

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Michael A. Tricarichi,

Appellant,

v.

PricewaterhouseCoopers, LLP,

Respondent.

No. 86317

Electronically Filed

Jul 13 2023 02:39 PM

AMENDED DOCKETING STATEMENT

CIVIL APPEALS Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 31
County Clark Judge Honorable Joanna S. Kishner
District Ct. Case No. A-16-735910-B

2. Attorney filing this docketing statement:

Attorney Ariel C. Johnson Telephone (702) 385-2500
Firm Hutchison & Steffen, PLLC
Address 10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Client(s) Plaintiff/Appellant Michael Tricarichi

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Patrick Byrne Telephone (702) 784-5200
Firm Snell & Wilmer, LLP
Address 3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Client(s) Defendant/Appellee PricewaterhouseCoopers, LLP

Attorney Christopher D. Landgraff Telephone (312) 494-4400
Firm Bartlit Beck LLP
Address 54 West Hubbard Street, Suite 300
Chicago, Illinois 60654

Client(s) Defendant/Appellee PricewaterhouseCoopers, LLP

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input checked="" type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

PricewaterhouseCoopers LLP v. The Eighth Judicial District Court, et al., No. 73175

PricewaterhouseCoopers LLP v. The Eighth Judicial District Court, et al., No. 82371

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

Not applicable

8. Nature of the action. Briefly describe the nature of the action and the result below:

Plaintiff filed his complaint seeking to hold PwC responsible for its negligent representation of him in providing accounting services regarding a 2003 transaction commonly referred to as a “Midco transaction.” The district court, Judge Elizabeth Gonzalez, entered an October 24, 2018, order granting summary judgment to PwC ruling that any and all claims arising from services PwC provided Plaintiff in 2003 are time barred.

On January 5, 2021, Judge Gonzalez denied PwC’s motion to strike Plaintiff’s jury demand. On mandamus, Judge Joanna Kishner, who replaced Judge Gonzalez, entered an April 29, 2022, order ruling that Plaintiff was bound by a jury trial waiver under *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92 (2002).

The matter proceeded to trial on Plaintiff’s amended complaint. The district court, in its February 9, 2023, Findings of Fact and Conclusions of Law and Judgment, ruled in favor of PwC at trial.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether the district court erred by ruling in its October 24, 2018, order that any and all claims arising from the services PwC provided Plaintiff in 2003 are time barred.

Whether the district court erred by ruling in its April 29, 2022, order that Plaintiff was bound by a jury trial waiver under the factors identified in *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial Dist. Court*, 118 Nev. 92 (2002).

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

Not applicable

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This appeal should be retained by the Supreme Court pursuant NRAP 17(a)(9) because it originates in Business Court.

14. Trial. If this action proceeded to trial, how many days did the trial last? 9 _____

Was it a bench or jury trial? Bench _____

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from February 9, 2023

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

Not applicable

17. Date written notice of entry of judgment or order was served February 22, 2023

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed March 24, 2023

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

Not applicable

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

The appealed order is a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Plaintiff: Michael Tricarichi

Defendants: PricewaterhouseCoopers, LLP, Cooperatieve Rabobank UA, Seyfarth Shaw LLP, Graham R. Taylor, Utrechit-America Finance Co.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Defendants Cooperatieve Robobank UA, Seyfarth Shaw LLP, Graham R. Taylor, and Utrechit-America Finance Co. are not parties to this appeal as they were dismissed at earlier phases in this matter.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Plaintiff Michael Tricarichi:

- Negligent representation against PwC for acts in 2003; summary judgment was granted in PwC's favor on **October 24, 2018**. *See* the Court's Order Granting Summary Judgment, attached hereto as Exhibit 2.

- Negligence representation against PwC for acts arising after 2003; PwC prevailed at trial, as noted in the Court's Findings of Fact and Conclusions of Law and Judgment, filed on **February 9, 2023**, attached hereto as Exhibit 4.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

Not applicable

(b) Specify the parties remaining below:

Not applicable

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

Not applicable

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Michael A. Tricarichi

Name of appellant

Ariel C. Johnson

Name of counsel of record

July 13, 2023

Date

/s/ Ariel C. Johnson

Signature of counsel of record

State of Nevada, County of Clark

State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 13th day of July, **2023**, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

X By electronic service to all parties on the e-service list.

Dated this 13th day of July, 2023

/s/ Kaylee Conradi

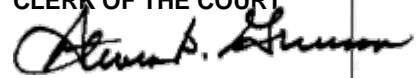
Signature

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EXHIBIT PAGE ONLY

EXHIBIT 1

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



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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. XI**

) **AMENDED COMPLAINT**

) **BUSINESS COURT MATTER**

) **JURY TRIAL DEMANDED**

) **EXEMPT FROM ARBITRATION**

NATURE OF THE CASE¹

1. Plaintiff, Michael Tricarichi, built a cellular telephone business from the ground up and preserved that business through years of litigation necessitated by the illegal trade practices of several larger, competing cellular providers. After those competitors were found liable for their anticompetitive actions, Mr. Tricarichi and his company, Westside Cellular, resolved the damages owed for those actions via a substantial settlement. As part of the settlement, Mr. Tricarichi's company exited the cellular phone business.

2. Faced with the question of what to do next, Mr. Tricarichi considered a number of options, including investing in other ventures via Westside, of which he was the sole shareholder. During this process, Mr. Tricarichi met with representatives of another company, Fortrend International, LLC ("Fortrend"), which offered to buy all his shares in Westside and employ Westside in Fortrend's debt-collection business. Fortrend represented, among other things, that Westside's remaining assets would facilitate this business, and that it would employ Westside's tax liabilities to legitimately offset tax deductions associated with the debt-collection business. As a result, Fortrend said, Mr. Tricarichi would realize a greater net return on his investment in Westside than would otherwise be the case if Westside were liquidated. Fortrend assured Mr. Tricarichi that the proposed transaction, including its tax aspect, was legitimate and in accordance with the tax laws. Unbeknownst to Plaintiff, Fortrend's representations and assurances were knowingly false.

3. Mr. Tricarichi retained a nationally recognized accounting firm with expertise in tax matters – Defendant PricewaterhouseCoopers LLP ("PwC") – to review the proposed transaction. PwC, via its senior partner Richard Stovsky and tax experts in its National Tax Office, did so, ultimately advising Mr. Tricarichi that the proposed transaction was legitimate

¹ In addition to setting forth new allegations and claims in this Amended Complaint, Plaintiff restates the claims of the original Complaint in order to preserve his appellate rights with respect thereto.

1 for tax purposes, and that Mr. Tricarichi had no ongoing exposure related to Westside once the
2 transaction with Fortrend was completed. Unbeknownst to Mr. Tricarichi at the time, PwC's
3 advice in this regard was, at minimum, grossly negligent.

4 4. PwC further breached its obligations to Plaintiff when it subsequently – and in
5 violation of its disclosure duties – failed to inform Mr. Tricarichi regarding the errors PwC
6 made when it advised him to proceed with the transaction at issue here. PwC breached its duty
7 to inform Tricarichi of these errors when the duty first arose – and for years thereafter –
8 notwithstanding multiple opportunities to do so during the parties' ongoing communications
9 about Tricarichi's tax situation. As a result, Plaintiff lost the opportunity to correct those errors,
10 to avoid substantial penalties and interest imposed by the IRS, and to forego costly and
11 ultimately unsuccessful litigation with the IRS in Tax Court – not to mention bring claims
12 against PwC sooner. In addition to thus failing to inform Tricarichi of such errors and related
13 IRS pronouncements, PwC also concealed the fact that it had conflicting interests – and had
14 even given directly conflicting advice – when it came to transactions such as the one it advised
15 Tricarichi to go ahead with.

16 5. Defendant Coöperatieve Rabobank U.A. ("Rabobank") and its affiliate Utrecht-
17 America Finance Co. ("Utrecht") facilitated the transaction by loaning Fortrend the lion's share
18 of the purchase price and by serving as the key conduit for the funds that changed hands at
19 closing, in return for a substantial fee – all along knowing that the transaction was improper for
20 tax purposes.

21 6. Defendants Seyfarth Shaw LLP ("Seyfarth") and Graham R. Taylor – a law firm
22 and a now-disbarred lawyer who was a Seyfarth partner at the time – unbeknownst to Plaintiff
23 until years later, further facilitated the transaction by providing Fortrend with a legal opinion
24 blessing steps that Fortrend would take but that Seyfarth and Taylor actually knew to be
25 illegitimate for tax purposes – also in return for a substantial fee.

7. Despite their representations and advice to the contrary to Mr. Tricarichi, Fortrend knew and PwC should have known that the Fortrend transaction was illegitimate for tax purposes, and would result in substantial tax and penalty exposure to Mr. Tricarichi personally. Defendants Rabobank, Utrecht, Seyfarth and Taylor knew the same thing, but they failed to disclose this material information to Mr. Tricarichi and otherwise facilitated the transaction that would result in harm to him.

8. As a result of Defendants' actions, Plaintiff was forced to defend himself before the IRS and in the U.S. Tax Court, and was found liable in October 2015 for millions of dollars in back taxes, penalties and interest, which Fortrend did not pay.

9. As further set forth below, Defendants' actions constitute gross negligence, the aiding and abetting of fraud, conspiracy and violations of the Nevada racketeering statute. Defendants should be held to account for these actions and for the tens of millions of dollars in damages that Mr. Tricarichi has suffered as a result.

PARTIES

10. Plaintiff, Michael A. Tricarichi, is an individual who has resided since May 2003 in the City of Las Vegas, Clark County, Nevada. Plaintiff was previously the president and sole shareholder of a company that provided telecommunications services. As a result of Defendants' improper actions in connection with the purchase of Plaintiff's shares in that company, Plaintiff has suffered millions of dollars in liabilities that he otherwise would not have faced.

11. Defendant PricewaterhouseCoopers LLP (“PwC”) is a limited liability partnership organized and existing under the law of Delaware, and is registered with the Nevada Secretary of State to do business in the State of Nevada. PwC engages in the business of tax and business consulting and has maintained a Nevada CPA License (PART-0663) since at least 1990. PwC has offices and is doing business in the City of Las Vegas,

1 Clark County, Nevada and PwC has partners who reside in the State of Nevada. At all times
2 material to this Complaint, PwC held itself out to the public, including to the Plaintiff, as
3 having specialized knowledge and skill possessed by a specialist in the field of income taxes,
4 tax savings transactions, and business tax consulting.

5
6 12. Defendant Coöperatieve Rabobank U.A. ("Rabobank"), formerly known as
7 Coöperatieve Centrale Raiffeisen-Boerenleenbank, B.A., is a bank with principal branches in
8 New York, New York and Utrecht, Netherlands. Rabobank is organized as a Dutch
9 cooperative and regulated in the U.S. by the Federal Reserve Bank of New York and other
10 agencies. Rabobank did business with Plaintiff in Nevada via its New York branch.
11 Rabobank also has other offices throughout the world and the United States and does
12 business in the U.S. and, on information and belief, Nevada via a number of branches,
13 divisions and affiliates, including Defendant Utrecht-America Finance Co. During the period
14 relevant to this complaint, Rabobank's business included financing and facilitating, via such
15 units, certain tax savings transactions promoted by third parties including Fortrend
16 International, LLC and Midcoast Credit Corp. Rabobank purposefully did business with
17 Plaintiff in Las Vegas, Clark County, Nevada in connection with such a transaction,
18 including entering a deposit account agreement with Plaintiff in Las Vegas.

19
20 13. Defendant Utrecht-America Finance Co. ("Utrecht"), a wholly-owned
21 subsidiary of Rabobank, is a Delaware corporation with its principal place of business in New
22 York. Utrecht was, on information and belief, a subsidiary via which Rabobank financed
23 transactions promoted by Fortrend, Midcoast and related entities, and financed the transaction
24 into which Plaintiff was drawn. Utrecht purposefully directed its activities complained of
25 herein toward and established contacts with Las Vegas, Clark County, Nevada in
26 participating in the transaction described below.
27
28

14. Defendant Seyfarth Shaw LLP (“Seyfarth”) is a law firm with its principal office in Chicago, Illinois. Seyfarth has offices and is doing business in a number of different cities and states including San Francisco, California, and, on information and belief, Nevada. At least one Seyfarth attorney maintains a Nevada bar license and on information and belief Seyfarth partners reside and/or do business in Nevada. During the period relevant to this complaint, Seyfarth's business included providing opinion letters that facilitated certain tax savings transactions promoted by third parties including Fortrend International, LLC.

15. Defendant Graham R. Taylor (“Taylor”) is a disbarred lawyer residing, on information and belief, in Tiburon, California. During the period relevant to this complaint, Taylor was a partner at and agent of Seyfarth whose business included providing opinion letters that facilitated certain tax savings transactions promoted by third parties such as Fortrend International, LLC, including a transaction promoted to Plaintiff. After his involvement in this transaction, Taylor pleaded guilty in Utah federal court to conspiring to commit tax fraud, and was subsequently disbarred.

THIRD PARTIES

16. Fortrend International, LLC (“Fortrend”) is, on information and belief, a defunct Delaware limited liability company that had its principal place of business in San Francisco, California. During the period relevant to this complaint, Fortrend and its affiliates were engaged in the promotion of certain tax-shelter transactions, including the transaction promoted to Plaintiff.

17. Timothy H. Vu (f/k/a Timothy H. Conn, a/k/a Timothy Conn Vu) (“Conn Vu”) is an individual residing in San Francisco, California, who has held himself out as a tax practitioner. In or about March 2003, Conn Vu began working with Fortend as its agent to promote and facilitate certain tax-shelter transactions, including the transaction promoted to Plaintiff. On information and belief, Conn Vu managed various companies acquired by

1 Fortrend, which he and other co-promoters used to facilitate tax-avoidance transactions. These
2 companies included Westside Cellular. Conn Vu is currently the subject of a federal criminal
3 investigation in New York with respect to such conduct, and it is anticipated that he will be
4 indicted.

5
6 18. John P. McNabola (“McNabola”) is, on information and belief, an accountant
7 residing in Dublin, Ireland. The U.S. Department of Justice, based on its investigation, has
8 named McNabola as a co-promoter, along with Conn Vu, Taylor and others, of certain unlawful
9 Midco and “DAD” tax shelter transactions during the period 2003-2010. McNabola was an
10 agent of Fortrend and the president of the Fortrend affiliates involved in defrauding Plaintiff.

11
12 19. Midcoast Credit Corp. (“Midcoast”) is, on information and belief, a defunct
13 Florida corporation that had its principal place of business in West Palm Beach, Florida. During
14 the period relevant to this complaint, Midcoast and its affiliates were engaged in the promotion
15 of certain tax-shelter transactions, including a transaction promoted to Plaintiff. In October
16 2013, the principals of Midcoast, along with other individuals, were indicted and charged with
17 criminal conspiracy to commit fraud and other offenses for allegedly designing and
18 implementing fraudulent tax schemes.

19
20 20. John E. Rogers (“Rogers”), an attorney residing, on information and belief, in
21 Kenilworth, Illinois, was a Seyfarth partner and agent from July 2003 until he was forced to
22 resign in May 2008. In early 2003, shortly before he joined Seyfarth, Rogers conceived of and
23 created an illegal tax shelter that was subsequently used to facilitate the Fortrend transaction
24 with Plaintiff and, on information and belief, numerous other such transactions. In 2010, the
25 U.S. Department of Justice sought to enjoin Rogers from engaging in such fraudulent conduct,
26 with Rogers agreeing to a permanent injunction in September 2011.

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1 taxation of gains at both the corporate and individual shareholder levels. Generally
2 speaking, Midco transactions proceeded as follows: First, an “intermediary company,” or
3 “midco,” affiliated with the promoter – typically a shell company, often organized offshore
4 – would purchase the shares of the target company, and thus its tax liability. After acquiring
5 the shares and this tax liability, the intermediary company would engage in a second step
6 that was supposed to offset the target’s realized gains and eliminate the corporate-level tax.
7 This second step, unbeknownst to the selling shareholder(s), would itself constitute an
8 improper tax-avoidance maneuver, frequently a “distressed asset/debt,” or “DAD,” tax
9 shelter (discussed in more detail below). The promoter received cash via the transaction,
10 and represented to the target company’s shareholders that they would legitimately net more
11 for their shares than they otherwise would absent the intermediary transaction.
12

13
14 27. As was the case with Plaintiff’s transaction, however, such representations
15 often proved, years later, to be false. As set forth below, Plaintiff (and others like him)
16 subsequently found himself “holding the bag” after the transaction that was promoted to him
17 by Fortrend and Midcoast; facilitated by Defendants Rabobank, Utrecht, Seyfarth and
18 Taylor; and blessed by Defendant PwC, resulted in substantial tax liabilities and penalties
19 for Plaintiff personally.
20

21 **The Midco Transaction Into Which Plaintiff Was Drawn**

22 28. Prior to 2003, Plaintiff was the president and sole shareholder of Westside
23 Cellular, Inc. (“Westside”). From 1991 through 2003, Westside undertook various
24 telecommunication activities in Ohio, including the resale of cellular phone service. In
25 particular, beginning in 1991, Westside purchased network access from major cellular
26 service providers in order to serve its customers. Plaintiff, as Westside’s president, soon
27 came to believe, however, that certain of these providers were discriminating against
28 Westside. So, in 1993 he engaged the Cleveland law firm of Hahn Loeser & Parks, LLP

1 (“Hahn Loeser”), to file a complaint with the Public Utilities Commission of Ohio
2 (“PUCO”) against certain of these providers, alleging anticompetitive trade practices.
3 Westside’s survival hung in the balance.

4 29. The PUCO ruled in Westside’s favor on the liability issue, and the Ohio
5 Supreme Court ultimately affirmed that decision. In early 2003 Westside returned to the
6 lower court to commence the damages phase of the litigation. Not long thereafter a
7 settlement was reached, pursuant to which Westside ultimately received, during April and
8 May 2003, total settlement proceeds of \$65,050,141. In exchange, Westside was required to
9 terminate its business as a retail provider of cell phone service and to end all service to its
10 customers in June 2003 – effectively relinquishing its assets in return for the settlement
11 proceeds. From the approximately \$65 million settlement, Westside would pay \$25 million
12 in legal fees and employee compensation and severance, leaving approximately \$40 million
13 in settlement proceeds.
14

15 30. Anticipating the settlement, Plaintiff asked Hahn Loeser to look into tax
16 matters related to the anticipated settlement. Because Westside was a C Corporation, there
17 was a concern that the settlement proceeds could be subject to double taxation. Hahn Loeser
18 had prior experience with Midcoast and thought Midcoast might assist Plaintiff in this
19 regard. So, a meeting between Plaintiff and Midcoast representatives was arranged for
20 February 19, 2003.
21

22 31. At the February 19 meeting, Midcoast’s representatives (including Donald
23 Stevenson and Louis Bernstein) explained to Plaintiff that it was in the debt collection
24 business and that, as part of its business model, it purchased companies in postures like
25 Westside’s.
26

27 32. Thereafter, Plaintiff was also introduced to Fortrend and received an
28 informational letter from Fortrend’s Steven Block. Plaintiff and his representatives

1 subsequently had multiple calls and at least one face-to-face meeting with Fortrend
2 representatives, including Block, in or about March/April 2003. Like Midcoast, Fortrend
3 claimed that it was involved in the distressed debt receivables business and that it wanted to
4 purchase Plaintiff's Westside stock as part of this business.

5 33. Midcoast and Fortrend each expressed interest in acquiring Plaintiff's
6 Westside stock, and each made an offer proposing essentially the same transactional
7 structure: An intermediary company would borrow money to purchase the stock. After the
8 sale closed, the intermediary company would merge into Westside, and Fortrend / Midcoast
9 would employ Westside in its distressed-debt collection business. The purchaser would
10 fund its operations with Westside's remaining cash (Fortrend represented that financing for
11 its distressed-debt recovery business was otherwise difficult to obtain), and employ
12 Westside's tax liabilities to legitimately offset tax deductions associated with this business.

13 34. Fortrend and Midcoast represented to Plaintiff that the transactions they
14 were each proposing would result in legitimate tax benefits and thus a greater net return
15 to Plaintiff than he would otherwise realize. These representations included the
16 assurance that the acquiring party had successfully undertaken numerous other
17 transactions like the one being proposed to Plaintiff and that such transactions were
18 proper under the tax laws. Neither party told Plaintiff that the IRS was scrutinizing and
19 challenging similar transactions as improper tax shelters.

20 35. Absent Defendants' improper actions, Plaintiff would have left the settlement
21 proceeds in Westside, paid the corporate-level tax and invested in other business ventures
22 through Westside, thereby avoiding any shareholder-level tax on a distribution from Westside.

23 36. Because Plaintiff thought Midcoast and Fortrend were competitors, he began
24 negotiating with both in the hope of stirring up a bidding war. Rather than continue to compete,
25 though, Midcoast and Fortrend secretly agreed that Midcoast would step away from the
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1 transaction in exchange for a kickback of \$1,180,000. As a result of this bid-rigging,
2 Midcoast's final offer was intentionally unattractive, and Plaintiff chose to proceed with
3 Fortrend.

4 37. Based on the representations made by Fortrend, Plaintiff was inclined to
5 proceed with the Fortrend transaction. But, not wanting to run afoul of the tax laws, Plaintiff
6 engaged a nationally regarded accounting firm, Defendant PwC, to independently evaluate
7 the bids and proposed transactions for his Westside stock, verify that they and the purchasers
8 were legitimate, and evaluate any potential tax issues.
9

10 38. On or about April 25, 2003, Plaintiff signed a letter agreement (the "PwC
11 Engagement Letter") whereby PwC agreed to provide such tax research and evaluation
12 services relating to the proposed sale of Westside's stock. The PwC Engagement Letter
13 specifically noted that PwC had an obligation to determine whether Plaintiff would be
14 participating in a reportable transaction as defined by the IRS. The PwC Engagement Letter
15 further noted that it would work with Plaintiff to avoid the imposition of any tax penalty.
16 Plaintiff is unsophisticated in tax matters and was relying on PwC's expertise in deciding
17 whether to proceed with the transaction.
18

19 39. Unbeknownst to Plaintiff, PwC had on at least one prior occasion brought
20 Fortrend to the table to facilitate a Midco transaction that PwC itself had advocated. In
21 particular, in late 1999, PwC advocated that a Midco transaction be used in the purchase of the
22 Bishop Group Ltd. ("Bishop") by PwC's client Midcoast Energy Resources, Inc.; PwC
23 approached Fortrend to serve as an intermediary; and a Fortrend affiliate in fact served as an
24 intermediary, purchasing the Bishop stock in a Midco transaction that PwC helped negotiate.
25 As it did in Mr. Tricarichi's case, Rabobank also facilitated the Bishop transaction by loaning
26 Fortrend the purchase price and serving as the conduit through which funds changed hands at
27 closing, all in return for a substantial fee. PwC disclosed none of this to Plaintiff. The Bishop
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1 Midco transaction was audited by the IRS starting in late 2003 (but before Plaintiff had
2 reported the Westside stock sale on any tax returns), found deficient by the IRS in 2004, and
3 confirmed by the courts in 2008 and 2009 to be an illegal tax shelter.

4 40. Also unbeknownst to Plaintiff, PwC – prior to advising Plaintiff – actually gave
5 at least one other taxpayer *completely the opposite advice* that it gave Plaintiff regarding a
6 basically identical intermediary transaction proposed by Fortrend. In March 2003 – before PwC
7 advised Mr. Tricarichi to go ahead with the Fortrend transaction – PwC advised another
8 taxpayer, John Marshall, to steer clear of such a transaction. *See Estate of Marshall v.*
9 *Commissioner of Internal Revenue*, T.C. Memo 2016-119 at *2, *4-5 (2016) (“PwC concluded
10 that the stock sale proposed by Essex was similar to a listed transaction and that it could not
11 consult or advise on the proposed stock sale any further.... [PwC] tried to discourage [Marshall]
12 from entering into the proposed stock sale ... advising [him] not to do the proposed stock
13 sale....”). PwC never said a word to Mr. Tricarichi about this contradictory advice to another
14 taxpayer contemplating an identical Fortrend transaction. But Plaintiff was entitled to know
15 then and certainly before litigation with the IRS that PwC advised at least one other taxpayer
16 to *avoid* the very transaction that PwC was advising Plaintiff to proceed with.

17 41. During the period April-August 2003, a team of PwC tax professionals,
18 including Rich Stovsky, Timothy Lohnes and Don Rocen, set out to examine and advise
19 Plaintiff regarding the transactions proposed by Fortrend and Midcoast. PwC personnel put
20 between 150 and 200 hours into this effort, for which PwC charged approximately \$48,000
21 in fees. PwC participated in various calls with the parties and/or their representatives,
22 reviewed transaction documentation, and undertook research. PwC understood, among
23 other things, that Fortrend would borrow a substantial sum from Rabobank in order to
24 finance the transaction; that Fortrend intended to employ Westside’s tax liability to offset
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1 gains and deductions associated with high basis / low value assets; and that Plaintiff was
2 relying on Fortrend to satisfy Westside's tax obligations.

3 42. PwC further understood but failed to properly advise Plaintiff that IRS Notice
4 2001-16, which had been issued in January 2001, applied to Midco transactions described
5 therein and to "substantially similar" transactions; that the term "substantially similar" was
6 broadly construed in this context; and that the proposed transaction and its tax implications
7 posed risk for Plaintiff.
8

9 43. On or about July 22, 2003, Fortrend (via an affiliate) sent Plaintiff a letter of
10 intent, signed by Conn Vu, regarding the proposed purchase of Plaintiff's Westside stock.
11 The letter of intent proposed, among other things, that Fortrend would pay \$34.9 million
12 (later reduced slightly to \$34.6 million) for the stock. The parties proceeded to discuss and
13 negotiate a proposed stock purchase agreement, with PwC reviewing the terms thereof as
14 part of its engagement.
15

16 44. Fortrend would use its affiliate Nob Hill, Inc. ("Nob Hill"), of which McNabola
17 was the president, as the intermediary company to purchase the Westside stock. Nob Hill's sole
18 shareholder was Millennium Recovery Fund, LLC, a Fortrend affiliate formed in the Cayman
19 Islands. In the stock purchase agreement, which McNabola signed, Nob Hill represented that
20 Westside would remain in existence for at least five years after the closing and "at all times be
21 engaged in an active trade or business." Nob Hill also provided purported tax warranties. The
22 agreement represented that Nob Hill would "cause ... [Westside] to satisfy fully all United
23 States ... taxes, penalties and interest required to be paid by ... [Westside] attributable to
24 income earned during the [2003] tax year." Nob Hill agreed to indemnify Plaintiff in the event
25 of liability arising from breach of its representation to satisfy Westside's 2003 tax liability, and
26 represented that it had sufficient assets to cover this indemnification obligation. Nob Hill
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1 further warranted that it had no intention of causing Westside to engage in an IRS reportable
2 transaction.

3 45. Plaintiff relied on these material representations and warranties, as well as
4 PwC's evaluation and assessment of them, in deciding to proceed with the Fortrend transaction.
5 Unbeknownst to Plaintiff, however, these representations and warranties were false when
6 made; and they were not subsequently fulfilled, as PwC knew or should have known that they
7 would not be. Although the stock purchase agreement contained covenants by the purchaser
8 to pay Westside's taxes, and despite the fact that the agreement contained an
9 indemnification provision in that regard, such provisions were without any value because,
10 upon information and belief, the indemnitor/purchaser had insufficient assets with which
11 to satisfy them when they were made and going forward, and simply intended to
12 misappropriate Westside's funds, offset its tax liabilities with a bogus deduction via a
13 reportable transaction, and conduct no business of substance.
14
15

16 46. Defendants Rabobank and Utrecht provided Fortrend financing for the vast
17 majority of the purchase price, and Rabobank was the key conduit for the funds that changed
18 hands in order to close the transaction. Without such participation and substantial assistance
19 by Rabobank and Utrecht, Fortrend would not have been able to proceed with the transaction.
20 Rabobank frequently partnered with Fortrend in executing Midco deals, and had done dozens
21 of transactions with Fortrend prior to Plaintiff's transaction.
22

23 47. On information and belief, from 1996 to 2003, Fortrend promoted almost one
24 hundred Midco transactions, and worked closely with Rabobank to obtain financing for many
25 of those transactions. In Plaintiff's case, of the \$34.6 million agreed purchase price for
26 Westside's stock, \$29.9 million would come from Rabobank, via Utrecht. (The remainder was
27 loaned to Nob Hill by another Fortrend affiliate, Moffat.) The loan and the closing were
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1 structured in such a way that Defendants Rabobank and Utrecht considered that they really
2 bore no risk of non-payment.

3 48. On August 13, 2003, Fortrend asked Chris Kortlandt at Rabobank for a \$29.9
4 million short-term loan, setting forth how those funds would remain in and be transferred
5 through accounts at Rabobank that the parties would open, before being quickly repaid to the
6 bank. Kortlandt at Rabobank subsequently requested and received internal approval of this
7 loan, with Nob Hill as the nominal borrower. Rabobank understood that Westside would be
8 required to have cash in excess of \$29.9 million on deposit with Rabobank when the stock
9 purchase closed. Rabobank therefore considered the risk of nonpayment of the loan to be
10 essentially zero. The risk rating shown on Nob Hill's credit application was "N/A, or based on
11 collateral: R-1 (cash)." Rabobank used the R-1 risk rating to denote a loan that is fully cash
12 collateralized.
13

14 49. Among the financing documents subsequently executed by Nob Hill (the
15 Fortrend affiliate) were a promissory note for \$29.9 million, a security agreement, and a pledge
16 agreement dated as of September 9, 2003. McNabola signed all these documents as Nob Hill's
17 president. Pursuant to the security agreement, the Tax Court subsequently found, Nob Hill
18 granted Rabobank a first priority security interest in a Rabobank account that Plaintiff would
19 open for Westside in connection with the transaction, in order to secure Nob Hill's repayment
20 obligation. Pursuant to the pledge agreement, the Tax Court also found, Nob Hill granted
21 Rabobank a first-priority security interest in the Westside stock and the stock sale proceeds as
22 collateral securing Nob Hill's repayment obligation. Among the financing documents to be
23 executed by Westside were security and guaranty agreements in favor of Rabobank, and a
24 control agreement. McNabola also signed these documents. Via the security and guaranty
25 agreements, the Tax Court further found, Westside unconditionally guaranteed payment of Nob
26 Hill's obligations to Rabobank, and granted Rabobank a first priority security interest in
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1 Westside's Rabobank account. The control agreement further gave Rabobank control over
2 Westside's account – including all cash, instruments, and other financial assets contained
3 therein from time to time, and all security entitlements with respect thereto – in order to ensure
4 that Westside did not default on its commitments, the Tax Court determined, further
5 concluding that these agreements effectively gave Rabobank a “springing lien” on Westside's
6 cash at the moment it funded the loan. For all practical purposes, therefore, the Tax Court
7 found, the Rabobank loan was fully collateralized with the cash in Westside's Rabobank
8 account, consistent with the R-1 risk rating that Rabobank assigned to that loan.

10 50. As noted above, in order to facilitate the transaction, Plaintiff and Westside
11 were required to open accounts at Rabobank. The account opening documentation reflects
12 Plaintiff's and Westside's residence in Las Vegas, Clark County, Nevada, where Rabobank and
13 Utrecht thus knew Plaintiff resided, and where they proceeded to do business with, and direct
14 their actions toward, Plaintiff and Westside. Plaintiff was relying on Rabobank, a large bank
15 with a worldwide presence, to serve as an independent escrow agent and lender, rather than as
16 a self-interested facilitator and co-conspirator of Fortrend's fraud – which, unbeknownst to
17 Plaintiff, was Rabobank's actual role.

19 51. Rabobank and Utrecht proceeded with the transaction and the loan to Fortrend
20 (Nob Hill) despite knowing that the Fortrend transaction in this case was a Midco deal that
21 constituted a reportable transaction considered by the IRS to be an improper tax-avoidance
22 mechanism. During the years 1998 – 2002, Rabobank (via, on information and belief,
23 subsidiaries including Utrecht) had financed a total of 88 Midco transactions, at the pace of
24 about 18 transactions per year. Rabobank earned considerable and attractive fees via the loans,
25 which ranged in amount between \$6 million and \$260 million, and were mostly for terms of
26 only one to three days. At the time, Rabobank was experiencing difficulty in other areas of its
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1 business, and opportunistically looked at the Midco financing transactions as “easy money” –
2 short term loans with high yield and no credit risk.

3 52. The Midco transactions that Rabobank / its affiliates participated in with
4 Fortrend included the following, among others:

- 5
- 6 a. Bishop Group: In or about October 1999, Rabobank facilitated the purchase of
7 Bishop stock by loaning another special-purpose Fortrend affiliate (K-Pipe
8 Merger Corp.) approximately \$200 million short-term for the purchase price,
9 and by serving as the conduit through which funds changed hands at closing, in
10 return for a substantial fee. Like Nob Hill in this case, K-Pipe was a shell
11 company with no assets and conducted virtually no business after the purchase.
12 A federal court in Texas subsequently found that the Bishop transaction was a
13 sham and constituted an improper Midco tax shelter, and that determination
14 was affirmed by the U.S. Court of Appeals for the Fifth Circuit.
- 15
- 16 b. Town Taxi and Checker Taxi: In or about October 2000, Rabobank loaned
17 Three Wood LLC, a newly formed Fortrend special-purpose affiliate, \$30 million
18 short-term to purchase the stock of Town Taxi Inc. and Checker Taxi Inc. from
19 the Frank Sawyer Trust after those companies had sold all their assets.
20 Rabobank again served as the conduit through which funds changed hands at
21 closing, on information and belief in return for a substantial fee. On
22 information and belief, in order to induce the Trust into the transaction, Fortrend
23 falsely represented to the Trust that Fortrend had a strategy to legitimately offset
24 the taxes due as a result of the taxi companies’ asset sales. Within about two
25 months of the closing, Fortrend stripped Town Taxi and Checker Taxi of their
26 remaining funds, totaling millions of dollars, moving that money to other
27 Fortrend affiliates. Late in 2000, Fortrend contributed to Town Taxi and
28

1 Checker Taxi the stock of other companies that had ostensibly declined in value,
2 subsequently claiming tax losses that offset nearly all the gains from the Town
3 Taxi and Checker Taxi asset sales. After the IRS examined the transaction, the
4 U.S. Tax Court found in 2014 that it constituted an improper Midco tax shelter.

5
6 c. St. Botolph Holding Co.: In or about February 2001, Rabobank loaned \$19
7 million to Monte Mar, Inc., a special-purpose Fortrend affiliate, to purchase from
8 the Frank Sawyer Trust the stock of St. Botolph, which was in the process of
9 selling its assets. Rabobank again served as the conduit through which funds
10 changed hands at closing, on information and belief in return for a substantial
11 fee. On information and belief, in order to induce the Trust into the transaction,
12 Fortrend falsely represented to the Trust that Fortrend had a strategy to
13 legitimately offset the taxes due as a result of St. Botolph's asset sales. Over the
14 next ten months, Fortrend stripped St. Botolph of its remaining cash. In 2001,
15 Fortrend contributed to St. Botolph stock that had ostensibly declined in value,
16 subsequently claiming tax losses that offset nearly all the gains from the St.
17 Botolph asset sale. After the IRS examined the transaction, the U.S. Tax Court
18 found in 2014 that it constituted an improper Midco tax shelter.

19
20 d. Slone Broadcasting: In December 2001, after the assets of Slone Broadcasting
21 had been sold, Utrecht loaned another special-purpose Fortrend affiliate,
22 Berlinetta, Inc., \$30 million short-term to purchase the stock of Slone. Fortrend
23 represented to the shareholders of Slone that it had a legitimate strategy to reduce
24 the taxes due as a result of the asset sale. On information and belief, Rabobank
25 served as the conduit through which funds changed hands at closing, in return
26 for a substantial fee. Slone Broadcasting and Berlinetta merged, and the
27 company's named was changed to Arizona Media, which then claimed an
28

1 inflated basis for certain Treasury bills contributed to the company by another
2 Fortrend affiliate. Conn Vu was also Arizona Media's president, secretary and
3 treasurer. The IRS maintains that the Slone-Fortrend transaction was an illegal
4 Midco tax shelter, with the former Slone shareholders having transferee
5 liability, and the matter is currently in litigation.
6

7 53. However, on information and belief, in or about October 2002 – that is,
8 approximately ten months before it financed the transaction involving Plaintiff – Rabobank
9 determined that many if not all of the Midco transactions it had previously financed were
10 reportable transactions as defined by the IRS. As a result, the number of Midco transactions
11 executed by Rabobank after October 2002 decreased significantly. Rabobank undertook only
12 five Midco financing transactions in 2003, one of those being the financing in Plaintiff's case.
13 In 2004, Rabobank undertook only one Midco financing transaction, its last. A Rabobank
14 internal audit further found in 2005 that Rabobank's internal controls had been inadequate in
15 numerous respects with respect to the Midco transactions in which it had participated. The
16 audit found, among other things, that it was at least "questionable" whether Midco promoters
17 like Fortrend could be described as "reputable" companies with which Rabobank should be
18 doing business. Rabobank would have stopped financing Midco transactions entirely after
19 October 2002 were it not for the fact that it did not want to harm its existing relationships with
20 Midco promoters like Fortrend.
21
22

23 54. In addition to its own activities directed toward Plaintiff and the Nevada forum,
24 Rabobank/Utrecht knew or should have known – via their participation in this and prior
25 Fortrend transactions – that their co-conspirators Fortrend, McNabola and Conn Vu were
26 directing and undertaking the acts alleged herein at Plaintiff and in the Nevada forum.
27 Rabobank's / Utrecht's actions caused harm to Plaintiff in Nevada.
28

1 55. Notwithstanding the problematic nature of the transaction proposed by Fortrend,
2 which should have been apparent to PwC given its expertise in tax matters, PwC, based on its
3 examination and due diligence, came to the conclusion that the transaction did not fit the IRS
4 definition of a Midco (or substantially similar) transaction and that it was not a reportable
5 transaction as defined by the IRS. PwC also came to the conclusion that Plaintiff would not be
6 subject to transferee liability for Westside's taxes as a result of the Fortrend transaction.
7 PwC's examination of the proposed transaction concluded with a determination that there was
8 no reason not to go forward with Fortrend's offer to purchase Plaintiff's Westside stock. PwC
9 advised Plaintiff of its conclusions in or about August 2003. Relying upon PwC's advice,
10 Plaintiff proceeded with the Fortrend transaction. Had PwC advised Plaintiff otherwise,
11 Plaintiff would not have proceeded with the transaction.
12

13 56. The parties executed the stock purchase agreement, and the Fortrend
14 transaction closed on September 9, 2003. As part of the closing, Nob Hill's Rabobank account
15 was credited with the \$29.9 million Rabobank loan proceeds; Nob Hill transferred the purchase
16 price from its Rabobank account into the Rabobank account that Plaintiff had been required to
17 open; Nob Hill acquired Plaintiff's Westside stock; Plaintiff's resignation as an officer and
18 director of Westside became effective (with Plaintiff being replaced by Fortrend personnel);
19 and Nob Hill paid Rabobank a \$150,000 fee. After the Rabobank and Moffat loans were
20 repaid the same day, however, Westside's remaining funds, rather than being used to facilitate
21 Fortrend's debt-collection business as represented, were actually drained by Fortrend, as set
22 forth below.
23

24 57. The day after the closing, Nob Hill merged into Westside with Westside being
25 the surviving corporation. By that point, there was approximately \$5.2 million left in
26 Westside's bank account. Westside – now under Fortrend's control – proceeded over the next
27 seven months to transfer about \$4.8 million of that amount to various Fortrend affiliates and
28

1 co-promoters, including MidCoast, which in mid-September received its \$1,180,000 payoff for
2 stepping away from the transaction. After Conn Vu transferred the remaining funds to another
3 bank in or about April 2004, Fortrend emptied the account and it was closed. Westside did not
4 engage in the debt-collection business as Fortrend had represented to Plaintiff it would.

5
6 58. Notwithstanding the multiple representations of Fortrend and PwC to
7 Plaintiff that the Fortrend transaction was proper under the tax laws, and the silence of
8 Rabobank and Utrecht in this regard, Defendants and Fortrend knew that on January 18,
9 2001 the IRS had issued Notice 2001-16 ("the 2001 Tax Notice"). The 2001 Tax Notice
10 describes transactions where a corporation disposes of substantially all of its assets and then
11 the corporation's shareholders sell their stock to another party who seeks favorable tax
12 treatment. The 2001 Tax Notice states that any transactions that are the same as, or
13 substantially similar to, those described in the 2001 Tax Notice are "listed transactions."
14 Listed transactions are deemed by the IRS to be abusive tax shelters. Persons failing to
15 report these tax shelters may be subject to penalties. The IRS in the 2001 Tax Notice
16 concluded that it "may challenge the purported tax results of these transactions on several
17 grounds." It further warned that it "may impose penalties on participants in these
18 transactions."
19

20
21 59. The publication of the 2001 Tax Notice put Defendants and Fortrend, who
22 were experienced in tax matters, on notice that there was, at minimum, a significant
23 likelihood that the IRS would consider the Fortrend transaction to be a listed
24 transaction. In addition, as a result of the 2001 Tax Notice, Defendants and Fortrend,
25 who were experienced in tax matters, knew or should have known that there was, at
26 minimum, a significant likelihood that the IRS would hold Plaintiff liable as a transferee
27 for the unpaid taxes owed by Westside.
28

1 60. Defendants and Fortrend failed to properly advise Plaintiffs about the
2 2001 Tax Notice and its significance for the Fortrend transaction. To the contrary, PwC
3 advised Plaintiff that the Fortrend transaction did not fall within, and was not substantially
4 similar to the transaction listed in, the 2001 Tax Notice, and was not a listed transaction as
5 defined by the IRS; PwC advised Plaintiff that he would not be exposed to transferee liability
6 with respect to the Fortrend transaction; Fortrend also made such representations; and
7 Rabobank and Utrecht remained silent, facilitating the transaction despite knowing that it was a
8 listed transaction per the 2001 Tax Notice.
9

10 **With Seyfarth and Taylor's Assistance,**
11 **Fortrend Closes the Loop on its Fraud Post-Closing**

12 61. After the closing, Fortrend did not conduct business via Westside in the manner
13 Fortrend had told Plaintiff it would. In fact, in order to draw Plaintiff into the Midco
14 transaction, Fortrend had made various misrepresentations to Plaintiff when it described,
15 represented and warranted how Westside's business would proceed after the stock sale.
16 Contrary to what Fortrend represented, Fortrend's plan was never to operate Westside going
17 forward as part of a legitimate debt-collection business, and its plan was never to "cause ...
18 [Westside] to satisfy fully all United States ... taxes, penalties and interest required to be paid
19 by ... [Westside] attributable to income earned during the [2003] tax year." Contrary to its
20 representations via Nob Hill and otherwise, Fortrend always intended to engage in an IRS
21 reportable transaction; avoid paying Westside's taxes; strip Westside of its assets; and leave
22 Plaintiff "holding the bag" for transferee liability imposed by the IRS.
23

24 62. Unbeknownst to Plaintiff, Fortrend's efforts to set the stage in this regard dated
25 back to at least 2001. As part of Fortrend's ongoing promotion of Midco transactions, in or
26 about March 2001, Millennium (the Fortrend and Nob Hill affiliate) obtained a portfolio of
27 distressed Japanese debt then valued at \$137,109 for a cost of \$137,000. Although
28

1 Millennium/Fortrend thus acquired the Japanese debt portfolio for only \$137,000 in March
2 2001, it later claimed that its tax basis in that portfolio was actually more than \$314 million.

3 63. As support for this claim, Fortrend looked to a canned opinion letter provided to
4 McNabola at Millennium by Defendants Seyfarth and Taylor on or about August 21, 2003 (the
5 “Seyfarth Opinion Letter”). Without a good-faith basis, the Seyfarth Opinion Letter stated,
6 among other things, that it was appropriate for Millenium to claim more than \$314 million in
7 basis for the Japanese debt that it had acquired for a tiny fraction of that amount.

8 64. By obtaining and claiming an artificially high basis in the Japanese debt – and
9 by “blessing” this maneuver – Fortrend, and Defendants Seyfarth and Taylor, facilitated the
10 Midco transaction that defrauded Plaintiff by effectuating a maneuver that Fortrend, Seyfarth
11 and Taylor all knew to be improper under the tax laws: a distressed asset/debt (or “DAD”)
12 scheme.

13 65. A DAD scheme uses purportedly high-basis, low-value distressed debt acquired
14 from foreign entities that are not subject to United States taxation. The distressed debt is
15 passed through one or more U.S. entities that fail to claim the proper basis for that debt. The
16 U.S. taxpayer that finally ends up holding the debt – here, Westside under Fortrend’s
17 ownership – then claims the significant tax loss that has passed through in order to offset other
18 U.S. income or gain. The effect is that the U.S. taxpayer (Westside under Fortrend’s
19 ownership) is seeking to benefit from the built-in economic losses in the foreign party’s
20 distressed asset when the U.S. taxpayer did not incur the economic costs of that asset.

21 66. As the Tax Court noted, Seyfarth “gained notoriety for issuing bogus tax-shelter
22 opinions,” and the opinion issued to Fortrend in Plaintiff’s case “seems par for the course.”
23 Rogers conceived of and created a DAD shelter in early 2003, shortly before he became a
24 Seyfarth partner in July 2003, and Seyfarth, Rogers and Taylor subsequently promoted,
25 facilitated and participated in numerous DAD and other illegal tax shelters thereafter with
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1 Fortrend and others. Upon information and belief, numerous clients of Seyfarth, Taylor and
2 Rogers were – like Fortrend – themselves tax shelter promoters who used the purported losses
3 from DAD and similar schemes as part of abusive Midco transactions.

4 67. Rogers and Taylor were both partners at the law firm Altheimer & Gray before
5 joining Seyfarth, after Altheimer went bankrupt in 2003. Rogers and Taylor both left Seyfarth
6 in 2008, Rogers after the firm – no longer comfortable with him promoting tax shelters –
7 forced him to resign, and Taylor after he pleaded guilty in January of that year to conspiring to
8 commit tax fraud.

9
10 68. In 2010, Taylor was disbarred, and the U.S. Department of Justice, based on a
11 years-long investigation, filed a complaint in federal court in Illinois accusing Rogers of tax
12 fraud and other offenses based on his creation and promotion of DAD shelters and similar tax
13 schemes dating back to at least 2003. Rather than contest the complaint's allegations, Rogers
14 agreed, in September 2011, to a permanent injunction against him directly or indirectly
15 organizing, promoting, advising, implementing, carrying out, managing or selling DAD or
16 similar transactions.

17
18 69. As was known at the time pertinent to this complaint by Fortrend, Seyfarth,
19 Taylor and Rogers, who were sophisticated practitioners in the tax arena, a DAD shelter
20 violates the legal doctrines of (1) economic substance; (2) substance over form; (3) step
21 transaction; and (4) sham partnership. Even though they violated such doctrines from their
22 inception, DAD shelters were widely promoted in the early 2000s by Fortrend, Seyfarth,
23 Taylor, Rogers and others. As a result, Congress emphasized their illegality by outlawing all
24 DAD schemes via the consideration and passage of the American Jobs Creation Act, with
25 which Fortrend, Seyfarth, Taylor and Rogers, as sophisticated tax practitioners, must have been
26 familiar. *See* American Jobs Creation Act of 2004, P.L. 108-357 (amending, among other
27 provisions, I.R.C. §§ 704(c), 734 and 743).
28

1 70. Fortrend, Seyfarth, Taylor and Rogers likewise knew, at the time pertinent to
2 this complaint, that the DAD aspect of the transaction was a sham because Fortrend incurred
3 no economic loss in connection with the deductions it was claiming.

4 71. In Plaintiff's case, and unbeknownst to Plaintiff, the second-stage DAD
5 transaction continued (after the Westside stock sale) this way:
6

- 7 a. On November 6, 2003, Millennium contributed to Westside a subset of the
8 Japanese debt portfolio, consisting of two defaulted loans (the "Aoyama
9 Loans"). The Aoyama Loans had a purported tax basis of \$43,323,069. Between
10 November 6 and December 31, 2003, Westside wrote off the Aoyama Loans as
11 worthless. On its Form 1120, U.S. Corporation Income Tax Return, for 2003,
12 Westside claimed a bad debt deduction of \$42,480,622 on account of that write-
13 off.
14
- 15 b. As the Tax Court found, Westside conducted no meaningful business operations
16 after September 10, 2003; it reported no gross receipts, income, or business
17 expenses relating to its supposed "debt collection" business; and it undertook no
18 efforts to collect the Aoyama Loans or contract with a third party to do so.
19 During this period, Conn Vu served Fortrend as Westside's president, secretary
20 and treasurer, signing Westside's tax returns and nominally presiding over the
21 company's "business" until Fortrend drained it of its last assets.
22
- 23 c. On its tax return for 2003, Westside (under Fortrend's control) reported total
24 income of \$66,116,708 and total deductions of \$67,840,521. The deductions
25 included purported bad debt losses of \$42,480,622 based on the Aoyama Loans.
26 Westside did not pay any amount of taxes.

27 72. By providing the purported justification for the \$42,480,622 deduction claimed
28 regarding the Aoyama Loans, Seyfarth and Taylor knowingly and substantially assisted the

1 fraud that Fortrend perpetrated upon Plaintiff. On information and belief, Seyfarth and Taylor
2 received a substantial fee in return for the Seyfarth Opinion Letter.

3 73. In addition to their own activities undertaken in or directed toward the Nevada
4 forum, Seyfarth and Taylor, on information and belief, knew or should have known – via their
5 participation in this transaction and otherwise – that their co-conspirators Fortrend, McNabola
6 and Conn Vu were directing and undertaking the acts alleged herein at Plaintiff and in the
7 Nevada forum. Seyfarth and Taylor’s actions caused harm to Plaintiff in Nevada.

9 74. The Seyfarth Opinion Letter in this case was, on information and belief, not the
10 only time that Seyfarth and Taylor were involved in similar transactions with McNabola, Conn
11 Vu and Fortrend. The U.S. Department of Justice, based on its investigation, has stated that
12 McNabola, with the assistance of Taylor, structured and/or assisted with setting up a DAD
13 transaction by which First Active Capital Inc. (“First Active”), in or about August 2005,
14 acquired distressed Chinese debt with a supposed basis of more than \$57 million. First Active,
15 which was incorporated in August 2005, and of which McNabola was the sole officer and
16 director until 2006, then used this distressed debt to offset gains in connection with other
17 transactions in which it participated in 2005, 2006, 2008, 2009 and 2010. In each of these
18 transactions, the DoJ has stated, Conn Vu, who replaced McNabola as an officer and director
19 of First Active, used the distressed debt that First Active had obtained to offset gains otherwise
20 incurred. Per the DoJ, First Active had no legitimate business purpose and was used solely to
21 facilitate illegal tax avoidance schemes. Moreover, while Taylor was indicted in November
22 2005 for tax fraud, and subsequently pleaded guilty to tax evasion, on information and belief,
23 he continued to practice law and provide advice to McNabola through at least 2008.

24 **PwC Monitored and Sought to Benefit from Midco Developments**

25 75. Meanwhile, after incorrectly advising Mr. Tricarichi with respect to the
26 Fortrend transaction, PwC continued to monitor developments regarding Midco
27
28

1 transactions – and to try to capitalize on such developments for its own benefit. For
2 example, in October 2003, the month after Tricarichi’s transaction with Fortrend closed,
3 internal PwC correspondence shows that PwC had already targeted the IRS’s focus on
4 reportable transactions such as Midcos as a chance to “sell a client service opportunity ...
5 for a fee.” PwC accordingly developed a “Sales Cycle” and marketing materials whereby it
6 would make “targets and clients” aware of the “potential impact” of IRS policies “before
7 they make their buying decision” about whether to seek guidance from PwC. By April
8 2004 a PwC marketing presentation noted, with respect to Midco and other transactions,
9 that “[t]he IRS is serious about enforcement actions.... The risks are real.”

11 76. While PwC was thus sounding the alarm elsewhere, it took a different tack as
12 to Mr. Tricarichi. In November 2003, two months after the Fortrend transaction closed,
13 PwC’s Stovsky and Lohnes reviewed IRS Notice 2003-76, which provided an updated list
14 of listed transactions. Determining the list “contain[ed] no items that would impact”
15 Tricarichi’s transaction, they did not advise him to take any action.

17 77. Subsequently, in January 2006, the IRS “announce[d] a directive
18 emphasizing ... that the original shareholders of target corporations” in Midco transactions
19 – such as, potentially, Mr. Tricarichi, the original shareholder of Westside – “must ... be
20 thoroughly considered for any tax liability, including ... transferee liability” since the
21 intermediary purchasers “will almost certainly be inadequate sources of collection” for the
22 IRS. PwC was aware of this directive, but did not advise Tricarichi of it – although PwC
23 still continued to monitor developments relevant to him.

25 **Commencing in Late 2008, PwC Breached its Duty to Inform Tricarichi**
26 **of its Prior Errors, Thereby Preventing Tricarichi from Correcting Those Errors**
27 **and Avoiding Millions of Dollars in Additional Damages**

28 78. In February 2008, when Plaintiff himself was required to respond to a request
from the IRS for information in connection with a “transferee liability” issue the IRS was

1 investigating, PwC likewise responded to a summons from the IRS. PwC did so after first
2 conferring with Plaintiff about the IRS summons and the documents that would be
3 produced in response. PwC was thus aware in early 2008 and going forward that the IRS
4 was looking at Plaintiff and the possibility of transferee liability. As further alleged below,
5 PwC remained in contact and had ongoing communications with Plaintiff in the ensuing
6 years.
7

8 79. In light of the recent IRS inquiries, in early March 2008 PwC's Mr. Stovsky
9 again consulted his colleague Mr. Lohnes about a new IRS notice (Notice 2008-34,
10 regarding the "Distressed Asset Trust (DAT) Transaction"). Lohnes told Stovsky not to
11 worry: "I don't think this should apply to your client's fact pattern...."

12 80. In April 2008, however, a federal district court held that the Bishop
13 transaction – where PwC brought Fortrend to the table in 1999 to facilitate a PwC-promoted
14 Midco deal– was a sham intermediary transaction. As one PwC professional stated to his tax
15 colleagues, "This is not a good situation.... I suspect we will hear more from the losing
16 plaintiffs [*i.e.*, PwC's clients] in the near future." By May 2008 there was also concern within
17 PwC about a Wall Street Journal article linking the sham Bishop transaction to Rabobank –
18 which also financed Fortrend's purchase of Tricarichi's Westside shares in 2003.
19

20 81. Then, on December 1, 2008, the IRS issued Notice 2008-111, which clarified
21 Notice 2001-16 regarding Midco tax shelters. Notice 2008-111 is retroactively effective
22 January 19, 2001, the effective date of Notice 2001-16. Notice 2008-111 superseded a prior
23 IRS notice, Notice 2008-20, issued in January 2008, which identified the components of the
24 Midco tax shelter transaction listed and described in Notice 2001-16. (Notice 2008-20 itself and
25 what the IRS said about the notice had already "caus[ed] quite a stir." In particular, there was
26 concern at PwC and elsewhere that the notice was "so broad as to make almost every deal to sell
27 stock of a company (short of a complete liquidation) a potential listed transaction.")
28

1 82. Notice 2008-111 retained Notice 2008-20's breakdown of the four components
2 of an intermediary tax shelter transaction and clarified that a transaction with all four of these
3 components is a Midco transaction with respect to a person who engages in the transaction
4 "pursuant to" a "Plan," *i.e.*, "under circumstances where the person or persons primarily liable
5 for any Federal income tax obligation with respect to the disposition of the Built-In Gain Assets
6 [component 1] will not pay that tax." "A person engages in the transaction pursuant to the Plan
7 if the person knows or has reason to know the transaction is structured to effectuate the Plan."
8 Notice 2008-111 further provides that any shareholder (X) of the target company (T) in the
9 transaction who controls at least 5 percent of the shares of T, or who is an officer or director of
10 T, is deemed to have "engage[d] in the transaction pursuant to the Plan if any of the following
11 [persons] knows or has reason to know the transaction is structured to effectuate the Plan: (i)
12 any officer or director of T; (ii) any of T's advisors engaged by T to advise T or X with respect
13 to the transaction; or (iii) any advisor of X [e.g., PwC] engaged by that X [e.g., Tricarichi] to
14 advise it with respect to the transaction."

15
16
17 83. Shortly after Notice 2008-111 was issued, Messrs. Stovsky and Lohnes, the
18 primary PwC personnel who advised Tricarichi in connection with the Fortrend transaction,
19 "read through the Notice and agree[d] ... that it shouldn't change any of our prior analysis" with
20 respect to Tricarichi. But, as Stovsky and Lohnes knew or had reason to know, Notice 2008-
21 111 – which was retroactively effective to the time period encompassing the Fortrend
22 transaction – indicated that their prior analysis of the transaction was wrong, or at least
23 questionable:
24

- 25 a. As Stovsky testified in Tax Court, PwC concluded when it originally advised
26 Tricarichi that Fortrend's plan "for the write-off of ... high basis/low valued property
27 that was to be contributed to Westside ... was not Mr. Tricarichi's concern." (Trial
28 Tr. 627:10 – 628:2) *See also* Trial Tr. 699:19 – 701:16 (Lohnes testifying that he
"observed that the IRS could challenge certain things that the buyers was planning to
do" but concluded that "it would not cause a recharacterization of Mr. Tricarichi's
stock sale"); 120:8-20, 173:23 – 174:20, 195:21 – 196:11, 197:24 – 200:1 (Tricarichi

1 testifying that he relied on PwC to advise him regarding the transaction and
2 Fortrend's distressed-asset plan).

- 3 b. But, under the newly-issued Notice 2008-111, Fortrend's plan was Tricarichi's
4 concern. As Notice 2008-111 indicates, Fortrend's plan was pertinent to the
5 question of whether Fortrend and/or Tricarichi were engaging in the transaction
6 "pursuant to" a "Plan," *i.e.*, "under circumstances where the person or persons
7 primarily liable for any Federal income tax obligation with respect to the disposition
8 of the Built-In Gain Assets will not pay that tax." Since PwC had been aware of
9 Fortrend's plan to write off the distressed assets it would contribute to Westside in
10 order to reduce Westside's (*i.e.*, Fortrend's) tax liability post-closing, under recently-
11 issued Notice 2008-111 PwC knew, or at least had reason to know, that the Fortrend
12 transaction was structured to effectuate a Plan as defined in the notice.
- 13 c. Since PwC had been Tricarichi's advisor with respect to the Fortrend transaction,
14 Tricarichi could thus now be deemed, under Notice 2008-111, to have engaged in the
15 transaction pursuant to a Plan, and the transaction thus deemed to be a Midco
16 transaction.
- 17 d. Accordingly, PwC's conclusion that the Fortrend transaction was not a reportable or
18 listed transaction (*see, e.g.*, Trial Tr. 653:19-25 [Stovsky]) was incorrect or at the
19 very least questionable, as PwC knew or should have known by December 2008.

20 84. PwC had an affirmative duty to inform Tricarichi of this error, and of the
21 resulting error on Tricarichi's tax return(s) with respect to the Fortrend transaction:

- 22 a. Notice 2008-111 itself states: "The Service and the Treasury Department recognize
23 that some taxpayers may have filed tax returns taking the position that they were
24 entitled to the purported tax benefits of the types of transactions described in Notice
25 2001-16. These taxpayers should consult with a tax advisor to ensure that their
26 transactions are disclosed properly and to take appropriate corrective action."
- 27 b. As PwC has itself noted, Association of International Certified Professional
28 Accountants ("AICPA") Statement on Standards for Tax Services ("SSTS") No. 6
29 (Knowledge of Error: Return Preparation and Administrative Proceedings) "sets
30 forth the applicable standards for a member who becomes aware of (a) an error in a
31 taxpayer's previously filed tax return [or] (b) an error in a return that is the subject of
32 an administrative proceeding, such as an examination by a taxing authority...."
33 Under this AICPA provision, "The term error ... includes a position taken on a prior
34 year's return that no longer meets these standards due to legislation, judicial
35 decisions, or administrative pronouncements having retroactive effect.... SSTS No.
36 6 applies whether or not the member prepared or signed the return that contains the
37 error."
- 38 c. Given its retroactive effective date of January 19, 2001, Notice 2008-111 is an
39 administrative pronouncement having retroactive effect. As alleged above, PwC
40 knew or had reason to know by December 1, 2008, that Notice 2008-111, and its

1 provisions regarding engaging in a Midco transaction pursuant to a Plan, resulted in
2 there being error(s) on Tricarichi's prior tax return(s).

- 3 d. SSTs No. 6 further provides that, "If a member becomes aware of an error in a
4 previously filed return, the member should promptly advise the taxpayer of the error,
5 the potential consequences, and recommend the measures to be taken.... If the
6 member is not engaged to perform tax return preparation, the member is only
7 responsible for informing the taxpayer of the error and recommend[ing] that the
8 taxpayer discuss the error with the taxpayer's tax return preparer."
- 9 e. Similarly, Section 10.21 of U.S. Treasury Department Circular No. 230, as
10 summarized by the IRS, requires that: "If you know that a client has not complied
11 with the U.S. revenue laws or has made an error in, or omission from, any return,
12 affidavit, or other document which the client submitted or executed under U.S.
13 revenue laws, you must promptly inform the client of that noncompliance, error, or
14 omission and advise the client regarding the consequences under the Code and
15 regulations of that noncompliance, error, or omission. Depending on the particular
16 facts and circumstances, the consequences of an error or omission could include
17 (among other things) additional tax liability, civil penalties, interest, criminal
18 penalties, and an extension of the statute of limitations.")

19 85. Notwithstanding the requirements of SSTs No. 6 and Treasury Circular No.
20 230, however, PwC did not inform Tricarichi of the foregoing developments and resulting
21 error(s) in his taxes. PwC thereby breached its affirmative duty to inform him thereof. PwC's
22 Stovsky and Lohnes expressly considered Notice 2008-111; made an affirmative (and wrong)
23 decision "that it shouldn't change any of our prior analysis" with respect to Tricarichi); and as
24 a result did not even contact Tricarichi – thereby improperly withholding information from
25 Tricarichi regarding Notice 2008-111 and its impact on the tax position Tricarichi had taken
26 with respect to the Fortrend transaction.

27 86. PwC had numerous opportunities to inform Plaintiff of the foregoing points, but
28 failed to do so in late 2008, early 2009 and thereafter. PwC's Stovsky, between 2008 and
2015, had various conversations with Jim Tricarichi, Plaintiff's brother – who served as a
liaison between Plaintiff and PwC – that included discussions of Plaintiff's IRS and Tax Court
proceeding. PwC also provided information in connection with Plaintiff's IRS and Tax Court
proceedings. And prior to providing deposition and trial testimony in Plaintiff's Tax Court

1 proceedings, PwC witnesses, including Stovsky, met with Plaintiff's counsel in August 2013,
2 December 2013 and June 2014, with PwC's counsel communicating closely with Plaintiff's
3 counsel during this period in advance of the testimony. During these communications,
4 Tricarichi's counsel informed PwC's counsel that the IRS was focused, among other things, on
5 the distressed debt transactions that Fortrend used to offset Westside's tax liabilities, and that
6 PwC had advised Plaintiff regarding. Indeed, in trying to convince the IRS not to depose Mr.
7 Lohnes, PwC's counsel learned in October 2013 that the IRS considered a key component of
8 its case to be establishing that Tricarichi had actual or constructive notice of Fortrend's plan to
9 write off Westside's tax liability via the distressed debt transactions – the very point addressed
10 by Notice 2008-111, and the very point with respect to which PwC (via AICPA SSTs No. 6
11 and Treasury Circular 230) had an obligation to tell Tricarichi it had given him bad advice.
12

13
14 87. Nonetheless, at no time, including on none of occasions just indicated, did PwC
15 inform Plaintiff of the errors noted above. But on all of these occasions, as also noted above,
16 PwC was aware that the IRS was looking at Plaintiff and the possibility of transferee
17 liability. On information and belief, PwC concealed the foregoing matters it was obligated
18 to disclose in order to avoid being sued by Tricarichi. As has only recently been learned,
19 and as set forth above, PwC thus breached its duty to inform Plaintiff of its prior errors.
20

21 **Defendants and Their Co-Conspirators Fraudulently Concealed Their Acts**

22 88. Defendants and their co-conspirators engaged in affirmative conduct designed
23 to prevent Plaintiff's discovery of their wrongdoing. These acts prevented Plaintiff's discovery
24 of the fraud and other misdeeds. PwC and its personnel were fiduciaries of Plaintiff, and the
25 remaining Defendants and conspirators were in a position of superior knowledge and/or trust,
26 and thus owed Plaintiff a duty to disclose the concealed facts, which they nonetheless
27 concealed or suppressed. Had Plaintiff known these facts, which came to light as a result of
28

1 the Tax Court trial or thereafter, he would have acted differently, but instead was damaged as a
2 result of the concealment.

3 89. Defendants' acts of concealment and omission included those set forth above,
4 and also continued after Plaintiff's agreement to and participation in the Fortrend transaction,
5 including: (i) Defendants' concealment of the second-stage DAD transaction with respect to
6 Westside; (ii) Defendants' concealment of their ongoing involvement in similar illegitimate
7 Midco and DAD transactions; (iii) Defendants' concealment of their knowledge of the
8 illegitimacy of these transactions and the transaction involving Plaintiff; (iv) Fortrend's
9 concealment of its ongoing involvement with Midcoast; (v) Fortrend and Conn Vu's
10 concealment of their post-closing actions despite the fact that Plaintiff's representatives were in
11 touch with them in 2006 and 2007 regarding the filing of a claim for the refund of excise taxes
12 for Westside; (vi) PwC's concealment of the fact that it advised at least one other taxpayer to
13 *avoid* the very transaction that PwC was advising Plaintiff to proceed with; and (vii) PwC's
14 ongoing failure, starting in late 2008 and continuing thereafter, to advise Plaintiff of PwC's
15 prior erroneous advice regarding the Fortrend transaction.

18 **Plaintiff Is Left Holding the Bag as a Result of the Foregoing Events**

19 90. As a result of foregoing events, the IRS audited Westside's 2003 tax return. At
20 the conclusion of the audit, the IRS disallowed the \$42,480,622 bad-debt deduction, and
21 another \$1,651,752 deduction claimed by Fortrend for legal and professional fees (on the
22 ground that these fees were incurred in connection with a transaction entered into solely for tax
23 avoidance). During the audit, the IRS was unable to find any assets or current sources of
24 income for Westside. On February 25, 2009, the IRS mailed a notice of deficiency to Westside
25 determining a deficiency of \$15,186,570 and penalties totaling \$6,012,777 under the tax code.

26 91. Westside – which had no assets or resources by this point as a result of
27 Fortrend's actions – did not pay any of these amounts and did not petition the U.S Tax Court
28

1 for relief. So, on July 20, 2009, the IRS assessed the tax and penalties set forth in the notice of
2 deficiency, plus accrued interest.

3 92. The IRS also proceeded with a transferee liability examination concerning
4 Westside's 2003 tax liabilities. Transferee liability is a method of imposing tax liability on a
5 person (here, Plaintiff) other than the taxpayer who is directly liable for the tax. This method is
6 used by the IRS when a person transfers property and tax related to that property subsequently
7 goes unpaid. In that case, the IRS goes after the person who made the transfer to recover the
8 taxes.
9

10 93. In connection with the investigation, the IRS issued a transferee report in
11 August 2009, to which Tricarichi objected in October 2009. The IRS and Mr. Tricarichi's
12 representatives conferred in the ensuing months in an effort to resolve the matter, including in
13 August, October and December 2010; and February, March and August 2011, with such efforts
14 coming to an end in early 2012. In addition to demonstrating that Tricarichi had no liability or
15 damages at the time he responded to the IRS' document requests in early 2008, these ongoing
16 communications and efforts – during which Tricarichi consistently took, and the IRS
17 considered, the position that he had no transferee liability – further demonstrate that, had PwC
18 then informed Tricarichi of its prior errors, as it had a duty and ample opportunity to do,
19 Tricarichi at that time could have at least minimized any ultimate transferee exposure on his
20 part by reaching agreement with the IRS or otherwise. Instead, PwC withheld information and
21 let Tricarichi proceed at his own peril, and to his ultimate harm.
22

23 94. As a result of its examination, the IRS determined that Plaintiff had transferee
24 liability for Westside's tax deficiency and penalties – a total of about \$21.2 million. The IRS
25 sent Plaintiff a notice of liability to that effect on June 25, 2012. (Years before, Plaintiff had
26 timely paid the IRS more than \$5 million in taxes relating to the long-term gain incurred in
27 2003 as a result of the sale of Plaintiff's Westside stock.)
28

1 95. Plaintiff petitioned the U.S. Tax Court in September 2012 for review of the IRS
2 notice of liability. The matter was litigated during 2013 and 2014, proceeding to a four-day
3 trial in June 2014. After trial, the Tax Court found in October 2015 that – contrary to what
4 Defendants and Fortrend had led Plaintiff to believe – the Fortrend transaction into which
5 Plaintiff had been drawn was an improper Midco transaction, and Plaintiff was liable under
6 transferee liability principles for Westside’s tax deficiency and penalties totaling about \$21.2
7 million, plus interest and interest penalties, which are estimated by Plaintiff to total more than
8 \$21.4 million (and counting).

10 96. The U.S. Court of Appeals for the Ninth Circuit affirmed the Tax Court decision
11 on November 13, 2018. Among other things, the appellate court affirmed the Tax Court’s
12 ruling that Tricarichi is liable for nearly \$13.9 million in interest that accrued before the IRS
13 sent Tricarichi notice of transferee liability in June 2012.

15 97. As a further result of Defendants’ actions, and in addition to the tax
16 deficiency, penalties and interest for which he has been held liable, Plaintiff has been
17 required to spend a considerable amount of money in fees and expenses in the IRS, Tax Court
18 and appellate proceedings. These fees and expenses exceed about \$5 million and continue to
19 be incurred. Additionally, Plaintiff lost other sums in connection with the Fortrend
20 transaction, including a \$5.4 million Fortrend “premium” and approximately \$125,000 in
21 professional fees paid upfront for review and advice regarding the transaction. All told,
22 Plaintiff has suffered tens of millions of dollars in damages as a result of Defendants’ actions.

24 98. At a minimum, had PwC in late 2008, early 2009 or thereafter fulfilled its
25 affirmative duty to inform Plaintiff of PwC’s prior erroneous advice regarding the Fortrend
26 transaction, and of the resulting errors on Plaintiff’s tax returns with respect to that transaction,
27 Plaintiff would have been able to amend his returns, avoid interest and penalties, avoid litigation
28 with the IRS, and thereby avoid related legal fees and expenses; and/or bring claims against

1 PwC then. But PwC, fearing the resulting exposure to Tricarichi had it come clean, remained
2 silent. PwC's failures thus, in and of themselves, caused Plaintiff millions of dollars in
3 damages, including the nearly \$13.9 million in interest that accrued before the IRS sent Plaintiff
4 notice of transferee liability, as the Ninth Circuit court of appeals recently held. By thus lulling
5 Plaintiff, PwC also protected itself from, or at least delayed, any litigation by Plaintiff seeking
6 recovery for PwC's failures.
7

8
9 **COUNT I**
GROSS NEGLIGENCE AS TO PwC

10 99. Plaintiff repeats and realleges paragraphs 1 through 98 above as though fully
11 set forth herein.

12 100. In consulting with and otherwise representing Plaintiff with respect to the sale
13 of Plaintiff's shares of stock in Westside and otherwise with respect to the transaction
14 proposed by Fortrend, Defendant PwC owed a duty to Plaintiff to use such skill, prudence
15 and diligence as commonly possessed and exercised by tax and business professionals in the
16 fields of income taxes, tax savings transactions and business tax consulting.
17

18 101. PwC breached that duty by committing, among others, one or more or a
19 combination of all of the following acts or omissions:

20 a. Failing to advise Plaintiff of PwC's prior dealings with Fortrend and
21 advocacy of a Midco transaction in the Bishop deal;

22 b. Advising Plaintiff that the transaction proposed by Fortrend was legal
23 and proper and in compliance with the tax laws;

24 c. Failing to properly advise Plaintiff about the significance of the
25 2001 Tax Notice or, in the alternative, failing to be fully aware of the 2001 Tax
26 Notice and/or its potential adverse consequences to Plaintiff as a result of the
27 Fortrend transaction; and
28

d. Failing to advise Plaintiff that because of the 2001 Tax Notice, there was an increased likelihood that the transaction might result in an audit by the IRS and possible liability under a theory of transferee liability.

102. Acting in reliance on the advice and opinions given by PwC, Plaintiff proceeded with the Fortrend transaction.

103. As a direct and proximate result of the gross negligence of PwC, Plaintiff has incurred damages in excess of \$10,000, including fees incurred to respond to and defend the examination by the IRS and to litigate the matter in Tax Court, the assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

104. PwC's actions compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT II
NEGLIGENT MISREPRESENTATION AS TO PwC

105. Plaintiff repeats and realleges paragraphs 1 through 104 above as though fully set forth herein.

106. In consulting and otherwise representing Plaintiff with respect to the sale of Plaintiff's shares of stock in Westside and otherwise with respect to the Fortrend transaction, Defendant PwC owed a duty to Plaintiff to communicate accurate information to Plaintiff.

107. The statements made by PwC to Plaintiff that the transaction proposed was proper and according to the tax laws were false statements of material fact and otherwise communications of inaccurate information to Plaintiff.

108. PwC was grossly negligent in failing to ascertain that these statements were, in fact, false and in otherwise conveying inaccurate information to Plaintiff.

1 109. PwC made the said false and otherwise inaccurate statements with
2 reckless disregard for their truth.

3 110. Plaintiff had no knowledge of the falsity or otherwise of the inaccuracy
4 of the said false statements made by PwC.

5 111. Plaintiff was thereby induced into going forward with and completing
6 the Fortrend transaction.

7
8 112. Plaintiff reasonably, justifiably and actually relied upon the said false
9 and otherwise inaccurate statements made by PwC and went forward with and
10 completed the transaction.

11 113. The said false and otherwise inaccurate statements made by PwC caused
12 Plaintiff to incur damages in excess of \$10,000, including but not limited to Plaintiff's
13 expenditure of a considerable amount of money in fees and expenses to respond to and
14 defend the examination by the IRS and to litigate the matter in Tax Court, and the
15 assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff
16 would otherwise have had to pay, and other losses.

17
18 114. PwC's actions compel Plaintiff to employ an attorney for redress, entitling
19 Plaintiff to obtain attorneys' fees and costs for pursuing this action.

20
21 **COUNT III**
 NEGLIGENCE AS TO PwC

22 115. Plaintiff repeats and realleges paragraphs 1 through 114 above as though fully
23 set forth herein.

24 116. The issuance of Notice 2008-111 in December 2008 gave rise to an
25 affirmative duty on the part of PwC to inform Plaintiff that its prior advice regarding the
26 Fortrend transaction had been erroneous, and of the resulting errors on Plaintiff's tax return(s)
27 with respect to the Fortrend transaction.
28

1 117. PwC breached that duty by not advising Plaintiff regarding Notice 2008-
2 111 and its impact on the tax position Plaintiff had taken with respect to the Fortrend
3 transaction. PwC breached its duty repeatedly, starting in December 2008 and continuing
4 thereafter, including making no mention of the errors to Plaintiff on the various occasions that
5 the parties communicated regarding Plaintiff's tax situation in the ensuing years. PwC's
6 breach was only recently discovered.
7

8 118. In these same communications in late 2008 and the ensuing years, PwC also
9 concealed from Plaintiff that fact that PwC – prior to advising Plaintiff – actually gave at least
10 one other taxpayer (John Marshall) completely the opposite advice that it gave Plaintiff
11 regarding a basically identical intermediary transaction proposed by Fortrend. But Plaintiff was
12 entitled to know then and certainly before litigation with the IRS that PwC advised at least one
13 other taxpayer to avoid the very transaction that PwC advised Plaintiff to proceed with.
14

15 119. As a result of PwC's breaches, Plaintiff was not able to amend his tax return(s),
16 avoid interest and penalties, avoid litigation with the IRS, and thereby avoid substantial related
17 legal fees and expenses. As a further result of PwC's breaches, Plaintiff was also prevented
18 from bringing claims against PwC sooner for PwC's failures and/or prior erroneous advice.
19

20 120. As a direct and proximate result of the negligence or gross negligence of
21 PwC, Plaintiff has incurred damages in excess of \$10,000, including fees incurred to respond
22 to and defend the examination by the IRS and to litigate the matter in Tax Court, the
23 assessment of penalties and interest by the IRS in sums far greater than Plaintiff would
24 otherwise have had to pay, and other losses.

25 121. PwC's actions compel Plaintiff to employ an attorney for redress, entitling
26 Plaintiff to obtain attorneys' fees and costs for pursuing this action.
27
28

COUNT IV
AIDING AND ABETTING FRAUD
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

122. Plaintiff repeats and realleges paragraphs 1 through 121 above as though fully set forth herein.

123. Fortrend made false representations to Plaintiff, knowing or believing that such representations were false or that there was insufficient basis to make such representations, intending to induce Plaintiff to act or to refrain from acting in reliance upon such representations. These false representations included the statements that Fortrend was really in the debt-collection business; that, after purchasing Westside's stock, Fortrend would employ Westside and its remaining assets in this debt-collection business; that Fortrend would employ Westside's tax liabilities to legitimately offset tax deductions associated with its debt-collection business; that the transaction it was proposing to Plaintiff would result in legitimate tax benefits and a greater net return to Plaintiff than he would otherwise realize; that Fortrend's affiliate Nob Hill would satisfy Westside's tax obligations for the year 2003; that Nob Hill would indemnify Plaintiff if it failed to satisfy these tax obligations; and that Fortrend / Nob Hill had no intention of causing Westside to engage in an IRS reportable transaction.

124. Plaintiff justifiably relied upon such representations in proceeding with the Fortrend transaction described above, and suffered tens of millions of dollars in damages as a result.

125. As reflected by the Rabobank audit and the steep drop-off in the number of Midco transactions it participated in, Rabobank / Utrecht knew that Fortrend was engaged in fraud, but nonetheless knowingly and substantially assisted Fortrend by loaning Fortrend the lion's share of the funds to purchase the Westside shares and by

1 serving as the conduit through which funds changed hands at closing, all in return for a
2 substantial “fee.” Plaintiff was damaged as a result.

3 126. Given their background and training as sophisticated practitioners in the tax
4 arena, Seyfarth and Taylor also knew that Fortrend was engaged in fraud, but nonetheless
5 knowingly and substantially assisted Fortrend by providing the Seyfarth Opinion Letter
6 “blessing” the DAD scheme that Fortrend used in order to claim a large deduction
7 supposedly offsetting the Westside tax liabilities it had purchased. Fortrend relied upon
8 the Seyfarth Opinion Letter in effectuating this maneuver. Plaintiff incurred damages in
9 excess of \$10,000 as a result.

11 127. Such actions by Rabobank, Utrecht, Seyfarth and Taylor were
12 oppressive, fraudulent and/or malicious; and/or part of a scheme to defraud Plaintiff
13 entered into by such Defendants, entitling Plaintiff to punitive damages.

15 128. Such actions by Rabobank, Utrecht, Seyfarth, and Taylor compel Plaintiff to
16 employ an attorney for redress, entitling Plaintiff to obtain attorneys’ fees and costs for
17 pursuing this action.

18 **COUNT V**
19 **CIVIL CONSPIRACY**
20 **AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR**

21 129. Plaintiff repeats and realleges paragraphs 1 through 128 set forth above
22 as though fully set forth herein.

23 130. The forgoing acts and omissions of the Defendants Rabobank, Utrecht,
24 Seyfarth and Taylor (collectively, the “Conspiring Defendants”) constitute and were part
25 of an ongoing scheme or artifice to defraud in which the said Conspiring Defendant(s)
26 agreed and conspired with Fortrend to unlawfully defraud the Plaintiff and others by
27 means of false or fraudulent pretenses, representations, omissions, concealments and
28 suppression of facts.

131. The foregoing acts and omissions of the Conspiring Defendant(s) were done in furtherance of the common scheme, and in concert with Fortrend, Vu, McNabola, Midcoast, Rogers and/or the other Conspiring Defendant(s).

132. As a result of the common scheme, Plaintiff has suffered, and will continue to suffer damages in an amount in excess of \$10,000, including but not limited to Plaintiff's expenditure of a considerable amount of money in fees and expenses to respond to and defend the examination by the IRS and to litigate the matter in Tax Court, the assessment of taxes, penalties and interest by the IRS in sums far greater than Plaintiff would otherwise have had to pay, and other losses.

133. Such actions by Rabobank, Utrecht, Seyfarth and Taylor were oppressive, fraudulent and/or malicious; and/or part of a scheme to defraud Plaintiff entered into by such Defendants, entitling Plaintiff to punitive damages.

134. Such actions by Rabobank, Urecht, Seyfarth, and Taylor compel Plaintiff to employ an attorney for redress, entitling Plaintiff to obtain attorneys' fees and costs for pursuing this action.

COUNT VI
RACKETEERING – VIOLATION OF NRS 207.400(1)(c)
AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR

135. Plaintiff repeats and realleges paragraphs 1 through 134 set forth above as though fully set forth herein.

136. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone Broadcasting, Westside, First Active and other transactions described above, Rabobank, Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two crimes related to racketeering within five years that have the same or similar pattern,

1 intents, results, accomplices, victims or methods of commission, or are otherwise related by
2 distinguishing characteristics and are not isolated incidents.

3 137. These crimes related to racketeering include obtaining possession of money
4 or property valued at \$650 or more, or obtaining signature by false pretenses (NRS
5 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS
6 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the
7 course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

9 138. Defendants' actions violate NRS 207.400(1)(c), in that they conducted or
10 participated, directly or indirectly, in the affairs of the enterprise through racketeering
11 activity, or racketeering activity through the affairs of the enterprise. Plaintiff was injured
12 by reason of such violation(s) in an amount in excess of \$10,000, and has a cause of action
13 against these Defendants for three times the actual damage sustained, plus attorney's fees
14 and costs of investigation and litigation reasonably incurred, and costs and expenses of the
15 proceeding, pursuant to NRS 207.470 and NRS 207.480.

17 **COUNT VII**
18 **RACKETEERING – VIOLATION OF NRS 207.400(1)(h)**
19 **AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR**

20 139. Plaintiff repeats and realleges paragraphs 1 through 138 set forth above as
21 though fully set forth herein.

22 140. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone
23 Broadcasting, Westside, First Active and other transactions described above, Rabobank,
24 Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and
25 participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two
26 crimes related to racketeering within five years that have the same or similar pattern,
27 intents, results, accomplices, victims or methods of commission, or are otherwise related by
28 distinguishing characteristics and are not isolated incidents.

1 141. These crimes related to racketeering include obtaining possession of money
2 or property valued at \$650 or more, or obtaining signature by false pretenses (NRS
3 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS
4 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the
5 course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

6
7 142. Defendants' actions violate NRS 207.400(1)(h), in that they provided
8 property to another person knowing that the other person intends to use the property to
9 further racketeering activity. Plaintiff was injured by reason of such violation(s) in an
10 amount in excess of \$10,000, and has a cause of action against these Defendants for three
11 times the actual damage sustained, plus attorney's fees and costs of investigation and
12 litigation reasonably incurred, and costs and expenses of the proceeding, pursuant to NRS
13 207.470 and NRS 207.480.

14
15 **COUNT VIII**
16 **RACKETEERING – VIOLATION OF NRS 207.400(1)(i)**
17 **AS TO RABOBANK, UTRECHT, SEYFARTH AND TAYLOR**

18 143. Plaintiff repeats and realleges paragraphs 1 through 142 set forth above as
19 though fully set forth herein.

20 144. As reflected by the Bishop, Town Taxi, Checker Taxi, St. Botolph, Slone
21 Broadcasting, Westside, First Active and other transactions described above, Rabobank,
22 Utrecht, Seyfarth and Taylor were part of an enterprise pursuant to NRS 207.380; and
23 participated in racketeering activity pursuant to NRS 207.390 by engaging in at least two
24 crimes related to racketeering within five years that have the same or similar pattern,
25 intents, results, accomplices, victims or methods of commission, or are otherwise related by
26 distinguishing characteristics and are not isolated incidents.

27 145. These crimes related to racketeering include obtaining possession of money
28 or property valued at \$650 or more, or obtaining signature by false pretenses (NRS

1 207.360(26)); fraud in connection with the offer, sale or purchase of a security (NRS
2 207.360(30) and NRS 90.570); and multiple transactions involving fraud or deceit in the
3 course of an enterprise or occupation (NRS 207.360(33) and NRS 205.377).

4 146. Defendants' actions violate NRS 207.400(1)(i), in that they conspired to
5 violate one or more of the provisions of NRS 207.400. Plaintiff was injured in an amount
6 in excess of \$10,000 by reason of such violation(s) and has a cause of action against these
7 Defendants for three times the actual damage sustained, plus attorney's fees and costs of
8 investigation and litigation reasonably incurred, and costs and expenses of the proceeding,
9 pursuant to NRS 207.470 and NRS 207.480.
10

11 **COUNT IX**
12 **UNJUST ENRICHMENT**
13 **AS TO RABOBANK AND UTRECHT**

14 147. Plaintiff repeats and realleges paragraphs 1 through 146 set forth above as
15 though fully set forth herein.

16 148. Approximately \$29.9 million of the PUCO settlement proceeds in Westside's
17 bank account were used by Nob Hill to repay the Rabobank / Utrecht loan to Nob Hill. By
18 keeping these funds as part of the improper tax scheme described above, in which they
19 participated, Rabobank and/or Utrecht had and retained a benefit which in equity and good
20 conscience belongs to another, namely, Plaintiff, the sole shareholder of Westside, who was
21 wrongfully drawn into Defendants' scheme, as set forth above.
22

23
24 WHEREFORE, Plaintiff respectfully prays that this Honorable Court enter the
25 following relief in favor of the Plaintiff and against Defendant(s):

26 A. A judgment for compensatory damages in favor of Plaintiff and against
27 Defendant(s), jointly and severally on all applicable claims in an amount in excess of \$10,000 to
28 be determined at trial.

1 B. A judgment for punitive damages in favor of Plaintiff and against Defendant(s),
2 jointly and severally on all applicable claims in an amount in excess of \$10,000 to be
3 determined at trial.

4 C. A judgment for three times compensatory damages in favor of Plaintiff and
5 against Defendant(s), jointly and severally on all applicable claims in an amount to be
6 determined at trial.

7 D. Costs of investigation and litigation reasonably incurred;

8 E. A judgment in favor of the Plaintiff and against such Defendant(s), ordering
9 Rabobank and/or Utrecht, as the case may be, to turn over in restitution the sums unjustly
10 retained, including interest;

11 F. Attorney's fees and costs and expenses for filing and proceeding with this suit.

12 G. Any other good and proper relief as this Court deems appropriate.

13
14 **JURY DEMAND**

15 Plaintiff demands trial by jury on all claims so triable as of right.

16 DATED this 10th day of December, 2018.

17 HUTCHISON & STEFFEN, LLC

18
19
20 

21 Mark A. Hutchison
22 Todd L. Moody
23 Todd W. Prall
24 10080 West Alta Drive, Suite 200
25 Las Vegas, NV 89145

26 Scott F. Hessell
27 Thomas D. Brooks
28 (Admitted *Pro Hac Vice*)
SPERLING & SLATER, P.C.
55 West Monroe, Suite 3200
Chicago, IL 60603

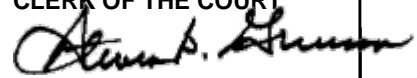
Attorneys for Plaintiff

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EXHIBIT 2

HUTCHISON & STEFFEN

A PROFESSIONAL LLC



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Telephone: (213) 687-5000
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12 *Attorneys for Defendant*
13 *PricewaterhouseCoopers LLP*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 MICHAEL A. TRICARICHI,

17 Plaintiff,

18 vs.

19 PRICEWATERHOUSECOOPERS LLP,
20 COÖPERATIEVE RABOBANK U.A.,
UTRECHT-AMERICA FINANCE CO.,
21 SEYFARTH SHAW LLP, and GRAHAM R.
TAYLOR,

22 Defendants.
23
24
25
26
27
28

Case No.: A-16-735910-B

Dept. No.: XI

**ORDER GRANTING SUMMARY
JUDGMENT**

10-10-1 10:23:57 AM

Snell & Wilmer

LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

1 Defendant PricewaterhouseCoopers LLP ("PwC") filed its Renewed Motion for Summary
2 Judgment ("Motion") on June 14, 2018. Plaintiff Michael A. Tricarichi ("Plaintiff") filed an
3 opposition to the Motion on July 30, 2018. PwC filed a reply on August 29, 2018.

4 A hearing on the Motion was held on September 24, 2018. Plaintiff was represented by
5 Mark A. Hutchison, Esq. of Hutchison & Steffen and Scott F. Hessell, Esq. of Sperling & Slater,
6 P.C. PwC was represented by Patrick G. Byrne, Esq. of Snell & Wilmer L.L.P. and Peter B.
7 Morrison, Esq. of Skadden, Arps, Slate & Flom LLP. Having considered the relevant briefing
8 and exhibits, having heard the arguments of the parties, and with good cause appearing, the Court
9 hereby enters the following Order Granting Summary Judgment in favor of PwC:

10 1. Plaintiff engaged PwC in April 2003 to provide certain advice regarding a
11 potential transaction between Plaintiff and Fortrend International, LLC (the "Transaction").

12 2. In connection with this engagement, Plaintiff and PwC entered into an engagement
13 agreement (the "Engagement Agreement"), which contained a New York choice-of-law
14 provision.

15 3. Plaintiff completed the Transaction in September 2003.

16 4. In the late 2000s, the Internal Revenue Service ("IRS") audited Westside's 2003
17 tax return, determined that the Transaction was a reportable Midco transaction under IRS Notice
18 2001-16, and assessed over \$21 million in unpaid tax deficiencies and tax penalties.

19 5. When Westside failed to pay its liabilities, the IRS initiated a transferee liability
20 examination to determine whether it could recover the liabilities from anyone who had received
21 Westside's assets.

22 6. As part of that investigation, the IRS sent Plaintiff an Information Document
23 Request ("IDR") regarding Plaintiff's potential transferee liability arising out of the Transaction.

24 7. Plaintiff responded to that IDR and produced documents to the IRS on February
25 21, 2008.

26 8. In January 2011, the parties entered into a tolling agreement with respect to any
27 claims Plaintiff might have against PwC arising out of services performed by PwC for Plaintiff
28

1 regarding the Transaction, which became effective January 19, 2011 and remained in place
2 through May 1, 2016.

3 9. The IRS ultimately issued a Notice of Liability, that Plaintiff was subject to
4 transferee liability for Westside's tax liabilities, dated June 25, 2012.

5 10. In September 2012, Plaintiff petitioned the United States Tax Court for review of
6 the IRS's determination.

7 11. In October 2015, the Tax Court held Plaintiff liable for Westside's tax liabilities.
8 The Tax Court's decision is pending before the U.S. Court of Appeals for the Ninth Circuit.

9 12. On April 29, 2016, Plaintiff filed this action.

10 13. In March 2017, PwC moved for summary judgment on statute of limitations
11 grounds.

12 14. The Court denied PwC's motion without prejudice based on Plaintiff's request for
13 NRCP 56(f) relief so that Plaintiff could conduct discovery with respect to his allegation that
14 PwC had fraudulently concealed its negligence from Plaintiff, which, Plaintiff maintained, tolled
15 the statute of limitations on his claims.

16 15. Plaintiff conducted discovery relative to his fraudulent concealment allegations
17 between May 30, 2017 and May 15, 2018, when NRCP 56(f) discovery closed.

18 16. PwC filed its present Motion on June 14, 2018.

19 17. The Court holds that regardless of whether New York's or Nevada's statute of
20 limitations applies, Plaintiff's claims are time-barred.

21 18. In the best-case scenario for Plaintiff, his claims were time-barred under NRS §
22 11.2075(1)(a)'s two-year statute of limitations because Plaintiff discovered or, as a matter of law,
23 should have discovered the alleged act, error or omission no later than when he received the IDR
24 from the IRS.

25 19. Plaintiff responded to the IDR on February 21, 2008. Therefore, Plaintiff's claims
26 were time-barred no later than February 21, 2010 under NRS § 11.2075(1)(a), nearly a year
27 before the parties entered into a tolling agreement in January 2011.
28

20. For these reasons, there are no genuine issues of material fact and Defendant PwC is entitled to judgment as a matter of law.

ORDER

Based upon the foregoing, this Court enters the following Order:

IT IS ORDERED that PwC's Renewed Motion for Summary Judgment is **GRANTED**. Judgment is **ENTERED** in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003.

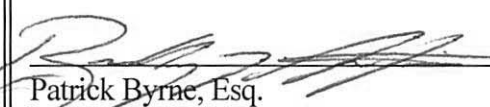
If Plaintiff believes that he has claims arising out of a subsequent retention of PwC in 2008 that may have a different statute of limitations, Plaintiff may file a motion for leave to assert such claims within 30 days of entry of this Order.

DATED: October 22, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

SNELL & WILMER L.L.P.


Patrick Byrne, Esq.
Bradley Austin, Esq.
3883 Howard Hughes Pkwy. #1100
Las Vegas, NV 89169

*Attorneys for Defendant
PricewaterhouseCoopers LLP*

Approved as to form and content by:

SPERLING & SLATER, P.C.

/s/ Scott F. Hessell
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Chicago, IL 60603

Attorneys for Plaintiff

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EXHIBIT PAGE ONLY

EXHIBIT 3

HUTCHISON & STEFFEN

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Attorneys for Defendant
PricewaterhouseCoopers LLP

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,
Plaintiff,

vs.

PRICEWATERHOUSECOOPERS, 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. XI

NOTICE OF ENTRY OF ORDER
GRANTING SUMMARY JUDGMENT

///

///

///

1 TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

2 PLEASE TAKE NOTICE that the attached **ORDER GRANTING SUMMARY**
3 **JUDGMENT** was entered in the above-entitled matter on October 24, 2018.

4
5 Dated: October 24, 2018

SNELL & WILMER L.L.P.

6 By: /s/ Bradley Austin
7 Patrick Byrne Esq.
8 Bradley T. Austin, Esq.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

9 Peter B. Morrison, Esq.
10 (Admitted *Pro Hac Vice*)
11 Winston P. Hsiao, Esq.
(Admitted *Pro Hac Vice*)
12 SKADDEN, ARPS, SLATE, MEAGHER &
13 FLOM, LLP
300 South Grand Avenue, Suite 3400
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14 *Attorneys for Defendant*
15 *PricewaterhouseCoopers LLP*
16
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CERTIFICATE OF SERVICE

As an employee of Snell & Wilmer L.L.P., I certify that a copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING SUMMARY JUDGMENT** was served on October 24, 2018, by the method indicated:

<input type="checkbox"/>	i) BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
<input type="checkbox"/>	ii) 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.
<input type="checkbox"/>	iii) BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
<input type="checkbox"/>	iv) BY PERSONAL DELIVERY: by causing personal delivery by _____, a messenger service with which this firm maintains an account, of the document(s) listed above to the person(s) at the address(es) set forth below.
<input checked="" type="checkbox"/>	v) 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.
<input type="checkbox"/>	vi) BY EMAIL: by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

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Todd L. Moody, Esq.
Todd W. Prall, Esq.
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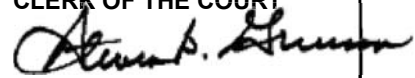
Scott F. Hessell, Esq.
Thomas D. Brooks, Esq.
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Attorneys for Plaintiff

/s/ Veronica Cross

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

4822-0665-0745.1



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11 Facsimile: (213) 687-5600

12 *Attorneys for Defendant*
13 *PricewaterhouseCoopers LLP*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 MICHAEL A. TRICARICHI,

17 Plaintiff,

18 vs.

19 PRICEWATERHOUSECOOPERS LLP,
20 COÖPERATIEVE RABOBANK U.A.,
UTRECHT-AMERICA FINANCE CO.,
21 SEYFARTH SHAW LLP, and GRAHAM R.
TAYLOR,

22 Defendants.
23
24
25
26
27
28

Case No.: A-16-735910-B

Dept. No.: XI

**ORDER GRANTING SUMMARY
JUDGMENT**

10-10-11 09:57 AM

Snell & Wilmer

LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

1 Defendant PricewaterhouseCoopers LLP ("PwC") filed its Renewed Motion for Summary
2 Judgment ("Motion") on June 14, 2018. Plaintiff Michael A. Tricarichi ("Plaintiff") filed an
3 opposition to the Motion on July 30, 2018. PwC filed a reply on August 29, 2018.

4 A hearing on the Motion was held on September 24, 2018. Plaintiff was represented by
5 Mark A. Hutchison, Esq. of Hutchison & Steffen and Scott F. Hessell, Esq. of Sperling & Slater,
6 P.C. PwC was represented by Patrick G. Byrne, Esq. of Snell & Wilmer L.L.P. and Peter B.
7 Morrison, Esq. of Skadden, Arps, Slate & Flom LLP. Having considered the relevant briefing
8 and exhibits, having heard the arguments of the parties, and with good cause appearing, the Court
9 hereby enters the following Order Granting Summary Judgment in favor of PwC:

10 1. Plaintiff engaged PwC in April 2003 to provide certain advice regarding a
11 potential transaction between Plaintiff and Fortrend International, LLC (the "Transaction").

12 2. In connection with this engagement, Plaintiff and PwC entered into an engagement
13 agreement (the "Engagement Agreement"), which contained a New York choice-of-law
14 provision.

15 3. Plaintiff completed the Transaction in September 2003.

16 4. In the late 2000s, the Internal Revenue Service ("IRS") audited Westside's 2003
17 tax return, determined that the Transaction was a reportable Midco transaction under IRS Notice
18 2001-16, and assessed over \$21 million in unpaid tax deficiencies and tax penalties.

19 5. When Westside failed to pay its liabilities, the IRS initiated a transferee liability
20 examination to determine whether it could recover the liabilities from anyone who had received
21 Westside's assets.

22 6. As part of that investigation, the IRS sent Plaintiff an Information Document
23 Request ("IDR") regarding Plaintiff's potential transferee liability arising out of the Transaction.

24 7. Plaintiff responded to that IDR and produced documents to the IRS on February
25 21, 2008.

26 8. In January 2011, the parties entered into a tolling agreement with respect to any
27 claims Plaintiff might have against PwC arising out of services performed by PwC for Plaintiff
28

1 regarding the Transaction, which became effective January 19, 2011 and remained in place
2 through May 1, 2016.

3 9. The IRS ultimately issued a Notice of Liability, that Plaintiff was subject to
4 transferee liability for Westside's tax liabilities, dated June 25, 2012.

5 10. In September 2012, Plaintiff petitioned the United States Tax Court for review of
6 the IRS's determination.

7 11. In October 2015, the Tax Court held Plaintiff liable for Westside's tax liabilities.
8 The Tax Court's decision is pending before the U.S. Court of Appeals for the Ninth Circuit.

9 12. On April 29, 2016, Plaintiff filed this action.

10 13. In March 2017, PwC moved for summary judgment on statute of limitations
11 grounds.

12 14. The Court denied PwC's motion without prejudice based on Plaintiff's request for
13 NRCP 56(f) relief so that Plaintiff could conduct discovery with respect to his allegation that
14 PwC had fraudulently concealed its negligence from Plaintiff, which, Plaintiff maintained, tolled
15 the statute of limitations on his claims.

16 15. Plaintiff conducted discovery relative to his fraudulent concealment allegations
17 between May 30, 2017 and May 15, 2018, when NRCP 56(f) discovery closed.

18 16. PwC filed its present Motion on June 14, 2018.

19 17. The Court holds that regardless of whether New York's or Nevada's statute of
20 limitations applies, Plaintiff's claims are time-barred.

21 18. In the best-case scenario for Plaintiff, his claims were time-barred under NRS §
22 11.2075(1)(a)'s two-year statute of limitations because Plaintiff discovered or, as a matter of law,
23 should have discovered the alleged act, error or omission no later than when he received the IDR
24 from the IRS.

25 19. Plaintiff responded to the IDR on February 21, 2008. Therefore, Plaintiff's claims
26 were time-barred no later than February 21, 2010 under NRS § 11.2075(1)(a), nearly a year
27 before the parties entered into a tolling agreement in January 2011.
28

20. For these reasons, there are no genuine issues of material fact and Defendant PwC is entitled to judgment as a matter of law.

ORDER

Based upon the foregoing, this Court enters the following Order:

IT IS ORDERED that PwC's Renewed Motion for Summary Judgment is **GRANTED**. Judgment is **ENTERED** in favor of PwC regarding any and all claims arising from the services PwC provided Plaintiff in 2003.


If Plaintiff believes that he has claims arising out of a subsequent retention of PwC in 2008 that may have a different statute of limitations, Plaintiff may file a motion for leave to assert such claims within 30 days of entry of this Order.

DATED: October 22, 2018.


DISTRICT COURT JUDGE

Respectfully submitted by:

SNELL & WILMER L.L.P.


Patrick Byrne, Esq.
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*Attorneys for Defendant
PricewaterhouseCoopers LLP*

Approved as to form and content by:

SPERLING & SLATER, P.C.

/s/ Scott F. Hessell
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Chicago, IL 60603

Attorneys for Plaintiff

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EXHIBIT PAGE ONLY

EXHIBIT 4

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

1 **FFCL**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5

6 **MICHAEL A. TRICARICHI,**
7
8 **Plaintiff,**

CASE NO.: A-16-735910-B

DEPT. NO.: XXXI

9
10 **vs.**

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT**

11
12 **PRICEWATERHOUSECOOPERS LLP,**
13 **Defendant.**

14
15 This matter came on for a Bench Trial before the Honorable Judge Joanna
16 S. Kishner, Department XXXI, commencing October 31, 2022, and the trial
17 concluded November 10, 2022. Appearing for Plaintiff Michael Tricarichi was
18 Ariel C. Johnson, Esq. of HUTCHISON & STEFFEN, PLLC., along with pro hac
19 vice counsel, Scott F. Hessell, Esq. and Blake Sercye, Esq. of SPERLING &
20 SLATER, P.C. Appearing for Defendant PricewaterhouseCoopers, LLP. ("PwC")
21 was Patrick G. Byrne, Esq. and Bradley T. Austin, Esq. of SNELL & WILMER,
22 LLP, along with pro hac vice counsel, Mark L. Levine, Esq., Christopher D.
23 Landgraff, Esq., Katharine A. Roin, Esq., of BARTLIT BECK, LLP. The Court,
24 having heard the testimony of the witnesses, having reviewed the trial exhibits
25 and evidence, and having heard arguments of counsel finds and orders as
26 follows:
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FINDINGS OF FACT

I. Introduction and Relevant Parties

1. This case arises from a 2003 transaction, in which Plaintiff Michael Tricarichi ("Tricarichi") sold his shares of his wholly-owned business, Westside Cellular ("Westside") to Fortrend International LLC ("Fortrend") for approximately \$34.9 million (the "Westside Transaction"). Tricarichi retained Defendant PriceWaterHouseCoopers, LLP ("PwC"), among others, to provide tax services related to the sale.¹

2. The IRS later audited Westside's 2003 tax return and sought to collect Westside's unpaid taxes from Tricarichi. The Tax Court ultimately ordered Tricarichi to pay roughly \$21 million in additional taxes and penalties, plus interest. Ex.² 66, Tricarichi Tax Court Memo at 068.

3. In 2016, Tricarichi filed this lawsuit against PwC, alleging that PwC was negligent in providing tax advice in 2003. Dkt. 1, Compl. ¶¶ 81–96. The Court granted Summary Judgment for PwC on that claim - on statute of limitations grounds. Dkt. 119, Order Granting Summ. J. at 3. Tricarichi then amended his Complaint to allege that PwC was separately negligent *five years later* for, among other things, failing to advise him in 2008 about IRS Notice 2008-111, which was issued in December 2008. Dkt. 140, Am. Compl. ¶¶ 115–121. Tricarichi set forth that *inter alia* if PwC had told him about Notice 2008-111, he could have avoided years of litigation with the IRS. *Id.* ¶ 121.

¹ While the background facts of this case have been extensively cited not only in at least two appellate decisions and in the Order in the Motion for Summary Judgment, the Court reiterates the relevant background facts as set forth in the trial to the extent they do not conflict with the law of the case.

² "Ex." refers to exhibits admitted into evidence at trial. "TT" (followed by the corresponding day of trial) refers to the trial transcripts, which are filed as docket numbers 396–405.

1 4. At trial, Tricarichi sought to recover the interest that has accrued
2 on his tax deficiency between early 2009 and 2018 as well as attorney's fees
3 and other costs he incurred litigating against the IRS (approximately \$3 million)
4 — a total of approximately \$18 million.
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6 **II. The Westside Transaction**

7 5. In April and May of 2003, Westside received approximately \$65
8 million in settlement proceeds from antitrust claims brought in Ohio. Ex. 66 at
9 007. The Record reflects that Tricarichi knew he would face substantial tax
10 liability on the settlement - both at the corporate level, and as a shareholder of
11 Westside and began looking for ways to minimize his tax burden. *Id.* Tricarichi's
12 brother, James, made an introduction to a company called Fortrend in early
13 2003, who told Tricarichi that it would purchase his Westside stock and offset the
14 taxable gain with losses, thereby eliminating Westside's corporate income tax
15 liability. *Id.* at 008. Tricarichi set forth that the amount after payment of legal fees
16 and employee bonuses, Westside was left with approximately \$40 million. Nov. 2,
17 2022, Trial Tr. 89:11-16; Trial Ex. 66 at 011. Regardless of whether the net
18 amount was \$65 million or \$40 million for purposes of the claims at issue in the
19 present litigation the analysis is the same.
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22 6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks,
23 LLP ("Hahn Loeser") to oversee all aspects of the transaction, including
24 structuring it, drafting the deal documents, and providing advice on how Tricarichi
25 could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20,
26 93:24–94:5).
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1 7. Hahn Loeser corporate and tax attorney Jeff Folkman, among
2 others, had authority to act on behalf of Tricarichi and acted as his agent in
3 various matters with respect to the Westside Transaction. See, e.g., Ex. 127,
4 Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

5 8. Ultimately, Tricarichi sold his shares of Westside to Nob Hill
6 Holdings, Inc., a Fortrend affiliate, for approximately \$35 million. The transaction
7 closed on September 9, 2003. Ex. 66 at 016, 023.

8 **III. PwC’s Engagement**

9 9. Tricarichi separately hired PwC to evaluate the tax implications of
10 the proposed Westside Transaction. TT4 142:10–13 (Stovsky). Tricarichi used
11 his brother James as a “conduit” during his dealings with PwC. TT3 143:7–15,
12 175:25–176:3. Tricarichi’s brother, James, was an accountant.

13 10. Tricarichi signed a written Engagement Agreement with PwC
14 dated April 10, 2003. Ex. 100. The Engagement Agreement consisted of an
15 Engagement Letter which incorporated an attached document entitled “Terms of
16 Engagement to Provide Tax Services.” These documents, collectively,
17 comprised the agreement between the parties. See *PricewaterhouseCoopers*
18 *LLP v. Eighth Jud. Dist. Court*, No. 82371, 2021 WL 4492128, at *1 (Nev. Sept.
19 30, 2021).

20 11. As this Court has found previously, Tricarichi received both the
21 Engagement Letter and the Terms of Engagement, and the Engagement
22 Agreement was a valid and binding contract. See Dkt. 336, Order Granting
23 PwC’s Mot. to Strike Jury Demand ¶ 33.³

24 12. The Engagement Agreement specified that PwC would provide
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27 ³ The instant Court was assigned the case in 2021 after certain decisions, which are law of the
28 case, had been made by the Honorable Elizabeth Gonzalez (ret.)

1 “tax research and evaluation services” for the Westside Transaction. Ex. 100 at
2 001. The Engagement Letter, thus, set forth specific parameters regarding the
3 scope of the engagement rather than an open ended engagement.

4 13. Section 7 of the Terms of Engagement contained a limitation-of-
5 liability clause, which states in relevant part:

6 IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED
7 THAT [PwC] WAS GROSSLY NEGLIGENT OR ACTED
8 WILLFULLY OR FRAUDULENTLY, SHALL [PwC] BE LIABLE TO
9 THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS,
10 EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD
11 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.

12 *Id.* at 007.

13 14. Section 3 of the Engagement Agreement advised that

14 Tax laws and regulations are subject to change at any
15 time, and such changes may be retroactive in effect
16 and may be applicable to advice given or other
services rendered before their effective dates. *[PwC]*
do[es] not assume responsibility for such changes
occurring after the date we have completed our
services.

17 *Id.* at 006.

18 15. Section 10 of the Engagement Agreement specified that it will be
19 governed by the laws of the State of New York. *Id.* at 007.

20 16. It was undisputed that several PwC tax professionals worked on
21 the Engagement, including Richard Stovsky, the Cleveland-based engagement
22 partner; Tim Lohnes, a partner in the corporate M&A group in the national office
23 in Washington DC; as well as partners Don Rocen and Ray Turk.

24 17. The PwC team performed a number of services pursuant to the
25 Engagment Agreement's terms, including analyzing draft agreements,
26 researching potential tax issues, discussing applicability of Treasury Notices,
27 and suggesting deal terms to protect Tricarichi (including indemnity protections
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1 and insurance).

2 18. PwC memorialized parts of its advice to Tricarichi in a memo
3 referred to at trial as the “Stovsky Memo,” which Stovsky updated periodically
4 after having conversations with other PwC partners, as well as with Tricarichi or
5 his advisors. Ex. 2. PwC also kept a file with notes and other communications
6 that it contended were relevant to its analysis. See, e.g., Ex. 1.

7 19. PwC primarily investigated two topics for Tricarichi: (1) whether the
8 Westside Transaction was reportable to the IRS as a so-called “Midco”
9 transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held
10 liable for Westside’s taxes, including under a transferee liability theory. *Id.* at
11 002–004.⁴

12 20. As to the first question, Stovsky advised Tricarichi that the
13 transaction “more likely than not” would not be reportable to the IRS as an
14 intermediary or Midco transaction under IRS Notice 2001-16. *Id.* at 001, 004;
15 TT4 158:1–7.

16 21. As to the second question, Stovsky similarly advised Tricarichi that
17 the transaction “more likely than not” would be “respected” by the IRS; and thus,
18 that Tricarichi would not be held liable for Westside’s taxes under transferee
19 liability. Ex. 2 at 001–003; TT4 154:3–6.

20 22. Based on the testimony of various witnesses for PwC, the “more
21 likely than not” qualifier to PwC’s advice is a standard tax industry term that
22 meant, consistent with its plain language, there was at least a 50.1% chance of
23 prevailing (up to 70% or 75%); or conversely, a 49.9% chance of losing. TT8
24 (Vol. 1) 250:5-9 (Harris); *id.* 60:10–19 (Greene); see also TT1 154:5–20
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27 ⁴ Although the parties disputed the depth of Midco experience the tax professionals at PwC had
28 in 2003, that dispute need not be resolved given the Summary Judgment ruling.

1 (Lohnes); TT6 143:2–18 (Boyer). That specific interpretation of “more likely
2 than not” was not set forth in any written communication sent to Tricarichi or his
3 representatives.

4 23. Based on evidence provided, Stovsky, either directly or through
5 conversations with Tricarichi’s representatives, also suggested that Tricarichi
6 take out an insurance policy for any potential tax liability or transferee liability.
7 Tricarichi did not follow this advice. Ex. 110, Handwritten Notes. TT6 23:18–
8 25:10.

9 24. PwC billed Tricarichi \$48,552.00 for the Engagement, which
10 Tricarichi paid in full. See Ex. 3, PwC Invoices.

11 25. PwC issued its last invoice on October 29, 2003, for services
12 rendered through September 30, 2003. *Id.* at 006. After that, PwC did not enter
13 into any Engagement Letter to perform any paid services for Tricarichi or
14 Westside. While it was undisputed that there was no monetary compensation
15 provided after the \$48,552.00 was paid in full by the end of 2003, and there was
16 no written Engagement Letter signed by Tricarichi in 2003, it was disputed
17 between the parties as to whether there was an implied client relationship due to
18 there being either an ongoing obligation to notify Tricarichi of new IRS bulletins
19 or rulings, or the fact that there were communications between PwC and
20 Tricarichi or his agents after 2003 relating to the IRS issues that arose regarding
21 the Westside Transaction.

22 26. While there was evidence that PwC reviewed IRS bulletins and
23 information relating to Midco transactions after providing Tricarichi its advice,
24 Plaintiff did not meet his burden to show that conduct created an affirmative duty
25 on behalf of PwC towards Tricarichi for claims that were not already precluded
26 by the Summary Judgment Motion.

27 27. For example, in approximately, November 2003, at Mr. Stovsky’s
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1 request, Mr. Lohnes reviewed an updated IRS list of prohibited transactions to
2 see if the Westside Midco Transaction, or a similar transaction, was listed. Trial
3 Ex. 32. Mr. Lohnes concluded that the November 2003 list “contain[ed] no
4 items that would impact [Westside’s] transaction, other than the items we
5 discussed previously, namely the midco listed transaction.” *Id.* at 001.

6 28. In addition, it was undisputed that PwC or its attorneys and
7 Tricarichi (or his attorneys) had contact after Tricarichi’s IRS dispute began. It
8 was disputed at trial, however, whether these communications were to provide
9 general assistance such as providing copies of documents or whether they
10 related to the retention of professional accounting services. *E.g.*, Ex. 7, Email
11 from S. Marcus to S. Dillon.

12 29. At trial, PwC witnesses consistently testified that by 2008, they did
13 not consider Tricarichi to be a current client, and that he did not have an
14 ongoing relationship with PwC after 2003. TT2 110:24–111:6 (Lohnes); TT3
15 31:21–32:3 (Lohnes); TT5 100:15–16 (Stovsky). Tricarichi, likewise, confirmed
16 that he never engaged PwC at any point after 2003, and did not have any
17 ongoing relationship after that time. Indeed, it was shown that while Tricarichi’s
18 brother, James, had some interactions with PwC, and so did Tricarichi’s lawyers,
19 there was no evidence that Tricarichi retained PwC’s services utilizing a similar
20 process involving a written Engagement Letter and payment of fees as he had
21 in 2003. Additionally, the 2003 Engagement Letter, on its face, did not set forth
22 there was an ongoing relationship; but, instead, was limited to the scope of
23 services provided and paid for. Further, no additional funds were paid by
24 Tricarichi, or anyone on his behalf, to PwC for any type of accounting services
25 on behalf of Tricarichi, or involving any interest held by Tricarichi. TT3 162:25–
26 163:5; 164:25–165:5 (Tricarichi).

27 30. In light of the foregoing specific facts and evidence presented at
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1 trial, the Court finds that Tricarichi ceased being a PwC client as of October,
2 2003 when the services pursuant to the specific Engagement Agreement were
3 completed and the final bill sent. By 2008, Tricarichi was a former client of
4 PwC's and had no ongoing professional relationship with the firm.

5 31. The next issue for the Court to determine is whether, in light of
6 Tricarichi's status as a former client and/or given the interactions between PwC
7 and either Tricarichi, his agents, his counsel and/or the IRS, PwC created a
8 relationship with Tricarichi that subjects it to liability pursuant to the claims in the
9 Amended Complaint. The Court sets forth the various issues raised by
10 Tricarichi below.

11 **IV. PwC's Prior Experience with Midco Transactions Do Not**
12 **Provide a Basis for Liability Against PwC in the Instant Case**

13 32. Tricarichi alleged that PwC's advice and/or involvement with other
14 Midco transactions demonstrated that it knew or had reason to know that the
15 advice it provided to Tricarichi was inaccurate or inconsistent; and thus, he
16 should prevail on his Amended Complaint. In support of that contention,
17 Tricarichi provided argument and/or evidence that advice provided in what was
18 referred to as the "Enbridge Matter" and the "Marshall Matter" was contrary or
19 different that the advice he received. PwC disputed both the allegations as well
20 as the applicability of both matters.

21 **A. The Enbridge Matter**

22 33. It was undisputed that the Enbridge matter arose in 1999 (prior to
23 the issuance of Notice 2001-16) and involved the purchase of shares from the
24 Bishop Group, Ltd. by Midcoast Energy Resources (which later came to be
25 known as Enbridge). Ex. 156, Enbridge Op. at 001-004. PwC (through its
26 Houston office) gave tax advice to Midcoast in the transaction. *Id.* at 002.

27 34. While the Enbridge matter involved a purported Midco transaction,
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1 the Court finds numerous differences between it and the instant case. First,
2 there were four parties (including an intermediary entity) to the Enbridge
3 transaction, while the Westside Transaction only involved three parties and
4 lacked an intermediary entity. *Id.* at 002–004.

5 35. Second, the Westside Transaction also did not include a target
6 corporation with built-in gain assets or a purchaser seeking to achieve a step-up
7 in the tax basis of such assets, as was the case in Enbridge. TT8 (Vol. 1) 196:8–
8 14 (Harris).

9 36. Third, the Enbridge transaction did not involve questions of
10 transferee liability. *Id.* 195:22–196:7 (Harris).

11 37. Thus, the evidence presented to this Court demonstrated that
12 there were differences between the two transactions as to not only their
13 structure, but also their timing *vis a vis* applicable IRS rules and regulations. In
14 addition, the Federal District Court's decision in *Enbridge* was published and
15 generally available to the public as of March 2008, including to Tricarichi and his
16 counsel. See, *Enbridge Energy Co. v. United States*, 553 F. Supp. 2d 716 (S.D.
17 Tex. 2008). Specifically to the case at bar, there was a memo from R. Corn to
18 Plaintiff Tricarichi which demonstrated that Tricarichi was advised on the
19 differences between Enbridge and the Westside Transaction so Tricarichi could
20 not have relied on any failure of PwC to provide him information about Enbridge
21 when his own counsel set forth that it was distinguishable from his case. Ex.
22 169, Memo from R. Corn to M. Tricarichi at 003–004.

23 24 **B. The Marshall Matter**

25 38. In addition to Enbridge, Tricarichi also contended that PwC failed
26 to disclose that it had any prior relationship with Fortrend and any of its prior
27 transactions. The evidence presented to the Court set forth that the Marshall

1 matter involved the family shareholders of a C corporation who sold their shares
2 to a Fortrend affiliate to minimize their tax liability from an expected litigation
3 settlement. Ex. 56, Marshall Tax Court Op. at 001–003. PwC (through its
4 Portland office) advised John Marshall not to proceed with the transaction and
5 stated that it would not consult or provide advice on the transaction. *Id.* at 004–
6 005. The transaction closed in March 2003. *Id.* at 007.

7 39. As with the Enbridge matter, the Court finds numerous differences
8 between the Marshall matter and the instant case. The Marshalls undertook an
9 integrated transaction with significant non-cash built-in gain assets (as opposed
10 to none in the Westside Transaction), and the nature of this transaction
11 presented greater risks of transferee liability than the Westside Transaction. TT8
12 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, Tricarichi did
13 not meet his burden to show that PwC has liability to him for failing to disclose
14 or take into account the advice given in that transaction.

15 **V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-11**

16 40. In his Amended Complaint, Tricarichi alleges that his claims are
17 not time barred based on a tolling agreement and instead PwC is liable for his
18 damages and interest because of what PwC did and did not do regarding IRS
19 Notice 2008-11. The gravamen of Tricarichi's claims are his contention that:
20 had PwC informed Mr. Tricarichi of the problems with its advice regarding the
21 Westside Midco Transaction and the resulting error on Mr. Tricarichi's tax
22 return(s), Mr. Tricarichi would have been able to amend his return(s), avoid
23 interest on taxes and penalties, avoid litigation with the IRS, and thereby avoid
24 related legal fees and expenses. Nov. 2, 2022, Trial Tr. 124:12-126:6.

25 41. PwC contended in its defense *inter alia* that: 1. All of Tricarichi's
26 claims are barred by statute of limitations; 2. Neither its 2003 advice, nor its
27 internal review of the 2008 Notice, which it did not advise Tricarichi it reviewed
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1 in 2008, did not fall below the standard of care based on the information
2 available and the risk factor it placed on its advice even with a retrospective
3 view of the 2008 Notice provisions; 3. Tricarichi hired experienced tax lawyers
4 who he relied upon in making his decisions and those lawyers provided similar
5 advice and analysis as PwC did; 4. There was no client relationship after 2003
6 and thus no duty was owed in 2008 or later; and 5. Tricarichi's damages are due
7 to his own conduct including not settling with the IRS.

8 42. It was undisputed that on December 1, 2008, the IRS issued
9 Notice 2008-111, entitled "Guidance on Intermediary Transaction Tax Shelters."
10 The impact and obligations relating to that Notice were disputed at trial. Ex. 44.

11 43. The plain language of the Notice itself sets forth that the purpose
12 of Notice 2008-111 was to "clarif[y]" the agency's prior notice on Midco
13 transactions, IRS Notice 2001-16. *Id.* at 003.

14 44. Specifically, Notice 2008-111 advised taxpayers that a transaction
15 would be treated as an "Intermediary Transaction" if: (1) a person engages in
16 that transaction pursuant to a "Plan" (as defined in the Notice); (2) the
17 transaction contains each of four objective components described in the Notice;
18 and, (3) no safe harbor exception applies. *Id.*

19 45. In so doing, PwC and others interpreted the Notice to mean that
20 the IRS narrowed the scope of Notice 2001-16. TT6 137:17–138:4 (Boyer); TT8
21 (Vol. 1) 182:23–183:1 (Harris).

22 46. Notice 2008-111 addressed only *reportability* of transactions to the
23 IRS, not *liability* under the tax laws. Ex. 44 at 003. The Notice did "not affect the
24 legal determination of whether a person's treatment of the transaction [was]
25 proper or whether such person [was] liable, at law or in equity, as a transferee of
26 property in respect of the unpaid tax obligation" *Id.*

27 47. After the IRS issued Notice 2008-111, Lohnes responded in an
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1 internal email to a question from Stovsky: "I read through the Notice and agree
2 with your assessment that it shouldn't change any of our prior analysis." Ex.
3 159, Lohnes Email to Stovsky. Stovsky testified that his receiving the IRS
4 subpoena to PwC relating to the Westside Transaction led him to communicate
5 with Lohnes about the Notice. TT6 67:9–13.

6 48. It was undisputed that the IRS began auditing Westside's 2003 tax
7 return in August 2005, and it interviewed Tricarichi in connection with that audit
8 in 2007. Ex. 144, IRS Notice of Audit to Westside Cellular. PwC was not
9 involved with the preparation of Westside's 2003 return.

10 49. On January 22, 2008—roughly ten months before issuing Notice
11 2008-111—the IRS sent Tricarichi an Information Document Request ("IDR")
12 seeking documents related to the Westside Transaction. Ex. 150. The IDR
13 advised Tricarichi that he may be liable for all or part of Westside's tax liability.
14 *Id.* at 001, See also, Order on Summary Judgment.

15 50. The IRS also issued a summons to PwC on January 29, 2008,
16 seeking documents related to the Westside Transaction. Ex. 152. On February
17 22, 2008, PwC responded to the summons, on its own behalf. In so doing, PwC
18 provided documents and set forth its contention that it had not provided any
19 services to Tricarichi since 2003. Ex. 155. Tricarichi was not billed for any of
20 these activities. See Ex. 3.

21 51. The IRS determined that as a result of the Westside transaction
22 the company owed an additional \$15.2 million in taxes and \$6 million in
23 penalties for 2003. Ex. 66 at 027. In a draft transferee report sent to Tricarichi
24 on February 3, 2009, the IRS sought payment of Westside's outstanding tax
25 liability from Tricarichi. Ex. 161 at 003–025.

26 52. After receiving the draft transferee report, Tricarichi recruited
27 highly experienced tax counsel to advise him.
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1 53. Among those who Tricarichi hired were Glenn Miller and Michael
2 Desmond of Bingham McCutcheon. Miller has practiced tax law for
3 approximately 30 years. TT7 185:6–8. Desmond is a tax lawyer with over 25
4 years of experience, including being employed at the DOJ's Tax Division. TT6
5 169:15–170:1. After his work for Tricarichi, Desmond later served as IRS Chief
6 Counsel. *Id.* 170:18–171:13.

7 54. Tricarichi also hired a team of lawyers at Sullivan & Cromwell, led
8 by Don Korb, a senior tax lawyer who, at the time of his deposition in 2020, had
9 been practicing tax law for over 45 years. TT8 (Vol. 2) 28 (Korb Dep. 15:25–
10 16:4). Korb's experience included serving as Chief Counsel of the IRS from
11 2004 to 2008. *Id.* at 28–29 (Korb Dep. 18:13–15, 19:23–20:1).

12 55. As his trial with the IRS in the Tax Court approached, Tricarichi
13 also hired several lawyers at McGuire Woods, led by one of its partners, Craig
14 Bell. TT6 182:24–183:10 (Desmond).

15 56. While representing their client before the IRS and consistent with
16 PwC's prior assessment, Tricarichi's lawyers repeatedly argued that under the
17 standards set forth by Notice 2008-111, the Westside Transaction was not an
18 intermediary transaction. *See, e.g.*, Ex. 102, 4/29/09 Response to Draft Protest
19 Letter at 006–010; Ex. 103A, 10/9/09 Formal Protest Letter at 012–016; Ex.
20 183, 10/27/10 Appeals Conference Presentation at 002–003, 010–012; Ex. 197,
21 3/18/11 Korb Letter to IRS at 003–004.

22 57. Each of the communications cited above contained lengthy
23 explanations of Notice 2008-111, by individuals separate from PwC including
24 tax lawyers, and they all set forth a similar opinion that Lohnes had provided
25 internally to Stovsky---i.e. that the 2008 Notice did not apply to the Westside
26 Transaction. *See id.* For example, the admitted exhibits included a March 2011
27 communication from one of Tricarichi's lawyers in the tax proceedings, Korb,
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1 wherein he contended that “pursuant to the clear and unambiguous language
2 of Notice 2008-111, the sale of West Side Cellular stock is neither an
3 intermediary transaction *nor* substantially similar to an intermediary transaction.
4 *We see no basis on which this conclusion can be challenged.*” Ex. 197 at 004
5 (emphasis added); see *also* Ex. 183 at 002–003, 010–012.

6 58. The evidence established that Tricarichi’s lawyers and the IRS
7 also undertook efforts to settle the case. For example, in October 2010, the IRS
8 indicated it would be willing to settle the claim for roughly \$14.5 million. Ex. 186,
9 Email from D. Korb to M. Tricarichi; Ex. 187, Tricarichi’s Baseline Case
10 Calculation at 005; TT6 177:3–9 (Desmond). Tricarichi did not accept this offer.

11 59. On December 6, 2010, Tricarichi’s lawyers at Sullivan & Crowell
12 sent a “decision tree” analysis to the IRS, which purported to calculate the IRS’s
13 chances of success at trial as a means of estimating the settlement value of the
14 case. Ex. 190, Email from A. Mason to P. Szpalik at 002. Tricarichi’s lawyers
15 took the position that the IRS had only a 17 percent (17%) chance of
16 establishing liability for Tricarichi and an 83 percent (83%) chance of failing to
17 make such a showing. *Id.*

18 60. At trial, Tricarichi confirmed that as of December 2010, he
19 understood that he had an 83 percent (83%) chance of winning his case against
20 the IRS based on the decision tree presented by his lawyers and which PwC
21 had no part in creating or editing. TT4 75:19–25.

22 61. On December 8, 2010, the IRS sent a new settlement offer of
23 approximately \$16.1 million. Ex. 192, Email from R. Corn to D. Korb; Ex. 193,
24 IRS Settlement Computation at 001. Tricarichi did not accept this offer.

25 62. The IRS made another settlement offer in August 2011 of
26 approximately \$12.4 million. Ex. 201, Facsimile from P. Szpalik to D. Korb at
27 002. Tricarichi did not accept this offer.

1 63. Tricarichi did not settle his IRS case. Tricarichi testified that he did
2 not have the ability to settle for the amount that was being sought. TT4 30:23–
3 31:1; *id.* 74:12–14; *id.* 86:11–13. Tricarichi's lawyers also testified that he was
4 not interested in considering settlement offers in the double-digit millions. TT6
5 198:2–17 (Desmond).

6 64. On June 25, 2012, the IRS issued a formal "Notice of Liability,"
7 asserting that Tricarichi owed \$15,186,570 in income tax and underpayment
8 penalties of \$6,012,777 (for a total of approximately \$21.2 million) for the
9 Westside Transaction. Ex. 210. Tricarichi petitioned the Tax Court for review
10 shortly thereafter. Ex. 66.

11 65. On May 30, 2014, Tricarichi rejected his lawyers' suggestion that
12 he might consider making a settlement offer to the IRS saying, "I don't want to
13 give the irs (sic) the impression that we think our case is weak, which I don't
14 believe it is." Ex. 228, Email from M. Tricarichi to M. Desmond.

15 66. In their arguments to the Tax Court, Tricarichi's lawyers continued
16 to argue that the Westside Transaction was not an intermediary transaction and
17 did not satisfy Notice 2008-111. *See, e.g.*, Ex. 225, Tricarichi's Tax Court Cross-
18 Motion in Limine at 005.

19 67. The Tax Court held a four-day trial on Tricarichi's petition in June
20 2014. After the trial, but before the Tax Court issued its decision in August 2014,
21 the IRS proposed settling the case for roughly \$13.7 million. Ex. 231, Email from
22 M. Desmond to M. Tricarichi; Ex. 232, Draft Settlement Discussion Framework;
23 TT6 201:18–202:3 (Desmond).

24 68. There was no settlement. Ex. 234, Email from M. Tricarichi to
25 M. Desmond.

26 69. The Tax Court issued its opinion on October 14, 2015, upholding
27 the IRS's Notice of Liability and ruling for the government on all issues. Ex. 66 at
28

1 005. Tricarichi's subsequent appeals were unsuccessful. *Tricarichi v. Comm'r of*
2 *Internal Revenue*, 752 F. App'x 455, 456 (9th Cir. 2018), cert. denied, 140 S. Ct.
3 38 (2019).

4 70. The evidence showed that PwC provided the information required
5 by the IRS or requested by Tricarichi and his agents or lawyers, regarding the
6 tax dispute and/or tax trials. There was no evidence that Tricarichi hired PwC to
7 perform any professional services for him relating to the tax dispute and/or tax
8 trials.

9 71. The Record further shows that while PwC did not contact Tricarichi
10 before or after Lohnes reviewed the 2008 Notice at Stovsky's request, Tricarichi
11 was familiar with Notice 2008-111 and was repeatedly advised as to its content
12 and applicability by the attorneys he hired.

13 72. For example, Tricarichi reviewed drafts of the April 29, 2009, and
14 October 9, 2009, letters to the IRS, both of which contained detailed discussions
15 of Notice 2008-111. TT7 189:1–18, 190:6-22 (discussing Ex. 102); Ex. 103A at
16 030. In fact, Tricarichi signed the October 9, 2009, letter himself, attesting under
17 penalty of perjury that he had “examined this protest, including any
18 accompanying documents,” and that the “facts presented in this protest are true,
19 correct, and complete.” *Id.*

20 73. Tricarichi's attorneys also testified that they advised him on Notice
21 2008-11 specifically, and Midco transactions generally, both orally and in writing.
22 TT7 189:19–190:2, 193:5–15 (Miller).

23 74. For example, in October 2009, Korb sent a memo to Tricarichi and
24 his personal attorney Randy Hart, advising them that the Westside transaction
25 was “quite different” from the type of transaction described in Notice 2008-111.
26 Ex. 165 at 003. Tricarichi also reviewed settlement presentations to the IRS that
27 discussed Notice 2008-111 and the reasons it did not apply to the Westside
28

1 Transaction. Ex. 174; Ex. 182.

2 75. The Court, therefore, finds that Tricarichi was aware of Notice
3 2008-111 and his counsel's interpretation of its applicability to the Westside
4 Transaction at least as of April 29, 2009. There was also evidence that during
5 the months and years that followed, his lawyers continued to advise him
6 repeatedly that in their opinion, and/or they had a strong argument to present to
7 a court, that the requirements of Notice 2008-111 were not met. This is the
8 same conclusion that PwC reached when it reviewed Notice 2008-111 shortly
9 after its issuance. See Ex. 159.

10 76. The preponderance of the evidence also shows that Tricarichi was
11 aware, or should have been aware, of the existence and contents of the Stovsky
12 memo no later than 2009. At trial, Tricarichi testified at one point that he first
13 saw a copy of the memo when PwC invited him and his lawyer, Randy Hart, to
14 review a box of documents it was planning to send to the IRS in response to a
15 summons it received regarding the Westside Transaction. TT4 7:21–23; see
16 *also* TT5 89:23–90:2, 90:21-91:1 (Stovsky); TT6 62:19–63:12 (Stovsky). This
17 meeting occurred in February 2008. See Ex. 155; TT6 62:11–25 (Stovsky). At
18 another point during his testimony, he stated that he was unsure whether he
19 saw the Stovsky memo in 2008. TT3. 122:14–19

20 77. Even if Tricarichi did not read the memo at the time he and Mr.
21 Hart were to review the documents to be sent to the IRS, that same memo was
22 cited by the IRS. Specifically, in February and August 2009, the IRS cited the
23 Stovsky memo and described its contents to Tricarichi in the draft and final
24 transferee reports that it issued. Ex. 161 at 009; Ex. 163 at 010. Further, in
25 September 2009, PwC sent Tricarichi a copy of the files it had provided to the
26 IRS, which included the Stovsky Memo. Ex. 51 at 001. Additionally, in October
27 2009, Sullivan & Cromwell billed Tricarichi, in part, for reviewing the Stovsky
28

1 Memo. Ex. 168 at 002. Thus, even though Tricarichi stated at one point that he
2 never heard the phrase “more likely than not” before trial, (TT3 107:17–21) and
3 provided different recollections of when and/or whether he read or was made
4 aware of the contents of the Stovsky memo, the evidence demonstrates that
5 given the number of other witnesses and documents, Tricarichi reasonably
6 should be viewed as being on notice of the contents of the Stovsky memo.

7
8 **VI. Procedural History of Tricarichi’s Dispute with PwC**

9 78. On January 14, 2011, Joel Levin, an attorney for Tricarichi, sent
10 Stovsky a letter in which he stated that “it is [Tricarichi’s] position that this multi-
11 million dollar potential tax liability [for the Westside Transaction] lies at the feet
12 of PwC for failing to provide him competent services, advice and counsel with
13 respect to the subject stock sale to Fortrend, particularly concerning the
14 potential tax consequences.” Ex. 205 at 002.

15 79. In April 2016, Tricarichi filed a Complaint against PwC in the
16 Eighth Judicial District alleging that PwC’s 2003 advice on the Westside
17 Transaction was negligent. Dkt. 1 ¶¶ 37–40, 81–96.

18 80. On October 22, 2018, the Court granted Summary Judgment in
19 PwC’s favor, holding that the statute of limitations barred any claims based on
20 PwC’s 2003 advice. Dkt. 119 at 2. The Court entered Judgment in favor of PwC
21 “regarding any and all claims arising from the services PwC provided Tricarichi
22 in 2003.” *Id.* at 3.

23 81. Tricarichi filed an Amended Complaint in which he added a claim
24 for negligence based on PwC’s alleged failure to tell him about Notice 2008-111.
25 Dkt. 140 ¶¶ 116–17. Tricarichi alleged that if PwC had told him about Notice
26 2008-111, he would have immediately stopped litigating against the IRS and
27 paid the tax deficiency. *Id.* ¶ 119.

28 82. In the meantime, Tricarichi pursued a professional negligence

1 claim against his attorneys at Hahn Loeser, alleging that they committed
2 malpractice by advising him to enter into the Westside Transaction. After a
3 mediation in September 2012, Tricarichi and Hahn Loeser settled their dispute
4 for \$4 million before any litigation was filed. Ex. 217, Letter from J. Levin to N.
5 Schwartz; Ex. 218, Confidential Settlement Agreement at 003 (¶ 5).

6 **VII. Standards of Professional Care**

7 83. The primary source of professional responsibility standards for
8 CPA tax practitioners during the time at issue in this case were standards
9 promulgated by the American Institute of Certified Public Accountants ("AICPA").

10 84. In fact, the Engagement Agreement between PwC and Tricarichi
11 specified that all services were to be performed "in accordance with the AICPA's
12 Statements on Standards for Tax Services." Ex. 100 at 007 (Section 7).

13 85. Both Nevada (where Tricarichi was located) and Ohio (where PwC
14 dispensed its advice) adopted the AICPA professional standards, at least in part,
15 to govern accountants licensed to practice. Nev. Admin. Code §§ 628.0060-5(a)
16 & (d), 628.500; Ohio Admin. Code § 4701-9-09.

17 86. AICPA Rule 201 provides that a CPA tax practitioner must exercise
18 professional competence and due care, which depends on the scope of the
19 practitioner's engagement under the particular facts and circumstances. Ex. 4,
20 AICPA Professional Standards.

21 87. The AICPA has defined the standard of care, and competence in
22 the context of tax planning advice and tax return preparation, in a series of
23 documents known as the Statements on Standards for Tax Services, or SSTs.
24 Ex. 106, Statements on Standards for Tax Services 1–8 (Aug. 2000).

25 88. SSTS No. 6 is entitled "Knowledge of Error: Return Preparation."
26 This standard addresses situations in which an accountant (or "member")
27 discovers either an error in a previously filed return or the taxpayer's failure to
28

1 file a return in the past. *Id.* at 027.

2 89. SSTS No. 6 states that “[a] member should inform the taxpayer
3 promptly upon becoming aware of an error in a previously filed return or upon
4 becoming aware of a taxpayer’s failure to file a required return.” *Id.* (§ 3).

5 90. An “error” under SSTS No. 6 is any position that has less than a
6 one-in-three chance of success. Ex. 106 at 027 (§ 1); *id.* at 008 (§ 2(a)), *id.* at
7 011 (Interpretation 1-1); Ex. 149 at 046, IRS Circular 230 (Section 10.34),
8 Definition D1; TT8 (Vol. 1) 191:17–25 (Harris).

9 91. The “Explanation” section of SSTS No. 6 clarifies that its
10 obligations exist only when the accountant is continuing to represent the client.
11 Both Paragraphs 5 and 9 of SSTS No. 6 refer to telling the “taxpayer” (client)
12 about the error if the member became aware of it “[w]hile performing services
13 for a taxpayer.” Ex. 106 at 028–029 (§§ 5, 9); TT7 32:16–33:12 (Dellinger).

14 92. Paragraph 6 of the same section discusses “whether to continue a
15 professional or employment relationship with the taxpayer” if the taxpayer does
16 not correct the error. Ex. 106 at 028 (§ 6). This, again, presupposes an existing
17 client relationship, a point upon which both PwC’s and Tricarichi’s experts
18 agreed. TT7 30:22–31:11 (Dellinger); TT8 (Vol. 1) 36:21–37:7 (Greene).

19 93. Nothing in the text of SSTS No. 6 imposes any obligations on an
20 accountant with respect to a former client. Trial testimony established that such
21 an open-ended obligation on accountants to their former clients would pose
22 enormous practical difficulties. TT7 33:13–22 (Dellinger); *see also* TT8 (Vol. 1)
23 38:19–22 (Greene).

24 94. SSTS No. 8 is entitled “Form and Content of Advice to Taxpayers.”
25 It addresses the “circumstances in which a member has a responsibility to
26 communicate with a taxpayer when subsequent developments affect advice
27 previously provided.” Ex. 106 at 033 (§ 1).

28

1 95. The standard states: “[a] member has no obligation to
2 communicate with a taxpayer when subsequent developments affect advice
3 previously provided with respect to significant matters, except while assisting a
4 taxpayer in implementing procedures or plans associated with the advice
5 provided or when a member undertakes this obligation by specific agreement.”
6 *Id.* (¶ 4).

7 96. The “Explanation” section of the standard further specifies that “a
8 member cannot be expected to communicate subsequent developments that
9 affect such advice unless the member undertakes this obligation by specific
10 agreement with the taxpayer.” *Id.* at 034 (¶ 9).

11 97. Finally, the standard notes that taxpayers should be informed that
12 any advice rendered reflects professional judgment based on an existing
13 situation, and that later developments could affect earlier advice. It further
14 instructs that “Members may use precautionary language to the effect that their
15 advice is based on facts as stated and authorities are subject to change.” *Id.* at
16 035 (¶ 10). PwC included such language in its Engagement Agreement. See
17 FOF ¶ 14, *supra*.

18 19 **VIII. Tricarichi’s Claimed Damages and PwC’s Mitigation Defense**

20 98. Tricarichi seeks, as damages, the legal fees incurred in his IRS
21 litigation, and the interest on his unpaid taxes and penalties that accrued from
22 January 1, 2009, through November 13, 2018. Specifically, in this case Tricarichi
23 contends that PwC is liable to him for \$3,180,143.03 in legal fees and costs, and
24 \$14,937,400.18 in interest owed to the IRS.

25 99. As one of its defenses, PwC contended through its expert that the
26 damages asserted are too high and do not reflect appropriate mitigation. PwC
27 contended that had Tricarichi set aside the money he potentially owed the IRS
28

1 and invested it in stock funds, bond funds, real estate funds, or some
2 combination of these, he could have enjoyed rates of return on the funds he
3 kept from the IRS significantly higher than the three-to-six percent interest rates
4 charged by the IRS during the same period. TT7 132:5–140:8 (Leaunae).

6 **CONCLUSIONS OF LAW**

8 **I. Elements of Tricarichi's Cause of Action (Count III)**

9 100. Tricarichi tried a single claim of professional negligence (Count III
10 of his Amended Complaint) to the Court. Dkt. 140 ¶¶ 115–121. Count III
11 focuses only on whether the issuance of Notice 2008-111 in December 2008
12 gave rise to any duty to Tricarichi that PwC breached. *Id.*⁵

13 101. Despite the narrow focus of Count III, some of the evidence at trial
14 focused on what was contended to be negligent acts and omissions that
15 occurred in 2003, when PwC originally rendered its advice, or earlier despite the
16 Court's prior Summary Judgment ruling, which barred as untimely "any and all
17 claims arising from the services PwC provided Plaintiff in 2003." Dkt. 191 at 3.
18 Given the time and effort spent on the providing the detailed history of the case,
19 and given the extensive procedural history including appeals and multiple
20 proceedings in other courts, the Court has included historical facts and
21 testimony for clarity of the record. By incorporating a fuller factual background,
22 the Court is not sua sponte altering or amending any prior judgment or ruling as
23 they remain law of the case. See, e.g. *Recontrust Co. v. Zhang*, 130 Nev. 1, 7–
24 8 (2014) ("[A] court involved in later phases of a lawsuit should not re-open

25
26 ⁵ The Amended Complaint also contains Counts I and II against PwC, both of which were
27 included only for preservation purposes after the Court dismissed them on Summary Judgment in
28 2018. Dkt. 140 n.1. Counts I and II were not tried to the Court, nor was any other claim in the
Amended Complaint apart from Count III. TT9 167:25–168:23.

1 questions decided (*i.e.*, established as law of the case) by that court or a higher
2 one in earlier phases”) (quotation omitted); see *a/so* Dkt. 234 at 4.

3 102. The elements of a cause of action in tort for professional
4 negligence are:

5 (1) the duty of the professional to use such skill,
6 prudence, and diligence as other members of his
7 profession commonly possess and exercise; (2) the
8 breach of that duty; (3) a proximate causal connection
between the negligent conduct and the resulting
injury, and (4) actual loss or damage resulting from
the professional’s negligence.

9 *Sorenson v. Pavlokowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (Nev. 1978).

10 103. As set forth in more detail below, at trial, Tricarichi failed to meet
11 his burden of proof on all four elements.

12
13 **II. First Element: PwC Did Not Owe Tricarichi a Duty of Care in 2008**

14 104. The Court concludes that PwC did not owe any duty to Tricarichi,
15 who ceased being a client in 2003, such that PwC should have updated its
16 previously-provided advice in 2008, after Notice 2008-111 issued. See
17 *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (Nev.
18 2009) (existence of duty is a matter of law for the Court to decide).

19 105. Under the AICPA’s SSTS No. 8, a member does not have any
20 obligation to communicate with a taxpayer about subsequent developments,
21 except “while assisting the taxpayer in implementing procedures or plans
22 associated with the advice provided or when the member undertakes this
23 obligation by specific agreement.” Ex. 106 at 033.

24 106. At trial, Tricarichi argued that the first exception (“while
25 implementing plans or procedures”) was satisfied because PwC provided
26 comments on the stock purchase agreement between Westside and Nob Hill in
27 2003, which he claimed created a continuing obligation for PwC to update him
28

1 on subsequent developments in 2008. TT9 112:13–24.

2 107. The Court disagrees. By its plain language, the exception only
3 applies “while” the member is assisting the taxpayer in implementing
4 procedures. TT9 81:17–84:1 (Harris); TT7 67:2–68:5 (Dellinger). Even if
5 providing comments on the agreement counted as “implementing” Tricarichi’s
6 plan in 2003 (a question that the Court need not reach here), it is undisputed
7 that those efforts ceased in 2003. By 2008, PwC was not performing any work
8 for Tricarichi.

9 108. As to the second exception, in the present case there was a
10 specific Engagement Letter signed by Tricarichi. PwC’s Engagement Letter,
11 consistent with SSTs No. 8, specifically disclaimed any ongoing obligation for
12 changes to the tax laws after services were rendered. Ex. 100 at 006 (Section
13 3); Ex. 106 at 006. Further, there was no contention that Tricarichi was not
14 aware of the terms of the Engagement Letter as he even made comments on
15 the Engagement Letter which he signed.

16 109. Tricarichi also pointed to Paragraphs 6 and 7 of SSTs No. 8,
17 which discusses when a member may consider providing advice in written, as
18 opposed to oral, form. TT8 (Vol. 1) 10:13–14:11 (Greene); Ex. 106 at 034. In
19 the present case, there was disputed testimony about whether there was a
20 specific discussion about obtaining the information orally or in writing or if
21 Tricarichi knew that he could have requested the opinions to be set forth in
22 writing. Regardless of whether there was a difference between the parties
23 whether any discussion took place or not, and even if the Court were to credit
24 Tricarichi’s view, the language of Paragraphs 6 and 7 of SSTs No. 8 is what the
25 Court focuses on to determine if the first prong of the cause of action is met. As
26 the plain language of the provision sets forth that the decision regarding the
27 form of advice is left to the “professional judgement” of the member, the Court
28

1 cannot find that it imposes any affirmative duty on members to provide written
2 advice. Instead, the Court reads the language as setting forth situations when
3 written advice may be preferable. TT8 (Vol. 1) 208:10–25 (Harris).

4 110. Thus, the Court concludes that Tricarichi did not meet his burden
5 to demonstrate in the present case that the standards set forth in SSTS No. 8
6 gave rise to any duty of care on the part of PwC to Tricarichi.

7 111. SSTS No. 6, likewise, does not create any duty to Tricarichi. The
8 Court has already found that SSTS No. 6 is limited to circumstances involving
9 awareness of an error on a tax return when an accountant is performing
10 services for a *current* client. Here, PwC was no longer performing services for
11 Tricarichi in 2008. At trial, even Tricarichi's expert would not commit to imposing
12 a duty on PwC under these circumstances. TT8 (Vol. 1) 38:19–22 (“[Q.] Let’s
13 say there were no services being provided to Mr. Tricarichi by PwC in 2008, in
14 that circumstance would PwC have a duty to disclose an error to a former client,
15 under SSTS 6? A. Perhaps not.”).

16 112. PwC’s later, occasional, contact with Tricarichi and his lawyers,
17 while responding to IRS subpoenas for documents in 2008 and later for
18 testimony in 2013 and 2014, does not constitute performing services for
19 Tricarichi. PwC was required by law to respond to IRS subpoenas on its own
20 behalf. Tricarichi concede that he did not seek to engage PwC, and PwC did
21 not invoice Tricarichi for time spent responding to the IRS subpoenas or
22 testifying at his Tax Court trial.

23 113. Relying on internal PwC policies and a single practice guide
24 published by the AICPA, Tricarichi also asserted at trial that PwC had a duty to
25 maintain a written file documenting how it reached its conclusions about Notice
26 2008-111. TT7 106:1–14, 109:7–19 (Greene); Ex. 22; Ex. 88.

27 114. While the Court took into account both the policies and the
28

1 practice guide, it cannot find that either of these created a duty that meets the
2 criteria necessary for a professional negligence tort. Furthermore, the practice
3 guide is not authoritative literature and describes only “best practices”; it does
4 not impose requirements on all accountants. TT8 (Vol. 1) 88:1–23 (Greene).
5 Indeed, it would be Tricarichi’s burden to establish that a failure to follow internal
6 policies or the terms of a practice guide creates a duty under Nevada law but he
7 did not provide any case law to the Court to support that contention. Instead,
8 the only case cited by either party was outside the jurisdiction and it provided
9 that a company’s internal standards are distinct from, and can be more rigorous
10 than, external duties imposed under the law. See, *In re Conticommodity Servs.,*
11 *Inc. Sec. Litig.*, No. MDL 644, 1988 WL 56172, at *1–2 (N.D. Ill. May 25, 1988).⁶

12 115. Based on the above reasons, the Court concludes, as a matter of
13 law, that PwC did not owe any duty of care to Tricarichi, its former client.
14 Accordingly, Tricarichi has failed to establish the first element of his claim.
15 While the failure to meet all elements of a cause of action would allow Judgment
16 in favor of PwC, the Court addresses each of the other elements as well.

17
18 **III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC**
19 **Did Not Breach That Duty**

20 116. Even if PwC owed a duty to update its former client, the Court
21 concludes that based on the evidence, Tricarichi has failed to prove that PwC
22 breached its duty.
23
24

25 ⁶ Plaintiff Tricarichi did cite a one case from a federal District Court in Nevada, *Garner v. Bank of*
26 *Am. Corp.*, 2014 WL 1945142 at *7–8 (D. Nev. May 13, 2014). That case, however, is inapposite
27 as it discusses generally that a duty can arise from a special relationship but does not address
28 the specific issues raised in this case.

1
2
3 **A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not**
4 **a Breach Because Tricarichi Did Not Meet His Burden to**
5 **Show that the Notice Rendered PwC's Prior Advice**
6 **Erroneous**

7 117. Assuming *arguendo* that SSTS No. 6 did create a duty to
8 Tricarichi, that duty could only be breached if Notice 2008-111 made PwC aware
9 of an "error" in a previously filed return. Ex. 106 at 027 (¶ 3). It did not.

10 118. First, it is undisputed that PwC was not aware of any error on a
11 previously filed tax return as a result of Notice 2008-111. Tricarichi contends,
12 instead, that PwC should have been aware of an error because it should have
13 interpreted the 2008 Notice as invalidating or being contrary in some respect to
14 the advice given by PwC in 2003. The evidence presented by Tricarichi was
15 that the IRS's position that Tricarichi owed taxes as a result of the Westside
16 transaction was upheld by the tax court, and then the appellate court; and by
17 implication, PwC should have known that Tricarichi would not prevail in either of
18 those courts. The challenge with that argument is that it is flawed and not
19 supported by the facts. First, there was no evidence that the IRS relied on
20 Notice 2008-111, which came out in December 2008, to commence its audit of
21 the Westside transaction, which began in 2005 about three years before the
22 Notice came out. Further, on January 22, 2008 - roughly ten months before
23 issuing Notice 2008-11 was sent to Tricarichi - he had already received an
24 Information Document Request ("IDR") from the IRS seeking documents related
25 to the Westside Transaction. The IDR advised Tricarichi that he may be liable
26 for all or part of Westside's tax liability. Ex. 150. Thus, even if Notice 2008-111
27 did more than narrow the circumstances in which a transaction would be
28 reportable, as was contended by PwC and others, Tricarichi did not meet his
burden to show that PwC breached its duty within the statute of limitations time

1 frame by failing to update him as there was no evidence that PwC knew that
2 such a Notice would come out in until it actually came out and by that time the
3 IRS had already begun its audit and he had already received the IDR.

4 119. To the extent that Tricarichi also claims that he would have
5 modified his tax returns and taken other actions after December 1, 2008, if PwC
6 had informed him that Notice 2008-111 impacted the merits of the IRS's position
7 on the audit they had already commenced in 2005, that contention was also not
8 established by the evidence. Instead the evidence showed that even after he
9 had various opportunities to resolve his tax dispute and had the benefit of
10 several legal tax professionals advising him, he chose not to settle the tax
11 dispute.

12 120. PwC further contended that pursuant to Notice 2008–111, a
13 transaction is treated as a Midco transaction if: (1) a person engages in that
14 transaction pursuant to a “Plan” (as defined in the notice); and (2) the
15 transaction contains each of four objective components described in the Notice.
16 Ex. 44 at 003.

17 121. There was no dispute that the term “Plan” is defined in Section 2
18 of the Notice, and it must include the disposition of Built-in Gain Assets. *Id.* at
19 003-004. “Built-in Gain Assets” is, in turn, defined as an asset “the sale of which
20 would result on taxable gain.” *Id.*

21 122. The undisputed evidence at trial—from fact and expert witnesses
22 called by *both* parties (including Tricarichi himself)—was that Westside did not
23 have any Built-in Gain Assets at the time of the transaction, and that the
24 Westside Transaction did not involve the sale of any Built-in Gain Assets. TT2
25 95:16–18 (Lohnes); TT4 63:5–10 (Tricarichi) (referring to Ex. 182 at 003); TT8
26 (Vol. 1) 76:20–22 (Greene); *Id.* 191:11–16 (Harris); TT7 200:3–23 (Miller). The
27 theory espoused in questioning by Tricarichi's counsel, that the release of the
28

1 claims in the lawsuit constituted Built-In Gain Assets, was not supported by a
2 single witness or any evidence in the case.

3 123. At the time of the transaction, Westside had only cash in its bank
4 accounts from the lawsuit settlement with the cell phone carriers, which was
5 considered ordinary income, not taxable gain from the sale of a Built-in Gain
6 Asset, and reported that way on Westside's tax return. TT2 47:12–22 (Lohnes);
7 TT8 (Vol. 1) 76:17–19 (Greene); *Id.* 259:11–21 (Harris); *see also Nahey v.*
8 *Comm'r*, 111 T.C. 256, 261–65 (1998) (holding that settlement of lawsuits “does
9 not constitute a sale or exchange” and thus would be treated as ordinary
10 income, not capital gain).

11 124. Thus, given the language of the Notice and how was interpreted
12 by others on behalf of Tricarichi, PwC did not fall below the standard of care by
13 reviewing Notice 2008-111 and making the determination that it did not change
14 the firm's prior analysis that, “more likely than not”, the transaction was not
15 reportable. Ex. 45, Lohnes Email to Stovsky.

16 125. Tricarichi argued at trial that Lohnes or Stovsky should have
17 consulted one of the designated “Subject Matter Experts,” or SMEs, at PwC
18 before reaching this conclusion. This argument, however, had no evidentiary
19 support. Tricarichi claimed at trial that it was the failure of PwC to inform him
20 that Notice 2008-111 impacted his personal liability to the IRS as a transferee.
21 Whether PwC had a SME involved or not is irrelevant. It was uncontested that
22 PwC (via Stovsky) did not believe there was any information to provide Tricarichi
23 based on Notice 2008-111. Stovsky was Tricarichi's relationship tax
24 professional at PwC who, in the past, had communicated what he thought
25 should be communicated to Tricarichi. Whether Stovsky communicated
26 internally with only Lohnes, or also with others such as a SME, prior to making
27 that determination, it was PwC's decision, via a tax partner, not to provide
28

1 Tricarichi with any analysis of Notice 2008-111, and whether that decision does
2 or does not meet the standard of professional negligence, is the issue before
3 the Court. The issue is not a speculation of whether if Stovsky or Lohnes
4 reached out to a SME would that SME give the same or a different opinion and
5 if so what would have happened. Tricarichi's claim and PwC's defenses are
6 based on what actually occurred - not speculation of what could have occurred
7 with a different set of facts.

8 126. In addition, in the present case, Tricarichi did not establish that the
9 individuals at PwC who provided the advice in 2003 were not qualified to
10 provide the advice. PwC did provide evidence that Lohnes had prior expertise
11 in Midco transactions, even though he could not recall names of specific matters
12 he worked on. TT3 4:21–5:20 (Lohnes). Second, the directory of SMEs was not
13 an exhaustive list of people at PwC with knowledge about particular
14 transactions, but rather that it served merely as a contact list for people outside
15 of Lohnes' group (Washington National Tax Service). TT2 115:2–116:10
16 (Lohnes). Finally, a designated SME on Midco transactions, Mark Boyer,
17 testified that Lohnes had a level of expertise in Midco transactions similar to his
18 own. TT6 140:15–141:12.

19 127. Another reason that PwC's advice in 2003 was not in "error" was
20 because it rendered its advice with a "more likely than not" confidence level.
21 That allows for up to a 49.9 percent (49.9%) likelihood of the result going the
22 other way. Thus, even if IRS 2008-111 did expand, rather than narrow, the
23 reportability standard (and it did not), that would not render earlier advice given
24 with a "more likely than not" standard erroneous.

25 128. As noted above, an "error" under SSTS No. 6 means that the
26 member advised the taxpayer to take a position with less than a 1-in-3 chance
27 of success. No one testified that as a result of Notice 2008-111, PwC's original
28

1 advice on reportability had such a low confidence level.

2 129. In evaluating the breach element, the Court also has to look at
3 what the other professionals Tricarichi hired advised him with in relation to
4 Notice 2008-111 and its applicability to his risk of liability to the IRS. Both the
5 internal communications, provided as exhibits, as well as the arguments
6 presented to the various courts by Tricarichi's legal tax attorneys as noted
7 herein, were consistent with the advice provided by PwC. See, also Ex. 165. In
8 addition, there was testimony that practitioners before the IRS and the Tax Court
9 must have a "good faith basis" in their positions—the same type of "good faith
10 basis" that is required under SSTs No. 1 when determining whether a position is
11 erroneous. TT8 (Vol. 1) 235:3–25, 237:21–238:16 (Harris); TT6 184:9–12
12 (Desmond).

13 130. Therefore, even if PwC had a duty to update Tricarichi about an
14 "error" in its prior advice on whether the transaction was now "reportable"
15 pursuant to Notice 2008-111, based on evidence presented as to the language
16 of the provision as well as the other advice Tricarichi received consistent with
17 PwC's own internal analysis, Tricarichi has failed to show that there was a
18 breach of any asserted duty.
19

20 **B. PwC Did Not Breach Any Duty to Provide Advice in**
21 **Writing or to Maintain Written Documentation**

22 131. As discussed above, PwC did not have any affirmative duty to put
23 its advice in writing, either in 2003 or at any point after. But, even if such a duty
24 existed, it would not have been breached in 2008 when Lohnes and Stovsky
25 reviewed Notice 2008-111 for its applicability to the Westside Transaction.

26 132. Any duty to provide advice in writing presupposes, as a matter of
27 logic, that some sort of advice is being provided to a client. That was not the
28 case in 2008. Tricarichi neither sought a tax engagement from PwC to receive

1 any advice from PwC in 2008, nor was he provided any tax advice from PwC in
2 2008. TT3 162:21–163:5; TT8 (Vol. 1) 113:5–7 (Greene). Thus, it would have
3 been impossible for PwC to breach any hypothetical duty to provide advice in
4 writing to Tricarichi at that time. TT8 (Vol. 1) 114:18–25 (Greene).

5
6 **C. Failure to Disclose PwC’s Prior Involvement in the**
7 **Enbridge and Marshall Transactions Was Not a Breach**
8 **of Any Duty**

9 133. Tricarichi also contends that Notice 2008-111 should have
10 prompted PwC to disclose its prior advice and the outcomes in the Enbridge and
11 Marshall transactions, and that its failure to do so was a negligent omission.

12 134. The Court disagrees. PwC’s involvement with Marshall and
13 Enbridge occurred long before the December 2008 issuance of Notice
14 2008-111, and the “independent duty” that Tricarichi claims came about at that
15 time as a result of the issuance of that Notice. PwC rendered its advice in the
16 Marshall case in 2003, and its involvement with Enbridge was in 1999.⁷

17 135. Moreover, as the Court has found above, both the Enbridge and
18 Marshall transactions were substantially distinct from the Westside Transaction,
19 and there is no reason to believe that PwC’s work in those two matters rendered
20 their advice to Tricarichi any more or less correct.

21 136. Furthermore, the evidence at trial showed that PwC would not
22 have been able to disclose the specific details of these engagements with
23 Tricarichi because of its confidentiality obligations. TT3 35:23–36:7 (Lohnes);
24 TT8 (Vol. 1) 199:17–23 (Harris); *id.* 102:14–103:4 (Greene).

25 137. Thus, the Court concludes as a matter of law that the failure to
26 disclose details of the Enbridge or Marshall transactions does not constitute a

27 ⁷ As noted above, the Court’s 2018 Summary Judgment ruling on statute of limitations bars
28 Tricarichi’s allegations regarding Marshall and Enbridge.

1 breach of any duty of care that PwC owed to Tricarichi.
2

3 **IV. Third Element: Tricarichi Has Not Proven Causation**

4 138. To prevail on his claim, Tricarichi must prove a “proximate causal
5 connection between the negligent conduct and resulting injury.” *Boesiger v.*
6 *Desert Appraisals, LLC*, 135 Nev. 192, 194–95, 444 P.3d 436, 439 (Nev. 2019).

7 139. Tricarichi asserts that PwC’s alleged negligence (*i.e.*, failing to
8 advise him about Notice 2008-111) caused his alleged injury (the \$14,937,400 in
9 interest that accrued after Notice 2008-111 was issued and the \$3,180,143 in
10 attorney’s fees he spent litigating against the IRS).

11 140. The Court disagrees and concludes that Tricarichi has failed to
12 establish causation for four independent reasons.

13 141. First, the record is clear that Tricarichi and his team of tax lawyers
14 were aware of Notice 2008-111 and its implications shortly after the Notice
15 issued as set forth above. The Court has already found that Tricarichi was
16 aware of Notice 2008-111 and its applicability to the Westside Transaction no
17 later than 2009; and further, that Tricarichi’s attorneys repeatedly advised him
18 thereafter throughout the course of his litigation with the IRS regarding whether
19 the requirements of Notice 2008-111 were met or not.

20 142. Thus, Tricarichi’s causation arguments rest on the supposition that
21 he would have abandoned his IRS litigation and immediately settled with the
22 government if only PwC had added a contrary voice to the chorus of
23 distinguished tax advisors—which included both former and future IRS Chief
24 Counsels—who were advising Tricarichi that the requirements of Notice
25 2008-111 were not satisfied. While Tricarichi argued that it would have made a
26 difference in his decisions, he failed to meet his evidentiary burden.

27 143. To the contrary, Tricarichi’s lawyers at Sullivan & Cromwell advised
28

1 him that the IRS did not need to rely on Notice 2008-111 to win, and that their
2 argument was “a bit of a red herring.” Ex. 165 at 003. And when asked at trial if
3 he knew in 2009 that Notice 2008-111 was a red herring, Tricarichi replied: “The
4 arguments that they’re using in 2008-111 -- again, I’m not a tax expert and I
5 keep saying that over and over again. But I can read. Okay? This is not why we
6 lost the [Tax Court] case. It has nothing to do with why we lost the case.” TT3
7 224:19–23 (Tricarichi) (emphasis added). The Court has to take Tricarichi’s own
8 testimony into account in evaluating every element of his claim. Giving
9 Tricarichi the benefit of the doubt that his words could be viewed out of context,
10 the weight of the rest of the evidence shows that there were too many
11 intervening causes which prevent holding PwC liable for Tricarichi’s asserted
12 damages.

13 144. Second, the chronology of the case demonstrates that Notice
14 2008-11 could not have prevented the audit which later resulted in the liability
15 determination. Specifically, Tricarichi did not show that disclosure of Notice
16 2008-111 would have made any difference to the rulings of the Courts as to his
17 liability because the Notice, on its face, relates only to reportability of
18 transactions and not a taxpayer’s underlying liability: The language of the
19 Notice sets forth it: “does not affect the legal determination of whether a
20 person’s treatment of the transaction is proper or whether such person is liable,
21 at law or in equity, as a transferee of property in respect of the unpaid tax
22 obligation” Ex. 44 at 003.

23 145. Importantly, in the present case, the chronology of facts shows
24 that the IRS had been examining/auditing the Westside Transaction for about
25 three years before Notice 2008-111 issued. The IRS began its audit of the 2003
26 Westside tax return in 2005, interviewed Tricarichi regarding that audit in 2007,
27 and issued an Information Document Request to Tricarichi in 2008, all before
28

1 the issuance of Notice 2008-111. Thus, even if PwC had informed Tricarichi that
2 2008-111 would require Tricarichi to report the Westside transaction, there was
3 no evidence presented how that would have changed the IRS determination
4 based on the audit that he was liable as a transferee in the instant case since
5 the audit had already progressed for three years prior to the Notice being
6 promulgated and the IRS had already informed him that it was seeking the
7 underpayment from his as a transferee.

8 146. The third reason, Tricarichi cannot meet the causation prong of his
9 professional negligence claim is that there is no credible evidence to support his
10 contention that if PwC had notified him regarding Notice 2008-111, he would
11 have amended his taxes and settled the case with the IRS in December 2008;
12 and thus, he would not have incurred any of the attorney fees or interest
13 damages he is seeking in the present case. Specifically, his transferee liability
14 stems from the taxes filed by various entities as a result of the Westside
15 transaction, and he did not present any evidence how he could amend the
16 relevant filings in 2008 or 2009 at no cost, and that as a result, the IRS would
17 not pursue him for transferee liability. There was no evidence from any IRS
18 witness or anyone else that the outcome described was possible.

19 147. Additionally, the evidence presented demonstrated that he had
20 several opportunities to settle the case with the IRS and minimize fees and
21 interest but he chose not to do so. As set forth in the Findings above, these
22 opportunities to settle the case came about after he was advised by
23 experienced tax counsel as to liability and the impact of 2008-111. While the
24 reason Tricarichi chose not to resolve the matter with the IRS was disputed,
25 PwC asserted that the communications between Tricarichi and his tax counsel
26 show he did not have the funds or felt the offers to settle were too high, and the
27 Record was devoid of any exhibit where Tricarichi contended that he did not
28

1 settle due to the advice provided by PwC in 2003. Instead, the only testimony in
2 support of that contention is Tricarichi's own testimony which the Court has to
3 weigh in contrast with the other testimony by his tax lawyers and the various
4 exhibits that were introduced which are not in accord with his testimony. In so
5 doing, the Court finds that Tricarichi did not meet his burden to show that PwC's
6 action or inaction relating to Notice 2008-111 meets the causation element of is
7 claim.

8 148. Thus, Tricarichi has failed to provide the level of evidence
9 necessary to support the notion that even had PwC advised Tricarichi about
10 Notice 2008-111 when it issued, Tricarichi could have or would have settled with
11 the IRS thereby avoiding the interest and legal fees he now seeks as damages.

12 149. Fourth, to the extent that Tricarichi's claim is that PwC was
13 negligent in 2008 because it did not advise him at that time of the contents of
14 the Stovsky Memo (as opposed to Notice 2008-111 itself), causation is still
15 defeated because the record is clear that Tricarichi was made aware of either
16 the existence or contents (or both) of the Stovsky memo on at least five
17 separate occasions in 2008 and 2009, either by PwC itself, the IRS, or his
18 attorneys. TT4 at 7:21-25; Ex. 161 at 009; Ex. 163 at 010; Ex. 164 at 001; Ex.
19 168 at 002.

20 21 **V. Fourth Element: Damages**

22 150. As the Court has found that Tricarichi, independently, has not met
23 his burden on any of the first three elements of a cause of action for
24 Professional Negligence, the Court need not, and determines it would not be
25 appropriate, to address the damages element.

26 **VI. Basis of PwC's Affirmative Defenses**

27 151. PwC tried four of its affirmative defenses to the Court: statute of
28

1 limitations (second affirmative defense), failure to mitigate damages (fourteenth
2 affirmative defense), offset/contribution (fifteenth affirmative defense), and
3 limitation of liability (sixteenth affirmative defense).

4 152. Consistent with the Court's determination that Tricarichi failed to
5 meet his burden on the elements of his cause of action for Professional
6 Negligence, the Court will only address the Second Affirmative Defense relating
7 to statute of limitations.⁸

8 153. Under Nevada law, an action for professional malpractice must be
9 brought two years from discovery or four years from the alleged malpractice,
10 whichever occurs earlier. NRS § 11.2075(1).

11 154. Under New York law—the governing law identified in the
12 Engagement Agreement—the statute of limitations is three years from the
13 alleged malpractice. See *Ackerman v. Price Waterhouse*, 644 N.E.2d 1009,
14 1011 (N.Y. 1994) (citing New York CPLR § 214).

15 155. Under either, the limitation period of Tricarichi's claim is untimely.

16 156. PwC's alleged acts of negligence related to Notice 2008-111
17 occurred in December 2008 or January 2009, shortly after it issued. Thus,
18 under New York law, the statute of limitations would have expired at the latest in
19 January 2013. Tricarichi did not file suit in this case until April 29, 2016, making
20 his claim untimely.

21 157. The outcome is no different if the Court applies Nevada law. The
22 Court found above that Tricarichi was subjectively aware of Notice 2008-111 at
23 least as of April 29, 2009. Thus, the Court concludes, for limitations purposes,
24

25 ⁸ As set forth above, the Court found that the first three elements of his cause of action were not
26 met for independent reasons. Thus, the Court found that there was not a basis to address the
27 damages element of his cause of action. Consistent therewith, the Court finds no basis to
28 address the other three affirmative defenses which are based on if there was a finding that
damages were appropriate - there was not.

1 that the latest date that Tricarichi knew or should have known about his claim
2 was April 29, 2009.

3 158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed
4 to be commenced no later than April 29, 2011 (two years from discovery). And
5 under N.R.S. 11.2075(1)(b), the action needed to be commenced by January,
6 2013 (four years from the alleged malpractice). However, the statute specifies
7 that the earlier of the two dates controls; thus, for limitations purposes, the latest
8 date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim
9 five years too late, on April 29, 2016.⁹

10 159. At trial, Tricarichi failed to introduce any evidence of a tolling
11 agreement, and expressly declined to do so when the Court inquired about such
12 an agreement immediately prior to closings. TT9 100:7–20 (“MR. HESSELL:
13 Yeah. No, we don’t need to -- We don’t need that”) (referring to proposed Exhibit
14 83). Furthermore, Tricarichi failed to include any proposed pre-trial findings or
15 conclusions of law on statute of limitations. As such, Tricarichi has waived any
16 argument that the limitations period was tolled by agreement or otherwise.¹⁰
17 *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 44,
18 49, 152 P.3d 737, 740 (Nev. 2007).

19 160. Instead, Tricarichi's counsel claimed in his closing argument
20 rebuttal, that the inclusion of a tolling agreement - as an exhibit to a brief in
21 opposition to an earlier Summary Judgment Motion - relieved him of any
22 obligation to introduce it as evidence at trial. The Court disagrees. See *Garcia*
23 *v. Shapiro*, 515 P.3d 345, (Nev. App. 2022) (“Regardless, motions, statements
24

25 _____
26 ⁹ In utilizing the January date, the this Court is providing Tricarichi the longer time frame as it is
taking into account the Levin letter (Ex. 205).

27 ¹⁰ Tricarichi's failure to disclose any proposed findings of fact or conclusions of law regarding
statute of limitations, likewise waives any argument that he is entitled to statutory tolling under
N.R.S. 11.2075(2).
28

1 and allegations within them, and exhibits attached to them do not necessarily
2 constitute evidence.”) (citing EDCR 5.205(g) (“Exhibits [to motions] may be
3 deemed offers of proof but shall not be considered substantive evidence until
4 admitted.”)); cf. NRAP 28(e) (party raising evidentiary issue on appeal must
5 identify where in the record “evidence was identified, offered, and received or
6 rejected”); see also *Town of Gorham v. Duchaine*, 224 A.3d 241, 244 (Me. 2020)
7 (“[S]imply attaching documents to a motion is not the equivalent of properly
8 introducing or admitting them as evidence. Documents attached to motions are
9 not part of the record and therefore cannot be considered evidence in the record
10 on appeal.”) (Collecting state cases).

11 161. Thus, under either the three-year statute of limitations in New
12 York, or the two-year statute of limitations in Nevada, Tricarichi’s claim is time-
13 barred¹¹.

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26 ¹¹ As set forth herein, the Court finds that PwC’s Statute of Limitations defense was met. The fact
27 that Tricarichi’s claim is barred by the Statute of Limitations is an independent basis upon which
28 Judgment for PwC is to be entered in addition to basis that Tricarichi did not meet his burden to
establish all four elements of his professional negligence claim.

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5		
6	Michael Tricarichi, Plaintiff(s)	CASE NO: A-16-735910-B
7	vs.	DEPT. NO. Department 31
8	PricewaterhouseCoopers LLP,	
9	Defendant(s)	

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
15 case as listed below:

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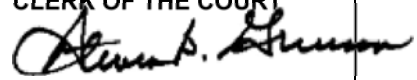
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EXHIBIT PAGE ONLY

EXHIBIT 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

CASE NO.: A-16-735910-B
DEPT. NO.: XXXI

**NOTICE OF ENTRY OF FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
ORDER GRANTING PWC'S MOTION TO
STRIKE JURY DEMAND**

1 PLEASE TAKE NOTICE that the attached *Findings of Fact, Conclusions of Law, and*
2 *Order Granting PWC'S Motion to Strike Jury Demand* was entered in the above-entitled action on
3 April 27th, 2022.

4 Dated: April 29, 2022.

SNELL & WILMER L.L.P.

7 By: /s/ Bradley Austin

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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 29, 2022, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PWC'S MOTION TO STRIKE JURY DEMAND** upon the following by the method indicated:

☐

BY E-MAIL: by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐

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.

☐

BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

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BY PERSONAL DELIVERY: by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below.

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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.

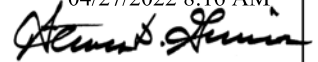
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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICEWATERHOUSECOOPERS LLP,

Defendant.

CASE NO.: A-16-735910-B
DEPT. NO.: XXXI

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING PWC'S
MOTION TO STRIKE JURY DEMAND**

The Court, having read and considered Defendant PricewaterhouseCoopers, LLP's
("PwC") Motion for Summary Judgment and to Strike the Jury Demand, Plaintiff Michael

Tricarichi's Opposition to PwC's Motion for Summary Judgment, PwC's Reply in Support of Motion for Summary Judgment, the Court's January 5, 2021 Order, The Supreme Court's September 21, 2021 Mandate, PwC's Pre-Hearing Brief and Errata, Tricarichi's Pre-Hearing Brief and Amended Pre-Hearing Brief, PwC's Motion to Strike Tricarichi's New Argument that the Contract is Unenforceable and Tricarichi's Response to PwC's Motion to Strike, and all other papers filed in support of the foregoing; having heard and considered the testimony of witnesses and the oral argument of counsel Pat Byrne, Esq. and Bradly Austin, Esq. of Snell & Wilmer L.L.P, and Chris Landgraff, Esq. and Mark Levine, Esq. of Bartlit Beck, L.L.P. appearing on behalf of PwC, and Scott Hessell of Sperling & Slater, P.C. and Ariel Johnson of Hutchinson & Steffen, LLC, on behalf of Tricarichi, and with good cause appearing, enters the following findings of fact, conclusions of law, and order.

PROCEDURAL BACKGROUND

1. On November 13, 2020, PwC filed a Motion for Summary Judgment and Motion to Strike the Jury Demand.

2. On January 5, 2021, Judge Gonzalez denied PwC's motion.

3. PwC petitioned the Nevada Supreme Court on January 25, 2021 asking it to issue a writ of mandamus directing the district court to enforce the jury-trial waiver.

4. On September 30, 2021, the Nevada Supreme Court granted PwC's petition for writ of mandamus and directed the Court to vacate its January 5, 2021 Order, in which it denied PwC's motion to strike Tricarichi's jury demand. Sept. 30, 2021 Mandamus Order at 3-4.

a. The Supreme Court held that: "As a matter of law, the contract here incorporated terms in a separate document containing the jury-trial waiver because it expressly referenced that document." *Id.* at 2.

b. "Tricarichi signed the contract, so the incorporated terms bound him regardless of whether he separately signed them." *Id.* at 3.

5. The Supreme Court "[le]ft it for the parties to litigate the enforceability of the jury-trial waiver in further district court proceedings." *Id.* And for this Court to "make findings under the applicable [*Lowe*] factors." *Id.* (citing *Lowe Enters. Residential Partners, L.P. v. Eighth Judicial*

1 *Dist. Court*, 118 Nev. 92, 101, 40 P.3d at 411 (providing four, non-exhaustive factors to analyze
2 whether a jury-trial waiver is entered into knowingly, voluntarily, and intentionally and is therefore
3 enforceable as a matter of public policy)).

4 6. On December 9, 2021, this Court held a hearing to address the outstanding issues
5 from the Supreme Court’s mandate and the process by which to present the issues to the Court.

6 7. On March 23, 2022, PwC and Tricarichi filed pre-hearing briefs to provide the Court
7 background and context for the evidentiary hearing.

8 a. On March 24, 2022, PwC filed an Errata correcting page numbering to its exhibits.

9 b. On March 24, 2022, Tricarichi filed an amended pre-hearing brief.

10 8. On March 28, 2022, PwC filed a motion to strike Tricarichi’s argument (“Motion to
11 Strike New Argument”) in his pre-hearing brief that the parties’ 2003 Engagement Agreement was
12 not legally binding. Tricarichi filed his response to PwC’s strike motion on March 29, 2022.

13 9. On March 30, 2022, this Court held an evidentiary hearing (“Hearing” or
14 “Evidentiary Hearing”) to determine whether the jury-trial waiver was enforceable under *Lowe*, as
15 instructed by the Supreme Court.

16 **LEGAL STANDARD**

17 10. Pursuant to the Supreme Court’s mandate, the Court finds that the parties had a full
18 and fair opportunity to present evidence for the Court to determine whether the jury-trial waiver in
19 the parties’ 2003 Engagement Agreement was enforceable.

20 11. The Supreme Court held that “Tricarichi signed the contract, so the incorporated
21 terms bound him regardless of whether he separately signed them.” Sept. 30, 2021 Mandamus
22 Order at 3.

23 12. The Supreme Court noted that “a jury-trial waiver is ‘*presumptively valid*’ unless the
24 challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or
25 intentionally.” *Id.* at 2 (quoting *Lowe*, 118 Nev. at 97, 40 P.3d at 408 (2002) (emphasis added)).

26 13. The factors to consider in determining whether the jury-trial waiver is enforceable
27 are: “(1) the parties’ negotiations concerning the waiver provision, if any, (2) the conspicuousness
28

of the provision, (3) the relative bargaining power of the parties and (4) whether the waiving party's counsel had an opportunity to review the agreement." *Lowe* 118 Nev. at 101, 40 P.3d at 411.

14. "[A] court may consider, but is not limited to, the above factors when determining whether a jury trial waiver should be enforced." *Id.*

FINDINGS OF FACT

1. Negotiations Regarding the Jury-Waiver Provision

15. The parties agree there were no specific negotiations over the jury-waiver provision found in the Terms of Engagement to Provide Tax Services ("Terms of Engagement").

16. However, Tricarichi proposed changes to certain provisions found in the 2003 Engagement Agreement though not in the attached Terms of Engagement and the parties negotiated over those proposed changes.

2. Conspicuousness of the Jury-Waiver Provision

17. There is no dispute that the jury-waiver is in the same size font as the Terms of Engagement's other provisions, and it is not bolded or in all caps, and that certain other text in Section 7 of the Terms of Engagement is in all caps.

18. However, the title of Section 9 that includes the jury-waiver, "**Resolution of Differences**", is in bold. *See* Ex. A admitted at the Hearing.

19. Moreover, the "Resolution of Differences" terms includes crystal clear, unambiguous language: "[PwC] 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."

20. Finally, the jury-trial waiver is mutual—it applies equally for all claims and counterclaims, binding both Tricarichi and PwC.

3. Relative Bargaining Power of the Parties

21. While PwC is an institution and Tricarichi is an individual, Tricarichi is a sophisticated individual with a very large business and was seeking a second opinion from PwC.

22. Tricarichi also testified that he had multiple resources and was consulting counsel in a variety of different areas at the time that he engaged PwC in 2003.

4. Whether Counsel Had an Opportunity to Review the Agreement

23. There was opportunity for Tricarichi to consult with counsel or other people as he negotiated the 2003 Engagement Agreement.

24. Tricarichi had ample time and opportunity from when he received the Agreement to when he signed it to have his counsel review the document.

5. Other Factors

25. While *Lowe* provides the Court an opportunity to consider other factors, the parties did not present in their summary judgment and motion to strike briefs, pre-hearing briefs or through testimony any other factors for the Court to consider.

26. The Court thus determines there are no other factors the Court should consider in accord with *Lowe*.

27. To the extent that the Court considers Tricarichi's argument that Mr. Tricarichi did not receive the Terms of Engagement as part of the 2003 Engagement Agreement as an additional factor, that argument is rejected.

28. The Supreme Court has already ruled as a matter of law the contract here incorporated the terms in a separate document containing the jury trial waiver because it expressly referenced the document.

29. The Court finds Tricarichi made an overt concession in his Declaration (admitted as Exhibit C at the Hearing) that he received the Terms which include the jury-waiver clause, because his Declaration referenced the same version of the 2003 Engagement Agreement that PwC provided to the Court, which included the jury-waiver clause at issue. August 1, 2018 Opp. to Mot. for Summ. J. [Dkt 113], Ex. 24 [Dkt 112]¹ ("Tricarichi Declaration"), *citing* PwC's Mot. for Summ. J, Ex. 2 [Dkt 77] (This is the same engagement agreement as admitted Exhibit A). While the Court recognizes that it was not the drafter of the Declaration and does not know Tricarichi's intention as to the statements in the Declaration, nowhere in the Declaration does Tricarichi say that there is not an enforceable agreement or that he was not bound to other parts of the 2003 Engagement Letter or the attached Terms of Engagement.

¹ Appendix of Exhibits to August 1, 2018 Opp. to Mot. for P. Sum. J.

CONCLUSIONS OF LAW

30. The Court denies PwC's Motion to Strike New Argument as unnecessary given the scope of the mandate from the Supreme Court.

31. Looking at the *Lowe* factors and taking into account the admitted exhibits, the full briefs submitted on March 23 and 24, 2022, the testimony presented at the Evidentiary Hearing, and the argument of counsel, the Court holds that Tricarichi has not met the required burden to prove that the presumptively valid jury waiver was not entered into knowingly, voluntarily and intentionally.

a. First, the fact that there were no specific negotiations related to the jury-trial waiver weighs in favor of Tricarichi. But there were negotiations about other provisions in the 2003 Engagement Agreement apart from the Terms of Engagement. Thus, the Court holds that the negotiation factor weighs in favor of PwC.

b. Second, the Court holds that the conspicuousness of the provision weighs in favor of PwC because the provision was under a bold heading, was in clear and unambiguous language, and was mutual.

c. Third, Tricarichi is a sophisticated businessman as he owned a large business, was seeking a second opinion from PwC and had counsel at his disposal. Thus, the Court holds that the relative bargaining power factor weighs in favor of PwC.

d. Fourth, Tricarichi had an opportunity to consult his counsel or other people with regards to the 2003 Engagement Agreement prior to signing it. Thus, this factor also weighs in favor of PwC.

32. Therefore, the jury-trial waiver is valid and enforceable.

33. Alternatively, the Court considered Tricarichi's arguments that there was no valid contract between the parties and that he did not receive the Terms of Engagement. The Court concludes that Tricarichi's arguments are not within the scope of the Supreme Court's mandate, but even if such arguments could be read into the scope of the mandate, Tricarichi's Declaration does not dispute there was a binding agreement and concedes that he received the Terms of Engagement.

ORDER

Joanna S. Kushner

7

Submitted by:

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Luxford, Lyndsey

To: Scott F. Hessel
Subject: RE: Revised

From: Scott F. Hessel <shessel@sperling-law.com>
Sent: Tuesday, April 26, 2022 8:58 AM
To: Austin, Bradley <baustin@swlaw.com>; Mark Levine <mark.levine@bartlitbeck.com>; Ariel C. Johnson <ajohnson@hutchlegal.com>; Todd W. Prall <TPrall@hutchlegal.com>
Cc: Chris Landgraff <chris.landgraff@bartlitbeck.com>; Kate Roin <kate.roin@bartlitbeck.com>; Blake Sercye <bsercye@sperling-law.com>; Byrne, Pat <pbyrne@swlaw.com>
Subject: Re: Revised

[EXTERNAL] shessel@sperling-law.com

You may include my signature.

From: Austin, Bradley <baustin@swlaw.com>
Date: Monday, April 25, 2022 at 5:28 PM
To: Scott F. Hessel <shessel@sperling-law.com>, Mark Levine <mark.levine@bartlitbeck.com>, Ariel C. Johnson <ajohnson@hutchlegal.com>, Todd W. Prall <TPrall@hutchlegal.com>
Cc: Chris Landgraff <chris.landgraff@bartlitbeck.com>, Kate Roin <kate.roin@bartlitbeck.com>, Blake Sercye <bsercye@sperling-law.com>, Byrne, Pat <pbyrne@swlaw.com>
Subject: RE: Revised

Hi Scott,

Per your below, we revised the order to only reference the jury demand in the amended complaint. A redline is attached. Please let us know if we may affix your e-signature and submit.

Thank you,

Brad

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EXHIBIT PAGE ONLY

EXHIBIT 6

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

1 **FFCL**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5

6 **MICHAEL A. TRICARICHI,**
7
8 **Plaintiff,**

CASE NO.: A-16-735910-B

DEPT. NO.: XXXI

9
10 **vs.**

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT**

11
12 **PRICEWATERHOUSECOOPERS LLP,**
13 **Defendant.**

14
15 This matter came on for a Bench Trial before the Honorable Judge Joanna
16 S. Kishner, Department XXXI, commencing October 31, 2022, and the trial
17 concluded November 10, 2022. Appearing for Plaintiff Michael Tricarichi was
18 Ariel C. Johnson, Esq. of HUTCHISON & STEFFEN, PLLC., along with pro hac
19 vice counsel, Scott F. Hessell, Esq. and Blake Sercye, Esq. of SPERLING &
20 SLATER, P.C. Appearing for Defendant PricewaterhouseCoopers, LLP. ("PwC")
21 was Patrick G. Byrne, Esq. and Bradley T. Austin, Esq. of SNELL & WILMER,
22 LLP, along with pro hac vice counsel, Mark L. Levine, Esq., Christopher D.
23 Landgraff, Esq., Katharine A. Roin, Esq., of BARTLIT BECK, LLP. The Court,
24 having heard the testimony of the witnesses, having reviewed the trial exhibits
25 and evidence, and having heard arguments of counsel finds and orders as
26 follows:
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FINDINGS OF FACT

I. Introduction and Relevant Parties

1. This case arises from a 2003 transaction, in which Plaintiff Michael Tricarichi ("Tricarichi") sold his shares of his wholly-owned business, Westside Cellular ("Westside") to Fortrend International LLC ("Fortrend") for approximately \$34.9 million (the "Westside Transaction"). Tricarichi retained Defendant PriceWaterHouseCoopers, LLP ("PwC"), among others, to provide tax services related to the sale.¹

2. The IRS later audited Westside's 2003 tax return and sought to collect Westside's unpaid taxes from Tricarichi. The Tax Court ultimately ordered Tricarichi to pay roughly \$21 million in additional taxes and penalties, plus interest. Ex.² 66, Tricarichi Tax Court Memo at 068.

3. In 2016, Tricarichi filed this lawsuit against PwC, alleging that PwC was negligent in providing tax advice in 2003. Dkt. 1, Compl. ¶¶ 81–96. The Court granted Summary Judgment for PwC on that claim - on statute of limitations grounds. Dkt. 119, Order Granting Summ. J. at 3. Tricarichi then amended his Complaint to allege that PwC was separately negligent *five years later* for, among other things, failing to advise him in 2008 about IRS Notice 2008-111, which was issued in December 2008. Dkt. 140, Am. Compl. ¶¶ 115–121. Tricarichi set forth that *inter alia* if PwC had told him about Notice 2008-111, he could have avoided years of litigation with the IRS. *Id.* ¶ 121.

¹ While the background facts of this case have been extensively cited not only in at least two appellate decisions and in the Order in the Motion for Summary Judgment, the Court reiterates the relevant background facts as set forth in the trial to the extent they do not conflict with the law of the case.

² "Ex." refers to exhibits admitted into evidence at trial. "TT" (followed by the corresponding day of trial) refers to the trial transcripts, which are filed as docket numbers 396–405.

1 4. At trial, Tricarichi sought to recover the interest that has accrued
2 on his tax deficiency between early 2009 and 2018 as well as attorney's fees
3 and other costs he incurred litigating against the IRS (approximately \$3 million)
4 — a total of approximately \$18 million.
5

6 **II. The Westside Transaction**

7 5. In April and May of 2003, Westside received approximately \$65
8 million in settlement proceeds from antitrust claims brought in Ohio. Ex. 66 at
9 007. The Record reflects that Tricarichi knew he would face substantial tax
10 liability on the settlement - both at the corporate level, and as a shareholder of
11 Westside and began looking for ways to minimize his tax burden. *Id.* Tricarichi's
12 brother, James, made an introduction to a company called Fortrend in early
13 2003, who told Tricarichi that it would purchase his Westside stock and offset the
14 taxable gain with losses, thereby eliminating Westside's corporate income tax
15 liability. *Id.* at 008. Tricarichi set forth that the amount after payment of legal fees
16 and employee bonuses, Westside was left with approximately \$40 million. Nov. 2,
17 2022, Trial Tr. 89:11-16; Trial Ex. 66 at 011. Regardless of whether the net
18 amount was \$65 million or \$40 million for purposes of the claims at issue in the
19 present litigation the analysis is the same.
20
21

22 6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks,
23 LLP ("Hahn Loeser") to oversee all aspects of the transaction, including
24 structuring it, drafting the deal documents, and providing advice on how Tricarichi
25 could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20,
26 93:24–94:5).
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1 7. Hahn Loeser corporate and tax attorney Jeff Folkman, among
2 others, had authority to act on behalf of Tricarichi and acted as his agent in
3 various matters with respect to the Westside Transaction. See, e.g., Ex. 127,
4 Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

5 8. Ultimately, Tricarichi sold his shares of Westside to Nob Hill
6 Holdings, Inc., a Fortrend affiliate, for approximately \$35 million. The transaction
7 closed on September 9, 2003. Ex. 66 at 016, 023.

8 **III. PwC’s Engagement**

9 9. Tricarichi separately hired PwC to evaluate the tax implications of
10 the proposed Westside Transaction. TT4 142:10–13 (Stovsky). Tricarichi used
11 his brother James as a “conduit” during his dealings with PwC. TT3 143:7–15,
12 175:25–176:3. Tricarichi’s brother, James, was an accountant.

13 10. Tricarichi signed a written Engagement Agreement with PwC
14 dated April 10, 2003. Ex. 100. The Engagement Agreement consisted of an
15 Engagement Letter which incorporated an attached document entitled “Terms of
16 Engagement to Provide Tax Services.” These documents, collectively,
17 comprised the agreement between the parties. See *PricewaterhouseCoopers*
18 *LLP v. Eighth Jud. Dist. Court*, No. 82371, 2021 WL 4492128, at *1 (Nev. Sept.
19 30, 2021).

20 11. As this Court has found previously, Tricarichi received both the
21 Engagement Letter and the Terms of Engagement, and the Engagement
22 Agreement was a valid and binding contract. See Dkt. 336, Order Granting
23 PwC’s Mot. to Strike Jury Demand ¶ 33.³

24 12. The Engagement Agreement specified that PwC would provide
25
26

27 ³ The instant Court was assigned the case in 2021 after certain decisions, which are law of the
28 case, had been made by the Honorable Elizabeth Gonzalez (ret.)

1 “tax research and evaluation services” for the Westside Transaction. Ex. 100 at
2 001. The Engagement Letter, thus, set forth specific parameters regarding the
3 scope of the engagement rather than an open ended engagement.

4 13. Section 7 of the Terms of Engagement contained a limitation-of-
5 liability clause, which states in relevant part:

6 IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED
7 THAT [PwC] WAS GROSSLY NEGLIGENT OR ACTED
8 WILLFULLY OR FRAUDULENTLY, SHALL [PwC] BE LIABLE TO
9 THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS,
10 EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD
11 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.

12 *Id.* at 007.

13 14. Section 3 of the Engagement Agreement advised that

14 Tax laws and regulations are subject to change at any
15 time, and such changes may be retroactive in effect
16 and may be applicable to advice given or other
services rendered before their effective dates. *[PwC]*
do[es] not assume responsibility for such changes
occurring after the date we have completed our
services.

17 *Id.* at 006.

18 15. Section 10 of the Engagement Agreement specified that it will be
19 governed by the laws of the State of New York. *Id.* at 007.

20 16. It was undisputed that several PwC tax professionals worked on
21 the Engagement, including Richard Stovsky, the Cleveland-based engagement
22 partner; Tim Lohnes, a partner in the corporate M&A group in the national office
23 in Washington DC; as well as partners Don Rocen and Ray Turk.

24 17. The PwC team performed a number of services pursuant to the
25 Engagment Agreement's terms, including analyzing draft agreements,
26 researching potential tax issues, discussing applicability of Treasury Notices,
27 and suggesting deal terms to protect Tricarichi (including indemnity protections
28

1 and insurance).

2 18. PwC memorialized parts of its advice to Tricarichi in a memo
3 referred to at trial as the “Stovsky Memo,” which Stovsky updated periodically
4 after having conversations with other PwC partners, as well as with Tricarichi or
5 his advisors. Ex. 2. PwC also kept a file with notes and other communications
6 that it contended were relevant to its analysis. See, e.g., Ex. 1.

7 19. PwC primarily investigated two topics for Tricarichi: (1) whether the
8 Westside Transaction was reportable to the IRS as a so-called “Midco”
9 transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held
10 liable for Westside’s taxes, including under a transferee liability theory. *Id.* at
11 002–004.⁴

12 20. As to the first question, Stovsky advised Tricarichi that the
13 transaction “more likely than not” would not be reportable to the IRS as an
14 intermediary or Midco transaction under IRS Notice 2001-16. *Id.* at 001, 004;
15 TT4 158:1–7.

16 21. As to the second question, Stovsky similarly advised Tricarichi that
17 the transaction “more likely than not” would be “respected” by the IRS; and thus,
18 that Tricarichi would not be held liable for Westside’s taxes under transferee
19 liability. Ex. 2 at 001–003; TT4 154:3–6.

20 22. Based on the testimony of various witnesses for PwC, the “more
21 likely than not” qualifier to PwC’s advice is a standard tax industry term that
22 meant, consistent with its plain language, there was at least a 50.1% chance of
23 prevailing (up to 70% or 75%); or conversely, a 49.9% chance of losing. TT8
24 (Vol. 1) 250:5-9 (Harris); *id.* 60:10–19 (Greene); see also TT1 154:5–20
25

26
27 ⁴ Although the parties disputed the depth of Midco experience the tax professionals at PwC had
28 in 2003, that dispute need not be resolved given the Summary Judgment ruling.

1 (Lohnes); TT6 143:2–18 (Boyer). That specific interpretation of “more likely
2 than not” was not set forth in any written communication sent to Tricarichi or his
3 representatives.

4 23. Based on evidence provided, Stovsky, either directly or through
5 conversations with Tricarichi’s representatives, also suggested that Tricarichi
6 take out an insurance policy for any potential tax liability or transferee liability.
7 Tricarichi did not follow this advice. Ex. 110, Handwritten Notes. TT6 23:18–
8 25:10.

9 24. PwC billed Tricarichi \$48,552.00 for the Engagement, which
10 Tricarichi paid in full. See Ex. 3, PwC Invoices.

11 25. PwC issued its last invoice on October 29, 2003, for services
12 rendered through September 30, 2003. *Id.* at 006. After that, PwC did not enter
13 into any Engagement Letter to perform any paid services for Tricarichi or
14 Westside. While it was undisputed that there was no monetary compensation
15 provided after the \$48,552.00 was paid in full by the end of 2003, and there was
16 no written Engagement Letter signed by Tricarichi in 2003, it was disputed
17 between the parties as to whether there was an implied client relationship due to
18 there being either an ongoing obligation to notify Tricarichi of new IRS bulletins
19 or rulings, or the fact that there were communications between PwC and
20 Tricarichi or his agents after 2003 relating to the IRS issues that arose regarding
21 the Westside Transaction.

22 26. While there was evidence that PwC reviewed IRS bulletins and
23 information relating to Midco transactions after providing Tricarichi its advice,
24 Plaintiff did not meet his burden to show that conduct created an affirmative duty
25 on behalf of PwC towards Tricarichi for claims that were not already precluded
26 by the Summary Judgment Motion.

27 27. For example, in approximately, November 2003, at Mr. Stovsky’s
28

1 request, Mr. Lohnes reviewed an updated IRS list of prohibited transactions to
2 see if the Westside Midco Transaction, or a similar transaction, was listed. Trial
3 Ex. 32. Mr. Lohnes concluded that the November 2003 list “contain[ed] no
4 items that would impact [Westside’s] transaction, other than the items we
5 discussed previously, namely the midco listed transaction.” *Id.* at 001.

6 28. In addition, it was undisputed that PwC or its attorneys and
7 Tricarichi (or his attorneys) had contact after Tricarichi’s IRS dispute began. It
8 was disputed at trial, however, whether these communications were to provide
9 general assistance such as providing copies of documents or whether they
10 related to the retention of professional accounting services. *E.g.*, Ex. 7, Email
11 from S. Marcus to S. Dillon.

12 29. At trial, PwC witnesses consistently testified that by 2008, they did
13 not consider Tricarichi to be a current client, and that he did not have an
14 ongoing relationship with PwC after 2003. TT2 110:24–111:6 (Lohnes); TT3
15 31:21–32:3 (Lohnes); TT5 100:15–16 (Stovsky). Tricarichi, likewise, confirmed
16 that he never engaged PwC at any point after 2003, and did not have any
17 ongoing relationship after that time. Indeed, it was shown that while Tricarichi’s
18 brother, James, had some interactions with PwC, and so did Tricarichi’s lawyers,
19 there was no evidence that Tricarichi retained PwC’s services utilizing a similar
20 process involving a written Engagement Letter and payment of fees as he had
21 in 2003. Additionally, the 2003 Engagement Letter, on its face, did not set forth
22 there was an ongoing relationship; but, instead, was limited to the scope of
23 services provided and paid for. Further, no additional funds were paid by
24 Tricarichi, or anyone on his behalf, to PwC for any type of accounting services
25 on behalf of Tricarichi, or involving any interest held by Tricarichi. TT3 162:25–
26 163:5; 164:25–165:5 (Tricarichi).

27 30. In light of the foregoing specific facts and evidence presented at
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1 trial, the Court finds that Tricarichi ceased being a PwC client as of October,
2 2003 when the services pursuant to the specific Engagement Agreement were
3 completed and the final bill sent. By 2008, Tricarichi was a former client of
4 PwC's and had no ongoing professional relationship with the firm.

5 31. The next issue for the Court to determine is whether, in light of
6 Tricarichi's status as a former client and/or given the interactions between PwC
7 and either Tricarichi, his agents, his counsel and/or the IRS, PwC created a
8 relationship with Tricarichi that subjects it to liability pursuant to the claims in the
9 Amended Complaint. The Court sets forth the various issues raised by
10 Tricarichi below.

11 **IV. PwC's Prior Experience with Midco Transactions Do Not**
12 **Provide a Basis for Liability Against PwC in the Instant Case**

13 32. Tricarichi alleged that PwC's advice and/or involvement with other
14 Midco transactions demonstrated that it knew or had reason to know that the
15 advice it provided to Tricarichi was inaccurate or inconsistent; and thus, he
16 should prevail on his Amended Complaint. In support of that contention,
17 Tricarichi provided argument and/or evidence that advice provided in what was
18 referred to as the "Enbridge Matter" and the "Marshall Matter" was contrary or
19 different that the advice he received. PwC disputed both the allegations as well
20 as the applicability of both matters.

21 **A. The Enbridge Matter**

22 33. It was undisputed that the Enbridge matter arose in 1999 (prior to
23 the issuance of Notice 2001-16) and involved the purchase of shares from the
24 Bishop Group, Ltd. by Midcoast Energy Resources (which later came to be
25 known as Enbridge). Ex. 156, Enbridge Op. at 001-004. PwC (through its
26 Houston office) gave tax advice to Midcoast in the transaction. *Id.* at 002.

27 34. While the Enbridge matter involved a purported Midco transaction,
28

1 the Court finds numerous differences between it and the instant case. First,
2 there were four parties (including an intermediary entity) to the Enbridge
3 transaction, while the Westside Transaction only involved three parties and
4 lacked an intermediary entity. *Id.* at 002–004.

5 35. Second, the Westside Transaction also did not include a target
6 corporation with built-in gain assets or a purchaser seeking to achieve a step-up
7 in the tax basis of such assets, as was the case in Enbridge. TT8 (Vol. 1) 196:8–
8 14 (Harris).

9 36. Third, the Enbridge transaction did not involve questions of
10 transferee liability. *Id.* 195:22–196:7 (Harris).

11 37. Thus, the evidence presented to this Court demonstrated that
12 there were differences between the two transactions as to not only their
13 structure, but also their timing *vis a vis* applicable IRS rules and regulations. In
14 addition, the Federal District Court's decision in *Enbridge* was published and
15 generally available to the public as of March 2008, including to Tricarichi and his
16 counsel. See, *Enbridge Energy Co. v. United States*, 553 F. Supp. 2d 716 (S.D.
17 Tex. 2008). Specifically to the case at bar, there was a memo from R. Corn to
18 Plaintiff Tricarichi which demonstrated that Tricarichi was advised on the
19 differences between Enbridge and the Westside Transaction so Tricarichi could
20 not have relied on any failure of PwC to provide him information about Enbridge
21 when his own counsel set forth that it was distinguishable from his case. Ex.
22 169, Memo from R. Corn to M. Tricarichi at 003–004.

23 24 **B. The Marshall Matter**

25 38. In addition to Enbridge, Tricarichi also contended that PwC failed
26 to disclose that it had any prior relationship with Fortrend and any of its prior
27 transactions. The evidence presented to the Court set forth that the Marshall

1 matter involved the family shareholders of a C corporation who sold their shares
2 to a Fortrend affiliate to minimize their tax liability from an expected litigation
3 settlement. Ex. 56, Marshall Tax Court Op. at 001–003. PwC (through its
4 Portland office) advised John Marshall not to proceed with the transaction and
5 stated that it would not consult or provide advice on the transaction. *Id.* at 004–
6 005. The transaction closed in March 2003. *Id.* at 007.

7 39. As with the Enbridge matter, the Court finds numerous differences
8 between the Marshall matter and the instant case. The Marshalls undertook an
9 integrated transaction with significant non-cash built-in gain assets (as opposed
10 to none in the Westside Transaction), and the nature of this transaction
11 presented greater risks of transferee liability than the Westside Transaction. TT8
12 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, Tricarichi did
13 not meet his burden to show that PwC has liability to him for failing to disclose
14 or take into account the advice given in that transaction.

15 **V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-11**

16 40. In his Amended Complaint, Tricarichi alleges that his claims are
17 not time barred based on a tolling agreement and instead PwC is liable for his
18 damages and interest because of what PwC did and did not do regarding IRS
19 Notice 2008-11. The gravamen of Tricarichi's claims are his contention that:
20 had PwC informed Mr. Tricarichi of the problems with its advice regarding the
21 Westside Midco Transaction and the resulting error on Mr. Tricarichi's tax
22 return(s), Mr. Tricarichi would have been able to amend his return(s), avoid
23 interest on taxes and penalties, avoid litigation with the IRS, and thereby avoid
24 related legal fees and expenses. Nov. 2, 2022, Trial Tr. 124:12-126:6.

25 41. PwC contended in its defense *inter alia* that: 1. All of Tricarichi's
26 claims are barred by statute of limitations; 2. Neither its 2003 advice, nor its
27 internal review of the 2008 Notice, which it did not advise Tricarichi it reviewed
28

1 in 2008, did not fall below the standard of care based on the information
2 available and the risk factor it placed on its advice even with a retrospective
3 view of the 2008 Notice provisions; 3. Tricarichi hired experienced tax lawyers
4 who he relied upon in making his decisions and those lawyers provided similar
5 advice and analysis as PwC did; 4. There was no client relationship after 2003
6 and thus no duty was owed in 2008 or later; and 5. Tricarichi's damages are due
7 to his own conduct including not settling with the IRS.

8 42. It was undisputed that on December 1, 2008, the IRS issued
9 Notice 2008-111, entitled "Guidance on Intermediary Transaction Tax Shelters."
10 The impact and obligations relating to that Notice were disputed at trial. Ex. 44.

11 43. The plain language of the Notice itself sets forth that the purpose
12 of Notice 2008-111 was to "clarif[y]" the agency's prior notice on Midco
13 transactions, IRS Notice 2001-16. *Id.* at 003.

14 44. Specifically, Notice 2008-111 advised taxpayers that a transaction
15 would be treated as an "Intermediary Transaction" if: (1) a person engages in
16 that transaction pursuant to a "Plan" (as defined in the Notice); (2) the
17 transaction contains each of four objective components described in the Notice;
18 and, (3) no safe harbor exception applies. *Id.*

19 45. In so doing, PwC and others interpreted the Notice to mean that
20 the IRS narrowed the scope of Notice 2001-16. TT6 137:17–138:4 (Boyer); TT8
21 (Vol. 1) 182:23–183:1 (Harris).

22 46. Notice 2008-111 addressed only *reportability* of transactions to the
23 IRS, not *liability* under the tax laws. Ex. 44 at 003. The Notice did "not affect the
24 legal determination of whether a person's treatment of the transaction [was]
25 proper or whether such person [was] liable, at law or in equity, as a transferee of
26 property in respect of the unpaid tax obligation" *Id.*

27 47. After the IRS issued Notice 2008-111, Lohnes responded in an
28

1 internal email to a question from Stovsky: "I read through the Notice and agree
2 with your assessment that it shouldn't change any of our prior analysis." Ex.
3 159, Lohnes Email to Stovsky. Stovsky testified that his receiving the IRS
4 subpoena to PwC relating to the Westside Transaction led him to communicate
5 with Lohnes about the Notice. TT6 67:9–13.

6 48. It was undisputed that the IRS began auditing Westside's 2003 tax
7 return in August 2005, and it interviewed Tricarichi in connection with that audit
8 in 2007. Ex. 144, IRS Notice of Audit to Westside Cellular. PwC was not
9 involved with the preparation of Westside's 2003 return.

10 49. On January 22, 2008—roughly ten months before issuing Notice
11 2008-111—the IRS sent Tricarichi an Information Document Request ("IDR")
12 seeking documents related to the Westside Transaction. Ex. 150. The IDR
13 advised Tricarichi that he may be liable for all or part of Westside's tax liability.
14 *Id.* at 001, See also, Order on Summary Judgment.

15 50. The IRS also issued a summons to PwC on January 29, 2008,
16 seeking documents related to the Westside Transaction. Ex. 152. On February
17 22, 2008, PwC responded to the summons, on its own behalf. In so doing, PwC
18 provided documents and set forth its contention that it had not provided any
19 services to Tricarichi since 2003. Ex. 155. Tricarichi was not billed for any of
20 these activities. See Ex. 3.

21 51. The IRS determined that as a result of the Westside transaction
22 the company owed an additional \$15.2 million in taxes and \$6 million in
23 penalties for 2003. Ex. 66 at 027. In a draft transferee report sent to Tricarichi
24 on February 3, 2009, the IRS sought payment of Westside's outstanding tax
25 liability from Tricarichi. Ex. 161 at 003–025.

26 52. After receiving the draft transferee report, Tricarichi recruited
27 highly experienced tax counsel to advise him.
28

1 53. Among those who Tricarichi hired were Glenn Miller and Michael
2 Desmond of Bingham McCutcheon. Miller has practiced tax law for
3 approximately 30 years. TT7 185:6–8. Desmond is a tax lawyer with over 25
4 years of experience, including being employed at the DOJ's Tax Division. TT6
5 169:15–170:1. After his work for Tricarichi, Desmond later served as IRS Chief
6 Counsel. *Id.* 170:18–171:13.

7 54. Tricarichi also hired a team of lawyers at Sullivan & Cromwell, led
8 by Don Korb, a senior tax lawyer who, at the time of his deposition in 2020, had
9 been practicing tax law for over 45 years. TT8 (Vol. 2) 28 (Korb Dep. 15:25–
10 16:4). Korb's experience included serving as Chief Counsel of the IRS from
11 2004 to 2008. *Id.* at 28–29 (Korb Dep. 18:13–15, 19:23–20:1).

12 55. As his trial with the IRS in the Tax Court approached, Tricarichi
13 also hired several lawyers at McGuire Woods, led by one of its partners, Craig
14 Bell. TT6 182:24–183:10 (Desmond).

15 56. While representing their client before the IRS and consistent with
16 PwC's prior assessment, Tricarichi's lawyers repeatedly argued that under the
17 standards set forth by Notice 2008-111, the Westside Transaction was not an
18 intermediary transaction. *See, e.g.*, Ex. 102, 4/29/09 Response to Draft Protest
19 Letter at 006–010; Ex. 103A, 10/9/09 Formal Protest Letter at 012–016; Ex.
20 183, 10/27/10 Appeals Conference Presentation at 002–003, 010–012; Ex. 197,
21 3/18/11 Korb Letter to IRS at 003–004.

22 57. Each of the communications cited above contained lengthy
23 explanations of Notice 2008-111, by individuals separate from PwC including
24 tax lawyers, and they all set forth a similar opinion that Lohnes had provided
25 internally to Stovsky---i.e. that the 2008 Notice did not apply to the Westside
26 Transaction. *See id.* For example, the admitted exhibits included a March 2011
27 communication from one of Tricarichi's lawyers in the tax proceedings, Korb,
28

1 wherein he contended that “pursuant to the clear and unambiguous language
2 of Notice 2008-111, the sale of West Side Cellular stock is neither an
3 intermediary transaction *nor* substantially similar to an intermediary transaction.
4 *We see no basis on which this conclusion can be challenged.*” Ex. 197 at 004
5 (emphasis added); see *also* Ex. 183 at 002–003, 010–012.

6 58. The evidence established that Tricarichi’s lawyers and the IRS
7 also undertook efforts to settle the case. For example, in October 2010, the IRS
8 indicated it would be willing to settle the claim for roughly \$14.5 million. Ex. 186,
9 Email from D. Korb to M. Tricarichi; Ex. 187, Tricarichi’s Baseline Case
10 Calculation at 005; TT6 177:3–9 (Desmond). Tricarichi did not accept this offer.

11 59. On December 6, 2010, Tricarichi’s lawyers at Sullivan & Crowell
12 sent a “decision tree” analysis to the IRS, which purported to calculate the IRS’s
13 chances of success at trial as a means of estimating the settlement value of the
14 case. Ex. 190, Email from A. Mason to P. Szpalik at 002. Tricarichi’s lawyers
15 took the position that the IRS had only a 17 percent (17%) chance of
16 establishing liability for Tricarichi and an 83 percent (83%) chance of failing to
17 make such a showing. *Id.*

18 60. At trial, Tricarichi confirmed that as of December 2010, he
19 understood that he had an 83 percent (83%) chance of winning his case against
20 the IRS based on the decision tree presented by his lawyers and which PwC
21 had no part in creating or editing. TT4 75:19–25.

22 61. On December 8, 2010, the IRS sent a new settlement offer of
23 approximately \$16.1 million. Ex. 192, Email from R. Corn to D. Korb; Ex. 193,
24 IRS Settlement Computation at 001. Tricarichi did not accept this offer.

25 62. The IRS made another settlement offer in August 2011 of
26 approximately \$12.4 million. Ex. 201, Facsimile from P. Szpalik to D. Korb at
27 002. Tricarichi did not accept this offer.

1 63. Tricarichi did not settle his IRS case. Tricarichi testified that he did
2 not have the ability to settle for the amount that was being sought. TT4 30:23–
3 31:1; *id.* 74:12–14; *id.* 86:11–13. Tricarichi's lawyers also testified that he was
4 not interested in considering settlement offers in the double-digit millions. TT6
5 198:2–17 (Desmond).

6 64. On June 25, 2012, the IRS issued a formal "Notice of Liability,"
7 asserting that Tricarichi owed \$15,186,570 in income tax and underpayment
8 penalties of \$6,012,777 (for a total of approximately \$21.2 million) for the
9 Westside Transaction. Ex. 210. Tricarichi petitioned the Tax Court for review
10 shortly thereafter. Ex. 66.

11 65. On May 30, 2014, Tricarichi rejected his lawyers' suggestion that
12 he might consider making a settlement offer to the IRS saying, "I don't want to
13 give the irs (sic) the impression that we think our case is weak, which I don't
14 believe it is." Ex. 228, Email from M. Tricarichi to M. Desmond.

15 66. In their arguments to the Tax Court, Tricarichi's lawyers continued
16 to argue that the Westside Transaction was not an intermediary transaction and
17 did not satisfy Notice 2008-111. *See, e.g.*, Ex. 225, Tricarichi's Tax Court Cross-
18 Motion in Limine at 005.

19 67. The Tax Court held a four-day trial on Tricarichi's petition in June
20 2014. After the trial, but before the Tax Court issued its decision in August 2014,
21 the IRS proposed settling the case for roughly \$13.7 million. Ex. 231, Email from
22 M. Desmond to M. Tricarichi; Ex. 232, Draft Settlement Discussion Framework;
23 TT6 201:18–202:3 (Desmond).

24 68. There was no settlement. Ex. 234, Email from M. Tricarichi to
25 M. Desmond.

26 69. The Tax Court issued its opinion on October 14, 2015, upholding
27 the IRS's Notice of Liability and ruling for the government on all issues. Ex. 66 at
28

1 005. Tricarichi's subsequent appeals were unsuccessful. *Tricarichi v. Comm'r of*
2 *Internal Revenue*, 752 F. App'x 455, 456 (9th Cir. 2018), cert. denied, 140 S. Ct.
3 38 (2019).

4 70. The evidence showed that PwC provided the information required
5 by the IRS or requested by Tricarichi and his agents or lawyers, regarding the
6 tax dispute and/or tax trials. There was no evidence that Tricarichi hired PwC to
7 perform any professional services for him relating to the tax dispute and/or tax
8 trials.

9 71. The Record further shows that while PwC did not contact Tricarichi
10 before or after Lohnes reviewed the 2008 Notice at Stovsky's request, Tricarichi
11 was familiar with Notice 2008-111 and was repeatedly advised as to its content
12 and applicability by the attorneys he hired.

13 72. For example, Tricarichi reviewed drafts of the April 29, 2009, and
14 October 9, 2009, letters to the IRS, both of which contained detailed discussions
15 of Notice 2008-111. TT7 189:1–18, 190:6-22 (discussing Ex. 102); Ex. 103A at
16 030. In fact, Tricarichi signed the October 9, 2009, letter himself, attesting under
17 penalty of perjury that he had “examined this protest, including any
18 accompanying documents,” and that the “facts presented in this protest are true,
19 correct, and complete.” *Id.*

20 73. Tricarichi's attorneys also testified that they advised him on Notice
21 2008-11 specifically, and Midco transactions generally, both orally and in writing.
22 TT7 189:19–190:2, 193:5–15 (Miller).

23 74. For example, in October 2009, Korb sent a memo to Tricarichi and
24 his personal attorney Randy Hart, advising them that the Westside transaction
25 was “quite different” from the type of transaction described in Notice 2008-111.
26 Ex. 165 at 003. Tricarichi also reviewed settlement presentations to the IRS that
27 discussed Notice 2008-111 and the reasons it did not apply to the Westside
28

1 Transaction. Ex. 174; Ex. 182.

2 75. The Court, therefore, finds that Tricarichi was aware of Notice
3 2008-111 and his counsel's interpretation of its applicability to the Westside
4 Transaction at least as of April 29, 2009. There was also evidence that during
5 the months and years that followed, his lawyers continued to advise him
6 repeatedly that in their opinion, and/or they had a strong argument to present to
7 a court, that the requirements of Notice 2008-111 were not met. This is the
8 same conclusion that PwC reached when it reviewed Notice 2008-111 shortly
9 after its issuance. See Ex. 159.

10 76. The preponderance of the evidence also shows that Tricarichi was
11 aware, or should have been aware, of the existence and contents of the Stovsky
12 memo no later than 2009. At trial, Tricarichi testified at one point that he first
13 saw a copy of the memo when PwC invited him and his lawyer, Randy Hart, to
14 review a box of documents it was planning to send to the IRS in response to a
15 summons it received regarding the Westside Transaction. TT4 7:21–23; see
16 *also* TT5 89:23–90:2, 90:21-91:1 (Stovsky); TT6 62:19–63:12 (Stovsky). This
17 meeting occurred in February 2008. See Ex. 155; TT6 62:11–25 (Stovsky). At
18 another point during his testimony, he stated that he was unsure whether he
19 saw the Stovsky memo in 2008. TT3. 122:14–19

20 77. Even if Tricarichi did not read the memo at the time he and Mr.
21 Hart were to review the documents to be sent to the IRS, that same memo was
22 cited by the IRS. Specifically, in February and August 2009, the IRS cited the
23 Stovsky memo and described its contents to Tricarichi in the draft and final
24 transferee reports that it issued. Ex. 161 at 009; Ex. 163 at 010. Further, in
25 September 2009, PwC sent Tricarichi a copy of the files it had provided to the
26 IRS, which included the Stovsky Memo. Ex. 51 at 001. Additionally, in October
27 2009, Sullivan & Cromwell billed Tricarichi, in part, for reviewing the Stovsky
28

1 Memo. Ex. 168 at 002. Thus, even though Tricarichi stated at one point that he
2 never heard the phrase “more likely than not” before trial, (TT3 107:17–21) and
3 provided different recollections of when and/or whether he read or was made
4 aware of the contents of the Stovsky memo, the evidence demonstrates that
5 given the number of other witnesses and documents, Tricarichi reasonably
6 should be viewed as being on notice of the contents of the Stovsky memo.

7
8 **VI. Procedural History of Tricarichi’s Dispute with PwC**

9 78. On January 14, 2011, Joel Levin, an attorney for Tricarichi, sent
10 Stovsky a letter in which he stated that “it is [Tricarichi’s] position that this multi-
11 million dollar potential tax liability [for the Westside Transaction] lies at the feet
12 of PwC for failing to provide him competent services, advice and counsel with
13 respect to the subject stock sale to Fortrend, particularly concerning the
14 potential tax consequences.” Ex. 205 at 002.

15 79. In April 2016, Tricarichi filed a Complaint against PwC in the
16 Eighth Judicial District alleging that PwC’s 2003 advice on the Westside
17 Transaction was negligent. Dkt. 1 ¶¶ 37–40, 81–96.

18 80. On October 22, 2018, the Court granted Summary Judgment in
19 PwC’s favor, holding that the statute of limitations barred any claims based on
20 PwC’s 2003 advice. Dkt. 119 at 2. The Court entered Judgment in favor of PwC
21 “regarding any and all claims arising from the services PwC provided Tricarichi
22 in 2003.” *Id.* at 3.

23 81. Tricarichi filed an Amended Complaint in which he added a claim
24 for negligence based on PwC’s alleged failure to tell him about Notice 2008-111.
25 Dkt. 140 ¶¶ 116–17. Tricarichi alleged that if PwC had told him about Notice
26 2008-111, he would have immediately stopped litigating against the IRS and
27 paid the tax deficiency. *Id.* ¶ 119.

28 82. In the meantime, Tricarichi pursued a professional negligence

1 claim against his attorneys at Hahn Loeser, alleging that they committed
2 malpractice by advising him to enter into the Westside Transaction. After a
3 mediation in September 2012, Tricarichi and Hahn Loeser settled their dispute
4 for \$4 million before any litigation was filed. Ex. 217, Letter from J. Levin to N.
5 Schwartz; Ex. 218, Confidential Settlement Agreement at 003 (¶ 5).

6 **VII. Standards of Professional Care**

7 83. The primary source of professional responsibility standards for
8 CPA tax practitioners during the time at issue in this case were standards
9 promulgated by the American Institute of Certified Public Accountants ("AICPA").

10 84. In fact, the Engagement Agreement between PwC and Tricarichi
11 specified that all services were to be performed "in accordance with the AICPA's
12 Statements on Standards for Tax Services." Ex. 100 at 007 (Section 7).

13 85. Both Nevada (where Tricarichi was located) and Ohio (where PwC
14 dispensed its advice) adopted the AICPA professional standards, at least in part,
15 to govern accountants licensed to practice. Nev. Admin. Code §§ 628.0060-5(a)
16 & (d), 628.500; Ohio Admin. Code § 4701-9-09.

17 86. AICPA Rule 201 provides that a CPA tax practitioner must exercise
18 professional competence and due care, which depends on the scope of the
19 practitioner's engagement under the particular facts and circumstances. Ex. 4,
20 AICPA Professional Standards.

21 87. The AICPA has defined the standard of care, and competence in
22 the context of tax planning advice and tax return preparation, in a series of
23 documents known as the Statements on Standards for Tax Services, or SSTs.
24 Ex. 106, Statements on Standards for Tax Services 1–8 (Aug. 2000).

25 88. SSTS No. 6 is entitled "Knowledge of Error: Return Preparation."
26 This standard addresses situations in which an accountant (or "member")
27 discovers either an error in a previously filed return or the taxpayer's failure to
28

1 file a return in the past. *Id.* at 027.

2 89. SSTS No. 6 states that “[a] member should inform the taxpayer
3 promptly upon becoming aware of an error in a previously filed return or upon
4 becoming aware of a taxpayer’s failure to file a required return.” *Id.* (§ 3).

5 90. An “error” under SSTS No. 6 is any position that has less than a
6 one-in-three chance of success. Ex. 106 at 027 (§ 1); *id.* at 008 (§ 2(a)), *id.* at
7 011 (Interpretation 1-1); Ex. 149 at 046, IRS Circular 230 (Section 10.34),
8 Definition D1; TT8 (Vol. 1) 191:17–25 (Harris).

9 91. The “Explanation” section of SSTS No. 6 clarifies that its
10 obligations exist only when the accountant is continuing to represent the client.
11 Both Paragraphs 5 and 9 of SSTS No. 6 refer to telling the “taxpayer” (client)
12 about the error if the member became aware of it “[w]hile performing services
13 for a taxpayer.” Ex. 106 at 028–029 (§§ 5, 9); TT7 32:16–33:12 (Dellinger).

14 92. Paragraph 6 of the same section discusses “whether to continue a
15 professional or employment relationship with the taxpayer” if the taxpayer does
16 not correct the error. Ex. 106 at 028 (§ 6). This, again, presupposes an existing
17 client relationship, a point upon which both PwC’s and Tricarichi’s experts
18 agreed. TT7 30:22–31:11 (Dellinger); TT8 (Vol. 1) 36:21–37:7 (Greene).

19 93. Nothing in the text of SSTS No. 6 imposes any obligations on an
20 accountant with respect to a former client. Trial testimony established that such
21 an open-ended obligation on accountants to their former clients would pose
22 enormous practical difficulties. TT7 33:13–22 (Dellinger); *see also* TT8 (Vol. 1)
23 38:19–22 (Greene).

24 94. SSTS No. 8 is entitled “Form and Content of Advice to Taxpayers.”
25 It addresses the “circumstances in which a member has a responsibility to
26 communicate with a taxpayer when subsequent developments affect advice
27 previously provided.” Ex. 106 at 033 (§ 1).

28

1 95. The standard states: “[a] member has no obligation to
2 communicate with a taxpayer when subsequent developments affect advice
3 previously provided with respect to significant matters, except while assisting a
4 taxpayer in implementing procedures or plans associated with the advice
5 provided or when a member undertakes this obligation by specific agreement.”
6 *Id.* (¶ 4).

7 96. The “Explanation” section of the standard further specifies that “a
8 member cannot be expected to communicate subsequent developments that
9 affect such advice unless the member undertakes this obligation by specific
10 agreement with the taxpayer.” *Id.* at 034 (¶ 9).

11 97. Finally, the standard notes that taxpayers should be informed that
12 any advice rendered reflects professional judgment based on an existing
13 situation, and that later developments could affect earlier advice. It further
14 instructs that “Members may use precautionary language to the effect that their
15 advice is based on facts as stated and authorities are subject to change.” *Id.* at
16 035 (¶ 10). PwC included such language in its Engagement Agreement. See
17 FOF ¶ 14, *supra*.

18 19 **VIII. Tricarichi’s Claimed Damages and PwC’s Mitigation Defense**

20 98. Tricarichi seeks, as damages, the legal fees incurred in his IRS
21 litigation, and the interest on his unpaid taxes and penalties that accrued from
22 January 1, 2009, through November 13, 2018. Specifically, in this case Tricarichi
23 contends that PwC is liable to him for \$3,180,143.03 in legal fees and costs, and
24 \$14,937,400.18 in interest owed to the IRS.

25 99. As one of its defenses, PwC contended through its expert that the
26 damages asserted are too high and do not reflect appropriate mitigation. PwC
27 contended that had Tricarichi set aside the money he potentially owed the IRS

1 and invested it in stock funds, bond funds, real estate funds, or some
2 combination of these, he could have enjoyed rates of return on the funds he
3 kept from the IRS significantly higher than the three-to-six percent interest rates
4 charged by the IRS during the same period. TT7 132:5–140:8 (Leaunae).

6 **CONCLUSIONS OF LAW**

8 **I. Elements of Tricarichi's Cause of Action (Count III)**

9 100. Tricarichi tried a single claim of professional negligence (Count III
10 of his Amended Complaint) to the Court. Dkt. 140 ¶¶ 115–121. Count III
11 focuses only on whether the issuance of Notice 2008-111 in December 2008
12 gave rise to any duty to Tricarichi that PwC breached. *Id.*⁵

13 101. Despite the narrow focus of Count III, some of the evidence at trial
14 focused on what was contended to be negligent acts and omissions that
15 occurred in 2003, when PwC originally rendered its advice, or earlier despite the
16 Court's prior Summary Judgment ruling, which barred as untimely "any and all
17 claims arising from the services PwC provided Plaintiff in 2003." Dkt. 191 at 3.
18 Given the time and effort spent on the providing the detailed history of the case,
19 and given the extensive procedural history including appeals and multiple
20 proceedings in other courts, the Court has included historical facts and
21 testimony for clarity of the record. By incorporating a fuller factual background,
22 the Court is not sua sponte altering or amending any prior judgment or ruling as
23 they remain law of the case. See, e.g. *Recontrust Co. v. Zhang*, 130 Nev. 1, 7–
24 8 (2014) ("[A] court involved in later phases of a lawsuit should not re-open

25
26 ⁵ The Amended Complaint also contains Counts I and II against PwC, both of which were
27 included only for preservation purposes after the Court dismissed them on Summary Judgment in
28 2018. Dkt. 140 n.1. Counts I and II were not tried to the Court, nor was any other claim in the
Amended Complaint apart from Count III. TT9 167:25–168:23.

1 questions decided (*i.e.*, established as law of the case) by that court or a higher
2 one in earlier phases”) (quotation omitted); see *a/so* Dkt. 234 at 4.

3 102. The elements of a cause of action in tort for professional
4 negligence are:

5 (1) the duty of the professional to use such skill,
6 prudence, and diligence as other members of his
7 profession commonly possess and exercise; (2) the
8 breach of that duty; (3) a proximate causal connection
between the negligent conduct and the resulting
injury, and (4) actual loss or damage resulting from
the professional’s negligence.

9 *Sorenson v. Pavlokowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (Nev. 1978).

10 103. As set forth in more detail below, at trial, Tricarichi failed to meet
11 his burden of proof on all four elements.

12
13 **II. First Element: PwC Did Not Owe Tricarichi a Duty of Care in 2008**

14 104. The Court concludes that PwC did not owe any duty to Tricarichi,
15 who ceased being a client in 2003, such that PwC should have updated its
16 previously-provided advice in 2008, after Notice 2008-111 issued. See
17 *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (Nev.
18 2009) (existence of duty is a matter of law for the Court to decide).

19 105. Under the AICPA’s SSTS No. 8, a member does not have any
20 obligation to communicate with a taxpayer about subsequent developments,
21 except “while assisting the taxpayer in implementing procedures or plans
22 associated with the advice provided or when the member undertakes this
23 obligation by specific agreement.” Ex. 106 at 033.

24 106. At trial, Tricarichi argued that the first exception (“while
25 implementing plans or procedures”) was satisfied because PwC provided
26 comments on the stock purchase agreement between Westside and Nob Hill in
27 2003, which he claimed created a continuing obligation for PwC to update him
28

1 on subsequent developments in 2008. TT9 112:13–24.

2 107. The Court disagrees. By its plain language, the exception only
3 applies “while” the member is assisting the taxpayer in implementing
4 procedures. TT9 81:17–84:1 (Harris); TT7 67:2–68:5 (Dellinger). Even if
5 providing comments on the agreement counted as “implementing” Tricarichi’s
6 plan in 2003 (a question that the Court need not reach here), it is undisputed
7 that those efforts ceased in 2003. By 2008, PwC was not performing any work
8 for Tricarichi.

9 108. As to the second exception, in the present case there was a
10 specific Engagement Letter signed by Tricarichi. PwC’s Engagement Letter,
11 consistent with SSTS No. 8, specifically disclaimed any ongoing obligation for
12 changes to the tax laws after services were rendered. Ex. 100 at 006 (Section
13 3); Ex. 106 at 006. Further, there was no contention that Tricarichi was not
14 aware of the terms of the Engagement Letter as he even made comments on
15 the Engagement Letter which he signed.

16 109. Tricarichi also pointed to Paragraphs 6 and 7 of SSTS No. 8,
17 which discusses when a member may consider providing advice in written, as
18 opposed to oral, form. TT8 (Vol. 1) 10:13–14:11 (Greene); Ex. 106 at 034. In
19 the present case, there was disputed testimony about whether there was a
20 specific discussion about obtaining the information orally or in writing or if
21 Tricarichi knew that he could have requested the opinions to be set forth in
22 writing. Regardless of whether there was a difference between the parties
23 whether any discussion took place or not, and even if the Court were to credit
24 Tricarichi’s view, the language of Paragraphs 6 and 7 of SSTS No. 8 is what the
25 Court focuses on to determine if the first prong of the cause of action is met. As
26 the plain language of the provision sets forth that the decision regarding the
27 form of advice is left to the “professional judgement” of the member, the Court
28

1 cannot find that it imposes any affirmative duty on members to provide written
2 advice. Instead, the Court reads the language as setting forth situations when
3 written advice may be preferable. TT8 (Vol. 1) 208:10–25 (Harris).

4 110. Thus, the Court concludes that Tricarichi did not meet his burden
5 to demonstrate in the present case that the standards set forth in SSTS No. 8
6 gave rise to any duty of care on the part of PwC to Tricarichi.

7 111. SSTS No. 6, likewise, does not create any duty to Tricarichi. The
8 Court has already found that SSTS No. 6 is limited to circumstances involving
9 awareness of an error on a tax return when an accountant is performing
10 services for a *current* client. Here, PwC was no longer performing services for
11 Tricarichi in 2008. At trial, even Tricarichi's expert would not commit to imposing
12 a duty on PwC under these circumstances. TT8 (Vol. 1) 38:19–22 (“[Q.] Let’s
13 say there were no services being provided to Mr. Tricarichi by PwC in 2008, in
14 that circumstance would PwC have a duty to disclose an error to a former client,
15 under SSTS 6? A. Perhaps not.”).

16 112. PwC’s later, occasional, contact with Tricarichi and his lawyers,
17 while responding to IRS subpoenas for documents in 2008 and later for
18 testimony in 2013 and 2014, does not constitute performing services for
19 Tricarichi. PwC was required by law to respond to IRS subpoenas on its own
20 behalf. Tricarichi concede that he did not seek to engage PwC, and PwC did
21 not invoice Tricarichi for time spent responding to the IRS subpoenas or
22 testifying at his Tax Court trial.

23 113. Relying on internal PwC policies and a single practice guide
24 published by the AICPA, Tricarichi also asserted at trial that PwC had a duty to
25 maintain a written file documenting how it reached its conclusions about Notice
26 2008-111. TT7 106:1–14, 109:7–19 (Greene); Ex. 22; Ex. 88.

27 114. While the Court took into account both the policies and the
28

1 practice guide, it cannot find that either of these created a duty that meets the
2 criteria necessary for a professional negligence tort. Furthermore, the practice
3 guide is not authoritative literature and describes only “best practices”; it does
4 not impose requirements on all accountants. TT8 (Vol. 1) 88:1–23 (Greene).
5 Indeed, it would be Tricarichi’s burden to establish that a failure to follow internal
6 policies or the terms of a practice guide creates a duty under Nevada law but he
7 did not provide any case law to the Court to support that contention. Instead,
8 the only case cited by either party was outside the jurisdiction and it provided
9 that a company’s internal standards are distinct from, and can be more rigorous
10 than, external duties imposed under the law. See, *In re Conticommodity Servs.,*
11 *Inc. Sec. Litig.*, No. MDL 644, 1988 WL 56172, at *1–2 (N.D. Ill. May 25, 1988).⁶

12 115. Based on the above reasons, the Court concludes, as a matter of
13 law, that PwC did not owe any duty of care to Tricarichi, its former client.
14 Accordingly, Tricarichi has failed to establish the first element of his claim.
15 While the failure to meet all elements of a cause of action would allow Judgment
16 in favor of PwC, the Court addresses each of the other elements as well.

17
18 **III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC**
19 **Did Not Breach That Duty**

20 116. Even if PwC owed a duty to update its former client, the Court
21 concludes that based on the evidence, Tricarichi has failed to prove that PwC
22 breached its duty.
23
24

25 ⁶ Plaintiff Tricarichi did cite a one case from a federal District Court in Nevada, *Garner v. Bank of*
26 *Am. Corp.*, 2014 WL 1945142 at *7–8 (D. Nev. May 13, 2014). That case, however, is inapposite
27 as it discusses generally that a duty can arise from a special relationship but does not address
28 the specific issues raised in this case.

1
2
3 **A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not**
4 **a Breach Because Tricarichi Did Not Meet His Burden to**
5 **Show that the Notice Rendered PwC's Prior Advice**
6 **Erroneous**

7 117. Assuming *arguendo* that SSTS No. 6 did create a duty to
8 Tricarichi, that duty could only be breached if Notice 2008-111 made PwC aware
9 of an "error" in a previously filed return. Ex. 106 at 027 (¶ 3). It did not.

10 118. First, it is undisputed that PwC was not aware of any error on a
11 previously filed tax return as a result of Notice 2008-111. Tricarichi contends,
12 instead, that PwC should have been aware of an error because it should have
13 interpreted the 2008 Notice as invalidating or being contrary in some respect to
14 the advice given by PwC in 2003. The evidence presented by Tricarichi was
15 that the IRS's position that Tricarichi owed taxes as a result of the Westside
16 transaction was upheld by the tax court, and then the appellate court; and by
17 implication, PwC should have known that Tricarichi would not prevail in either of
18 those courts. The challenge with that argument is that it is flawed and not
19 supported by the facts. First, there was no evidence that the IRS relied on
20 Notice 2008-111, which came out in December 2008, to commence its audit of
21 the Westside transaction, which began in 2005 about three years before the
22 Notice came out. Further, on January 22, 2008 - roughly ten months before
23 issuing Notice 2008-11 was sent to Tricarichi - he had already received an
24 Information Document Request ("IDR") from the IRS seeking documents related
25 to the Westside Transaction. The IDR advised Tricarichi that he may be liable
26 for all or part of Westside's tax liability. Ex. 150. Thus, even if Notice 2008-111
27 did more than narrow the circumstances in which a transaction would be
28 reportable, as was contended by PwC and others, Tricarichi did not meet his
burden to show that PwC breached its duty within the statute of limitations time

1 frame by failing to update him as there was no evidence that PwC knew that
2 such a Notice would come out in until it actually came out and by that time the
3 IRS had already begun its audit and he had already received the IDR.

4 119. To the extent that Tricarichi also claims that he would have
5 modified his tax returns and taken other actions after December 1, 2008, if PwC
6 had informed him that Notice 2008-111 impacted the merits of the IRS's position
7 on the audit they had already commenced in 2005, that contention was also not
8 established by the evidence. Instead the evidence showed that even after he
9 had various opportunities to resolve his tax dispute and had the benefit of
10 several legal tax professionals advising him, he chose not to settle the tax
11 dispute.

12 120. PwC further contended that pursuant to Notice 2008–111, a
13 transaction is treated as a Midco transaction if: (1) a person engages in that
14 transaction pursuant to a “Plan” (as defined in the notice); and (2) the
15 transaction contains each of four objective components described in the Notice.
16 Ex. 44 at 003.

17 121. There was no dispute that the term “Plan” is defined in Section 2
18 of the Notice, and it must include the disposition of Built-in Gain Assets. *Id.* at
19 003-004. “Built-in Gain Assets” is, in turn, defined as an asset “the sale of which
20 would result on taxable gain.” *Id.*

21 122. The undisputed evidence at trial—from fact and expert witnesses
22 called by *both* parties (including Tricarichi himself)—was that Westside did not
23 have any Built-in Gain Assets at the time of the transaction, and that the
24 Westside Transaction did not involve the sale of any Built-in Gain Assets. TT2
25 95:16–18 (Lohnes); TT4 63:5–10 (Tricarichi) (referring to Ex. 182 at 003); TT8
26 (Vol. 1) 76:20–22 (Greene); *Id.* 191:11–16 (Harris); TT7 200:3–23 (Miller). The
27 theory espoused in questioning by Tricarichi's counsel, that the release of the
28

1 claims in the lawsuit constituted Built-In Gain Assets, was not supported by a
2 single witness or any evidence in the case.

3 123. At the time of the transaction, Westside had only cash in its bank
4 accounts from the lawsuit settlement with the cell phone carriers, which was
5 considered ordinary income, not taxable gain from the sale of a Built-in Gain
6 Asset, and reported that way on Westside's tax return. TT2 47:12–22 (Lohnes);
7 TT8 (Vol. 1) 76:17–19 (Greene); *Id.* 259:11–21 (Harris); *see also Nahey v.*
8 *Comm'r*, 111 T.C. 256, 261–65 (1998) (holding that settlement of lawsuits “does
9 not constitute a sale or exchange” and thus would be treated as ordinary
10 income, not capital gain).

11 124. Thus, given the language of the Notice and how was interpreted
12 by others on behalf of Tricarichi, PwC did not fall below the standard of care by
13 reviewing Notice 2008-111 and making the determination that it did not change
14 the firm's prior analysis that, “more likely than not”, the transaction was not
15 reportable. Ex. 45, Lohnes Email to Stovsky.

16 125. Tricarichi argued at trial that Lohnes or Stovsky should have
17 consulted one of the designated “Subject Matter Experts,” or SMEs, at PwC
18 before reaching this conclusion. This argument, however, had no evidentiary
19 support. Tricarichi claimed at trial that it was the failure of PwC to inform him
20 that Notice 2008-111 impacted his personal liability to the IRS as a transferee.
21 Whether PwC had a SME involved or not is irrelevant. It was uncontested that
22 PwC (via Stovsky) did not believe there was any information to provide Tricarichi
23 based on Notice 2008-111. Stovsky was Tricarichi's relationship tax
24 professional at PwC who, in the past, had communicated what he thought
25 should be communicated to Tricarichi. Whether Stovsky communicated
26 internally with only Lohnes, or also with others such as a SME, prior to making
27 that determination, it was PwC's decision, via a tax partner, not to provide
28

1 Tricarichi with any analysis of Notice 2008-111, and whether that decision does
2 or does not meet the standard of professional negligence, is the issue before
3 the Court. The issue is not a speculation of whether if Stovsky or Lohnes
4 reached out to a SME would that SME give the same or a different opinion and
5 if so what would have happened. Tricarichi's claim and PwC's defenses are
6 based on what actually occurred - not speculation of what could have occurred
7 with a different set of facts.

8 126. In addition, in the present case, Tricarichi did not establish that the
9 individuals at PwC who provided the advice in 2003 were not qualified to
10 provide the advice. PwC did provide evidence that Lohnes had prior expertise
11 in Midco transactions, even though he could not recall names of specific matters
12 he worked on. TT3 4:21–5:20 (Lohnes). Second, the directory of SMEs was not
13 an exhaustive list of people at PwC with knowledge about particular
14 transactions, but rather that it served merely as a contact list for people outside
15 of Lohnes' group (Washington National Tax Service). TT2 115:2–116:10
16 (Lohnes). Finally, a designated SME on Midco transactions, Mark Boyer,
17 testified that Lohnes had a level of expertise in Midco transactions similar to his
18 own. TT6 140:15–141:12.

19 127. Another reason that PwC's advice in 2003 was not in "error" was
20 because it rendered its advice with a "more likely than not" confidence level.
21 That allows for up to a 49.9 percent (49.9%) likelihood of the result going the
22 other way. Thus, even if IRS 2008-111 did expand, rather than narrow, the
23 reportability standard (and it did not), that would not render earlier advice given
24 with a "more likely than not" standard erroneous.

25 128. As noted above, an "error" under SSTS No. 6 means that the
26 member advised the taxpayer to take a position with less than a 1-in-3 chance
27 of success. No one testified that as a result of Notice 2008-111, PwC's original
28

1 advice on reportability had such a low confidence level.

2 129. In evaluating the breach element, the Court also has to look at
3 what the other professionals Tricarichi hired advised him with in relation to
4 Notice 2008-111 and its applicability to his risk of liability to the IRS. Both the
5 internal communications, provided as exhibits, as well as the arguments
6 presented to the various courts by Tricarichi's legal tax attorneys as noted
7 herein, were consistent with the advice provided by PwC. See, also Ex. 165. In
8 addition, there was testimony that practitioners before the IRS and the Tax Court
9 must have a "good faith basis" in their positions—the same type of "good faith
10 basis" that is required under SSTs No. 1 when determining whether a position is
11 erroneous. TT8 (Vol. 1) 235:3–25, 237:21–238:16 (Harris); TT6 184:9–12
12 (Desmond).

13 130. Therefore, even if PwC had a duty to update Tricarichi about an
14 "error" in its prior advice on whether the transaction was now "reportable"
15 pursuant to Notice 2008-111, based on evidence presented as to the language
16 of the provision as well as the other advice Tricarichi received consistent with
17 PwC's own internal analysis, Tricarichi has failed to show that there was a
18 breach of any asserted duty.
19

20 **B. PwC Did Not Breach Any Duty to Provide Advice in**
21 **Writing or to Maintain Written Documentation**

22 131. As discussed above, PwC did not have any affirmative duty to put
23 its advice in writing, either in 2003 or at any point after. But, even if such a duty
24 existed, it would not have been breached in 2008 when Lohnes and Stovsky
25 reviewed Notice 2008-111 for its applicability to the Westside Transaction.

26 132. Any duty to provide advice in writing presupposes, as a matter of
27 logic, that some sort of advice is being provided to a client. That was not the
28 case in 2008. Tricarichi neither sought a tax engagement from PwC to receive

1 any advice from PwC in 2008, nor was he provided any tax advice from PwC in
2 2008. TT3 162:21–163:5; TT8 (Vol. 1) 113:5–7 (Greene). Thus, it would have
3 been impossible for PwC to breach any hypothetical duty to provide advice in
4 writing to Tricarichi at that time. TT8 (Vol. 1) 114:18–25 (Greene).

5
6 **C. Failure to Disclose PwC’s Prior Involvement in the**
7 **Enbridge and Marshall Transactions Was Not a Breach**
8 **of Any Duty**

9 133. Tricarichi also contends that Notice 2008-111 should have
10 prompted PwC to disclose its prior advice and the outcomes in the Enbridge and
11 Marshall transactions, and that its failure to do so was a negligent omission.

12 134. The Court disagrees. PwC’s involvement with Marshall and
13 Enbridge occurred long before the December 2008 issuance of Notice
14 2008-111, and the “independent duty” that Tricarichi claims came about at that
15 time as a result of the issuance of that Notice. PwC rendered its advice in the
16 Marshall case in 2003, and its involvement with Enbridge was in 1999.⁷

17 135. Moreover, as the Court has found above, both the Enbridge and
18 Marshall transactions were substantially distinct from the Westside Transaction,
19 and there is no reason to believe that PwC’s work in those two matters rendered
20 their advice to Tricarichi any more or less correct.

21 136. Furthermore, the evidence at trial showed that PwC would not
22 have been able to disclose the specific details of these engagements with
23 Tricarichi because of its confidentiality obligations. TT3 35:23–36:7 (Lohnes);
24 TT8 (Vol. 1) 199:17–23 (Harris); *id.* 102:14–103:4 (Greene).

25 137. Thus, the Court concludes as a matter of law that the failure to
26 disclose details of the Enbridge or Marshall transactions does not constitute a

27 ⁷ As noted above, the Court’s 2018 Summary Judgment ruling on statute of limitations bars
28 Tricarichi’s allegations regarding Marshall and Enbridge.

1 breach of any duty of care that PwC owed to Tricarichi.

2
3 **IV. Third Element: Tricarichi Has Not Proven Causation**

4 138. To prevail on his claim, Tricarichi must prove a “proximate causal
5 connection between the negligent conduct and resulting injury.” *Boesiger v.*
6 *Desert Appraisals, LLC*, 135 Nev. 192, 194–95, 444 P.3d 436, 439 (Nev. 2019).

7 139. Tricarichi asserts that PwC’s alleged negligence (*i.e.*, failing to
8 advise him about Notice 2008-111) caused his alleged injury (the \$14,937,400 in
9 interest that accrued after Notice 2008-111 was issued and the \$3,180,143 in
10 attorney’s fees he spent litigating against the IRS).

11 140. The Court disagrees and concludes that Tricarichi has failed to
12 establish causation for four independent reasons.

13 141. First, the record is clear that Tricarichi and his team of tax lawyers
14 were aware of Notice 2008-111 and its implications shortly after the Notice
15 issued as set forth above. The Court has already found that Tricarichi was
16 aware of Notice 2008-111 and its applicability to the Westside Transaction no
17 later than 2009; and further, that Tricarichi’s attorneys repeatedly advised him
18 thereafter throughout the course of his litigation with the IRS regarding whether
19 the requirements of Notice 2008-111 were met or not.

20 142. Thus, Tricarichi’s causation arguments rest on the supposition that
21 he would have abandoned his IRS litigation and immediately settled with the
22 government if only PwC had added a contrary voice to the chorus of
23 distinguished tax advisors—which included both former and future IRS Chief
24 Counsels—who were advising Tricarichi that the requirements of Notice
25 2008-111 were not satisfied. While Tricarichi argued that it would have made a
26 difference in his decisions, he failed to meet his evidentiary burden.

27 143. To the contrary, Tricarichi’s lawyers at Sullivan & Cromwell advised
28

1 him that the IRS did not need to rely on Notice 2008-111 to win, and that their
2 argument was “a bit of a red herring.” Ex. 165 at 003. And when asked at trial if
3 he knew in 2009 that Notice 2008-111 was a red herring, Tricarichi replied: “The
4 arguments that they’re using in 2008-111 -- again, I’m not a tax expert and I
5 keep saying that over and over again. But I can read. Okay? This is not why we
6 lost the [Tax Court] case. It has nothing to do with why we lost the case.” TT3
7 224:19–23 (Tricarichi) (emphasis added). The Court has to take Tricarichi’s own
8 testimony into account in evaluating every element of his claim. Giving
9 Tricarichi the benefit of the doubt that his words could be viewed out of context,
10 the weight of the rest of the evidence shows that there were too many
11 intervening causes which prevent holding PwC liable for Tricarichi’s asserted
12 damages.

13 144. Second, the chronology of the case demonstrates that Notice
14 2008-11 could not have prevented the audit which later resulted in the liability
15 determination. Specifically, Tricarichi did not show that disclosure of Notice
16 2008-111 would have made any difference to the rulings of the Courts as to his
17 liability because the Notice, on its face, relates only to reportability of
18 transactions and not a taxpayer’s underlying liability: The language of the
19 Notice sets forth it: “does not affect the legal determination of whether a
20 person’s treatment of the transaction is proper or whether such person is liable,
21 at law or in equity, as a transferee of property in respect of the unpaid tax
22 obligation” Ex. 44 at 003.

23 145. Importantly, in the present case, the chronology of facts shows
24 that the IRS had been examining/auditing the Westside Transaction for about
25 three years before Notice 2008-111 issued. The IRS began its audit of the 2003
26 Westside tax return in 2005, interviewed Tricarichi regarding that audit in 2007,
27 and issued an Information Document Request to Tricarichi in 2008, all before
28

1 the issuance of Notice 2008-111. Thus, even if PwC had informed Tricarichi that
2 2008-111 would require Tricarichi to report the Westside transaction, there was
3 no evidence presented how that would have changed the IRS determination
4 based on the audit that he was liable as a transferee in the instant case since
5 the audit had already progressed for three years prior to the Notice being
6 promulgated and the IRS had already informed him that it was seeking the
7 underpayment from his as a transferee.

8 146. The third reason, Tricarichi cannot meet the causation prong of his
9 professional negligence claim is that there is no credible evidence to support his
10 contention that if PwC had notified him regarding Notice 2008-111, he would
11 have amended his taxes and settled the case with the IRS in December 2008;
12 and thus, he would not have incurred any of the attorney fees or interest
13 damages he is seeking in the present case. Specifically, his transferee liability
14 stems from the taxes filed by various entities as a result of the Westside
15 transaction, and he did not present any evidence how he could amend the
16 relevant filings in 2008 or 2009 at no cost, and that as a result, the IRS would
17 not pursue him for transferee liability. There was no evidence from any IRS
18 witness or anyone else that the outcome described was possible.

19 147. Additionally, the evidence presented demonstrated that he had
20 several opportunities to settle the case with the IRS and minimize fees and
21 interest but he chose not to do so. As set forth in the Findings above, these
22 opportunities to settle the case came about after he was advised by
23 experienced tax counsel as to liability and the impact of 2008-111. While the
24 reason Tricarichi chose not to resolve the matter with the IRS was disputed,
25 PwC asserted that the communications between Tricarichi and his tax counsel
26 show he did not have the funds or felt the offers to settle were too high, and the
27 Record was devoid of any exhibit where Tricarichi contended that he did not
28

1 settle due to the advice provided by PwC in 2003. Instead, the only testimony in
2 support of that contention is Tricarichi's own testimony which the Court has to
3 weigh in contrast with the other testimony by his tax lawyers and the various
4 exhibits that were introduced which are not in accord with his testimony. In so
5 doing, the Court finds that Tricarichi did not meet his burden to show that PwC's
6 action or inaction relating to Notice 2008-111 meets the causation element of is
7 claim.

8 148. Thus, Tricarichi has failed to provide the level of evidence
9 necessary to support the notion that even had PwC advised Tricarichi about
10 Notice 2008-111 when it issued, Tricarichi could have or would have settled with
11 the IRS thereby avoiding the interest and legal fees he now seeks as damages.

12 149. Fourth, to the extent that Tricarichi's claim is that PwC was
13 negligent in 2008 because it did not advise him at that time of the contents of
14 the Stovsky Memo (as opposed to Notice 2008-111 itself), causation is still
15 defeated because the record is clear that Tricarichi was made aware of either
16 the existence or contents (or both) of the Stovsky memo on at least five
17 separate occasions in 2008 and 2009, either by PwC itself, the IRS, or his
18 attorneys. TT4 at 7:21–25; Ex. 161 at 009; Ex. 163 at 010; Ex. 164 at 001; Ex.
19 168 at 002.

20 21 **V. Fourth Element: Damages**

22 150. As the Court has found that Tricarichi, independently, has not met
23 his burden on any of the first three elements of a cause of action for
24 Professional Negligence, the Court need not, and determines it would not be
25 appropriate, to address the damages element.

26 **VI. Basis of PwC's Affirmative Defenses**

27 151. PwC tried four of its affirmative defenses to the Court: statute of
28

1 limitations (second affirmative defense), failure to mitigate damages (fourteenth
2 affirmative defense), offset/contribution (fifteenth affirmative defense), and
3 limitation of liability (sixteenth affirmative defense).

4 152. Consistent with the Court's determination that Tricarichi failed to
5 meet his burden on the elements of his cause of action for Professional
6 Negligence, the Court will only address the Second Affirmative Defense relating
7 to statute of limitations.⁸

8 153. Under Nevada law, an action for professional malpractice must be
9 brought two years from discovery or four years from the alleged malpractice,
10 whichever occurs earlier. NRS § 11.2075(1).

11 154. Under New York law—the governing law identified in the
12 Engagement Agreement—the statute of limitations is three years from the
13 alleged malpractice. See *Ackerman v. Price Waterhouse*, 644 N.E.2d 1009,
14 1011 (N.Y. 1994) (citing New York CPLR § 214).

15 155. Under either, the limitation period of Tricarichi's claim is untimely.

16 156. PwC's alleged acts of negligence related to Notice 2008-111
17 occurred in December 2008 or January 2009, shortly after it issued. Thus,
18 under New York law, the statute of limitations would have expired at the latest in
19 January 2013. Tricarichi did not file suit in this case until April 29, 2016, making
20 his claim untimely.

21 157. The outcome is no different if the Court applies Nevada law. The
22 Court found above that Tricarichi was subjectively aware of Notice 2008-111 at
23 least as of April 29, 2009. Thus, the Court concludes, for limitations purposes,
24

25 ⁸ As set forth above, the Court found that the first three elements of his cause of action were not
26 met for independent reasons. Thus, the Court found that there was not a basis to address the
27 damages element of his cause of action. Consistent therewith, the Court finds no basis to
28 address the other three affirmative defenses which are based on if there was a finding that
damages were appropriate - there was not.

1 that the latest date that Tricarichi knew or should have known about his claim
2 was April 29, 2009.

3 158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed
4 to be commenced no later than April 29, 2011 (two years from discovery). And
5 under N.R.S. 11.2075(1)(b), the action needed to be commenced by January,
6 2013 (four years from the alleged malpractice). However, the statute specifies
7 that the earlier of the two dates controls; thus, for limitations purposes, the latest
8 date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim
9 five years too late, on April 29, 2016.⁹

10 159. At trial, Tricarichi failed to introduce any evidence of a tolling
11 agreement, and expressly declined to do so when the Court inquired about such
12 an agreement immediately prior to closings. TT9 100:7–20 (“MR. HESSELL:
13 Yeah. No, we don’t need to -- We don’t need that”) (referring to proposed Exhibit
14 83). Furthermore, Tricarichi failed to include any proposed pre-trial findings or
15 conclusions of law on statute of limitations. As such, Tricarichi has waived any
16 argument that the limitations period was tolled by agreement or otherwise.¹⁰
17 *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 44,
18 49, 152 P.3d 737, 740 (Nev. 2007).

19 160. Instead, Tricarichi's counsel claimed in his closing argument
20 rebuttal, that the inclusion of a tolling agreement - as an exhibit to a brief in
21 opposition to an earlier Summary Judgment Motion - relieved him of any
22 obligation to introduce it as evidence at trial. The Court disagrees. See *Garcia*
23 *v. Shapiro*, 515 P.3d 345, (Nev. App. 2022) (“Regardless, motions, statements
24

25 _____
26 ⁹ In utilizing the January date, the this Court is providing Tricarichi the longer time frame as it is
taking into account the Levin letter (Ex. 205).

27 ¹⁰ Tricarichi's failure to disclose any proposed findings of fact or conclusions of law regarding
statute of limitations, likewise waives any argument that he is entitled to statutory tolling under
N.R.S. 11.2075(2).
28

1 and allegations within them, and exhibits attached to them do not necessarily
2 constitute evidence.”) (citing EDCR 5.205(g) (“Exhibits [to motions] may be
3 deemed offers of proof but shall not be considered substantive evidence until
4 admitted.”)); cf. NRAP 28(e) (party raising evidentiary issue on appeal must
5 identify where in the record “evidence was identified, offered, and received or
6 rejected”); see also *Town of Gorham v. Duchaine*, 224 A.3d 241, 244 (Me. 2020)
7 (“[S]imply attaching documents to a motion is not the equivalent of properly
8 introducing or admitting them as evidence. Documents attached to motions are
9 not part of the record and therefore cannot be considered evidence in the record
10 on appeal.”) (Collecting state cases).

11 161. Thus, under either the three-year statute of limitations in New
12 York, or the two-year statute of limitations in Nevada, Tricarichi's claim is time-
13 barred¹¹.

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26 ¹¹ As set forth herein, the Court finds that PwC's Statute of Limitations defense was met. The fact
27 that Tricarichi's claim is barred by the Statute of Limitations is an independent basis upon which
28 Judgment for PwC is to be entered in addition to basis that Tricarichi did not meet his burden to
establish all four elements of his professional negligence claim.

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IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that
any request for fees and costs shall be handled via separate timely-filed Motion.

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1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5		
6	Michael Tricarichi, Plaintiff(s)	CASE NO: A-16-735910-B
7	vs.	DEPT. NO. Department 31
8	PricewaterhouseCoopers LLP,	
9	Defendant(s)	

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Judgment was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 2/9/2023

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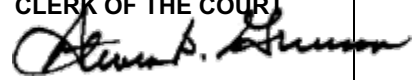
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EXHIBIT PAGE ONLY

EXHIBIT 7

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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL A. TRICARICHI,

Plaintiff,

vs.

PRICewaterhouseCOOPERS LLP,

Defendant.

CASE NO.: A-16-735910-B
DEPT. NO.: XXXI

**NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW AND
JUDGMENT**

1 PLEASE TAKE NOTICE that the *Findings of Fact and Conclusions of Law and Judgment*
2 was entered in the above-captioned matter on February 9, 2023, a copy of which is attached hereto
3 as Exhibit 1.

4 Dated: February 22, 2023

SNELL & WILMER L.L.P.

6 By: /s/ Bradley Austin

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On February 22, 2023, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** upon the following by the method indicated:

☐

BY E-MAIL: by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☐

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.

☐

BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

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BY PERSONAL DELIVERY: by causing personal delivery via messenger service of the document(s) listed above to the person(s) at the address(es) set forth below.

☒

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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4886-1991-5088

EXHIBIT 1

1 **FFCL**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5

6 MICHAEL A. TRICARICHI,
7
8 Plaintiff,

CASE NO.: A-16-735910-B

DEPT. NO.: XXXI

9
10 vs.

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT**

11
12 PRICEWATERHOUSECOOPERS LLP,
13 Defendant.

14
15 This matter came on for a Bench Trial before the Honorable Judge Joanna
16 S. Kishner, Department XXXI, commencing October 31, 2022, and the trial
17 concluded November 10, 2022. Appearing for Plaintiff Michael Tricarichi was
18 Ariel C. Johnson, Esq. of HUTCHISON & STEFFEN, PLLC., along with pro hac
19 vice counsel, Scott F. Hessell, Esq. and Blake Sercye, Esq. of SPERLING &
20 SLATER, P.C. Appearing for Defendant PricewaterhouseCoopers, LLP. ("PwC")
21 was Patrick G. Byrne, Esq. and Bradley T. Austin, Esq. of SNELL & WILMER,
22 LLP, along with pro hac vice counsel, Mark L. Levine, Esq., Christopher D.
23 Landgraff, Esq., Katharine A. Roin, Esq., of BARTLIT BECK, LLP. The Court,
24 having heard the testimony of the witnesses, having reviewed the trial exhibits
25 and evidence, and having heard arguments of counsel finds and orders as
26 follows:
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FINDINGS OF FACT

I. Introduction and Relevant Parties

1. This case arises from a 2003 transaction, in which Plaintiff Michael Tricarichi ("Tricarichi") sold his shares of his wholly-owned business, Westside Cellular ("Westside") to Fortrend International LLC ("Fortrend") for approximately \$34.9 million (the "Westside Transaction"). Tricarichi retained Defendant PriceWaterHouseCoopers, LLP ("PwC"), among others, to provide tax services related to the sale.¹

2. The IRS later audited Westside's 2003 tax return and sought to collect Westside's unpaid taxes from Tricarichi. The Tax Court ultimately ordered Tricarichi to pay roughly \$21 million in additional taxes and penalties, plus interest. Ex.² 66, Tricarichi Tax Court Memo at 068.

3. In 2016, Tricarichi filed this lawsuit against PwC, alleging that PwC was negligent in providing tax advice in 2003. Dkt. 1, Compl. ¶¶ 81–96. The Court granted Summary Judgment for PwC on that claim - on statute of limitations grounds. Dkt. 119, Order Granting Summ. J. at 3. Tricarichi then amended his Complaint to allege that PwC was separately negligent *five years later* for, among other things, failing to advise him in 2008 about IRS Notice 2008-111, which was issued in December 2008. Dkt. 140, Am. Compl. ¶¶ 115–121. Tricarichi set forth that *inter alia* if PwC had told him about Notice 2008-111, he could have avoided years of litigation with the IRS. *Id.* ¶ 121.

¹ While the background facts of this case have been extensively cited not only in at least two appellate decisions and in the Order in the Motion for Summary Judgment, the Court reiterates the relevant background facts as set forth in the trial to the extent they do not conflict with the law of the case.

² "Ex." refers to exhibits admitted into evidence at trial. "TT" (followed by the corresponding day of trial) refers to the trial transcripts, which are filed as docket numbers 396–405.

1 4. At trial, Tricarichi sought to recover the interest that has accrued
2 on his tax deficiency between early 2009 and 2018 as well as attorney's fees
3 and other costs he incurred litigating against the IRS (approximately \$3 million)
4 — a total of approximately \$18 million.

5
6 **II. The Westside Transaction**

7 5. In April and May of 2003, Westside received approximately \$65
8 million in settlement proceeds from antitrust claims brought in Ohio. Ex. 66 at
9 007. The Record reflects that Tricarichi knew he would face substantial tax
10 liability on the settlement - both at the corporate level, and as a shareholder of
11 Westside and began looking for ways to minimize his tax burden. *Id.* Tricarichi's
12 brother, James, made an introduction to a company called Fortrend in early
13 2003, who told Tricarichi that it would purchase his Westside stock and offset the
14 taxable gain with losses, thereby eliminating Westside's corporate income tax
15 liability. *Id.* at 008. Tricarichi set forth that the amount after payment of legal fees
16 and employee bonuses, Westside was left with approximately \$40 million. Nov. 2,
17 2022, Trial Tr. 89:11-16; Trial Ex. 66 at 011. Regardless of whether the net
18 amount was \$65 million or \$40 million for purposes of the claims at issue in the
19 present litigation the analysis is the same.

20
21
22 6. Tricarichi retained his long-time attorneys at Hahn Loeser & Parks,
23 LLP ("Hahn Loeser") to oversee all aspects of the transaction, including
24 structuring it, drafting the deal documents, and providing advice on how Tricarichi
25 could minimize his tax burden. TT8 (Vol. 2) 9, 12–13 (Hart Dep. 56:14–20,
26 93:24–94:5).

1 7. Hahn Loeser corporate and tax attorney Jeff Folkman, among
2 others, had authority to act on behalf of Tricarichi and acted as his agent in
3 various matters with respect to the Westside Transaction. See, e.g., Ex. 127,
4 Email from J. Folkman at 001; TT3 89:7–90:20 (Tricarichi).

5 8. Ultimately, Tricarichi sold his shares of Westside to Nob Hill
6 Holdings, Inc., a Fortrend affiliate, for approximately \$35 million. The transaction
7 closed on September 9, 2003. Ex. 66 at 016, 023.

8 **III. PwC’s Engagement**

9 9. Tricarichi separately hired PwC to evaluate the tax implications of
10 the proposed Westside Transaction. TT4 142:10–13 (Stovsky). Tricarichi used
11 his brother James as a “conduit” during his dealings with PwC. TT3 143:7–15,
12 175:25–176:3. Tricarichi’s brother, James, was an accountant.

13 10. Tricarichi signed a written Engagement Agreement with PwC
14 dated April 10, 2003. Ex. 100. The Engagement Agreement consisted of an
15 Engagement Letter which incorporated an attached document entitled “Terms of
16 Engagement to Provide Tax Services.” These documents, collectively,
17 comprised the agreement between the parties. See *PricewaterhouseCoopers*
18 *LLP v. Eighth Jud. Dist. Court*, No. 82371, 2021 WL 4492128, at *1 (Nev. Sept.
19 30, 2021).

20 11. As this Court has found previously, Tricarichi received both the
21 Engagement Letter and the Terms of Engagement, and the Engagement
22 Agreement was a valid and binding contract. See Dkt. 336, Order Granting
23 PwC’s Mot. to Strike Jury Demand ¶ 33.³

24 12. The Engagement Agreement specified that PwC would provide
25
26

27 ³ The instant Court was assigned the case in 2021 after certain decisions, which are law of the
28 case, had been made by the Honorable Elizabeth Gonzalez (ret.)

1 “tax research and evaluation services” for the Westside Transaction. Ex. 100 at
2 001. The Engagement Letter, thus, set forth specific parameters regarding the
3 scope of the engagement rather than an open ended engagement.

4 13. Section 7 of the Terms of Engagement contained a limitation-of-
5 liability clause, which states in relevant part:

6 IN NO EVENT, UNLESS IT HAS BEEN FINALLY DETERMINED
7 THAT [PwC] WAS GROSSLY NEGLIGENT OR ACTED
8 WILLFULLY OR FRAUDULENTLY, SHALL [PwC] BE LIABLE TO
9 THE CLIENT OR ANY OF ITS OFFICERS, DIRECTORS,
10 EMPLOYEES OR SHAREHOLDERS OR TO ANY OTHER THIRD
11 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.

12 *Id.* at 007.

13 14. Section 3 of the Engagement Agreement advised that

14 Tax laws and regulations are subject to change at any
15 time, and such changes may be retroactive in effect
16 and may be applicable to advice given or other
services rendered before their effective dates. *[PwC]*
do[es] not assume responsibility for such changes
occurring after the date we have completed our
services.

17 *Id.* at 006.

18 15. Section 10 of the Engagement Agreement specified that it will be
19 governed by the laws of the State of New York. *Id.* at 007.

20 16. It was undisputed that several PwC tax professionals worked on
21 the Engagement, including Richard Stovsky, the Cleveland-based engagement
22 partner; Tim Lohnes, a partner in the corporate M&A group in the national office
23 in Washington DC; as well as partners Don Rocen and Ray Turk.

24 17. The PwC team performed a number of services pursuant to the
25 Engagment Agreement's terms, including analyzing draft agreements,
26 researching potential tax issues, discussing applicability of Treasury Notices,
27 and suggesting deal terms to protect Tricarichi (including indemnity protections
28

1 and insurance).

2 18. PwC memorialized parts of its advice to Tricarichi in a memo
3 referred to at trial as the “Stovsky Memo,” which Stovsky updated periodically
4 after having conversations with other PwC partners, as well as with Tricarichi or
5 his advisors. Ex. 2. PwC also kept a file with notes and other communications
6 that it contended were relevant to its analysis. See, e.g., Ex. 1.

7 19. PwC primarily investigated two topics for Tricarichi: (1) whether the
8 Westside Transaction was reportable to the IRS as a so-called “Midco”
9 transaction under IRS Notice 2001-16; and (2) whether Tricarichi could be held
10 liable for Westside’s taxes, including under a transferee liability theory. *Id.* at
11 002–004.⁴

12 20. As to the first question, Stovsky advised Tricarichi that the
13 transaction “more likely than not” would not be reportable to the IRS as an
14 intermediary or Midco transaction under IRS Notice 2001-16. *Id.* at 001, 004;
15 TT4 158:1–7.

16 21. As to the second question, Stovsky similarly advised Tricarichi that
17 the transaction “more likely than not” would be “respected” by the IRS; and thus,
18 that Tricarichi would not be held liable for Westside’s taxes under transferee
19 liability. Ex. 2 at 001–003; TT4 154:3–6.

20 22. Based on the testimony of various witnesses for PwC, the “more
21 likely than not” qualifier to PwC’s advice is a standard tax industry term that
22 meant, consistent with its plain language, there was at least a 50.1% chance of
23 prevailing (up to 70% or 75%); or conversely, a 49.9% chance of losing. TT8
24 (Vol. 1) 250:5-9 (Harris); *id.* 60:10–19 (Greene); see also TT1 154:5–20
25

26
27 ⁴ Although the parties disputed the depth of Midco experience the tax professionals at PwC had
28 in 2003, that dispute need not be resolved given the Summary Judgment ruling.

1 (Lohnes); TT6 143:2–18 (Boyer). That specific interpretation of “more likely
2 than not” was not set forth in any written communication sent to Tricarichi or his
3 representatives.

4 23. Based on evidence provided, Stovsky, either directly or through
5 conversations with Tricarichi’s representatives, also suggested that Tricarichi
6 take out an insurance policy for any potential tax liability or transferee liability.
7 Tricarichi did not follow this advice. Ex. 110, Handwritten Notes. TT6 23:18–
8 25:10.

9 24. PwC billed Tricarichi \$48,552.00 for the Engagement, which
10 Tricarichi paid in full. See Ex. 3, PwC Invoices.

11 25. PwC issued its last invoice on October 29, 2003, for services
12 rendered through September 30, 2003. *Id.* at 006. After that, PwC did not enter
13 into any Engagement Letter to perform any paid services for Tricarichi or
14 Westside. While it was undisputed that there was no monetary compensation
15 provided after the \$48,552.00 was paid in full by the end of 2003, and there was
16 no written Engagement Letter signed by Tricarichi in 2003, it was disputed
17 between the parties as to whether there was an implied client relationship due to
18 there being either an ongoing obligation to notify Tricarichi of new IRS bulletins
19 or rulings, or the fact that there were communications between PwC and
20 Tricarichi or his agents after 2003 relating to the IRS issues that arose regarding
21 the Westside Transaction.

22 26. While there was evidence that PwC reviewed IRS bulletins and
23 information relating to Midco transactions after providing Tricarichi its advice,
24 Plaintiff did not meet his burden to show that conduct created an affirmative duty
25 on behalf of PwC towards Tricarichi for claims that were not already precluded
26 by the Summary Judgment Motion.

27 27. For example, in approximately, November 2003, at Mr. Stovsky’s
28

1 request, Mr. Lohnes reviewed an updated IRS list of prohibited transactions to
2 see if the Westside Midco Transaction, or a similar transaction, was listed. Trial
3 Ex. 32. Mr. Lohnes concluded that the November 2003 list “contain[ed] no
4 items that would impact [Westside’s] transaction, other than the items we
5 discussed previously, namely the midco listed transaction.” *Id.* at 001.

6 28. In addition, it was undisputed that PwC or its attorneys and
7 Tricarichi (or his attorneys) had contact after Tricarichi’s IRS dispute began. It
8 was disputed at trial, however, whether these communications were to provide
9 general assistance such as providing copies of documents or whether they
10 related to the retention of professional accounting services. *E.g.*, Ex. 7, Email
11 from S. Marcus to S. Dillon.

12 29. At trial, PwC witnesses consistently testified that by 2008, they did
13 not consider Tricarichi to be a current client, and that he did not have an
14 ongoing relationship with PwC after 2003. TT2 110:24–111:6 (Lohnes); TT3
15 31:21–32:3 (Lohnes); TT5 100:15–16 (Stovsky). Tricarichi, likewise, confirmed
16 that he never engaged PwC at any point after 2003, and did not have any
17 ongoing relationship after that time. Indeed, it was shown that while Tricarichi’s
18 brother, James, had some interactions with PwC, and so did Tricarichi’s lawyers,
19 there was no evidence that Tricarichi retained PwC’s services utilizing a similar
20 process involving a written Engagement Letter and payment of fees as he had
21 in 2003. Additionally, the 2003 Engagement Letter, on its face, did not set forth
22 there was an ongoing relationship; but, instead, was limited to the scope of
23 services provided and paid for. Further, no additional funds were paid by
24 Tricarichi, or anyone on his behalf, to PwC for any type of accounting services
25 on behalf of Tricarichi, or involving any interest held by Tricarichi. TT3 162:25–
26 163:5; 164:25–165:5 (Tricarichi).

27 30. In light of the foregoing specific facts and evidence presented at
28

1 trial, the Court finds that Tricarichi ceased being a PwC client as of October,
2 2003 when the services pursuant to the specific Engagement Agreement were
3 completed and the final bill sent. By 2008, Tricarichi was a former client of
4 PwC's and had no ongoing professional relationship with the firm.

5 31. The next issue for the Court to determine is whether, in light of
6 Tricarichi's status as a former client and/or given the interactions between PwC
7 and either Tricarichi, his agents, his counsel and/or the IRS, PwC created a
8 relationship with Tricarichi that subjects it to liability pursuant to the claims in the
9 Amended Complaint. The Court sets forth the various issues raised by
10 Tricarichi below.

11 **IV. PwC's Prior Experience with Midco Transactions Do Not**
12 **Provide a Basis for Liability Against PwC in the Instant Case**

13 32. Tricarichi alleged that PwC's advice and/or involvement with other
14 Midco transactions demonstrated that it knew or had reason to know that the
15 advice it provided to Tricarichi was inaccurate or inconsistent; and thus, he
16 should prevail on his Amended Complaint. In support of that contention,
17 Tricarichi provided argument and/or evidence that advice provided in what was
18 referred to as the "Enbridge Matter" and the "Marshall Matter" was contrary or
19 different that the advice he received. PwC disputed both the allegations as well
20 as the applicability of both matters.

21 **A. The Enbridge Matter**

22 33. It was undisputed that the Enbridge matter arose in 1999 (prior to
23 the issuance of Notice 2001-16) and involved the purchase of shares from the
24 Bishop Group, Ltd. by Midcoast Energy Resources (which later came to be
25 known as Enbridge). Ex. 156, Enbridge Op. at 001-004. PwC (through its
26 Houston office) gave tax advice to Midcoast in the transaction. *Id.* at 002.

27 34. While the Enbridge matter involved a purported Midco transaction,
28

1 the Court finds numerous differences between it and the instant case. First,
2 there were four parties (including an intermediary entity) to the Enbridge
3 transaction, while the Westside Transaction only involved three parties and
4 lacked an intermediary entity. *Id.* at 002–004.

5 35. Second, the Westside Transaction also did not include a target
6 corporation with built-in gain assets or a purchaser seeking to achieve a step-up
7 in the tax basis of such assets, as was the case in Enbridge. TT8 (Vol. 1) 196:8–
8 14 (Harris).

9 36. Third, the Enbridge transaction did not involve questions of
10 transferee liability. *Id.* 195:22–196:7 (Harris).

11 37. Thus, the evidence presented to this Court demonstrated that
12 there were differences between the two transactions as to not only their
13 structure, but also their timing *vis a vis* applicable IRS rules and regulations. In
14 addition, the Federal District Court's decision in *Enbridge* was published and
15 generally available to the public as of March 2008, including to Tricarichi and his
16 counsel. See, *Enbridge Energy Co. v. United States*, 553 F. Supp. 2d 716 (S.D.
17 Tex. 2008). Specifically to the case at bar, there was a memo from R. Corn to
18 Plaintiff Tricarichi which demonstrated that Tricarichi was advised on the
19 differences between Enbridge and the Westside Transaction so Tricarichi could
20 not have relied on any failure of PwC to provide him information about Enbridge
21 when his own counsel set forth that it was distinguishable from his case. Ex.
22 169, Memo from R. Corn to M. Tricarichi at 003–004.

23 24 **B. The Marshall Matter**

25 38. In addition to Enbridge, Tricarichi also contended that PwC failed
26 to disclose that it had any prior relationship with Fortrend and any of its prior
27 transactions. The evidence presented to the Court set forth that the Marshall
28

1 matter involved the family shareholders of a C corporation who sold their shares
2 to a Fortrend affiliate to minimize their tax liability from an expected litigation
3 settlement. Ex. 56, Marshall Tax Court Op. at 001–003. PwC (through its
4 Portland office) advised John Marshall not to proceed with the transaction and
5 stated that it would not consult or provide advice on the transaction. *Id.* at 004–
6 005. The transaction closed in March 2003. *Id.* at 007.

7 39. As with the Enbridge matter, the Court finds numerous differences
8 between the Marshall matter and the instant case. The Marshalls undertook an
9 integrated transaction with significant non-cash built-in gain assets (as opposed
10 to none in the Westside Transaction), and the nature of this transaction
11 presented greater risks of transferee liability than the Westside Transaction. TT8
12 (Vol. 1) 199:3–12 (Harris). Given the differences in the matters, Tricarichi did
13 not meet his burden to show that PwC has liability to him for failing to disclose
14 or take into account the advice given in that transaction.

15 **V. Tricarichi's Tax Dispute with the IRS and IRS Notice 2008-11**

16 40. In his Amended Complaint, Tricarichi alleges that his claims are
17 not time barred based on a tolling agreement and instead PwC is liable for his
18 damages and interest because of what PwC did and did not do regarding IRS
19 Notice 2008-11. The gravamen of Tricarichi's claims are his contention that:
20 had PwC informed Mr. Tricarichi of the problems with its advice regarding the
21 Westside Midco Transaction and the resulting error on Mr. Tricarichi's tax
22 return(s), Mr. Tricarichi would have been able to amend his return(s), avoid
23 interest on taxes and penalties, avoid litigation with the IRS, and thereby avoid
24 related legal fees and expenses. Nov. 2, 2022, Trial Tr. 124:12-126:6.

25 41. PwC contended in its defense *inter alia* that: 1. All of Tricarichi's
26 claims are barred by statute of limitations; 2. Neither its 2003 advice, nor its
27 internal review of the 2008 Notice, which it did not advise Tricarichi it reviewed
28

1 in 2008, did not fall below the standard of care based on the information
2 available and the risk factor it placed on its advice even with a retrospective
3 view of the 2008 Notice provisions; 3. Tricarichi hired experienced tax lawyers
4 who he relied upon in making his decisions and those lawyers provided similar
5 advice and analysis as PwC did; 4. There was no client relationship after 2003
6 and thus no duty was owed in 2008 or later; and 5. Tricarichi's damages are due
7 to his own conduct including not settling with the IRS.

8 42. It was undisputed that on December 1, 2008, the IRS issued
9 Notice 2008-111, entitled "Guidance on Intermediary Transaction Tax Shelters."
10 The impact and obligations relating to that Notice were disputed at trial. Ex. 44.

11 43. The plain language of the Notice itself sets forth that the purpose
12 of Notice 2008-111 was to "clarif[y]" the agency's prior notice on Midco
13 transactions, IRS Notice 2001-16. *Id.* at 003.

14 44. Specifically, Notice 2008-111 advised taxpayers that a transaction
15 would be treated as an "Intermediary Transaction" if: (1) a person engages in
16 that transaction pursuant to a "Plan" (as defined in the Notice); (2) the
17 transaction contains each of four objective components described in the Notice;
18 and, (3) no safe harbor exception applies. *Id.*

19 45. In so doing, PwC and others interpreted the Notice to mean that
20 the IRS narrowed the scope of Notice 2001-16. TT6 137:17–138:4 (Boyer); TT8
21 (Vol. 1) 182:23–183:1 (Harris).

22 46. Notice 2008-111 addressed only *reportability* of transactions to the
23 IRS, not *liability* under the tax laws. Ex. 44 at 003. The Notice did "not affect the
24 legal determination of whether a person's treatment of the transaction [was]
25 proper or whether such person [was] liable, at law or in equity, as a transferee of
26 property in respect of the unpaid tax obligation" *Id.*

27 47. After the IRS issued Notice 2008-111, Lohnes responded in an
28

1 internal email to a question from Stovsky: "I read through the Notice and agree
2 with your assessment that it shouldn't change any of our prior analysis." Ex.
3 159, Lohnes Email to Stovsky. Stovsky testified that his receiving the IRS
4 subpoena to PwC relating to the Westside Transaction led him to communicate
5 with Lohnes about the Notice. TT6 67:9–13.

6 48. It was undisputed that the IRS began auditing Westside's 2003 tax
7 return in August 2005, and it interviewed Tricarichi in connection with that audit
8 in 2007. Ex. 144, IRS Notice of Audit to Westside Cellular. PwC was not
9 involved with the preparation of Westside's 2003 return.

10 49. On January 22, 2008—roughly ten months before issuing Notice
11 2008-111—the IRS sent Tricarichi an Information Document Request ("IDR")
12 seeking documents related to the Westside Transaction. Ex. 150. The IDR
13 advised Tricarichi that he may be liable for all or part of Westside's tax liability.
14 *Id.* at 001, See also, Order on Summary Judgment.

15 50. The IRS also issued a summons to PwC on January 29, 2008,
16 seeking documents related to the Westside Transaction. Ex. 152. On February
17 22, 2008, PwC responded to the summons, on its own behalf. In so doing, PwC
18 provided documents and set forth its contention that it had not provided any
19 services to Tricarichi since 2003. Ex. 155. Tricarichi was not billed for any of
20 these activities. See Ex. 3.

21 51. The IRS determined that as a result of the Westside transaction
22 the company owed an additional \$15.2 million in taxes and \$6 million in
23 penalties for 2003. Ex. 66 at 027. In a draft transferee report sent to Tricarichi
24 on February 3, 2009, the IRS sought payment of Westside's outstanding tax
25 liability from Tricarichi. Ex. 161 at 003–025.

26 52. After receiving the draft transferee report, Tricarichi recruited
27 highly experienced tax counsel to advise him.
28

1 53. Among those who Tricarichi hired were Glenn Miller and Michael
2 Desmond of Bingham McCutcheon. Miller has practiced tax law for
3 approximately 30 years. TT7 185:6–8. Desmond is a tax lawyer with over 25
4 years of experience, including being employed at the DOJ's Tax Division. TT6
5 169:15–170:1. After his work for Tricarichi, Desmond later served as IRS Chief
6 Counsel. *Id.* 170:18–171:13.

7 54. Tricarichi also hired a team of lawyers at Sullivan & Cromwell, led
8 by Don Korb, a senior tax lawyer who, at the time of his deposition in 2020, had
9 been practicing tax law for over 45 years. TT8 (Vol. 2) 28 (Korb Dep. 15:25–
10 16:4). Korb's experience included serving as Chief Counsel of the IRS from
11 2004 to 2008. *Id.* at 28–29 (Korb Dep. 18:13–15, 19:23–20:1).

12 55. As his trial with the IRS in the Tax Court approached, Tricarichi
13 also hired several lawyers at McGuire Woods, led by one of its partners, Craig
14 Bell. TT6 182:24–183:10 (Desmond).

15 56. While representing their client before the IRS and consistent with
16 PwC's prior assessment, Tricarichi's lawyers repeatedly argued that under the
17 standards set forth by Notice 2008-111, the Westside Transaction was not an
18 intermediary transaction. *See, e.g.*, Ex. 102, 4/29/09 Response to Draft Protest
19 Letter at 006–010; Ex. 103A, 10/9/09 Formal Protest Letter at 012–016; Ex.
20 183, 10/27/10 Appeals Conference Presentation at 002–003, 010–012; Ex. 197,
21 3/18/11 Korb Letter to IRS at 003–004.

22 57. Each of the communications cited above contained lengthy
23 explanations of Notice 2008-111, by individuals separate from PwC including
24 tax lawyers, and they all set forth a similar opinion that Lohnes had provided
25 internally to Stovsky---i.e. that the 2008 Notice did not apply to the Westside
26 Transaction. *See id.* For example, the admitted exhibits included a March 2011
27 communication from one of Tricarichi's lawyers in the tax proceedings, Korb,
28

1 wherein he contended that “pursuant to the clear and unambiguous language
2 of Notice 2008-111, the sale of West Side Cellular stock is neither an
3 intermediary transaction *nor* substantially similar to an intermediary transaction.
4 *We see no basis on which this conclusion can be challenged.*” Ex. 197 at 004
5 (emphasis added); see *also* Ex. 183 at 002–003, 010–012.

6 58. The evidence established that Tricarichi’s lawyers and the IRS
7 also undertook efforts to settle the case. For example, in October 2010, the IRS
8 indicated it would be willing to settle the claim for roughly \$14.5 million. Ex. 186,
9 Email from D. Korb to M. Tricarichi; Ex. 187, Tricarichi’s Baseline Case
10 Calculation at 005; TT6 177:3–9 (Desmond). Tricarichi did not accept this offer.

11 59. On December 6, 2010, Tricarichi’s lawyers at Sullivan & Crowell
12 sent a “decision tree” analysis to the IRS, which purported to calculate the IRS’s
13 chances of success at trial as a means of estimating the settlement value of the
14 case. Ex. 190, Email from A. Mason to P. Szpalik at 002. Tricarichi’s lawyers
15 took the position that the IRS had only a 17 percent (17%) chance of
16 establishing liability for Tricarichi and an 83 percent (83%) chance of failing to
17 make such a showing. *Id.*

18 60. At trial, Tricarichi confirmed that as of December 2010, he
19 understood that he had an 83 percent (83%) chance of winning his case against
20 the IRS based on the decision tree presented by his lawyers and which PwC
21 had no part in creating or editing. TT4 75:19–25.

22 61. On December 8, 2010, the IRS sent a new settlement offer of
23 approximately \$16.1 million. Ex. 192, Email from R. Corn to D. Korb; Ex. 193,
24 IRS Settlement Computation at 001. Tricarichi did not accept this offer.

25 62. The IRS made another settlement offer in August 2011 of
26 approximately \$12.4 million. Ex. 201, Facsimile from P. Szpalik to D. Korb at
27 002. Tricarichi did not accept this offer.

1 63. Tricarichi did not settle his IRS case. Tricarichi testified that he did
2 not have the ability to settle for the amount that was being sought. TT4 30:23–
3 31:1; *id.* 74:12–14; *id.* 86:11–13. Tricarichi's lawyers also testified that he was
4 not interested in considering settlement offers in the double-digit millions. TT6
5 198:2–17 (Desmond).

6 64. On June 25, 2012, the IRS issued a formal "Notice of Liability,"
7 asserting that Tricarichi owed \$15,186,570 in income tax and underpayment
8 penalties of \$6,012,777 (for a total of approximately \$21.2 million) for the
9 Westside Transaction. Ex. 210. Tricarichi petitioned the Tax Court for review
10 shortly thereafter. Ex. 66.

11 65. On May 30, 2014, Tricarichi rejected his lawyers' suggestion that
12 he might consider making a settlement offer to the IRS saying, "I don't want to
13 give the irs (sic) the impression that we think our case is weak, which I don't
14 believe it is." Ex. 228, Email from M. Tricarichi to M. Desmond.

15 66. In their arguments to the Tax Court, Tricarichi's lawyers continued
16 to argue that the Westside Transaction was not an intermediary transaction and
17 did not satisfy Notice 2008-111. *See, e.g.*, Ex. 225, Tricarichi's Tax Court Cross-
18 Motion in Limine at 005.

19 67. The Tax Court held a four-day trial on Tricarichi's petition in June
20 2014. After the trial, but before the Tax Court issued its decision in August 2014,
21 the IRS proposed settling the case for roughly \$13.7 million. Ex. 231, Email from
22 M. Desmond to M. Tricarichi; Ex. 232, Draft Settlement Discussion Framework;
23 TT6 201:18–202:3 (Desmond).

24 68. There was no settlement. Ex. 234, Email from M. Tricarichi to
25 M. Desmond.

26 69. The Tax Court issued its opinion on October 14, 2015, upholding
27 the IRS's Notice of Liability and ruling for the government on all issues. Ex. 66 at
28

1 005. Tricarichi's subsequent appeals were unsuccessful. *Tricarichi v. Comm'r of*
2 *Internal Revenue*, 752 F. App'x 455, 456 (9th Cir. 2018), cert. denied, 140 S. Ct.
3 38 (2019).

4 70. The evidence showed that PwC provided the information required
5 by the IRS or requested by Tricarichi and his agents or lawyers, regarding the
6 tax dispute and/or tax trials. There was no evidence that Tricarichi hired PwC to
7 perform any professional services for him relating to the tax dispute and/or tax
8 trials.

9 71. The Record further shows that while PwC did not contact Tricarichi
10 before or after Lohnes reviewed the 2008 Notice at Stovsky's request, Tricarichi
11 was familiar with Notice 2008-111 and was repeatedly advised as to its content
12 and applicability by the attorneys he hired.

13 72. For example, Tricarichi reviewed drafts of the April 29, 2009, and
14 October 9, 2009, letters to the IRS, both of which contained detailed discussions
15 of Notice 2008-111. TT7 189:1–18, 190:6-22 (discussing Ex. 102); Ex. 103A at
16 030. In fact, Tricarichi signed the October 9, 2009, letter himself, attesting under
17 penalty of perjury that he had “examined this protest, including any
18 accompanying documents,” and that the “facts presented in this protest are true,
19 correct, and complete.” *Id.*

20 73. Tricarichi's attorneys also testified that they advised him on Notice
21 2008-11 specifically, and Midco transactions generally, both orally and in writing.
22 TT7 189:19–190:2, 193:5–15 (Miller).

23 74. For example, in October 2009, Korb sent a memo to Tricarichi and
24 his personal attorney Randy Hart, advising them that the Westside transaction
25 was “quite different” from the type of transaction described in Notice 2008-111.
26 Ex. 165 at 003. Tricarichi also reviewed settlement presentations to the IRS that
27 discussed Notice 2008-111 and the reasons it did not apply to the Westside
28

1 Transaction. Ex. 174; Ex. 182.

2 75. The Court, therefore, finds that Tricarichi was aware of Notice
3 2008-111 and his counsel's interpretation of its applicability to the Westside
4 Transaction at least as of April 29, 2009. There was also evidence that during
5 the months and years that followed, his lawyers continued to advise him
6 repeatedly that in their opinion, and/or they had a strong argument to present to
7 a court, that the requirements of Notice 2008-111 were not met. This is the
8 same conclusion that PwC reached when it reviewed Notice 2008-111 shortly
9 after its issuance. See Ex. 159.

10 76. The preponderance of the evidence also shows that Tricarichi was
11 aware, or should have been aware, of the existence and contents of the Stovsky
12 memo no later than 2009. At trial, Tricarichi testified at one point that he first
13 saw a copy of the memo when PwC invited him and his lawyer, Randy Hart, to
14 review a box of documents it was planning to send to the IRS in response to a
15 summons it received regarding the Westside Transaction. TT4 7:21–23; see
16 *also* TT5 89:23–90:2, 90:21-91:1 (Stovsky); TT6 62:19–63:12 (Stovsky). This
17 meeting occurred in February 2008. See Ex. 155; TT6 62:11–25 (Stovsky). At
18 another point during his testimony, he stated that he was unsure whether he
19 saw the Stovsky memo in 2008. TT3. 122:14–19

20 77. Even if Tricarichi did not read the memo at the time he and Mr.
21 Hart were to review the documents to be sent to the IRS, that same memo was
22 cited by the IRS. Specifically, in February and August 2009, the IRS cited the
23 Stovsky memo and described its contents to Tricarichi in the draft and final
24 transferee reports that it issued. Ex. 161 at 009; Ex. 163 at 010. Further, in
25 September 2009, PwC sent Tricarichi a copy of the files it had provided to the
26 IRS, which included the Stovsky Memo. Ex. 51 at 001. Additionally, in October
27 2009, Sullivan & Cromwell billed Tricarichi, in part, for reviewing the Stovsky
28

1 Memo. Ex. 168 at 002. Thus, even though Tricarichi stated at one point that he
2 never heard the phrase “more likely than not” before trial, (TT3 107:17–21) and
3 provided different recollections of when and/or whether he read or was made
4 aware of the contents of the Stovsky memo, the evidence demonstrates that
5 given the number of other witnesses and documents, Tricarichi reasonably
6 should be viewed as being on notice of the contents of the Stovsky memo.

7
8 **VI. Procedural History of Tricarichi’s Dispute with PwC**

9 78. On January 14, 2011, Joel Levin, an attorney for Tricarichi, sent
10 Stovsky a letter in which he stated that “it is [Tricarichi’s] position that this multi-
11 million dollar potential tax liability [for the Westside Transaction] lies at the feet
12 of PwC for failing to provide him competent services, advice and counsel with
13 respect to the subject stock sale to Fortrend, particularly concerning the
14 potential tax consequences.” Ex. 205 at 002.

15 79. In April 2016, Tricarichi filed a Complaint against PwC in the
16 Eighth Judicial District alleging that PwC’s 2003 advice on the Westside
17 Transaction was negligent. Dkt. 1 ¶¶ 37–40, 81–96.

18 80. On October 22, 2018, the Court granted Summary Judgment in
19 PwC’s favor, holding that the statute of limitations barred any claims based on
20 PwC’s 2003 advice. Dkt. 119 at 2. The Court entered Judgment in favor of PwC
21 “regarding any and all claims arising from the services PwC provided Tricarichi
22 in 2003.” *Id.* at 3.

23 81. Tricarichi filed an Amended Complaint in which he added a claim
24 for negligence based on PwC’s alleged failure to tell him about Notice 2008-111.
25 Dkt. 140 ¶¶ 116–17. Tricarichi alleged that if PwC had told him about Notice
26 2008-111, he would have immediately stopped litigating against the IRS and
27 paid the tax deficiency. *Id.* ¶ 119.

28 82. In the meantime, Tricarichi pursued a professional negligence

1 claim against his attorneys at Hahn Loeser, alleging that they committed
2 malpractice by advising him to enter into the Westside Transaction. After a
3 mediation in September 2012, Tricarichi and Hahn Loeser settled their dispute
4 for \$4 million before any litigation was filed. Ex. 217, Letter from J. Levin to N.
5 Schwartz; Ex. 218, Confidential Settlement Agreement at 003 (¶ 5).

6 **VII. Standards of Professional Care**

7 83. The primary source of professional responsibility standards for
8 CPA tax practitioners during the time at issue in this case were standards
9 promulgated by the American Institute of Certified Public Accountants ("AICPA").

10 84. In fact, the Engagement Agreement between PwC and Tricarichi
11 specified that all services were to be performed "in accordance with the AICPA's
12 Statements on Standards for Tax Services." Ex. 100 at 007 (Section 7).

13 85. Both Nevada (where Tricarichi was located) and Ohio (where PwC
14 dispensed its advice) adopted the AICPA professional standards, at least in part,
15 to govern accountants licensed to practice. Nev. Admin. Code §§ 628.0060-5(a)
16 & (d), 628.500; Ohio Admin. Code § 4701-9-09.

17 86. AICPA Rule 201 provides that a CPA tax practitioner must exercise
18 professional competence and due care, which depends on the scope of the
19 practitioner's engagement under the particular facts and circumstances. Ex. 4,
20 AICPA Professional Standards.

21 87. The AICPA has defined the standard of care, and competence in
22 the context of tax planning advice and tax return preparation, in a series of
23 documents known as the Statements on Standards for Tax Services, or SSTs.
24 Ex. 106, Statements on Standards for Tax Services 1–8 (Aug. 2000).

25 88. SSTS No. 6 is entitled "Knowledge of Error: Return Preparation."
26 This standard addresses situations in which an accountant (or "member")
27 discovers either an error in a previously filed return or the taxpayer's failure to
28

1 file a return in the past. *Id.* at 027.

2 89. SSTS No. 6 states that “[a] member should inform the taxpayer
3 promptly upon becoming aware of an error in a previously filed return or upon
4 becoming aware of a taxpayer’s failure to file a required return.” *Id.* (§ 3).

5 90. An “error” under SSTS No. 6 is any position that has less than a
6 one-in-three chance of success. Ex. 106 at 027 (§ 1); *id.* at 008 (§ 2(a)), *id.* at
7 011 (Interpretation 1-1); Ex. 149 at 046, IRS Circular 230 (Section 10.34),
8 Definition D1; TT8 (Vol. 1) 191:17–25 (Harris).

9 91. The “Explanation” section of SSTS No. 6 clarifies that its
10 obligations exist only when the accountant is continuing to represent the client.
11 Both Paragraphs 5 and 9 of SSTS No. 6 refer to telling the “taxpayer” (client)
12 about the error if the member became aware of it “[w]hile performing services
13 for a taxpayer.” Ex. 106 at 028–029 (§§ 5, 9); TT7 32:16–33:12 (Dellinger).

14 92. Paragraph 6 of the same section discusses “whether to continue a
15 professional or employment relationship with the taxpayer” if the taxpayer does
16 not correct the error. Ex. 106 at 028 (§ 6). This, again, presupposes an existing
17 client relationship, a point upon which both PwC’s and Tricarichi’s experts
18 agreed. TT7 30:22–31:11 (Dellinger); TT8 (Vol. 1) 36:21–37:7 (Greene).

19 93. Nothing in the text of SSTS No. 6 imposes any obligations on an
20 accountant with respect to a former client. Trial testimony established that such
21 an open-ended obligation on accountants to their former clients would pose
22 enormous practical difficulties. TT7 33:13–22 (Dellinger); *see also* TT8 (Vol. 1)
23 38:19–22 (Greene).

24 94. SSTS No. 8 is entitled “Form and Content of Advice to Taxpayers.”
25 It addresses the “circumstances in which a member has a responsibility to
26 communicate with a taxpayer when subsequent developments affect advice
27 previously provided.” Ex. 106 at 033 (§ 1).

28

1 95. The standard states: “[a] member has no obligation to
2 communicate with a taxpayer when subsequent developments affect advice
3 previously provided with respect to significant matters, except while assisting a
4 taxpayer in implementing procedures or plans associated with the advice
5 provided or when a member undertakes this obligation by specific agreement.”
6 *Id.* (¶ 4).

7 96. The “Explanation” section of the standard further specifies that “a
8 member cannot be expected to communicate subsequent developments that
9 affect such advice unless the member undertakes this obligation by specific
10 agreement with the taxpayer.” *Id.* at 034 (¶ 9).

11 97. Finally, the standard notes that taxpayers should be informed that
12 any advice rendered reflects professional judgment based on an existing
13 situation, and that later developments could affect earlier advice. It further
14 instructs that “Members may use precautionary language to the effect that their
15 advice is based on facts as stated and authorities are subject to change.” *Id.* at
16 035 (¶ 10). PwC included such language in its Engagement Agreement. See
17 FOF ¶ 14, *supra*.

18 19 **VIII. Tricarichi’s Claimed Damages and PwC’s Mitigation Defense**

20 98. Tricarichi seeks, as damages, the legal fees incurred in his IRS
21 litigation, and the interest on his unpaid taxes and penalties that accrued from
22 January 1, 2009, through November 13, 2018. Specifically, in this case Tricarichi
23 contends that PwC is liable to him for \$3,180,143.03 in legal fees and costs, and
24 \$14,937,400.18 in interest owed to the IRS.

25 99. As one of its defenses, PwC contended through its expert that the
26 damages asserted are too high and do not reflect appropriate mitigation. PwC
27 contended that had Tricarichi set aside the money he potentially owed the IRS
28

1 and invested it in stock funds, bond funds, real estate funds, or some
2 combination of these, he could have enjoyed rates of return on the funds he
3 kept from the IRS significantly higher than the three-to-six percent interest rates
4 charged by the IRS during the same period. TT7 132:5–140:8 (Leaunae).

6 **CONCLUSIONS OF LAW**

8 **I. Elements of Tricarichi's Cause of Action (Count III)**

9 100. Tricarichi tried a single claim of professional negligence (Count III
10 of his Amended Complaint) to the Court. Dkt. 140 ¶¶ 115–121. Count III
11 focuses only on whether the issuance of Notice 2008-111 in December 2008
12 gave rise to any duty to Tricarichi that PwC breached. *Id.*⁵

13 101. Despite the narrow focus of Count III, some of the evidence at trial
14 focused on what was contended to be negligent acts and omissions that
15 occurred in 2003, when PwC originally rendered its advice, or earlier despite the
16 Court's prior Summary Judgment ruling, which barred as untimely "any and all
17 claims arising from the services PwC provided Plaintiff in 2003." Dkt. 191 at 3.
18 Given the time and effort spent on the providing the detailed history of the case,
19 and given the extensive procedural history including appeals and multiple
20 proceedings in other courts, the Court has included historical facts and
21 testimony for clarity of the record. By incorporating a fuller factual background,
22 the Court is not sua sponte altering or amending any prior judgment or ruling as
23 they remain law of the case. See, e.g. *Recontrust Co. v. Zhang*, 130 Nev. 1, 7–
24 8 (2014) ("[A] court involved in later phases of a lawsuit should not re-open

26 ⁵ The Amended Complaint also contains Counts I and II against PwC, both of which were
27 included only for preservation purposes after the Court dismissed them on Summary Judgment in
28 2018. Dkt. 140 n.1. Counts I and II were not tried to the Court, nor was any other claim in the
Amended Complaint apart from Count III. TT9 167:25–168:23.

1 questions decided (*i.e.*, established as law of the case) by that court or a higher
2 one in earlier phases”) (quotation omitted); see *a/so* Dkt. 234 at 4.

3 102. The elements of a cause of action in tort for professional
4 negligence are:

5 (1) the duty of the professional to use such skill,
6 prudence, and diligence as other members of his
7 profession commonly possess and exercise; (2) the
8 breach of that duty; (3) a proximate causal connection
between the negligent conduct and the resulting
injury, and (4) actual loss or damage resulting from
the professional’s negligence.

9 *Sorenson v. Pavlokowski*, 94 Nev. 440, 443, 581 P.2d 851, 853 (Nev. 1978).

10 103. As set forth in more detail below, at trial, Tricarichi failed to meet
11 his burden of proof on all four elements.

12
13 **II. First Element: PwC Did Not Owe Tricarichi a Duty of Care in 2008**

14 104. The Court concludes that PwC did not owe any duty to Tricarichi,
15 who ceased being a client in 2003, such that PwC should have updated its
16 previously-provided advice in 2008, after Notice 2008-111 issued. See
17 *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (Nev.
18 2009) (existence of duty is a matter of law for the Court to decide).

19 105. Under the AICPA’s SSTS No. 8, a member does not have any
20 obligation to communicate with a taxpayer about subsequent developments,
21 except “while assisting the taxpayer in implementing procedures or plans
22 associated with the advice provided or when the member undertakes this
23 obligation by specific agreement.” Ex. 106 at 033.

24 106. At trial, Tricarichi argued that the first exception (“while
25 implementing plans or procedures”) was satisfied because PwC provided
26 comments on the stock purchase agreement between Westside and Nob Hill in
27 2003, which he claimed created a continuing obligation for PwC to update him
28

1 on subsequent developments in 2008. TT9 112:13–24.

2 107. The Court disagrees. By its plain language, the exception only
3 applies “while” the member is assisting the taxpayer in implementing
4 procedures. TT9 81:17–84:1 (Harris); TT7 67:2–68:5 (Dellinger). Even if
5 providing comments on the agreement counted as “implementing” Tricarichi’s
6 plan in 2003 (a question that the Court need not reach here), it is undisputed
7 that those efforts ceased in 2003. By 2008, PwC was not performing any work
8 for Tricarichi.

9 108. As to the second exception, in the present case there was a
10 specific Engagement Letter signed by Tricarichi. PwC’s Engagement Letter,
11 consistent with SSTS No. 8, specifically disclaimed any ongoing obligation for
12 changes to the tax laws after services were rendered. Ex. 100 at 006 (Section
13 3); Ex. 106 at 006. Further, there was no contention that Tricarichi was not
14 aware of the terms of the Engagement Letter as he even made comments on
15 the Engagement Letter which he signed.

16 109. Tricarichi also pointed to Paragraphs 6 and 7 of SSTS No. 8,
17 which discusses when a member may consider providing advice in written, as
18 opposed to oral, form. TT8 (Vol. 1) 10:13–14:11 (Greene); Ex. 106 at 034. In
19 the present case, there was disputed testimony about whether there was a
20 specific discussion about obtaining the information orally or in writing or if
21 Tricarichi knew that he could have requested the opinions to be set forth in
22 writing. Regardless of whether there was a difference between the parties
23 whether any discussion took place or not, and even if the Court were to credit
24 Tricarichi’s view, the language of Paragraphs 6 and 7 of SSTS No. 8 is what the
25 Court focuses on to determine if the first prong of the cause of action is met. As
26 the plain language of the provision sets forth that the decision regarding the
27 form of advice is left to the “professional judgement” of the member, the Court
28

1 cannot find that it imposes any affirmative duty on members to provide written
2 advice. Instead, the Court reads the language as setting forth situations when
3 written advice may be preferable. TT8 (Vol. 1) 208:10–25 (Harris).

4 110. Thus, the Court concludes that Tricarichi did not meet his burden
5 to demonstrate in the present case that the standards set forth in SSTS No. 8
6 gave rise to any duty of care on the part of PwC to Tricarichi.

7 111. SSTS No. 6, likewise, does not create any duty to Tricarichi. The
8 Court has already found that SSTS No. 6 is limited to circumstances involving
9 awareness of an error on a tax return when an accountant is performing
10 services for a *current* client. Here, PwC was no longer performing services for
11 Tricarichi in 2008. At trial, even Tricarichi's expert would not commit to imposing
12 a duty on PwC under these circumstances. TT8 (Vol. 1) 38:19–22 (“[Q.] Let’s
13 say there were no services being provided to Mr. Tricarichi by PwC in 2008, in
14 that circumstance would PwC have a duty to disclose an error to a former client,
15 under SSTS 6? A. Perhaps not.”).

16 112. PwC’s later, occasional, contact with Tricarichi and his lawyers,
17 while responding to IRS subpoenas for documents in 2008 and later for
18 testimony in 2013 and 2014, does not constitute performing services for
19 Tricarichi. PwC was required by law to respond to IRS subpoenas on its own
20 behalf. Tricarichi concede that he did not seek to engage PwC, and PwC did
21 not invoice Tricarichi for time spent responding to the IRS subpoenas or
22 testifying at his Tax Court trial.

23 113. Relying on internal PwC policies and a single practice guide
24 published by the AICPA, Tricarichi also asserted at trial that PwC had a duty to
25 maintain a written file documenting how it reached its conclusions about Notice
26 2008-111. TT7 106:1–14, 109:7–19 (Greene); Ex. 22; Ex. 88.

27 114. While the Court took into account both the policies and the
28

1 practice guide, it cannot find that either of these created a duty that meets the
2 criteria necessary for a professional negligence tort. Furthermore, the practice
3 guide is not authoritative literature and describes only “best practices”; it does
4 not impose requirements on all accountants. TT8 (Vol. 1) 88:1–23 (Greene).
5 Indeed, it would be Tricarichi’s burden to establish that a failure to follow internal
6 policies or the terms of a practice guide creates a duty under Nevada law but he
7 did not provide any case law to the Court to support that contention. Instead,
8 the only case cited by either party was outside the jurisdiction and it provided
9 that a company’s internal standards are distinct from, and can be more rigorous
10 than, external duties imposed under the law. See, *In re Conticommodity Servs.,*
11 *Inc. Sec. Litig.*, No. MDL 644, 1988 WL 56172, at *1–2 (N.D. Ill. May 25, 1988).⁶

12 115. Based on the above reasons, the Court concludes, as a matter of
13 law, that PwC did not owe any duty of care to Tricarichi, its former client.
14 Accordingly, Tricarichi has failed to establish the first element of his claim.
15 While the failure to meet all elements of a cause of action would allow Judgment
16 in favor of PwC, the Court addresses each of the other elements as well.

17
18 **III. Second Element: Even if PwC Owed a Duty to Tricarichi, PwC**
19 **Did Not Breach That Duty**

20 116. Even if PwC owed a duty to update its former client, the Court
21 concludes that based on the evidence, Tricarichi has failed to prove that PwC
22 breached its duty.
23
24

25 ⁶ Plaintiff Tricarichi did cite a one case from a federal District Court in Nevada, *Garner v. Bank of*
26 *Am. Corp.*, 2014 WL 1945142 at *7–8 (D. Nev. May 13, 2014). That case, however, is inapposite
27 as it discusses generally that a duty can arise from a special relationship but does not address
28 the specific issues raised in this case.

1
2
3 **A. Failure to Disclose Notice 2008-111 to Tricarichi Was Not**
4 **a Breach Because Tricarichi Did Not Meet His Burden to**
5 **Show that the Notice Rendered PwC's Prior Advice**
6 **Erroneous**

7 117. Assuming *arguendo* that SSTS No. 6 did create a duty to
8 Tricarichi, that duty could only be breached if Notice 2008-111 made PwC aware
9 of an "error" in a previously filed return. Ex. 106 at 027 (§ 3). It did not.

10 118. First, it is undisputed that PwC was not aware of any error on a
11 previously filed tax return as a result of Notice 2008-111. Tricarichi contends,
12 instead, that PwC should have been aware of an error because it should have
13 interpreted the 2008 Notice as invalidating or being contrary in some respect to
14 the advice given by PwC in 2003. The evidence presented by Tricarichi was
15 that the IRS's position that Tricarichi owed taxes as a result of the Westside
16 transaction was upheld by the tax court, and then the appellate court; and by
17 implication, PwC should have known that Tricarichi would not prevail in either of
18 those courts. The challenge with that argument is that it is flawed and not
19 supported by the facts. First, there was no evidence that the IRS relied on
20 Notice 2008-111, which came out in December 2008, to commence its audit of
21 the Westside transaction, which began in 2005 about three years before the
22 Notice came out. Further, on January 22, 2008 - roughly ten months before
23 issuing Notice 2008-11 was sent to Tricarichi - he had already received an
24 Information Document Request ("IDR") from the IRS seeking documents related
25 to the Westside Transaction. The IDR advised Tricarichi that he may be liable
26 for all or part of Westside's tax liability. Ex. 150. Thus, even if Notice 2008-111
27 did more than narrow the circumstances in which a transaction would be
28 reportable, as was contended by PwC and others, Tricarichi did not meet his
burden to show that PwC breached its duty within the statute of limitations time

1 frame by failing to update him as there was no evidence that PwC knew that
2 such a Notice would come out in until it actually came out and by that time the
3 IRS had already begun its audit and he had already received the IDR.

4 119. To the extent that Tricarichi also claims that he would have
5 modified his tax returns and taken other actions after December 1, 2008, if PwC
6 had informed him that Notice 2008-111 impacted the merits of the IRS's position
7 on the audit they had already commenced in 2005, that contention was also not
8 established by the evidence. Instead the evidence showed that even after he
9 had various opportunities to resolve his tax dispute and had the benefit of
10 several legal tax professionals advising him, he chose not to settle the tax
11 dispute.

12 120. PwC further contended that pursuant to Notice 2008–111, a
13 transaction is treated as a Midco transaction if: (1) a person engages in that
14 transaction pursuant to a “Plan” (as defined in the notice); and (2) the
15 transaction contains each of four objective components described in the Notice.
16 Ex. 44 at 003.

17 121. There was no dispute that the term “Plan” is defined in Section 2
18 of the Notice, and it must include the disposition of Built-in Gain Assets. *Id.* at
19 003-004. “Built-in Gain Assets” is, in turn, defined as an asset “the sale of which
20 would result on taxable gain.” *Id.*

21 122. The undisputed evidence at trial—from fact and expert witnesses
22 called by *both* parties (including Tricarichi himself)—was that Westside did not
23 have any Built-in Gain Assets at the time of the transaction, and that the
24 Westside Transaction did not involve the sale of any Built-in Gain Assets. TT2
25 95:16–18 (Lohnes); TT4 63:5–10 (Tricarichi) (referring to Ex. 182 at 003); TT8
26 (Vol. 1) 76:20–22 (Greene); *Id.* 191:11–16 (Harris); TT7 200:3–23 (Miller). The
27 theory espoused in questioning by Tricarichi's counsel, that the release of the
28

1 claims in the lawsuit constituted Built-In Gain Assets, was not supported by a
2 single witness or any evidence in the case.

3 123. At the time of the transaction, Westside had only cash in its bank
4 accounts from the lawsuit settlement with the cell phone carriers, which was
5 considered ordinary income, not taxable gain from the sale of a Built-in Gain
6 Asset, and reported that way on Westside's tax return. TT2 47:12–22 (Lohnes);
7 TT8 (Vol. 1) 76:17–19 (Greene); *Id.* 259:11–21 (Harris); *see also Nahey v.*
8 *Comm'r*, 111 T.C. 256, 261–65 (1998) (holding that settlement of lawsuits “does
9 not constitute a sale or exchange” and thus would be treated as ordinary
10 income, not capital gain).

11 124. Thus, given the language of the Notice and how was interpreted
12 by others on behalf of Tricarichi, PwC did not fall below the standard of care by
13 reviewing Notice 2008-111 and making the determination that it did not change
14 the firm's prior analysis that, “more likely than not”, the transaction was not
15 reportable. Ex. 45, Lohnes Email to Stovsky.

16 125. Tricarichi argued at trial that Lohnes or Stovsky should have
17 consulted one of the designated “Subject Matter Experts,” or SMEs, at PwC
18 before reaching this conclusion. This argument, however, had no evidentiary
19 support. Tricarichi claimed at trial that it was the failure of PwC to inform him
20 that Notice 2008-111 impacted his personal liability to the IRS as a transferee.
21 Whether PwC had a SME involved or not is irrelevant. It was uncontested that
22 PwC (via Stovsky) did not believe there was any information to provide Tricarichi
23 based on Notice 2008-111. Stovsky was Tricarichi's relationship tax
24 professional at PwC who, in the past, had communicated what he thought
25 should be communicated to Tricarichi. Whether Stovsky communicated
26 internally with only Lohnes, or also with others such as a SME, prior to making
27 that determination, it was PwC's decision, via a tax partner, not to provide
28

1 Tricarichi with any analysis of Notice 2008-111, and whether that decision does
2 or does not meet the standard of professional negligence, is the issue before
3 the Court. The issue is not a speculation of whether if Stovsky or Lohnes
4 reached out to a SME would that SME give the same or a different opinion and
5 if so what would have happened. Tricarichi's claim and PwC's defenses are
6 based on what actually occurred - not speculation of what could have occurred
7 with a different set of facts.

8 126. In addition, in the present case, Tricarichi did not establish that the
9 individuals at PwC who provided the advice in 2003 were not qualified to
10 provide the advice. PwC did provide evidence that Lohnes had prior expertise
11 in Midco transactions, even though he could not recall names of specific matters
12 he worked on. TT3 4:21–5:20 (Lohnes). Second, the directory of SMEs was not
13 an exhaustive list of people at PwC with knowledge about particular
14 transactions, but rather that it served merely as a contact list for people outside
15 of Lohnes' group (Washington National Tax Service). TT2 115:2–116:10
16 (Lohnes). Finally, a designated SME on Midco transactions, Mark Boyer,
17 testified that Lohnes had a level of expertise in Midco transactions similar to his
18 own. TT6 140:15–141:12.

19 127. Another reason that PwC's advice in 2003 was not in "error" was
20 because it rendered its advice with a "more likely than not" confidence level.
21 That allows for up to a 49.9 percent (49.9%) likelihood of the result going the
22 other way. Thus, even if IRS 2008-111 did expand, rather than narrow, the
23 reportability standard (and it did not), that would not render earlier advice given
24 with a "more likely than not" standard erroneous.

25 128. As noted above, an "error" under SSTS No. 6 means that the
26 member advised the taxpayer to take a position with less than a 1-in-3 chance
27 of success. No one testified that as a result of Notice 2008-111, PwC's original
28

1 advice on reportability had such a low confidence level.

2 129. In evaluating the breach element, the Court also has to look at
3 what the other professionals Tricarichi hired advised him with in relation to
4 Notice 2008-111 and its applicability to his risk of liability to the IRS. Both the
5 internal communications, provided as exhibits, as well as the arguments
6 presented to the various courts by Tricarichi's legal tax attorneys as noted
7 herein, were consistent with the advice provided by PwC. See, also Ex. 165. In
8 addition, there was testimony that practitioners before the IRS and the Tax Court
9 must have a "good faith basis" in their positions—the same type of "good faith
10 basis" that is required under SSTs No. 1 when determining whether a position is
11 erroneous. TT8 (Vol. 1) 235:3–25, 237:21–238:16 (Harris); TT6 184:9–12
12 (Desmond).

13 130. Therefore, even if PwC had a duty to update Tricarichi about an
14 "error" in its prior advice on whether the transaction was now "reportable"
15 pursuant to Notice 2008-111, based on evidence presented as to the language
16 of the provision as well as the other advice Tricarichi received consistent with
17 PwC's own internal analysis, Tricarichi has failed to show that there was a
18 breach of any asserted duty.
19

20 **B. PwC Did Not Breach Any Duty to Provide Advice in**
21 **Writing or to Maintain Written Documentation**

22 131. As discussed above, PwC did not have any affirmative duty to put
23 its advice in writing, either in 2003 or at any point after. But, even if such a duty
24 existed, it would not have been breached in 2008 when Lohnes and Stovsky
25 reviewed Notice 2008-111 for its applicability to the Westside Transaction.

26 132. Any duty to provide advice in writing presupposes, as a matter of
27 logic, that some sort of advice is being provided to a client. That was not the
28 case in 2008. Tricarichi neither sought a tax engagement from PwC to receive

1 any advice from PwC in 2008, nor was he provided any tax advice from PwC in
2 2008. TT3 162:21–163:5; TT8 (Vol. 1) 113:5–7 (Greene). Thus, it would have
3 been impossible for PwC to breach any hypothetical duty to provide advice in
4 writing to Tricarichi at that time. TT8 (Vol. 1) 114:18–25 (Greene).

5
6 **C. Failure to Disclose PwC’s Prior Involvement in the**
7 **Enbridge and Marshall Transactions Was Not a Breach**
8 **of Any Duty**

9 133. Tricarichi also contends that Notice 2008-111 should have
10 prompted PwC to disclose its prior advice and the outcomes in the Enbridge and
11 Marshall transactions, and that its failure to do so was a negligent omission.

12 134. The Court disagrees. PwC’s involvement with Marshall and
13 Enbridge occurred long before the December 2008 issuance of Notice
14 2008-111, and the “independent duty” that Tricarichi claims came about at that
15 time as a result of the issuance of that Notice. PwC rendered its advice in the
16 Marshall case in 2003, and its involvement with Enbridge was in 1999.⁷

17 135. Moreover, as the Court has found above, both the Enbridge and
18 Marshall transactions were substantially distinct from the Westside Transaction,
19 and there is no reason to believe that PwC’s work in those two matters rendered
20 their advice to Tricarichi any more or less correct.

21 136. Furthermore, the evidence at trial showed that PwC would not
22 have been able to disclose the specific details of these engagements with
23 Tricarichi because of its confidentiality obligations. TT3 35:23–36:7 (Lohnes);
24 TT8 (Vol. 1) 199:17–23 (Harris); *id.* 102:14–103:4 (Greene).

25 137. Thus, the Court concludes as a matter of law that the failure to
26 disclose details of the Enbridge or Marshall transactions does not constitute a

27 ⁷ As noted above, the Court’s 2018 Summary Judgment ruling on statute of limitations bars
28 Tricarichi’s allegations regarding Marshall and Enbridge.

1 breach of any duty of care that PwC owed to Tricarichi.

2
3 **IV. Third Element: Tricarichi Has Not Proven Causation**

4 138. To prevail on his claim, Tricarichi must prove a “proximate causal
5 connection between the negligent conduct and resulting injury.” *Boesiger v.*
6 *Desert Appraisals, LLC*, 135 Nev. 192, 194–95, 444 P.3d 436, 439 (Nev. 2019).

7 139. Tricarichi asserts that PwC’s alleged negligence (*i.e.*, failing to
8 advise him about Notice 2008-111) caused his alleged injury (the \$14,937,400 in
9 interest that accrued after Notice 2008-111 was issued and the \$3,180,143 in
10 attorney’s fees he spent litigating against the IRS).

11 140. The Court disagrees and concludes that Tricarichi has failed to
12 establish causation for four independent reasons.

13 141. First, the record is clear that Tricarichi and his team of tax lawyers
14 were aware of Notice 2008-111 and its implications shortly after the Notice
15 issued as set forth above. The Court has already found that Tricarichi was
16 aware of Notice 2008-111 and its applicability to the Westside Transaction no
17 later than 2009; and further, that Tricarichi’s attorneys repeatedly advised him
18 thereafter throughout the course of his litigation with the IRS regarding whether
19 the requirements of Notice 2008-111 were met or not.

20 142. Thus, Tricarichi’s causation arguments rest on the supposition that
21 he would have abandoned his IRS litigation and immediately settled with the
22 government if only PwC had added a contrary voice to the chorus of
23 distinguished tax advisors—which included both former and future IRS Chief
24 Counsels—who were advising Tricarichi that the requirements of Notice
25 2008-111 were not satisfied. While Tricarichi argued that it would have made a
26 difference in his decisions, he failed to meet his evidentiary burden.

27 143. To the contrary, Tricarichi’s lawyers at Sullivan & Cromwell advised
28

1 him that the IRS did not need to rely on Notice 2008-111 to win, and that their
2 argument was “a bit of a red herring.” Ex. 165 at 003. And when asked at trial if
3 he knew in 2009 that Notice 2008-111 was a red herring, Tricarichi replied: “The
4 arguments that they’re using in 2008-111 -- again, I’m not a tax expert and I
5 keep saying that over and over again. But I can read. Okay? This is not why we
6 lost the [Tax Court] case. It has nothing to do with why we lost the case.” TT3
7 224:19–23 (Tricarichi) (emphasis added). The Court has to take Tricarichi’s own
8 testimony into account in evaluating every element of his claim. Giving
9 Tricarichi the benefit of the doubt that his words could be viewed out of context,
10 the weight of the rest of the evidence shows that there were too many
11 intervening causes which prevent holding PwC liable for Tricarichi’s asserted
12 damages.

13 144. Second, the chronology of the case demonstrates that Notice
14 2008-11 could not have prevented the audit which later resulted in the liability
15 determination. Specifically, Tricarichi did not show that disclosure of Notice
16 2008-111 would have made any difference to the rulings of the Courts as to his
17 liability because the Notice, on its face, relates only to reportability of
18 transactions and not a taxpayer’s underlying liability: The language of the
19 Notice sets forth it: “does not affect the legal determination of whether a
20 person’s treatment of the transaction is proper or whether such person is liable,
21 at law or in equity, as a transferee of property in respect of the unpaid tax
22 obligation” Ex. 44 at 003.

23 145. Importantly, in the present case, the chronology of facts shows
24 that the IRS had been examining/auditing the Westside Transaction for about
25 three years before Notice 2008-111 issued. The IRS began its audit of the 2003
26 Westside tax return in 2005, interviewed Tricarichi regarding that audit in 2007,
27 and issued an Information Document Request to Tricarichi in 2008, all before
28

1 the issuance of Notice 2008-111. Thus, even if PwC had informed Tricarichi that
2 2008-111 would require Tricarichi to report the Westside transaction, there was
3 no evidence presented how that would have changed the IRS determination
4 based on the audit that he was liable as a transferee in the instant case since
5 the audit had already progressed for three years prior to the Notice being
6 promulgated and the IRS had already informed him that it was seeking the
7 underpayment from his as a transferee.

8 146. The third reason, Tricarichi cannot meet the causation prong of his
9 professional negligence claim is that there is no credible evidence to support his
10 contention that if PwC had notified him regarding Notice 2008-111, he would
11 have amended his taxes and settled the case with the IRS in December 2008;
12 and thus, he would not have incurred any of the attorney fees or interest
13 damages he is seeking in the present case. Specifically, his transferee liability
14 stems from the taxes filed by various entities as a result of the Westside
15 transaction, and he did not present any evidence how he could amend the
16 relevant filings in 2008 or 2009 at no cost, and that as a result, the IRS would
17 not pursue him for transferee liability. There was no evidence from any IRS
18 witness or anyone else that the outcome described was possible.

19 147. Additionally, the evidence presented demonstrated that he had
20 several opportunities to settle the case with the IRS and minimize fees and
21 interest but he chose not to do so. As set forth in the Findings above, these
22 opportunities to settle the case came about after he was advised by
23 experienced tax counsel as to liability and the impact of 2008-111. While the
24 reason Tricarichi chose not to resolve the matter with the IRS was disputed,
25 PwC asserted that the communications between Tricarichi and his tax counsel
26 show he did not have the funds or felt the offers to settle were too high, and the
27 Record was devoid of any exhibit where Tricarichi contended that he did not
28

1 settle due to the advice provided by PwC in 2003. Instead, the only testimony in
2 support of that contention is Tricarichi's own testimony which the Court has to
3 weigh in contrast with the other testimony by his tax lawyers and the various
4 exhibits that were introduced which are not in accord with his testimony. In so
5 doing, the Court finds that Tricarichi did not meet his burden to show that PwC's
6 action or inaction relating to Notice 2008-111 meets the causation element of is
7 claim.

8 148. Thus, Tricarichi has failed to provide the level of evidence
9 necessary to support the notion that even had PwC advised Tricarichi about
10 Notice 2008-111 when it issued, Tricarichi could have or would have settled with
11 the IRS thereby avoiding the interest and legal fees he now seeks as damages.

12 149. Fourth, to the extent that Tricarichi's claim is that PwC was
13 negligent in 2008 because it did not advise him at that time of the contents of
14 the Stovsky Memo (as opposed to Notice 2008-111 itself), causation is still
15 defeated because the record is clear that Tricarichi was made aware of either
16 the existence or contents (or both) of the Stovsky memo on at least five
17 separate occasions in 2008 and 2009, either by PwC itself, the IRS, or his
18 attorneys. TT4 at 7:21-25; Ex. 161 at 009; Ex. 163 at 010; Ex. 164 at 001; Ex.
19 168 at 002.

20 21 **V. Fourth Element: Damages**

22 150. As the Court has found that Tricarichi, independently, has not met
23 his burden on any of the first three elements of a cause of action for
24 Professional Negligence, the Court need not, and determines it would not be
25 appropriate, to address the damages element.

26 **VI. Basis of PwC's Affirmative Defenses**

27 151. PwC tried four of its affirmative defenses to the Court: statute of
28

1 limitations (second affirmative defense), failure to mitigate damages (fourteenth
2 affirmative defense), offset/contribution (fifteenth affirmative defense), and
3 limitation of liability (sixteenth affirmative defense).

4 152. Consistent with the Court's determination that Tricarichi failed to
5 meet his burden on the elements of his cause of action for Professional
6 Negligence, the Court will only address the Second Affirmative Defense relating
7 to statute of limitations.⁸

8 153. Under Nevada law, an action for professional malpractice must be
9 brought two years from discovery or four years from the alleged malpractice,
10 whichever occurs earlier. NRS § 11.2075(1).

11 154. Under New York law—the governing law identified in the
12 Engagement Agreement—the statute of limitations is three years from the
13 alleged malpractice. See *Ackerman v. Price Waterhouse*, 644 N.E.2d 1009,
14 1011 (N.Y. 1994) (citing New York CPLR § 214).

15 155. Under either, the limitation period of Tricarichi's claim is untimely.

16 156. PwC's alleged acts of negligence related to Notice 2008-111
17 occurred in December 2008 or January 2009, shortly after it issued. Thus,
18 under New York law, the statute of limitations would have expired at the latest in
19 January 2013. Tricarichi did not file suit in this case until April 29, 2016, making
20 his claim untimely.

21 157. The outcome is no different if the Court applies Nevada law. The
22 Court found above that Tricarichi was subjectively aware of Notice 2008-111 at
23 least as of April 29, 2009. Thus, the Court concludes, for limitations purposes,
24

25 ⁸ As set forth above, the Court found that the first three elements of his cause of action were not
26 met for independent reasons. Thus, the Court found that there was not a basis to address the
27 damages element of his cause of action. Consistent therewith, the Court finds no basis to
28 address the other three affirmative defenses which are based on if there was a finding that
damages were appropriate - there was not.

1 that the latest date that Tricarichi knew or should have known about his claim
2 was April 29, 2009.

3 158. Under N.R.S. 11.2075(1)(a), Tricarichi's action would have needed
4 to be commenced no later than April 29, 2011 (two years from discovery). And
5 under N.R.S. 11.2075(1)(b), the action needed to be commenced by January,
6 2013 (four years from the alleged malpractice). However, the statute specifies
7 that the earlier of the two dates controls; thus, for limitations purposes, the latest
8 date that Tricarichi could have filed his claim is April 29, 2011. He filed his claim
9 five years too late, on April 29, 2016.⁹

10 159. At trial, Tricarichi failed to introduce any evidence of a tolling
11 agreement, and expressly declined to do so when the Court inquired about such
12 an agreement immediately prior to closings. TT9 100:7–20 (“MR. HESSELL:
13 Yeah. No, we don’t need to -- We don’t need that”) (referring to proposed Exhibit
14 83). Furthermore, Tricarichi failed to include any proposed pre-trial findings or
15 conclusions of law on statute of limitations. As such, Tricarichi has waived any
16 argument that the limitations period was tolled by agreement or otherwise.¹⁰
17 *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. Cnty. of Clark*, 123 Nev. 44,
18 49, 152 P.3d 737, 740 (Nev. 2007).

19 160. Instead, Tricarichi's counsel claimed in his closing argument
20 rebuttal, that the inclusion of a tolling agreement - as an exhibit to a brief in
21 opposition to an earlier Summary Judgment Motion - relieved him of any
22 obligation to introduce it as evidence at trial. The Court disagrees. See *Garcia*
23 *v. Shapiro*, 515 P.3d 345, (Nev. App. 2022) (“Regardless, motions, statements
24

25 _____
26 ⁹ In utilizing the January date, the this Court is providing Tricarichi the longer time frame as it is
taking into account the Levin letter (Ex. 205).

27 ¹⁰ Tricarichi's failure to disclose any proposed findings of fact or conclusions of law regarding
statute of limitations, likewise waives any argument that he is entitled to statutory tolling under
N.R.S. 11.2075(2).
28

1 and allegations within them, and exhibits attached to them do not necessarily
2 constitute evidence.”) (citing EDCR 5.205(g) (“Exhibits [to motions] may be
3 deemed offers of proof but shall not be considered substantive evidence until
4 admitted.”)); cf. NRAP 28(e) (party raising evidentiary issue on appeal must
5 identify where in the record “evidence was identified, offered, and received or
6 rejected”); see also *Town of Gorham v. Duchaine*, 224 A.3d 241, 244 (Me. 2020)
7 (“[S]imply attaching documents to a motion is not the equivalent of properly
8 introducing or admitting them as evidence. Documents attached to motions are
9 not part of the record and therefore cannot be considered evidence in the record
10 on appeal.”) (Collecting state cases).

11 161. Thus, under either the three-year statute of limitations in New
12 York, or the two-year statute of limitations in Nevada, Tricarichi’s claim is time-
13 barred¹¹.

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26 ¹¹ As set forth herein, the Court finds that PwC’s Statute of Limitations defense was met. The fact
27 that Tricarichi’s claim is barred by the Statute of Limitations is an independent basis upon which
28 Judgment for PwC is to be entered in addition to basis that Tricarichi did not meet his burden to
establish all four elements of his professional negligence claim.

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IT IS HEREBY FURTHER ORDERED, ADJUDGED, and DECREED that any request for fees and costs shall be handled via separate timely-filed Motion.

Counsel for Defendant PwC is directed pursuant to NRCP 58 (b) and (e) to file and serve Notice of Entry of this Findings of Fact, Conclusions of Law, and Judgment within fourteen (14) days hereof.

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Joanna S. Kushner

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