No. 82371

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICEWATERHOUSECOOPERS LLP,

Petitioner,

v.

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

Respondents,

and

MICHAEL A. TRICARICHI,

Real party in interest.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

The district court denied PwC's motion to strike Tricarichi's jury demand solely because "there is no rider that is signed or initialed by Plaintiff waiving the jury trial." APP1306. In his Answer, real party in interest Michael Tricarichi does not even attempt to defend the district court's stated rationale. This silence demonstrates the indefensibility of the district court's reasoning. "Nevada contract law d[oes] not require evidence that [a party] sign[ed] each page" of a contract. *Energetic Lath & Plaster, Inc. v. Cimini*, No. 66657, 2016 WL 7439346, at *2 (Nev. Dec. 22, 2016).

Rather than defend the district court's actual ruling, Tricarichi mischaracterizes the district court's decision as a "factual determination." Michael Tricarichi's Answer to PricewaterhouseCoopers LLP's Petition for Writ of Mandamus ("Answer") at 2. Tricarichi claims the district court weighed evidence, assessed credibility, and made a factual finding that Tricarichi did not receive the Terms of Engagement containing the jury trial waiver along with the engagement letter. *See id.* at 10, 17, 21-24. The district court did no such thing. The district court did not weigh evidence or evaluate anyone's credibility. Doing so would

have been improper on a paper summary judgment record. Instead, the district court refused to enforce the jury trial waiver on the legally erroneous ground that Tricarichi had not separately signed or initialed the Terms of Engagement, even though it was undisputed that the Terms of Engagement were expressly incorporated in the contract Tricarichi signed.

The district court's error presents a classic case for a writ of mandamus. The district court's clearly incorrect interpretation of Nevada law constitutes a manifest abuse of discretion. And Tricarichi does not dispute that writ review provides the only opportunity PwC has for obtaining review of the district court's incorrect decision. *See Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92, 96-97, 40 P.3d 405, 407-08 (2002).

PwC's petition also presents an important unanswered legal question that goes to the heart of contractual jury waivers—"a matter of great importance" in Nevada. *Id.* at 97. That question is: When a contract expressly incorporates terms and conditions, including a jury trial waiver, can a party escape the waiver simply by asserting that he did not receive the terms and conditions at the time of contracting? Tricarichi

and the district court both say yes, but such a rule would create a significant loophole and undermine parties' confidence in their contracts. The better rule, and one that courts across the country have adopted when they have confronted these circumstances, is that when a contract explicitly incorporates terms and conditions, those terms are binding regardless of whether a party later claims that he did not physically receive the document at the time of contracting. *See* PwC's Petition for Writ of Mandamus ("Pet.") at 19-22.

Here, Tricarichi does not dispute that he signed the engagement letter with PwC, and that letter expressly defined the "Agreement" between the parties to include the "engagement letter and the **attached Terms of Engagement to Provide Tax Services**." APP0388 (bold text in original). Given this clear language, the Terms of Engagement are part of the contract as a matter of law. If Tricarichi did not receive a copy of the incorporated Terms with the engagement letter, it was incumbent upon him to ask for a copy *before* he signed the contract. But having signed the contract, the law presumes that Tricarichi knew of and assented to all its terms, including the jury trial waiver in the Terms of

Engagement. *See Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (citation omitted).

If, conversely, the Court concludes that Tricarichi's receipt of the Terms of Engagement is a condition to their enforceability, the Court should remand for an evidentiary hearing on that issue. Contrary to Tricarichi's representations, the district court has not already made a factual finding that Tricarichi did not receive the Terms. Any such finding on a paper summary judgment record would have been inappropriate given the substantial record evidence that Tricarichi *did* receive the Terms. If a factual determination regarding receipt is necessary, this Court should give the district court an opportunity to make that finding after an evidentiary hearing.

RESPONSE TO TRICARICHI'S RECITATION OF THE FACTUAL AND PROCEDURAL BACKGROUND

I. TRICARICHI MISCHARACTERIZES THE EVIDENTIARY RECORD REGARDING HIS ENGAGEMENT AGREEMENT WITH PWC

Tricarichi misrepresents the factual record on the issues germane to this petition. Tricarichi quotes his own self-serving and uncorroborated deposition testimony that he did not receive the Terms of Engagement with the PwC engagement letter. Answer at 8-9. Tricarichi

then claims that "PwC did not submit to the district court any evidence the Rider was attached to the Engagement Letter when it was provided to Mr. Tricarichi, or that the Rider otherwise was provided or available to Mr. Tricarichi when he executed the Engagement Letter." *Id.* at 9. This is simply false.

PwC submitted ample evidence to the district court that the Terms of Engagement were attached to the engagement letter. This evidence includes: (1) the plain language of the engagement letter itself, which states that the Terms of Engagement were "attached" and included as an "[e]nslosure[]," APP0388, APP0391; (2) the fact that Tricarichi never called PwC partner Richard Stovsky (as the engagement letter invited him to do, *see* APP0390) or anyone else at PwC to say he had not received the Terms of Engagement referenced in the letter, APP0448-49; and (3) Tricarichi's prior statements in his complaint, an affidavit, and briefs submitted to the district court in which Tricarichi either strongly implied or directly said that the Terms of Engagement were attached to the engagement letter, *see* Pet. at 9-10; APP0173-174 (Tricarichi brief stating the "rider [was] *attached* to the engagement letter that PwC sent Plaintiff" (emphasis added)).

What Tricarichi seems to mean by his claim that PwC did not submit "any evidence" is that PwC did not submit an "email, fax, or other documentation showing PwC sent the Rider with the engagement agreement." Answer at 9. Of course, documentation of what PwC physically sent Tricarichi by U.S. mail in 2003 does not exist. Nor is that kind of hyper-specific evidence required, especially given the specific incorporation language in the engagement letter that Tricarichi admits he signed. And while PwC's Richard Stovsky did testify that PwC did not have a specific record of what was sent to Mr. Tricarichi in 2003, he also testified that he "always . . . included the terms and conditions with the [engagement] letter," T.APP1332[1]; that he could "say with certainty that the terms and conditions were attached to the letter" he sent to Mr. Tricarichi because his "recollection is that they . . . always are," T.APP1332; and that he "recall[ed] the terms and conditions being in the [Tricarichi] file with the engagement letter," T.APP1332.

[1] Tricarichi's Appendix contains the same bates-numbering preface as PwC's Appendix: "APP." To avoid confusion between the two documents, PwC cites Tricarichi's Appendix as "T.APP."

II. TRICARICHI MISLEADINGLY DESCRIBES THE MERITS

Tricarichi devotes much of his recitation of the factual and procedural background to laying out his theory of the case on the merits. Answer at 3-7. Although most of what Tricarichi says is false, PwC will not respond to every point here. The question presented in this mandamus petition is narrow: *who* should decide the merits, a judge or a jury? Most of the facts Tricarichi recounts have no bearing on that issue.

But PwC must briefly respond to Tricarichi's claim that IRS Notice 2008-111 "made clear that Notice 2001-16 applied to the Transaction." *Id.* at 7. Tricarichi's claim against PwC centers on Notice 2008-111, which Tricarichi alleges created a duty on the part of PwC to inform him that his 2003 sale of Westside Cellular was an intermediary or "midco" tax shelter under IRS Notice 2001-16. *Id.* Tricarichi's only support for his assertion is a one-page general guidance document from PwC's Knowledge Gateway that provided a high-level overview of Notice 2008-111. *Id.* (citing T.APP1384-1385). That document in no way shows that Notice 2008-111 "made clear" that Notice 2001-16 "applied" to the Westside Transaction. The document does not mention Westside or Tricarichi at all.

Tricarichi fails to tell the Court that his own tax lawyers, whom he retained long after PwC's engagement ended, concluded that Notice 2008-111 did *not* apply to the Westside Transaction, and they made that argument forcefully to the IRS, the Tax Court, and the Ninth Circuit. For example, Glenn Miller of Bingham McCutcheon LLP sent the IRS a detailed letter on behalf of Tricarichi on October 9, 2009, in which he argued at length that the Westside transaction was *not* an intermediary transaction under Notice 2008-111. APP0605-609. Further, on October 26, 2010, Tricarichi's lawyers at Sullivan & Cromwell LLP sent the IRS a presentation that argued the Westside transaction was not an intermediary tax shelter under Notice 2008-111 because it lacked three of the four required elements under the Notice. APP0813-814.[2]

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[2] Tricarichi also overreaches when he claims that IRS Notice 2001-16 "specifically deemed the Midco Transaction an improper tax avoidance mechanism." Answer at 4-5. Tricarichi's only cited support for this claim is paragraph 58 of his own complaint, which simply contains a general description of Notice 2001-16. *Id.* at 5 (citing APP0188). In reality, Notice 2001-16 contains general standards whose application is not straightforward. The IRS "clarified" Notice 2001-16 multiple times. *See* APP0789-798. PwC concluded in 2003 that the Westside Transaction "more likely than not" was not an intermediary transaction under Notice 2001-16. APP0630-634. The "more likely than not" confidence level meant there was a 49.9% chance the IRS *would* deem the transaction to be reportable under Notice 2001-16. *See* APP0410-412.

This brief excursion into the merits illustrates an important point. Liability in this case will turn in large part on complicated tax issues and interpretation of densely worded IRS notices. That reality is one of the reasons the parties agreed in the original 2003 engagement agreement that neither PwC nor Tricarichi would "demand a trial by jury in any action, proceeding or counterclaim arising out of or relating to th[e] Agreement." APP0393. As the parties agreed at the time, the issues presented in this dispute are more appropriate for a judge to resolve than a jury. PwC's mandamus petition asks this Court to direct the district court to hold both PwC and Tricarichi to the terms of their bargain.

ARGUMENT

I. WRIT REVIEW IS WARRANTED IN THIS CASE

Contrary to Tricarichi's arguments, this petition presents a classic case for writ review because the district court committed a clear error and PwC has no other remedy. This Court has explained that "[a] writ of mandamus is available . . . to control a manifest abuse or arbitrary or capricious exercise of discretion," which includes a "clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *State v. Eighth Judicial Dist. Court*, 127 Nev. 927, 931-32, 267 P.3d

777, 779-80 (2011). Additionally, writ review is appropriate where the petitioner does not have "a plain, speedy, and adequate remedy in the ordinary course of the law." *Id.* at 931; *see also* NRS 34.170.

This petition checks both boxes. The district court clearly erred when it refused to enforce the jury trial waiver simply because Tricarichi did not separately sign or initial the Terms of Engagement containing the waiver. Tricarichi does not even attempt to defend that reasoning, which conflicts directly with Nevada law. *See Energetic Lath & Plaster*, 2016 WL 7439346, at *2 (Nev. Dec. 22, 2016).

Tricarichi also does not dispute that a writ of mandamus provides PwC's only opportunity for review of this issue. This Court held in *Lowe* that "extraordinary review is available when a district court denies a party's motion to strike a jury demand" because "there is not a plain, speedy and adequate remedy in the ordinary course of law." *Lowe*, 118 Nev. at 96-97 (citation omitted). Trying the case to a jury and then challenging the district court's ruling on direct appeal is not a viable option because PwC "would have too difficult a burden to meet upon appellate review" given the need to show that "the outcome of the case would have been different" absent the district court's error. *Id.* at 97. For

this reason, this Court routinely considers the enforceability of jury trial waivers on writ review. *See, e.g.*, *Casey v. Third Judicial Dist. Court*, No. 51593, 2009 WL 3188939, at *1-2 (Nev. Sept. 25, 2009) (denying mandamus petition challenging district court's order striking jury demand because district court correctly concluded jury trial waiver in consumer account agreement was valid); *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, No. 57784, 2012 WL 642746, at *2 (Nev. Feb. 27, 2012) (denying mandamus petition challenging district court order striking jury demand because district court correctly concluded jury trial waiver was valid).

The unavailability of appeal as an adequate remedy sets PwC's petition apart from the petitions in *Archon* and *Walker*, two of the cases Tricarichi relies on in his Answer. Answer at 11-13. In both cases, the Court denied writ review of issues the petitioner could readily challenge on direct appeal. *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 820-21, 407 P.3d 702, 707 (Nev. 2017) (denying writ review of district court's denial of motion to dismiss where petitioner "conced[ed]" that "an appeal is an adequate remedy at law"); *Walker v. Second Judicial Dist. Court*, 476 P.3d 1194, 1195 (Nev. 2020) (denying writ review of "factual

question" that "will be appealable by the petitioners . . . at the conclusion of their respective matters"). Unlike in *Archon* and *Walker*, the time to review the issues in PwC's mandamus petition is now or never.

PwC's petition also separately qualifies for "advisory mandamus." *MDC Rests., LLC v. Eighth Judicial Dist. Court*, 134 Nev. 315, 318, 419 P.3d 148, 151 (2018). This Court has granted advisory mandamus review where "'an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.'" *Id.* at 318 (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)). Advisory mandamus is appropriate "'when the issue presented is novel, of great public importance, and likely to recur.'" *Id.* at 318-319 (quoting *Archon*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017)).

PwC's petition presents such an issue. This Court has already declared that "the validity of contractual jury trial waivers is an important issue of Nevada law." *Lowe*, 118 Nev. at 97. While *Lowe* established the general principle that contractual jury trial waivers "are enforceable when they are entered into knowingly, voluntarily and intentionally," *id.* at 100, neither this Court (nor any Nevada court to

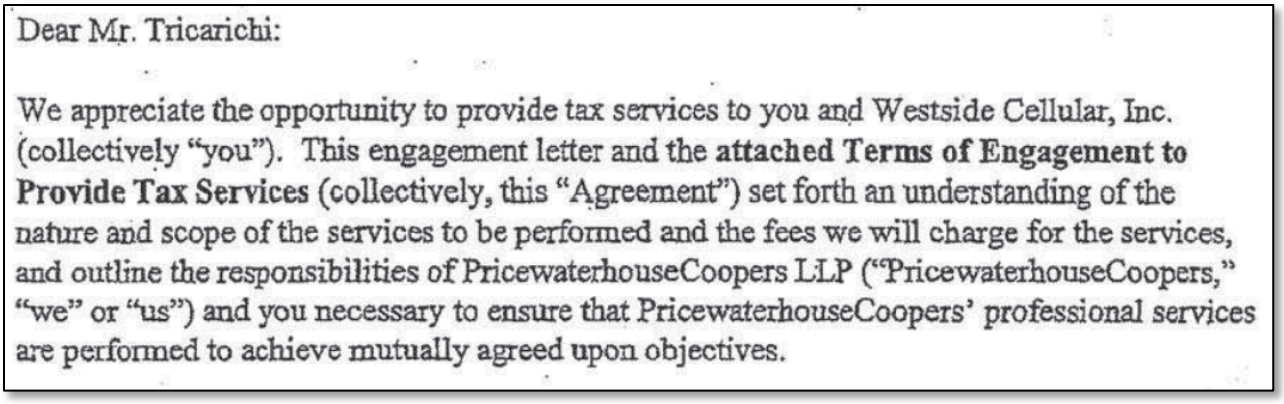
PwC's knowledge) has addressed whether a party can escape a contractual waiver simply by later claiming he did not receive the portion of the contract containing the waiver. This is an "important issue of law [that] needs clarification" because the district court's rationale creates a loophole that allows parties to evade contractual jury waivers. *MDC Rests.*, 134 Nev. at 318.

This petition presents far weightier concerns than *GGP Inc. v. Eighth Judicial District Court*, No. 76100, 2019 WL 1349858 (Nev. Mar. 22, 2019), which Tricarichi cites multiple times in his Answer. Answer at 12, 22. In that case, the Court denied a mandamus petition seeking review of a district court's finding that jury trial waiver provisions in several commercial leases were unenforceable. *Id.* at *1. The district court's order in *GGP* turned on a finding that the waivers were not sufficiently conspicuous. *See* No. 76100, Doc. 18-22957 at 5-6 (quoting district court order). The waivers consisted of a single sentence "found at the end of a non-descript paragraph with no heading on page 26 of a 31-page lease" that "was not highlighted or made conspicuous in any way." *Id.* at 5.

Notably, Tricarichi does not argue that the jury trial waiver in his Engagement Agreement with PwC was inconspicuous. Nor could he, as the waiver appears on the second page of the Terms of Engagement under the bold heading "**Resolution of Differences**." APP0393. But the salient point here is that *GGP* presented a fact-bound question about conspicuousness that did not merit writ review, whereas PwC's petition presents a question of law that goes directly to the enforceability of contractual jury trial waivers.

II. THE COURT SHOULD ENFORCE THE JURY TRIAL WAIVER

Tricarichi's Answer all but ignores the clear and unmistakable language in the engagement letter (which Tricarichi admits he received and signed) that incorporates the Terms of Engagement into the agreement. The second sentence of the letter makes clear in bold text that the Terms of Engagement are part of the "Agreement" between Tricarichi and PwC:

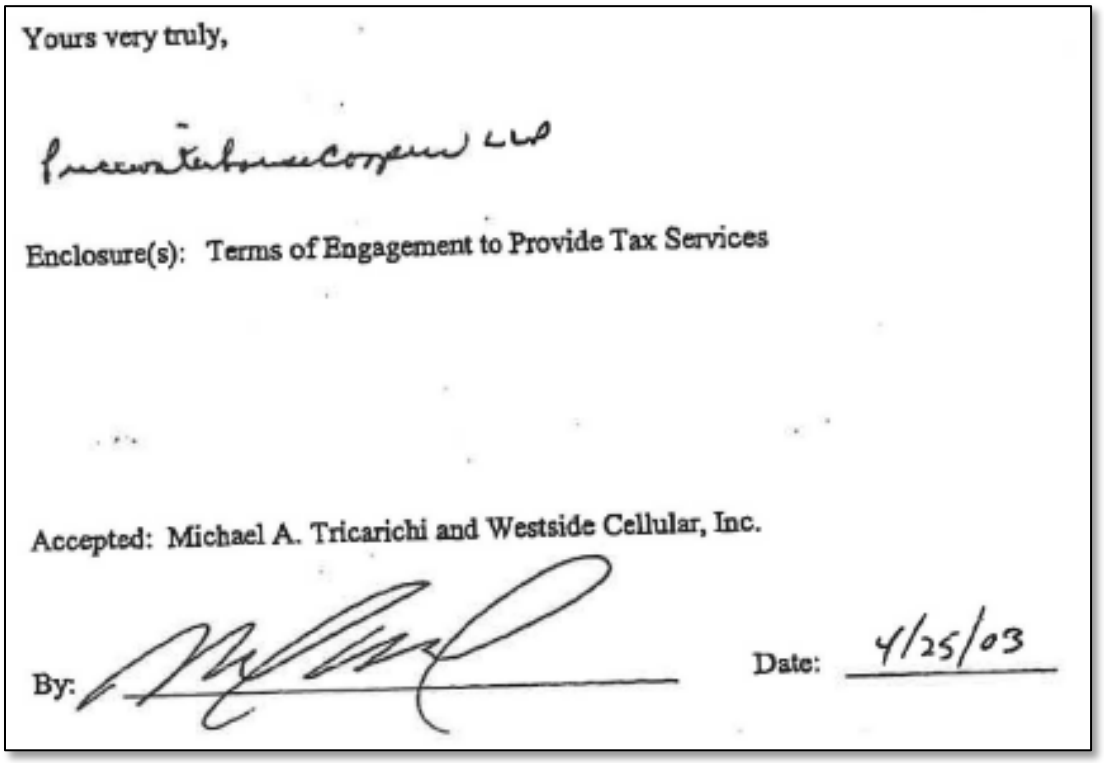


Dear Mr. Tricarichi:

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.

APP0388.

Further, Tricarichi signed the engagement letter directly below an indication that the Terms of Engagement were included as an enclosure:



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

APP0391.

The clear and unmistakable incorporation language in the engagement letter made the Terms of Engagement part of the contract as a matter of law. *See Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982) (if a document is "by express terms made a part of the contract, the terms of [that document] will control with the same force as though incorporated in the very contract itself").

Tricarichi does not dispute that the engagement letter incorporates the Terms of Engagement as part of the contract, or that under Nevada law the Terms of Engagement "control with the same force as though incorporated in the very contract itself." *Id.* Instead, Tricarichi claims that he can excise the Terms of Engagement from his contract with PwC simply by alleging, 17 years after the fact, that he did not physically receive a copy of the Terms when he signed the Engagement Agreement. *See* Answer at 15 ("Mr. Tricarichi's testimony that he never saw, received, or approved the Rider containing [sic] alleged jury trial waiver was a sufficient basis for the trial court to decline to enforce it.").

As explained in PwC's Petition, courts around the country that have confronted this same litigation tactic do not countenance it. *See* Pet. at 19-22. And with good reason. If a party can throw the terms of a contract

into doubt simply by claiming he did not receive an attachment before signing—even when the contract expressly incorporates the attachment and defines it as part of the "Agreement"—it will sow doubt and uncertainty in contract law. And in the specific context of jury trial waivers, it makes no sense to allow a party to create a "fact issue"—and thereby get a jury—simply by claiming not to have received the part of the contract containing the jury waiver.

Tricarichi's attempts to distinguish the authorities cited in PwC's Petition are unavailing. Tricarichi tries to distinguish *Madison Who's Who of Executive & Professionals Throughout the World, Inc. v. SecureNet Payment Systems, LLC*, No. 10-CV-364 (ILG), 2010 WL 2091691 (E.D.N.Y. May 25, 2010), on the ground that the contract there specifically stated that the plaintiff "received a copy of [the] Terms & Conditions." *Id.* at *1, *3. But the engagement letter here is crystal clear that the Terms of Engagement are part of the Agreement between Tricarichi and PwC, and that they were an enclosure to the letter. APP0388, APP0391. *Madison* did not turn on any particular magic words in the contract, but on the reality that "the Terms & Conditions were incorporated by reference into the Merchant Agreement and thereby

became a part of that agreement," just as the Engagement Agreement here incorporated the Terms of Engagement. *Id.* at *3.

Tricarichi cannot answer the key point from *Madison*: "If [Tricarichi] agreed to abide by this document without securing a copy of it for review or even contacting [PwC] for any information then such an omission of due diligence was negligent and will not relieve [Tricarichi] of [his] obligations under the agreement." *Id.* at *4. The *Madison* court found it significant that the contract "advised the merchant that it could either contact a sales agent or SecureNet directly if it had any questions about the Terms & Conditions." *Id.* PwC's engagement letter says the same thing: "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." APP0390. Indeed, Tricarichi made line edits to the engagement letter and sent them back to PwC, showing he had every opportunity to raise questions or ask about the Terms of Engagement before signing the contract. *See* APP0388, APP0390.

Tricarichi misrepresents *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991 (N.D. Cal. 2012). Tricarichi claims the plaintiff in *Lucas* "'did not declare facts to suggest' that [he] did not receive the relevant provisions." Answer

at 16 (quoting *Lucas*, 875 F. Supp. 2d at 999). Not so. The plaintiff in *Lucas*, just like Tricarichi, "declare[d] that he [] was never given a copy of the folder jacket [containing terms and conditions]," but the court held that "this representation is *immaterial* because the terms of an incorporated document must only have been easily available to him; they need not have actually been provided." *Lucas*, 875 F. Supp. 2d at 999 (emphasis added). The court noted that the plaintiff did "not declare facts to suggest" that the "folder jacket was [not] easily available to him." *Id.* Here too, Tricarichi has not established that the Terms of Engagement were not easily available to him. If they were not included in the envelope with the engagement letter, Tricarichi could have simply called Mr. Stovsky, the lead PwC partner on the matter, as the letter invited him to do. APP0390.

Tricarichi's attempt to distinguish *Koffler Electrical Mechanical Apparatus Repair, Inc. v. Wartsila North America, Inc.*, No. C-11-0052 EMC, 2011 WL 1086035 (N.D. Cal. Mar. 24, 2011), is even less persuasive. Tricarichi claims that "[i]n *Koffler*, unlike here, the reference to the incorporated terms in the agreement was clear." Answer at 17. But the language incorporating the Terms of Engagement in the PwC

engagement letter was every bit as clear as the incorporation language in *Koffler*. *Compare* 2011 WL 1086035, at *1 ("ALL SUPPLIES OF GOOD AND/OR SERVICES ARE SUBJECT TO THE WARTSILA NORTH AMERICA, INC. GENERAL TERMS AND CONDITIONS USA—PURCHASE ORDERS (2007)."); *with* APP0388 ("This engagement letter and the **attached Terms of Engagement to Provide Tax Services** (collectively, this 'Agreement') . . . ." (bold text in original)).

Finally, Tricarichi attempts to distinguish *Supermedia LLC v. Mustell & Borrow*, No. 08-21510, 2011 WL 13175082 (S.D. Fla. Feb. 3, 2011), on the ground that the terms and conditions there were "available on the internet." Answer at 17 (quoting *Supermedia*, 2011 WL 13175082, at *4). The particular medium in which the terms and conditions are available is not important. What mattered in *Supermedia* and what matters here is that "irrespective of whether the Terms and Conditions were provided . . . at the time the agreements were signed," the signed contract incorporated and "acknowledge[ed] receipt of the Terms and Conditions," and the terms were available, including by picking up the phone and calling PwC. *Supermedia*, 2011 WL 13175082, at *4.

In contrast to the significant number of cases PwC cited holding that a party cannot escape contractual terms by claiming he did not receive terms and conditions explicitly incorporated into the main contract, Tricarichi cites just two cases; but they do not help his cause. Answer at 14-15. In *La Amapola, Inc. v. Honeyville, Inc.*, No. CV 17-01946-AB (ASx), 2017 WL 10574226 (C.D. Cal. July 28, 2017), the court declined to enforce an arbitration clause where the party moving to compel arbitration "concede[d] that it did not include the arbitration agreement in any of the draft contracts it emailed to Honeyville." *Id.* at *2. PwC has made no such concession, and the Engagement Agreement here explicitly incorporates the Terms of Engagement.

Tricarichi also cites *Martin v. Citibank, N.A.*, 64 A.D.3d 477 (N.Y. App. Div. 2009), a decision of the New York Appellate Division that affirmed the trial court's denial of summary judgment to enforce a limitation-of-liability clause in a lease agreement for a safe deposit box. A three-judge majority of the five-judge panel held that summary judgment in favor of the bank was inappropriate because the plaintiff claimed the bank did not give him the page of the lease agreement containing the liability limitation, which "raised a triable issue of fact

regarding whether or not he was given the entire agreement." *Id.* at 477-78. The net result was not that the liability limitation was unenforceable, as Tricarichi claims. Answer at 14-15. Rather, the court left it up to the factfinder to determine if the provision was part of the contract. *Martin,* 64 A.D.3d at 478.

Two judges dissented in *Martin*. They would have granted summary judgment and enforced the liability limitation as a matter of law. *Id.* at 478-80. The dissent emphasized the "fundamental axiom of contract law that a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it." *Id.* at 478 (citation and quotation marks omitted). Because the plaintiff "signed a document indicating that he had received a lease," and the face of the lease plainly indicated there were other pages (the pages were labeled "Page 4 of 6," etc.), the dissent concluded that plaintiff's "averment, made years later, and only after a loss, that he did not receive the page, cannot be accepted as a valid excuse for avoiding the constraints of fundamental contract law." *Id.* at 479.

Because *Martin* is merely persuasive authority, this Court can credit whichever opinion it finds most persuasive. The dissent is more

consistent with Nevada law and the need to respect "parties' freedom to contract and their corresponding ability to allocate risk." *Lowe*, 118 Nev. at 101. Nevada follows the black-letter principle that "[h]e who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its conten[t]s and to assent to them." *Campanelli v. Conservas Altamira, S.A.*, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970). Allowing parties to do what Tricarichi is attempting to do here—escape a valid contract by claiming 17 years later that he did not receive an attachment when the contract clearly incorporates the attachment—would severely undermine the sanctity of contracts in Nevada.

III. IN THE ALTERNATIVE THIS COURT COULD REMAND FOR AN EVIDENTIARY HEARING

This Court should hold that the Terms of Engagement and the jury trial waiver are part of the contract between Tricarichi and PwC as a matter of law. That result is most consistent with black-letter contract law and avoids the uncertainty caused by permitting parties to create "factual questions" that bring the terms of contracts into doubt simply by claiming they did not receive a particular part of the contract.

If the Court nevertheless concludes that the enforceability of the Terms of Engagement hinges on whether Tricarichi actually received them, the appropriate course is to remand the case to the district court for an evidentiary hearing to determine if the Terms of Engagement are part of the contract between Tricarichi and PwC.

Tricarichi's Answer creates the false impression that the district court already held an evidentiary hearing. Tricarichi claims the district court evaluated "Mr. Tricarichi's credibility" and made a "factual determination regarding the terms of the Engagement Agreement." Answer at 23; *see also id.* at 2 (arguing this Court should not disturb the district court's "factual determination"); *id.* at 10 (describing the "trial court's reasonable and discretionary factual decision"); *id.* at 17 (urging deference because the district court "is in the best position to consider credibility challenges"); *id.* at 21 (claiming district court made a "factual finding that no agreement to waive a jury trial was formed"); *id.* at 24 (claiming district court decided motion "on an evidentiary record").

The district court made no such ruling. The district court denied PwC's motion to strike Tricarichi's jury demand for one reason and one reason only: because "there is no rider that is signed or initialed by

Plaintiff waiving the jury trial." APP1306. There is no indication whatsoever that the district court weighed evidence, evaluated credibility, or made any factual determination regarding whether Tricarichi received the Terms of Engagement. Nor could it have done so, as it would have been inappropriate for the district court to resolve a factual question on a paper summary judgment record. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (inappropriate to resolve genuine factual dispute on summary judgment).

At a minimum, there is evidence on both sides of the question of whether Tricarichi received the Terms of Engagement containing the jury trial waiver. The only piece of evidence on Tricarichi's side of the ledger is his self-serving and unsubstantiated October 2020 deposition testimony in which he claimed for the first time that he did not receive the Terms 17 years earlier. Tricarichi admitted in the same testimony that he received and signed the engagement letter, and he did not dispute that he saw the reference to the Terms of Engagement in the second sentence of the letter and the indication directly above his signature that the Terms were included as an enclosure. APP0448-49. Tricarichi

testified that he did not "ask where any enclosures were," but just "assumed that [the letter] was the agreement." APP0449.

On PwC's side of the ledger is the ample evidence described above, *supra* at 5-6, including the plain language of the engagement letter stating the Terms of Engagement were "attached" and included as an "[e]nslosure[]," APP0388; Richard Stovsky's testimony that he was "certain[]" the terms and conditions were attached to Tricarichi's engagement letter because he "always" included the terms as an attachment, T.APP1332 (Stovsky Dep. 82:13-83:1, 83:2-15); the fact that Tricarichi never called Mr. Stovsky or anyone else at PwC to ask where the Terms were, APP0448-49; and Mr. Tricarichi's *multiple* prior statements made in this litigation indicating that he did in fact receive the Terms of Engagement attached to the engagement letter, *see* Pet. at 9-10.

Tricarichi devotes four pages of his Answer to attempting to explain away his prior statements to the district court admitting that he had received the Terms of Engagement. Answer at 17-20. At best Tricarichi's explanations strain credulity. At worst they are *post hoc* fabrications. Tricarichi claims that the allegation in his complaint that "[t]he PwC

Engagement Letter further noted that it would work with Plaintiff to avoid the imposing of any tax penalty," *see* APP0012-13 (Compl. ¶ 37); APP0199 (Am. Compl. ¶ 38), was not a reference to the Terms of Engagement, but rather was a reference "to PwC's commitments to him as detailed in the Engagement Letter," Answer at 18-19. But the engagement letter without the attached terms nowhere says that PwC would work with Tricarichi to avoid tax penalties. The words "penalty" or "penalties" do not appear in the letter at all. The only place that "noted that [PwC] would work with Plaintiff to avoid the imposing of any tax penalty" is Section 3 of the Terms of Engagement: "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)." APP0392 (emphasis added).

Tricarichi also struggles to explain his April 2017 affidavit, which referred to the "rider *attached to* the letter." APP1249-53 (emphasis added). Tricarichi claims the affidavit "make[s] clear that he did not receive the Rider at the time he entered the Engagement Letter." Answer at 19. That is simply false. The affidavit never says Tricarichi did not receive the rider. To the contrary, the affidavit operates from a premise

that Tricarichi *did* receive the rider. When Tricarichi said in the affidavit that "[t]here were no *other* drafts of the engagement letter, or of the rider attached to the letter, exchanged with me," APP1250 (emphasis added), the clear implication is that he received at least one draft of both the engagement letter (which Tricarichi admitted) *and the rider*.

Tricarichi also said in this Affidavit that the choice-of-law provision in the Terms of Engagement "had not even been discussed or called to my attention." APP1250. Given that the whole point of this affidavit was to defeat application of the choice-of-law provision contained in the Terms of Engagement, one would think that if Tricarichi had not received the Terms he would have said so explicitly in the affidavit. Instead, the affidavit does not dispute receipt of the Terms and instead claims that PwC did not call a specific provision to his attention.

Finally, Tricarichi does not dispute that he filed a brief in the district court in which he admitted point-blank that the "rider [was] *attached* to the engagement letter that PwC sent Plaintiff." APP0173-174 (emphasis added). Tricarichi's only response to this unequivocal statement is to argue in a footnote that the statement does not satisfy the elements of judicial estoppel. Answer at 20 n.5. But even if the Court does

not formally estop Tricarichi from now claiming the opposite of what he said in his brief, Tricarichi's flip-flopping certainly bears on his credibility.

At the very least, the above discussion shows that neither this Court nor the district court should accept at face value Tricarichi's eleventh-hour claim that he did not receive the Terms of Engagement. And that is not what the district court did. The district court refused to enforce the Terms simply because Tricarichi did not separately sign or initial them. If actual receipt matters (and it does not, as discussed earlier), the district court should hold an evidentiary hearing so that PwC can cross-examine Tricarichi and present all the other evidence in the record showing that Tricarichi received the Terms.

Tricarichi suggests that PwC "should be deemed to have waived any right to request an evidentiary hearing" because PwC did not previously request an evidentiary hearing in the district court. Answer at 24. Tricarichi does not develop this argument or cite any authority in support of waiver, so he has waived his waiver argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 130 P.3d 1280, 1288 n.38

(2006) (Court "need not consider" contentions that party does not "cogently argue" or "present relevant authority" for).

In any event, the fact that PwC did not previously request an evidentiary hearing does not prohibit this Court from ordering the district court to conduct one now. PwC's position before the district court is the same as PwC's position before this Court—that the Terms of Engagement and the jury trial waiver are part of Tricarichi's contract with PwC as a matter of law. This position makes actual receipt of the Terms irrelevant, which is why PwC did not previously request an evidentiary hearing on this issue. As argued above, the Court should adopt PwC's position because it is most consistent with Nevada law and the need to foster certainty in contracts. But if the Court adopts a different rule under which actual receipt is important, the Court should direct the district court to hold an evidentiary hearing on that question.

That is exactly what the Court did in *Bank of America, N.A. v. Lee*, Nos. 69101, 69306, 2017 WL 4803907 (Nev. Oct. 23, 2007). There, in the face of a factual question regarding whether a party's signature was authentic, this Court held that "the district court should have held an evidentiary hearing to determine whether a valid contract exists." *Id.* at

*2. There is no indication in the opinion that either party had requested an evidentiary hearing before the district court, but this Court nevertheless remanded for that evidentiary hearing to take place. *Id.*

Tricarichi's only response to *Lee* is that an evidentiary hearing is unnecessary here because "PwC's motion to strike the jury demand was decided on an evidentiary record." Answer at 24. As explained above, that is simply false. The district court has never had an opportunity to evaluate the evidence and determine whether Tricarichi received the Terms of Engagement.

Accordingly, to the extent the Court determines that resolution of factual questions is necessary to enforcement of the jury trial waiver in the Terms of Engagement, the Court should remand for an evidentiary hearing for the district court to determine if the Terms of Engagement are part of the contract between Tricarichi and PwC.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should issue a writ of mandamus directing the district court to grant PwC's motion to strike Tricarichi's jury demand, or alternatively vacate and remand for an evidentiary hearing.

DATED: April 9, 2021

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type-face requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook, 14 point, and is 6,116 words.

2. I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 9, 2021, I caused to be served a true and correct copy of the foregoing **REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS** by the method indicated:

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

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

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