope of the services to be performed and the fees we will charge (inaudible) and outline the responsibilities (inaudible) and you necessary to ensure PricewaterhouseCoopers' professional services are performed to achieve mutually-agreed-upon objectives."
Do you see that?
MR. HESSELL: You broke up a little bit there while reading it. I really don't want you to have to read it all --
BY THE WITNESS:
A You don't have to read it again. I got it.
BY MR. LANDGRAFF:
Q You see where the bold language of the second sentence on Page 485 that refers to the attached Terms of Engagement to Provide Tax

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Services?
A Yeah.
Q So if you'd flip to Page 489, the Bates number ending in 489 of Exhibit 9.
A 489? Yeah, I got it.
Q And the top of the page, it's -- it's a little -- there's like a hole punch that knocks out -- a little bit out, but do you see the title at the top of that page?
A Yeah.
Q "Terms of Engagement to Provide Tax Services"?
A Yeah.
MR. HESSELL: Objection.
BY MR. LANDGRAFF:
Q So the -- the title on Page 489 matches the bold language on Page 485 that you edited, correct?
A It matches the page that I edited, yeah, the language on the page, sure.
Q And your signature appears on Page 488 of Exhibit 9; is that right?
A That's right.
Q And so does Pricewaterhouse's signature, right?

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A Well --
MR. HESSELL: Objection, foundation.
BY THE WITNESS:
A I've never seen something signed by a corporation, so, yeah, that's what it says, but I don't believe that to be a valid contractual signature.
BY MR. LANDGRAFF:
Q The only other thing other than the signatures on Page 488 of Exhibit 9 that you signed says "Enclosure(s): Terms of Engagement to Provide Tax Services."
Do you see that?
A I do.
MR. HESSELL: Objection to the form of the question.
BY MR. LANDGRAFF:
Q Now, it's your claim that you did not get a version of the engagement agreement with the Terms of Engagement to Provide Tax Services, right?
A I have never seen this document before these depositions.
Q If, as you claim, you didn't get a copy of the Terms of Engagement to Provide Tax Services,

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did you ask where they were when you saw them on Page 1 of Exhibit 9?
A I don't believe so, no.
Q If, as you claim, you didn't get a copy of the terms of engagement to provide tax services, did you ask where the enclosure was that's referred to right above your signature?
A Well, there's an "S" on the end of "enclosure," so where's the other one?
Q Did you ask where any enclosures were?
A No, I don't believe that I did. I assumed that this was the agreement.
Q And --
A I've never -- let me put it this way: I've done plenty of -- of -- of engagement letters. This would be -- if -- if I saw this document attached to the engagement letter, this would have been the first one of its kind because I've never gotten an engagement letter that had a separate attached sheet that wasn't part of the -- of the engagement letter itself that didn't have a signature line or initial line or something for me to acknowledge that I received it.
And if I had received this particular document, I would have made changes to it.

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Q What would you have made changes to?
A I would have struck number seven, "Limitations of Liability" because that would defeat me -- that would defeat my purpose of hiring you in the first place.
And I would have struck the part about New York law.
Q Anything else you would have struck?
MR. HESSELL: Objection --
BY THE WITNESS:
A No.
MR. HESSELL: -- speculation.
BY THE WITNESS:
A I don't know.
BY MR. LANDGRAFF:
Q Why would the limitation of liability defeat your purpose of hiring PwC? Was your purpose to sue them?
A You want me to answer that? No, my purpose was to get tax advice on a $40 million deal.
Q And why would a limitation of liability defeat the purpose of hiring PwC?
A Because I'm not going to be limited in -- if your advice goes bad, I'm not going to be

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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.
Q Okay. You don't -- do you have any recollection of asking anyone to review the engagement agreement between you and PwC?
A I may have. I don't recall.
Q Do you recall asking your brother, Jim Tricarichi, to look at the engagement agreement?
A Oh, I'm sure Jim looked at the engagement agreement.
Q Why --
A I'm not sure, but I'm assuming that he did.

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Q Why do you assume he did?
A Because Stovsky and him were the ones that were communicating.
Q You -- Jim Tricarichi didn't sign the letter, right?
A No, I signed it. I didn't say I didn't review it. You asked me if I had anyone else review it.
And you asked me specifically about Randy Hart, and I said I didn't recall. Now you're asking me about Jim, and I'm saying it's more likely than not that Jim reviewed this letter but I can't say for certain.
Q And why is it more likely than not that Jim reviewed the letter?
A Because Jim was involved in the transaction.
Q Did you ask Mr. Folkman to review the letter?
A I don't have any recollection of that.
Q Did you ask Carla Tricarichi to review the letter?
A I don't have any recollection of that either.
Q Page 1 of Exhibit 9 or the -- you could

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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 $20,000; do you see that, sir?
A I do.
Q And right underneath where your handwriting is, there's a sentence that says, "We look forward to working with you and your staff during the completion of this important project."
Do you see that?
A That's what it says.
Q What was the project?
A Didn't you just ask me that?
Q I just asked you that, what was the

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A I don't recall that either.
Q Did you receive invoices from PwC any time after this invoice that you received sometime in October of 2003?
A I don't recall.
Q Do you think it's possible you received invoices from PwC after 2003?
A It's possible. I wasn't paying the invoices.
Q You did -- did you ever pay PwC after 2003?
A I don't recall.
Q What do you mean you weren't paying the invoices?
A I wasn't the person who paid the invoices.
Q Who was the person who paid the invoices?
A Well, it would have been Jimmy, or it would have been my -- it could have been Scott Ginsburg, or it could have been Nemic, my accounting person.
Q Did Scott Ginsburg or --
A Steve Nemic.
Q I'm sorry. Go ahead.
A Steve Nemic.
Q Did Scott Ginsburg or Steve Nemic work for

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you after the sale of the Westside stock?
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 invoice from PwC in 2004 or 2005 or after the Westside sale?
A I have no recollection either way.
Q Now, you -- you did not have an ongoing relationship with PwC after the sale of the Westside stock in September 2003, correct?
MR. HESSELL: Objection to the form of the question.
BY THE WITNESS:
A Define ongoing relationship.
BY MR. LANDGRAFF:
Q If you'd turn to Exhibit 309.
MR. HESSELL: Is that in the other binder?
MR. LANDGRAFF: He's already looked at it, but, yes. It should be in the second binder.
BY THE WITNESS:
A 309. What is that?
BY MR. LANDGRAFF:
Q It's your trial testimony.
A Okay. Go ahead.

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Q Exhibit 309, Page 164 --
A Wait a minute. Wait a minute. Wait a minute. Is that in this book or the other book?
MR. HESSELL: The other -- the second binder, volume two.
THE WITNESS: Oh, I'm in the wrong book. I'm sorry.
MR. LANDGRAFF: And, Lawrence, you can take the --
THE WITNESS: My bad.
MR. LANDGRAFF: -- down.
BY THE WITNESS:
A 309. Got it.
BY MR. LANDGRAFF:
Q Exhibit 309, Page 164.
A Got it.
Q Line 14, "QUESTION: And have you had any ongoing relationship with PricewaterhouseCoopers after the sale of your stock?
"ANSWER: I don't think so."
Were you asked that question and did you give that answer?
A Yeah, I said the same thing I just said, "I don't think so."
Q Now, you know --

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A (Unintelligible.)
Q You knew PwC received a summons from the IRS in 2008 relating to PwC's work on the Westside sale, right?
A I don't know that I -- I -- I don't know that I knew that in 2008. I knew that at some point before the trial, but I can't tell you when.
Q Do you -- do you recall PwC inviting you and your counsel to review or look at documents that PwC was planning on sending the IRS in response to a summons that PwC had received?
A I think -- I think there was some coordination between Hahn Loeser and PwC at that time. But I can't tell you for sure what year that was or when that was.
Q Did -- was there any coordination with you personally in reviewing the materials that PwC was intending to send to the IRS?
A I may have. I don't have a specific recollection of that.
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 had received?
A Where would that office have been?

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Q Do you recall going to a -- any PwC office to review materials that PwC said it was going to send the IRS -- to the IRS in response to a summons that PwC had received?

A I asked you a question. I'm going to -- I'm going to tell you that I'm not sure and I'm going to tell -- I'm asking you to define which PwC office that would have been.

Q And I'm asking you do you recall going to any PwC office?

A There was a PwC office in the same building as Hahn Loeser, in the BP building, downtown Cleveland, and I would go there from time to time.

You are asking me a specific question about reviewing specific documents during a specific time frame. If you told me that I -- I did that in New York, I would be questioning it because I don't recall going to PwC's office in New York, okay? Or Chicago or any other office.

If you're asking me did I -- do I have a specific recollection of going to PwC's office in the BP building to review specific documents, I can tell you that I don't have a specific recollection of that.

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Q Do you -- do you recall talking with anyone at PwC in the 2008 time frame about PwC's response to an IRS summons that PwC had received relating to the Westside stock sale?

A Well, I already -- if you take the 2008 out of that question, I'll answer it. Because I already answered 2008.

Q I'd like an answer to my question.

A Well, I can't answer that question because I -- you have to give me a time frame. If you say 2008, I told you I wasn't sure of the time frame. So I'm going to give you the same answer that I just gave you, which is I'm not sure of the time frame.

Q Do you -- so regardless of any time frame -- or can you put it in time -- let me ask you that, do you recall going to PwC's office to look at documents that PwC had told you that PwC planned to send to the IRS in response to a summons that PwC had received?

A I don't have a specific recollection of that, but that's not to say I didn't do it.

Q Do you have any recollection of talking with anyone at PwC about PwC's response to a summons that PwC received from the IRS?

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A Do you want me to speculate?

Q I'd like you to answer my question.

A Well, I can tell you that if I did go and see documents in 2008 at PwC, that I would have requested that Stovsky be there and I would have talked to Stovsky.

Q Do you have any recollection --

A That's the best I'm going to do.

Q Okay. That -- so let me just -- I'd like you to answer my question.

Do you have any recollection of talking with anyone at PwC about PwC's response to a summons that PwC received from the IRS relating to the Westside stock sale?

A I'm going to say it one more time. If I went to PwC to look at documents, I'm sure that I would have talked to people at PwC. And since my contact at PwC was Rich Stovsky, that I would have talked to Rich Stovsky.

Q Do you have any recollection of talking to Rich Stovsky about PwC's response to an IRS --

A I'm not going to answer that again. That's twice now.

Q No, you -- you're saying if, if, if. I'm asking you as you sit --

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A I'm telling --

Q -- today --

A -- I don't have a specific recollection. You're telling me I did. And if you're telling me I did, then I'm going to tell you that I wouldn't have done that without talking to someone at PwC.

Q I'm asking you questions; I'm not telling you anything, sir. So see if you can focus on my question.

MR. HESSELL: He answered it. He just answered it.

BY MR. LANDGRAFF:

Q You -- you have no recollection of talking to Rich Stovsky about PwC's response to an IRS summons; is that fair?

A No, that's not fair because that's not what I told you.

Q Well, okay, so let me ask the question and let's see if you can answer it.

Do you have any recollection of talking with Rich Stovsky or anyone at PwC about PwC's response to an IRS summons that it received relating to the Westside stock sale?

MR. HESSELL: Objection --

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Q Were you invoiced or billed for the time PwC spent gathering documents that PwC was going to send to the IRS?
A I think that's the same question you asked me about did I get any more bills from PwC, and I -- I told you that I may have but I'm not sure.
Q Now, PwC did not interact with the IRS on your behalf after the transferee liability report was issued, right?
MR. HESSELL: Objection, calls for speculation. Foundation.
BY THE WITNESS:
A No, clue.
BY MR. LANDGRAFF:
Q I mean, you didn't -- you didn't hire PwC to participate in -- in your interactions with the IRS in 2008 and going forward, right?
A Specifically? No, I expected them to stand behind their advice. Whether that entailed them talking to the IRS or not, I don't know. But that -- I expected them to stand behind their advice.
Q But you didn't separately engage PwC to participate in the IRS proceedings that began in 2008, right?

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MR. HESSELL: Objection to the form of the question.
BY THE WITNESS:
A Specifically? No.
BY MR. LANDGRAFF:
Q You had your own team; you had Glenn Miller and Sullivan & Cromwell and Mike Desmond, right?
MR. HESSELL: Objection to the form of the question.
BY THE WITNESS:
A Well, I didn't have them until 2009 I think. So I don't -- again, you're very nebulous on time frames. So if you would give me specific time frames, if I have a recollection of a specific time frame, I'll tell you. If I don't, I'll ask you. So if you give me a specific time frame on that, I'll tell you.
BY MR. LANDGRAFF:
Q In 2009, you had -- you had a legal team helping you with your interactions with the IRS, right?
A I believe I hired Bingham in 2009.
Q And Bingham's a law firm, right?
A Yes.

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Q And what did you hire Bingham to do?
A To respond to a letter that I got from the IRS.
Q And you didn't hire PwC to respond to that letter from the IRS, right?
A No. I don't know how PwC would have responded to that letter; they were legal questions.
Q And PwC didn't prepare you for settlement discussions with the IRS, right?
A I don't understand your question.
Q You had law firms helping you prepare for settlement discussions with the IRS, right?
A I had engaged a law firm to do settlement negotiations with the IRS. Does that answer your question?
Q My question was PwC didn't do settlement discussions with the IRS on your behalf, right?
A Not that --
MR. HESSELL: Objection --
BY THE WITNESS:
A -- I'm aware of.
BY MR. LANDGRAFF:
Q And PwC didn't attend settlement meetings with the IRS with you or your lawyers, right?

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A I have no knowledge of that. I didn't attend any settlement negotiation meetings with the IRS.
Q When you -- do you remember when you first retained Bingham?
A Yeah, sometime in 2009.
Q When did you first retain Sullivan & Cromwell?
A It was after that.
Q Was it also in 2009?
A I don't have a specific recollection.
Q Do you recall asking Rich Stovsky in 2009 for -- for him to send you documents?
A Send me documents? Why would he send me documents?
Q Do you recall -- my question is do you recall asking Rich Stovsky in 2009 to send you PwC's file?
A Personally, no. The lawyers may have done it. I don't know.
Q Do you have -- and I apologize, I don't know if it's in your binder. Do you have an Exhibit 224 in your binder?
A I do.
MR. LANDGRAFF: And I'd ask that --

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THE WITNESS: Hold on.
MR. LANDGRAFF: I'm just asking for the record --
THE WITNESS: I have a 223 -- yes, I have 224.
MR. LANDGRAFF: Okay. Let's have Exhibit 224 marked as PwC Exhibit 224.
(WHEREUPON, a certain document was marked PwC Deposition Exhibit No. 224, for identification.)
BY MR. LANDGRAFF:
Q And this is -- 224 is a September 17th, 2009 letter to you from Rich Stovsky; is that correct?
A That's what it purports to be.
Q And -- well, did you receive it?
A I don't have a specific recollection of receiving it.
Q Were you --
A It's addressed to my house in Nevada.
Q Is that the correct address where you lived in 2009?
A I believe so, yes.
Q And Mr. --
A That's not where --

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Q -- Stovsky --
A -- got documents, but yeah.
Q I'm sorry, I cut -- say that again.
A I said that's not where I typically received documents, but I see the address is a good address.
Q And Mr. Stovsky said on September 17th, 2009, "Dear, Mike. Per my discussion with Jim Tricarichi, enclosed are copies of the relevant -- relevant materials you requested. I believe these are essentially the same materials provided to the IRS in February 2008 after review by you and your counsel. Sincerely, Rich."
Do you see that?
A Yeah.
Q So do you remember asking -- or, sorry, do you remember receiving documents from Mr. Stovsky around this time in 2009?
A Well, since you don't have any documents attached to this letter, I can't tell you for sure what -- what the documents were, if I did receive any. I could tell you that the letter says "Enclosures" and there are no enclosures attached to it.
Q Do you have -- my question was do you have -- do you remember receiving documents from Mr. Stovsky around this time in 2009?

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A I'm sorry I'm not answering your questions the way you want me to answer them, but I am answering them. And I'm going to answer it again. And that is, there are no documents attached to this letter. I can't tell you if I received specific documents or any documents.
And if you want to show me documents, I'll be happy to tell you whether I have a recollection of receiving those documents or not. But short of that, giving me a three-line letter doesn't strike -- doesn't ring any bells.
Q Do you -- do you know if you were billed for the time PwC spent gathering documents in 2009?
A I don't know --
MR. HESSELL: Objection --
BY THE WITNESS:
A -- that would be a question to ask Jim.
BY MR. LANDGRAFF:
Q I'm asking you.
A Do I have a specific recollection of that? No. Is it possible that I was? Yes. Is it possible that I was and Jimmy paid it? Yes.

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Q Did -- did you ask PwC to conduct any research relating to the Westside sale as part of receiving these documents in 2009?
A I'm -- I'm going to tell you that I can't tell you what documents received, so I can't answer your question.
Q Did you ask PwC to conduct any research relating to the Westside stock sale in 2009?
MR. HESSELL: Objection, asked and answered.
BY THE WITNESS:
A I don't know. I -- I think I just said what I said.
BY MR. LANDGRAFF:
Q I'm separating it from the documents. My question is did you ask PwC to conduct any research relating to the Westside stock sale in 2009?
A Define --
MR. HESSELL: Objection --
BY THE WITNESS:
A -- "you."
BY MR. LANDGRAFF:
Q You. Do you --
A Me personally?

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Q Do you know not -- do you not know what "you" means?
A I'm sorry, sir, but if you're going to debase me in this deposition, I'm going to stop it and we're going to take the video to the Court and we're going to see what the judge thinks of it, okay?
Q You -- you asked me what -- what "you" is. Do you not know what "you" is? Do you --
A "You" is --
Q -- explain that?
A -- could be -- "you" could be you as me, you, it could be you as my representatives.
Jimmy asked for the documents, I didn't.
Q Okay. I'm not --
A You can see that in the letter, right?
Q I'm not -- I'm not asking you about the exhibit. I'm --
A I'm saying that --
(Unintelligible - speaking at once.)
MS. REPORTER: Hang on. Stop. Hold on one second.
I can't get two and three people talking at one time --
THE WITNESS: Well, if he'd let me finish

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my answer --
MS. REPORTER: -- I need --
THE WITNESS: -- you wouldn't have that problem.
MR. HESSELL: Mike.
MS. REPORTER: I need the question and answer one at a time because I can't get anything you're saying otherwise.
So the last thing I got was the question, "I'm not asking you about the exhibits. I'm -- " and then there was an interruption.
BY MR. LANDGRAFF:
Q Okay. I'm not asking you about these -- these documents. What I'm asking you is, in 2009, did you ask PwC to perform any tax research relating to the Westside stock sale?
A Okay, I'm going to answer this again. I don't know what you mean by "you." If you mean me or my representatives, I'm going to tell you it's possible.
If you ask me did I, I'm going to tell you no. If you're going to ask me did Jimmy ask Stovsky to do any work -- any research, I don't know.
Jimmy had an ongoing relationship with

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Stovsky. Jimmy saw Stovsky all the time. They were friends. They exchanged leads. They were business -- they were -- they weren't in business together but they did business together.
So don't -- if you're asking me did Jim ask for this, I can tell you that I don't know.
Q So for the --
A If you're asking me did I ask for it, I can tell you I didn't.
Q So for the rest of the deposition, when I say "you," unless I tell you otherwise, I mean you, Michael Tricarichi. Understand?
A I understand, but if there's more than me, I'm going to say there's more than me.
Q I -- you asked me to explain what "you" means, and I'm telling you, when I use "you," I mean you, Michael Tricarichi.
Do you understand?
A I understand that. And I also understand that you're not -- I -- listen, we can have a caveat and the caveat will be if you ask me did I specifically do something, I will tell you.
But if I also say it's possible that someone else did it on my behalf, I will tell you that as well.

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Q Did you personally ask anyone from PwC to perform any tax research relating to the Westside stock sale in 2009?
A Personally, no. Possibly through someone else, yes.
Q Did you personally ask PwC to do any tax evaluation relating to anything relating to the Westside stock sale in 2009?
A Same --
MR. HESSELL: Objection --
BY THE WITNESS:
A -- answer.
MR. HESSELL: -- to the form of the question.
BY MR. LANDGRAFF:
Q "Same answer" meaning not you personally, right?
A Not me personally, but it's possible that Jimmy or someone else did. Particularly Jimmy, he would have been the person who did it.
Q So the Fortrend entity that agreed to purchase the Westside stock was Nob Hill, right? We talked about that a little bit earlier.
A Yeah.
Q And who from your team was the main point

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of contact with Nob Hill?
A Depend on time frame.
Q In the summer of 2003.
A Okay, I don't know when they formed Nob Hill, and I don't even know if Nob Hill was formed by the summer of 2003.
We were talking to Fortrend, okay? They incorporated an entity called Nob Hill to be the buyer of stock, which is not unusual because I do that when I purchase large things. I don't purchase them personally or I don't purchase them through another corporation that's currently doing business; I'll form a nice, new corporation or a nice, new LLC that will be the sole entity that will take possession of whatever it is, okay?
So I don't know when Nob Hill was formed. I know that it was formed by Fortrend. And I hope that answers your question.
Q So between -- and whether it was -- well, let me just ask it this way and see if it helps: Who was your main point of contact with Fortrend with respect to the Westside stock sale?
A The main contact with Fortrend was Folkman.
Q Jeff Folkman from Hahn Loeser?

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A Yeah, he's the only Folkman in this conversation.
Q If you would turn to Exhibit 32.
A That's in the other book.
Got it.
(WHEREUPON, a certain document was marked PwC Deposition Exhibit No. 32, for identification.)
BY MR. LANDGRAFF:
Q And Exhibit 32, I'm not representing that you -- well, let me ask you, did you receive a copy of a term sheet from Nob Hill in July of 2003?
A I may have.
Q Do you have any recollection of receiving --
A I'm sure I got a term sheet. I don't know if it was in July of 2003 or not.
MR. HESSELL: Mike, you've got to stop -- you've got to let him finish his answer for --
THE WITNESS: Oh, sorry. My bad.
MR. HESSELL: -- question for the benefit of the court reporter. I know you know where he's going but it's --
THE WITNESS: My bad.

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BY MR. LANDGRAFF:
Q Exhibit 32 is addressed to you, right?
A Yeah.
MR. LANDGRAFF: And if I need to say it, we'll -- we'll mark this as PwC Exhibit 32.
BY MR. LANDGRAFF:
Q Did you review the term sheet when you received it from Nob Hill Holdings?
A I'm sure I looked at it and I'm sure I would have had Folkman look at it.
Q Do you know whether you had changes that you wanted to propose to the term sheet?
A Specifically, no, that was up to Folkman. That's one of the things we hired Folkman to do. And we also had -- we had also hired PwC to advise Folkman as to terms that he needed to include in the -- in the agreement.
Q Do you know if -- if Folkman or PwC made edits or proposed changes to the term sheet?
MR. HESSELL: Objection, foundation.
BY THE WITNESS:
A I have no idea. I'm sure they did.
BY MR. LANDGRAFF:
Q Why are you sure they did?
A Because I've never done a deal where I got

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a contract from another entity and didn't make changes to it.
Q But you personally don't remember any changes you may have proposed with respect to the term sheet that's Exhibit 32?
A I don't know. I -- I -- don't have a specific recollection of that.
Q What about draft stock purchase agreements; did you -- do you recall reviewing draft stock purchase agreements?
A I may have. I'm sure I did.
Q Do you recall making comments to them or proposing changes to them?
A I may have.
Q Do you recall any changes you would have proposed?
MR. HESSELL: Objection to the form of the question.
BY THE WITNESS:
A Not specifically, no. If you have something particular, let me know.
BY MR. LANDGRAFF:
Q Did you send -- or do you know whether PwC was sent draft stock purchase agreements?
A I'm sure they were.

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Q Who would have sent -- who from your team would have been the person to send PwC draft purchase agreements?
A That would have been Folkman.
Q Do you know if PwC -- were you personally made aware of whether PwC made comments or suggested changes to draft stock purchase agreements?
A I believe they did.
Q Do you -- did you discuss PwC's view of the stock purchase agreement with PwC representatives?
A Did I? No. But my representatives did.
Q And was that acceptable to you that your representatives were the communicators with PwC with respect to the stock purchase agreement?
A Well, I told you at the onset of this deposition that I had no specific tax knowledge. So I hired people that I assumed had tax knowledge, which would have been PwC and Hahn Loeser.
So if they're going to show me something that has a red flag in it, I'll be happy to say, hey, that's a red flag. But not having specific knowledge of tax transactions, I would have relied

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on PwC and Hahn Loeser to give me the advice that I paid them for.
Q Was it acceptable to you that your representatives were the communicators with PwC with respect to the stock purchase agreement and PwC's views of the stock purchase agreement?
A Yeah, I am not going to micromanage that. That's not me.
Q If you would turn to Exhibit 36.
MR. LANDGRAFF: And we'll mark that as PwC 36.
(WHEREUPON, a certain document was marked PwC Deposition Exhibit No. 36, for identification.)
BY THE WITNESS:
A I see it.
BY MR. LANDGRAFF:
Q And Exhibit 36 is an August 13th, 2003 email from Jim Tricarichi to you with a copy to Jeff Folkman and Randy Hart; do you see that?
A I do.
Q And there's a closing checklist that -- attachment, right?
A Yeah, I don't -- I don't see this as being part of this email. I see it -- I see it as part

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of Exhibit 36, but if you look at the -- the typeface and everything else -- now, it could have been an attachment, but it -- the email doesn't tell me that this is -- it says -- the email has a thing in it that says, Closing checklist, buyer's SE, dot, dot, dot.
So I don't know that this necessarily was attached to that email, so don't hold me to it.
Q Do you see where it says "Attachments" and it says, "Closing Checklist - Buyer's/Seller's Stock"?
A Yeah, I see that.
Q And so with that note, the attachment is there on Exhibit 36, you're still not sure that this closing document checklist was attached?
A Possible.
Q Possible --
A Possible, sure.
Q Because it says it, right, that's why it's possible?
A It says that something's attached and this is attached. I mean, this is -- I -- I don't have a -- I don't have any reason to believe it wasn't attached and I don't have any reason to believe that it was other than it has the same

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title that's what's written in the cover email.
Q Well, that -- that's pretty good reason to believe it was attached; would you agree with that?
A That's what you said. I didn't say it. I said --
Q I'm asking --
A -- I don't know.
Q I'm asking you --
A I said I don't know.
Q -- seriously sitting there today -- are you seriously sitting here under oath saying you're -- it's just as likely that it wasn't attached when there's an attachment reference as it was attached? Is that what you're sitting here saying?
MR. HESSELL: Objection to the form of the question. Argumentative.
BY THE WITNESS:
A What I have seen is you guys attaching stuff after the fact that was never attached to the original document.
So with that caveat in mind, I will tell you that I am not certain that this document was attached to the email. And I have no reason to be

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in that IRS notice that you won't show me that is stuff you should have known and didn't.
I can tell you that you spent all of two hours determining that there was no transferee liability and the guy that made that determination is dead, and I -- and we can't even ask him any kind of questions about how he arrived at that.
The main problem that I have with -- with -- with PwC is that they kept secrets from us. They never gave us an opinion, they never told us what the potential pitfalls of the transaction were, which the judge seized on in the tax case.
Q So you said that PwC took money from Fortrend in the Enbridge transaction, there's some IRS notice that you claim I won't show you. What are you talking about?
A The notice that's in contention in this case that I -- that you keep asking me about, 2008 something 111. I don't know. Whatever it is.
Q Whatever --
A I asked you --
Q -- about the --
A I asked you twice to show me that notice and you refused to show to me.

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Q I -- what is it about 2008-111 that PwC should have told you in 2003?
A Oh, not in 2003, no. In 2008 they should have told me.
Q Okay --
A In 2003 they should have disclosed that they knew what was going on and they should have known that they were giving conflicting advice to different clients that they didn't disclose.
You have some kind of a goofy, I don't know what it is, I'll call it a wall set up between accountants over there where one accountant can't talk about what another accountant did.
So you've given advice in these -- in these Midco cases -- and we're going to call them all Midco cases -- you -- your -- your client has given conflicting advice in Midco cases under the same facts.
Sometimes -- sometimes you give advice go ahead and do the deal, sometimes you give advice don't do the deal, and sometimes you give advice, hey, pay me and I'll -- and I'll hook you up.
So I don't know what else -- what else do you want to know. And the -- and the

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transferee -- the entire transferee liability theory, which we don't know what your transferee liability theory was and we'll never know.
Q What would you have done in 2003 if you had learned, as you claim today, that PwC received money from Fortrend in the Enbridge transaction?
A I wouldn't have -- that's a clear conflict of interest, and I would have fired you immediately.
Q What would you have done with respect to the sale of Westside?
A I would have probably tried to find another accounting firm to give me another opinion. I wouldn't have done the deal with Westside for sure in September of 2009 depending on when that came up.
I don't think I could have hired another accounting firm and gotten a -- I couldn't hire -- I told you before I couldn't hire KPMG and if -- if PwC was out, I would have to go find another accounting firm of some stature to give me another opinion.
That wouldn't have happened immediately. I would not have done that deal.
Q If you had gotten another opinion from

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another accounting firm, would you have gone through with the sale?
A Depends on what the opinion was.
Q With respect to transferee liability, what did Mr. Stovsky tell you about transferee liability?
A He told me that there's not a problem with transferee liability. And it was not couched in any kind of 51/49 percentage. He understood why I retained him and he understood that there was -- he told me there was no problem with transferee liability or -- or words to that effect.
And I don't think we were using the term transferee liability. I told you before, I think we were using the term that it could -- the IRS could come back at me. Which is the only way the IRS can come back at me is transferee liability.
So -- can I finish? So -- and -- and -- and you guys in papers that we have -- you -- we have seen since the onset of this case and in the tax case, you guys had a lot of notes, a lot of things that you were discussing that you didn't clue us in on.
You're looking at -- at my bills from my lawyers, looking at what they're discussing,

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A Okay, now you're mischaracterizing my testimony.
Q I'm not trying to. Tell me what evidence you have that PwC knew in 2003 of a Fortrend scheme not to follow through on whatever Fortrend said it was going to do?
A We have notes to file that you people wrote to one another.
Q That say what about knowledge of Fortrend -- of a Fortrend scheme?
THE WITNESS: I -- I -- I don't know where to go with this, Scott. I really don't know where to go with this because he's playing stupid now, and I am not going to go along with that, okay?
BY MR. LANDGRAFF:
Q Can you answer my question, sir?
A I did answer your question.
Q No, you haven't, and so I'll ask it again. And if you can't answer it, that's okay, but the question is, what -- what evidence do you have that PwC knew in 2003 of a Fortrend scheme for Fortrend not to follow through on whatever Fortrend said it was going to do?
MR. HESSELL: Objection, asked and answered. He identified --

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MR. LANDGRAFF: He hasn't -- don't testify for him, Scott.
MR. HESSELL: I'm not --
MR. LANDGRAFF: Don't testify for him.
MR. HESSELL: I'm not. It's right there. I mean, I'm read -- I'm literally --
MR. LANDGRAFF: I'd like --
MR. HESSELL: -- just reading what he's already said.
MR. LANDGRAFF: I'm sorry to talk over you. I'd like an answer to my question.
BY MR. LANDGRAFF:
Q Mr. Tricarichi --
MR. HESSELL: He gave you --
BY MR. LANDGRAFF:
Q -- answer the question, please do so. If not, just say you can't answer it, and I'll move on.
A I'm telling you that you have produced documents that show that Fortrend -- that -- that PwC knew the plan that Fortrend had to reduce the tax liability. That's what I'm saying, okay?
Q Do you have any evidence of what you called Fortrend's intention not to follow through on what Fortrend said it was going to do? Do you

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have any evidence that PwC --
A Where did that come from?
Q I'm asking you.
A You -- you better lay some kind of foundation for that because I don't know where that's coming from.
Q Okay. So you don't have any information or evidence to suggest that PwC knew that Fortrend intended not to follow through on what Fortrend said it was going to follow through on in 2003?
MR. HESSELL: Objection, asked and answered, and mischaracterizes what the witness just said.
You can answer if you can.
BY THE WITNESS:
A I think I've already answered it. I don't know what more I can say. I don't know where you get the failed to follow through part. They followed through just fine. Fortrend followed through just fine.
BY MR. LANDGRAFF:
Q So what do you contend PwC should have told you about what you claim PwC knew of Fortrend's plan?
A Look, they should have given me

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information on what the plan was and what the degree of difficulty was of that plan and how the IRS would look at that plan and what the likelihood was that the IRS was going to bounce the plan.
Not only that, but your knowledge, just your knowledge of this plan is attributed to me. Based on this Notice 2008-111, it's attributed to me. And I -- and you didn't give me the information.
Go to number four. "An officer or director of T engages in the transaction pursuant to the plan or any of the following knows or has reason to know the trans- -- the transaction is structured to effectuate the plan.
"Any officer or director of T. Any of T's advisors by T to invade -- to advise T or X with the respect to the transaction or any advisor of X engaged by that -- engaged by that X to advise it with respection -- with respect to the transaction."
You are the advisor. PwC is the advisor. And the judge in the tax case attributed your knowledge of the plan to me, which I had no knowledge of.

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Q What do you --
A Could I be more clear?
Q What do you contend you would have done if PwC had told you whatever it is you claim PwC should have told you in 2008 after Notice 2008-111 came out? What would you have none?
A I would not have done the transaction. If I knew that there was a risk of -- in this transaction that it was going to blow up, I wouldn't have done it. I made that clear to Stovsky when he was retained.
Q That -- that wasn't my question. What do you contend --
A (Unintelligible) just said what would I have done if I'd had known. And I said I wouldn't have done the transaction --
Q Okay. What --
A -- what don't you understand?
Q Well, let --
MR. HESSELL: Take a breath --
BY MR. LANDGRAFF:
Q -- why don't you calm down.
MR. HESSELL: -- 2008.
BY MR. LANDGRAFF:
Q Do you want to take a break?

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A No, I don't need a break. Go ahead.
Q Okay. So try to listen to my question and stop yelling at me, okay?
Are you --
A Then ask --
Q -- ready?
A -- legitimate questions and stop going over the same material 16 different times.
Q Okay. Here's the question: What would you -- what do you contend you would have done if PwC had told you whatever it is you claim PwC should have told you in 2008 after 2008-111 came out? What would you have done?
A I would have settled with the IRS.
Q And how much would you have settled with the IRS for?
A I don't know, whatever I could get. My problem with settlement with the IRS was we never got to the point where they were reasonable in terms of what the settlement was.
I was getting advice from counsel as far as what the settlement should be, okay? The IRS never got to that point. The reason they never got to that point is because as long as we were in the -- I don't know what you call it -- the

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litigation section of the IRS, they had directives as to what they could or could not do with Midco cases.
Q So how do you know you could have settled with the IRS if PwC told you whatever you claim today that PwC should have told you in 2008, how do you know you could have settled with the IRS?
A Because we would have got -- we would have acknowledged the -- the document -- just like, I don't know, you showed me a couple of documents on here where we could have just signed off on it, acknowledged that we owed the tax.
We would have knowledged -- acknowledged that we owed the tax. It would have gone to a different section of the IRS, what Desmond used to refer to as the adults in the room, and they would have settled for a much lower number than the people who were structured and had no ability or no flexibility to settle.
Q What amount could you have gotten then --
A I don't know. They're telling me between a million five and 5 million.
Q Why didn't the IRS ever make an offer in that range?
A I just explained --

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MR. HESSELL: Objection -- hold on. Hold on. Hold on.
Why didn't they ever -- objection to foundation and calls for speculation about the IRS.
BY MR. LANDGRAFF:
Q Why did you never get into that range with the IRS?
MR. HESSELL: Same objection.
BY THE WITNESS:
A Because the litigation squad had specific settlement instructions from the IRS and they were not authorized to come down to a level that we could afford to settle at.
Had we acknowledged the debt and not gotten -- and not gone to court and not gone to trial, we would have been transferred to the collection section of the IRS and we would have gotten a substantially better deal, I think, and -- and that was my advice -- that I was getting, not that I was giving -- my advice was we could have settled at that point in time for substantially less, somewhere in the neighborhood of between a million five and $5 million.
We thought we had to beat this thing

Exhibit 18

Message

From: gary.cesnik@us.pwc.com [gary.cesnik@us.pwc.com]
Sent: 4/2/2008 1:08:13 PM
To: elaine.church@us.pwc.com
CC: tax core qrm
Subject: Re: US District Court concludes that Midco transaction on which we provided advice was a sham
Attachments: 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 a was a sham

FYI .....

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.

========== **CASE NAME** ==========

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

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 long-term 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 $23,816,420, $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, Midcoast[6] 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, concluding that the liquidation and dissolution were genuine transactions and that at no time did 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 stockholders rather than the corporation. *Id.* 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. *Id.* Pemrich retained as an apparent profit $1,931.71 on the deal. *Id.* 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 Corporation ("New Reef"), and received all of the common stock of New Reef in exchange for a portion of their stock in 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 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 purportedly relied. With respect to the adequate disclosure/reasonable basis exception, it is undisputed that 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. (Pl.'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. (Pls.' 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.

[8] 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

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

Enbridge Energy 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 Enbridge Energy 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

FOR INTERNAL USE ONLY

Take-Aways to Discuss with Clients

1. **Court applied Substance over form principles based on Conduit Theory (Court Holding Co. and other authorities). The Step Transaction and Economic Substance doctrines were mentioned but the Court did not need to address.**
2. **In Enbridge Energy, the benefit of the structure was denied to the purchaser of assets. In Blueberry Land Co., 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

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 may result in over-disclosure or under-disclosure of the transaction 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 T's Built-in Tax. 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 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), all or most of T's 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. 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. All or most of T's Built-in Tax described in component one that would otherwise result from the disposition of the Sold T Assets described in component three is purportedly offset or avoided or not paid.

Exhibit 21

December 1, 2008

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

By Sean C Pheils

Rating: (U) Useful **LoS:** Tax **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'

independent legal entity.

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 for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

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

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

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

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

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

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

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

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

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

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

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

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

01. Safe Harbor Exceptions for Certain Persons

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

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

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

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

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 for purposes of this Notice if there is neither any X nor any Y engaging in the transaction pursuant to the Plan (as defined in section 4).

SECTION 3. COMPONENTS OF AN INTERMEDIARY TRANSACTION

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

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

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

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

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

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

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

SECTION 4. ENGAGING IN THE TRANSACTION PURSUANT TO THE PLAN

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

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

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

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

01. Safe Harbor Exceptions for Certain Persons

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- 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

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

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 v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 23630-12. Filed October 14, 2015.

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

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

MEMORANDUM FINDINGS OF FACT AND OPINION

LAUBER, Judge: 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.

[1]For 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, clarified by 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 Diebold Found. Inc. v. Commissioner, 736 F.3d 172, 175-176 (2d Cir. 2013), vacating and remanding 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

[*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

[2]Unless 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 hands-on role in the lengthy litigation that ensued. Hahn Loeser lawyers described him as a constant presence at the firm throughout this period.

[*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

[*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-

[3]Petitioner'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/charged-off" 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

[4]West 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-

[*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] Preparation for the Closing

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

[5]The $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. See, e.g., Salus Mundi Found., T.C. Memo. 2012-61; Slone, T.C. Memo. 2012-57; Frank Sawyer Trust of May 1992, T.C. Memo. 2011-298; Diebold, T.C. Memo. 2010-238; LR Dev. Co. LLC v. Commissioner, 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:

[*26]

Tax year	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 transferee-liability 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:

[6]In 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. See sec. 6901(c) and (d). 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] Deficiency	Penalty sec. 6662(a), (d)	Penalty sec. 6662(h)
$15,186,570	$61,851	$5,950,926

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. See sec. 7482(b)(1)(A); Golsen v. Commissioner, 54 T.C. 742, 757 (1970), aff'd, 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." Popov v. Commissioner, 246 F.3d 1190, 1195 (9th Cir. 2001) (quoting Unger v. Commissioner, 936 F.2d

[7]In 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), aff'g T.C. Memo. 1990-15), aff'g in part, rev'g 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. Commissioner v. Stern, 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); Commissioner v. Stern, 357 U.S. at 45; Hagaman v. Commissioner, 100 T.C. 180, 183 (1993). State law thus determines the transferee's substantive liability. Ginsberg v. Commissioner, 305 F.2d 664, 667 (2d Cir. 1962), aff'g 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." Starnes v. Commissioner, 680 F.3d 417, 429 (4th Cir. 2012), aff'g 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. See Commissioner v. Stern, 357 U.S. at 45; Estate of Miller v. Commissioner, 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. See Diebold Found., Inc., 736 F.3d at 183-184; Starnes, 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); Welch v. Helvering, 290

[*32] U.S. 111, 115 (1933); see United States v. Williams, 514 U.S. 527, 539 (1995) (noting that "the Code treats the transferee as the taxpayer" for this purpose); L.V. Castle Inv. Grp., Inc. v. Commissioner, 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

[8]Whether the burden has shifted matters only in the case of an evidentiary tie. See Polack v. Commissioner, 366 F.3d 608, 613 (8th Cir. 2004), aff'g T.C. Memo. 2002-145. In this case, we discerned no evidentiary tie on any material issue of fact. See Payne v. Commissioner, 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. See Agro Sci. Co. v. Commissioner, 934 F.2d 573, 576 (5th Cir. 1991), aff'g T.C. Memo. 1989-687; Simon v. Commissioner, 830 F.2d 499, 500-501 (3d Cir. 1987), aff'g T.C. Memo. 1986-156; Cullifer v. Commissioner, 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

[9]Petitioner 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. See, e.g., Kenna Trading, LLC v. Commissioner, 143 T.C. 322 (2014), aff'd, 728 F.3d 676 (7th Cir. 2013); Superior Trading, LLC v. Commissioner, 137 T.C. 70 (2011); Rogers v. Commissioner, T.C. Memo. 2014-141; Rogers v. Commissioner, T.C. Memo. 2011-277, aff'd, 728 F.3d 673 (7th Cir. 2013); Sterling Trading, LLC v. United States, 553 F. Supp. 2d 1152 (C.D. Cal. 2008).

[10]Petitioner 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 infra pp. 61-63.

[*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. Petitioner's Liability as Transferee of West Side

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.

[*36] A. Petitioner's Substantive Liability Under Ohio Law

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. See 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.

[11]Ohio Supreme Court opinions considering the treatment of uniform acts by courts of other States include Al Minor & Assoc., Inc. v. Martin, 881 N.E.2d 850 (Ohio 2008) (Uniform Trade Secrets Act); Cruz v. Cumba-Ortiz, 878 N.E.2d 620 (Ohio 2007) (Uniform Interstate Support Act and Uniform Reciprocal Enforcement of Support Act); Erie Ins. Grp. v. Fisher, 474 N.E.2d 320 (Ohio 1984) (Uniform Declaratory Judgments Act); Levi v. Levi, 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. See Wagner v. Galipo, 553 N.E.2d 610, 613 (Ohio 1990); Locafrance United States Corp. v. Interstate Distrib. Servs., Inc., 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. See id. 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. See id. 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." Id. 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. See Sease v. John Smith Grain Co., 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"); Nelson v. Walnut Inv. Partners, L.P., 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." Ibid. 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. Petitioner's Status Under Ohio Law as a "Transferee"

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. Sham Loans

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 For-trend affiliate. Ohio courts have consistently allowed finders of fact, in appropriate circumstances, to disregard transactions as shams. See, e.g., Rowe v. Standard

[12]Respondent 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] Drug Co., 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."); Selanders v. Selanders, 2009 WL 1365226, at *11 (Ohio Ct. App. 2009) (affirming the trial court's decision and agreeing that "the entire transaction was quite possibly nothing more than a sham"); Galley v. Galley, 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 fraudulent transfer[.]"); Phillips v. Phillips, 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." See OUFTA sec. 1336.01(L). Petitioner was thus was a "transferee" of West Side under Ohio law.

b. De Facto Liquidation of West Side

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." Salus Mundi Found., 776 F.3d at 1020. Addressing the application of New York law to that same Midco transaction in Diebold Found., Inc., the Court of Appeals for the Second Circuit held that multi-party 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

[*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. See supra pp. 36-37 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]

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[13]Petitioner argues that Ohio law does not permit transactions to be collapsed, citing Official Comm. of Unsecured Creditors of Grand Eagle Cos. v. Asea Brown Boveri, Inc., 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. HBE 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." HBE Leasing Corp., 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. Diebold Found., Inc., 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

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[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.

[*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

[14]Under regulations in effect during 2003, "[a] position * * * [was] considered to have a realistic possibility of being sustained on its merits" if a well-informed 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-

[15]In 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. See Diebold Found., Inc., 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 HBE Leasing Corp., 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." Diebold Found., Inc., 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." Ibid. 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]

[16]As the Second Circuit explained in Diebold Found., Inc., "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 complete 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

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

[17]See, e.g., sec. 302(b)(4)(B), (e) (defining "partial liquidation"); Armstrong v. Marathon Oil Co., 513 N.E.2d 776 (Ohio 1987) (noting that corporation was considering complete or partial liquidation to prevent hostile takeover); Cleveland Tr. Co. v. Hickox, 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. See Salus Mundi Found., 776 F.3d at 1019-1020

[*56] (following the Second Circuit's analysis to the same effect in Diebold Found., Inc.). 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. Petitioner's Liability Under Ohio Law as a "Transferee"

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. When the IRS Claim Arose

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

[18]Respondent 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. See sec. 6901(c)(2); Frank Sawyer Trust of May 1992 v. Commissioner, 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." Id. 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." Ibid. A "creditor" is any person who has a "claim." Id. 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. See Zahra Spiritual Tr. v. United States, 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. Stuart v. Commissioner, 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 Nob Hill 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. "Reasonably Equivalent Value"

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. See Shockley v. Commissioner, 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. West Side's Insolvency

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. Id. 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." Id. 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]

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[19]The 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 or future 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. Petitioner's Liability Under Ohio Law For Penalties

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 Stanko v. Commissioner, 209 F.3d 1082 (8th Cir. 2000), rev'g T.C. Memo. 1996-530.

In Stanko, the Eighth Circuit interpreted Nebraska law in effect before 1989, when Nebraska adopted the UFTA. See id. 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." Id. 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." Ibid. 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." Id. at 1087 (quoting U.S. Nat'l Bank of Omaha v. Rupe, 296 N.W.2d 474, 476 (Neb. 1980)).

We find the Stanko 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." Stanko, 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. See, e.g., Kreps v. Commissioner, 42 T.C. 660, 670 (1964) (New York law), aff'd, 351 F.2d 1 (2d Cir. 1965); Cullifer, T.C. Memo. 2014-208, at *30, *74 (Texas law); Feldman v. Commissioner, T.C. Memo. 2011-297, 102 T.C.M. (CCH) 613, 623 (Wisconsin law).[20]

[20]In Frank Sawyer Trust of May 1992 v. Commissioner, T.C. Memo. 2014-128, at *10-*11, this Court cited Stanko, 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 Frank Sawyer Trust, 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." Frank Sawyer Trust of May 1992, 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.

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

Whether a person is a "transferee" within the meaning of section 6901 is "undisputedly [a question] of federal law." Starnes, 680 F.3d at 427; see Slone, __ F.3d __, 2015 WL 5061315; Feldman, 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. See Slone, __ 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." Id. 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] Id. at __, 2015 WL 5061315, at *5 (quoting Reddam v. Commissioner, 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." Id. (quoting Reddam, 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. See supra p. 40

[21]At least two other Circuits have previously ruled similarly. See Feldman, 779 F.3d at 454-457 (7th Cir. 2015); Owens v. Commissioner, 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 Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945))), aff'g in part, rev'g in part, 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. Respondent's Collection Efforts

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. See Sharp v. Commissioner, 35 T.C. 1168, 1175 (1961); Shockley v. Commissioner, T.C. Memo. 2015-113, at *54; Kardash v. Commissioner, T.C. Memo. 2015-51, at *22-*24; Zadorkin v. Commissioner, 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.

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. Alexander v. Commissioner, 61 T.C. 278, 295 (1973); Cullifer v. Commissioner, 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." Estate of Harrison v. Commissioner, 16 T.C. 727, 731 (1951) (citing Phillips v. Commissioner, 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." Id. 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. See OUFTA sec. 1336.08(B); Shussel v. Werfel, 758 F.3d 82 (1st Cir. 2014) (discussing the calculation of

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

To reflect the foregoing,

Decision will be entered under Rule 155.

Exhibit 38

PRICEWATERHOUSECOOPERS

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

PRICEWATERHOUSECOOPERS

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. [redacted] (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.

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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

PRICEWATERHOUSECOOPERS

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

Fees

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

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

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

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

* * * * *

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

PRICEWATERHOUSECOOPERS

Yours very truly,

PricewaterhouseCoopers LLP

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

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

By: _____ Date: 4/25/03

PER DISCUSSION W/ M. TRICARICHI

1. HE UNDERSTANDS AND AGREE THAT THIS IS REQUIRED

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

— DISCUSSED W/ RON PADGETT

Exhibit 51

PRICEWATERHOUSECOOPERS

Memo

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

From: / Location: Richard P. Stovsky

Date: April 13, 2003 <update>

Subject: Potential transaction

NOTE: ALL CONCLUSIONS DISCUSSED WITH TRICARICHI, AND JIM TRICARICHI, WERE CLEARLY QUALIFIED AS "MORE LIKELY THAN NOT". FURTHER, NO WRITTEN ANSWERS WERE PROVIDED TO TRICARICHI.

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 Newco~~:

- 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

Exhibit # Plaintiff 4 08/04/20 - AB exhibitsticker.com

PRICEWATERHOUSECOOPERS

- 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 PORTION OF THE PROCEEDS RECEIVED FROM THE PURCHASER AS FOLLOWS:

PRICEWATERHOUSECOOPERS

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)
TAXABLE INCOME:	$40,000,000
CORPORATE FEDERAL TAX RATE:	34%
FEDERAL TAX:	$13,600,000
AMOUNT AVAILABLE FOR LIQ. DIST.:	$26,400,000
COMPARE WITH ACTUAL PROCEEDS	$34,000,000
AMOUNT RECHARACT. AS ORD. INC.	$ 7,600,000

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).

PRICEWATERHOUSECOOPERS

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.

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? SEE THE STATE TAX MEMO WRITTEN BY DAVID COOK AND RAY TURK OF SALT.

PRICEWATERHOUSECOOPERS

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;

Note - No installment sale will be used for state tax. (to be non-Ohio returns) per Joey Tuck.

PRICEWATERHOUSECOOPERS

Memo

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:

- 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

PRICEWATERHOUSECOOPERS

Memo

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:

- 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)

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- 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

$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?

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?

PRICEWATERHOUSECOOPERS

Memo

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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- 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
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$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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PRICEWATERHOUSECOOPERS

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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?

PHC - lawsuit income not PHC income -
interest earned may be, but not over 60%

AA - ? no accumulation
- has claim but always been in
company

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

PRICEWATERHOUSECOOPERS

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

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

April 10, 2003

Dear Mr. Tricarichi:

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

Summary of Services

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

Timing of Engagement

We will be prepared to begin immediately.

Tax Return Disclosure and Tax Advisor Listing Requirements

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

EXHIBIT
PwC Dep Ex. No.
13
A-16-735910-B

PRICEWATERHOUSECOOPERS

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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Westside Cellular, Inc.
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PER DISCUSSION W/ M. TRICARICHI:

1. HE UNDERSTANDS AND AGREES THAT THIS IS REQUIRED

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

– DISCUSSED W/ RON PADGETT

PRICEWATERHOUSECOOPERS

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

Fees

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

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

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

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

* * * * *

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

PRICEWATERHOUSECOOPERS

Yours very truly,

PricewaterhouseCoopers LLP

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

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

By: _____ Date: 4/25/03

(3)

rms of Engagement to Provide Tax Ser . . ces

1. Entire Agreement

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

2. Responsibilities of the Client

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

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

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

3. Responsibilities of PricewaterhouseCoopers

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

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

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

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

4. Electronic Communications

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

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

5. Engagement Limitations

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

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

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

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

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

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

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

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

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

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

9. Resolution of Differences
In the unlikely event that differences concerning this Agreement should arise that are not resolved by mutual agreement, to facilitate judicial resolution and save time and expense of both parties, PricewaterhouseCoopers and the Client agree not to demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement.

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

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

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

Revised 04/08/03

077

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.

Exhibit 69

IN THE UNITED STATES TAX COURT

In the Matter of:	)	
	)	
MICHAEL A. TRICARICHI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No: 23630-12
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

Pages: 1 through 100

Place: Washington, DC

Date: June 9, 2014

Discount Cellular, and we maintained -- well, LXV maintained customer service for the base and they continued to do the billing and the collecting and that kind of thing.

Q So how long did that whole process take to play out, then? The LXV --

A I want to say -- I want to say with the two different buyers, probably about three years, three or four years, something like that.

Q Okay. So you told us about the customer base and trying to manage the customer base. Were you also thinking at the time about what to do about what to do with Westside as a corporate entity?

A Yeah. We were going -- we knew what we were going to do with it. We were going to make it a real estate investing operation. I had previous -- as I told you before, I had previous real estate experience in managing apartments and stuff like that.

So we were looking for things to buy, real estate, you know, things like that. And so we had a number of options that we could pursue.

I had Hahn Loesure came to us and said we want to do some planning as far as your tax liabilities go for the Cellnet and Westside. I think

at that time Westside had about $40 million left from paying Hahn Loesure and paying the bonuses, et cetera.

So one of the things we looked at was converting it back to a sub S, which wasn't really an option. We looked at the possibility of closing it, which wasn't really an option. And we also looked at the opportunity of selling it.

Q So I think you alluded to this, but just to ask you directly. Taxes, was that an important consideration for you at the time?

A It was. It was. Because it was a C corporation if I took any money out of it or if I closed it, I would be double-taxed. I would be -- the corporation would owe the tax and then I would owe tax on the money that I took out of it. So that was never a consideration. Closing the corporation down was never really a viable consideration.

Q Okay. And did you, personally, look into the tax issues or how did you -- how did you --

A No. I hired -- first I hired Hahn Loesure to give me advice on the tax issues separate and apart from the litigation that they were doing with the carriers. And then they came up with this entity called Midcoast. And they had told me that they had

did -- they had done a couple of deals with Midcoast and they were good deals and I should look at that.

So we had a meeting at Hahn Loesure with a representative from Midcoast and he made a pitch to us. And, you know, we nodded our head and said, Okay, that sounds like an interesting idea.

And my brother Jim, who was doing some accounting work for us at the time, I believe was at that meeting as well. He talked to another accountant that he knew, a guy by the name of Don Jasco (phonetic). And he talked to a guy by the name of Gary Zwick.

And Gary Zwick had some affiliation with this company called Fortrend. So when my brother and Jasco talked to Zwick and said, Oh, we've got a guy for you, we've got the company that does what Midcoast does.

So my brother Jim -- or I don't know who made the contact with Fortrend, but ultimately, we had a meeting with Fortrend, as well. And, you know, basically now we've got two companies who are interested in purchasing Westside.

Q Okay. Let me take you back to just one point you made earlier. You mentioned the prospect or possibility of real estate investments.

IN THE UNITED STATES TAX COURT

In the Matter of:	)	
	)	
MICHAEL A. TRICARICHI,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No: 23630-12
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent.	)	

Pages: 101 through 201

Place: Washington, DC

Date: June 9, 2014

that.

MR. DESMOND: Okay.

BY MR. DESMOND:

Q Going back, then, to the Fortrend offer, Mr. Tricarichi, we've talked about the $65 million and the tax consequences surrounding that consideration between PWC.

Did you have any understanding as to what was going to happen to the taxes, whatever that amount might be, that Westside might owe?

A Fortrend was going to make sure that the taxes got satisfied.

Q Do you know how they were going to make sure the taxes got satisfied?

A No. That was why I hired the outside experts.

Q Okay. Did your advisers look into that for you?

A I believe they did. To some -- to some degree I think PWC did.

Q Okay. And you mentioned earlier this -- well, let me come back to that in just a second. But were the specific terms in Exhibit 1-J, the stock purchase agreement, that addressed the taxes that you recall?

A The only term that addressed the taxes was that they were taking -- they took the tax obligation for anything -- any income that came in after the 1st of January of 2003.

Q Okay. And if I could have you look at page 23 of Exhibit 1-J. And in particular I'm looking at Section 5.2. Are you familiar with that particular --

A Yes.

Q -- agreement? And what is Section 5.2? It's got two subparts. But starting with Subpart A, what does that provision tell us?

A Subpart A is basically what I just said. That they, being Fortrend, were responsible for preparing -- I'm sorry.

We were responsible for preparing a pre -- a pretax whatever you want to call it and they were responsible for anything -- here. I'll read the line.

It says: Subject to Section such and such, buyer shall cause company to prepare and file timely at their own cost and expense all returns for taxes required to be filed by a company in respect to periods ending after closing date. Buyer shall cause company to satisfy all United States federal, state,

local, and franchise taxes, penalties, and interest required to be paid by a company attributable to income earned during the tax year January 1st, 2003, and for all tax years thereafter.

So Fortrend was committing to us that they were responsible for making sure that anything -- any income that was triggered from January 1st, 2003, forward, they were going to take care of the tax on that.

Q Does this agreement say anywhere how they're going to do that?

A No, it doesn't.

Q Does it say anywhere that they have to take some specific steps or any transactions? Does it tell them --

A Like a specific strategy or something?

Q Correct.

A No. There's nothing like that.

Q Okay. So as far as you knew, they could have cut a check to pay for the tax?

A If that was what they wanted to do, sure.

Q Okay. But it's their responsibility?

A Either way this agreement provided that they would satisfy whatever taxes were due.

Q And read it if you want to, but

Q And what did they say?

A Well, part of it was proprietary. They weren't telling us what they were going to do as far as minimizing the tax goes. They had a couple of options. I think -- I think PWC looked at one of them.

But we had nothing in the purchase agreement that spoke to a specific thing that they were going to do after they purchased the company. There was nothing -- all -- the only thing we had in the agreement was they were going to satisfy the tax obligation of Westside.

Q Okay.

A Okay. They didn't say how they were going to do it. They just said they were going to do it. And we had a lot of reps and warrants to that effect.

Q Thank you. Can you turn to Exhibit 26-J, please?

A 26-J, got it.

Q This is the letter of intent from Nob Hill Holdings to you.

A Yes.

Q And Nob Hill Holdings is the acquisition company that Fortrend used; is that correct?

A That's my understanding.